Appendix 1

Correspondence

ATTORNEY-GENERAL

CANBERRA

MC14/23329

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

11 FEB 2015

Dear Senator Dean,

Thank you for your letter of 25 November 2014 providing the report of the Parliamentary Joint Committee on Human Rights (the Committee), the Sixteenth Report of the 44th Parliament, concerning the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (the CTLA Bill). I apologise for the delay in responding.

The CTLA Bill was passed by the Senate on 26 November 2014 and the House of Representatives on 2 December 2014. It received Royal Assent on 12 December 2014.

I thank the Committee for its robust consideration of the compatibility of the CTLA Bill with Australia's human rights obligations and provide the enclosed additional information in response to the Committee's questions. This information reflects the measures as enacted in the *Counter Terrorism Legislation Amendment Act (No. 1) 2014* (the CTLA Act).

The Committee may wish to note that the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its report on the CTLA Bill made 16 recommendations. The Government accepted, or accepted-in-principle, all the recommendations in the PJCIS report, thirteen of which resulted in minor amendments to the CTLA Bill and Explanatory Memorandum and two of which resulted in small changes to administrative arrangements to enhance operational and administrative safeguards and oversight mechanisms. The final recommendation of the PJCIS was that the CTLA Bill be passed. The amendments included in the CTLA Act, as passed, and the additional information provided in the Explanatory Memorandum may address some of the issues raised by the Committee in its report.

Copies of the PJCIS report and the Government's response to the report are attached for your information. I also attach copies of submissions to the PJCIS inquiry into the CTLA Bill made by my Department, ASIO and ASIS for your information.

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Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

Encl: Response to the Parliamentary Joint Committee on Human Rights' *Sixteenth Report of the 44th Parliament*: Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (pp 7-21)

Advisory report on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, Parliamentary Joint Committee on Intelligence and Security, 20 November 2014

Parliamentary Joint Committee on Intelligence and Security, Counter-Terrorism Legislation Amendment Bill (No. 1) 2014: Attorney-General's Department Submission, November 2014

Parliamentary Joint Committee on Intelligence and Security, Counter-Terrorism Legislation Amendment Bill (No. 1) 2014: Attorney-General's Department Supplementary Submission 1, November 2014

Parliamentary Joint Committee on Intelligence and Security, Counter-Terrorism Legislation Amendment Bill (No. 1) 2014: Attorney-General's Department Supplementary Submission 2, November 2014

ASIO Submission to the Inquiry into the Counter-Terrorism Legislation Amendment Bill (No.1) 2014, 10 November 2014

ASIS submission to the Inquiry into Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, 13 November 2014

Response to the Parliamentary Joint Committee on Human Rights' *Sixteenth Report of the 44th Parliament*, concerning the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (pp 7-21)

Schedule 1 – *Criminal Code Act 1995* amendments

The committee has requested my advice on how the limits imposed on human rights by the amendments to the control order regime in Schedule 1 of the Counter-Terrorism Legislation Amendment Bill (No. 1) (CTLA Bill) are reasonable, necessary and proportionate to achieving the legitimate aim of responding to threats of terrorism. The Australian Federal Police (AFP), in their submission to the inquiry of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) into the CTLA Bill, note that 'individuals engaging in behaviours that support or facilitate terrorism or foreign incursions pose as great a risk as those directly engaging in terrorist acts or foreign incursions'. As such, the legitimate aim of the control order regime, responding to threats of terrorism, must include preventing or disrupting persons who provide critical support to those activities (without whom the terrorist act or hostile activity could not occur). The amendments to the purposes of the control order regime and the grounds for seeking and issuing a control order reflect this assessment.

The amendments do not, however, change the threshold for issuing a control order. A court cannot issue a control order unless satisfied that the obligations, prohibitions and restrictions proposed to be imposed on the person, and which may impose limits on their human rights, are 'reasonably necessary, and reasonably appropriate and adapted' for one of the purposes of the regime. In response to the PJCIS report on the CTLA Bill, the Government amended the CTLA Bill in the Senate to retain the existing requirement in the Criminal Code that the AFP provide an explanation as to why *each* of the proposed obligations, prohibitions and restrictions should be imposed on the person and that the court should be satisfied that *each* obligation, prohibition and restriction is 'reasonably necessary, and reasonably appropriate and adapted' for one of the purposes of the regime. This amendment, in addition to responding to the recommendation of the PJCIS, also addresses issues raised by the Committee in paragraphs 1.37 and 1.38 about the proportionality of the limits imposed on a person's human rights.

I note the Committee's assessment of the control order amendments in Schedule 1 of the Bill also raises issues from the Committee's Fourteenth Report of the 44th Parliament in relation to the control order amendments made by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Foreign Fighters Bill). Contrary to the Committee's statement at paragraph 1.28, I would like to reassure the Committee that the PJCIS completed its inquiry into the Foreign Fighters Bill before passage of that Bill.

The Foreign Fighters Bill was referred to the PJCIS on 24 September 2014, the day it was introduced into the Senate. The PJCIS made 37 recommendations in its Advisory Report on the Foreign Fighters Bill tabled in Parliament on 17 October 2014. The Government supported all 37 and introduced amendments in the Senate, as necessary, to implement these recommendations. Specifically, and as noted in my response to the Committee's Fourteenth Report, in implementing the recommendations of the PJCIS, the Foreign Fighters Bill was amended to require the Independent National Security Legislation Monitor (INSLM) to review the entire control order regime by 7 September 2017, and to require the PJCIS to undertake a further review by 7 March 2018. Given the urgent requirement to ensure the control order regime can respond to the current threat environment, the Parliament's decision to pass the control order amendments in the Foreign Fighters Bill but also require a comprehensive review of the whole control order regime by both the INSLM and PJCIS, is a responsible balance of protecting both Australia's national security and its human rights

obligations. The timing specified for these further reviews will allow for both the INSLM and the PJCIS to consider the operation of the control order regime as amended and to ensure that information is available to the Parliament to inform any proposal to further extend the regime beyond 2018.

The heightened security environment, noted in the decision to raise the National Terrorism Public Alert System to 'high—terrorist attack is likely' in September 2014, and the operational activity undertaken by police following passage of both the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* and the *Counter Terrorism Legislation Amendment Act (No. 1) 2014* has demonstrated the need for law enforcement agencies to have the tools necessary to disrupt terrorist activities and planning.

Schedule 2 – *Intelligence Services Act 2001* amendments

The Committee has sought my advice on the compatibility of measures in Schedule 2 to the Act, amending the *Intelligence Services Act 2001*. I intend to provide the Committee with a response in advance of the Autumn 2015 sittings. In the interim, the Committee may wish to examine the detailed consideration by the PJCIS in its Advisory Report on the CTLA Bill tabled in Parliament on 20 November 2014, together with the public submissions of my department, the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service to that inquiry. The matters raised in the Committee's Sixteenth Report of the 44th Parliament were also considered by the PJCIS, and the information provided to the PJCIS may usefully address a number of your Committee's questions.

ATTORNEY-GENERAL

CANBERRA

14/11487

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

Dear Chair Dean,

Counter-Terrorism Legislation Amendment Act (No 1) 2014

I refer to your Committee's Sixteenth Report of the 44th Parliament, as tabled on 25 November 2014, which included comments on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014. That Bill was passed by the Parliament on 2 December 2014 and received Royal Assent on 12 December 2014.

My letter dated 11 February 2015 enclosed my response to your Committee's request for my advice about measures in Schedule 1 to the Act, concerning amendments to Division 104 of the *Criminal Code 1995* (control orders). As foreshadowed in that letter, I now enclose my responses to your Committee's request for my advice about some of the measures in Schedule 2 to the Act, which amends the *Intelligence Services Act 2001*.

I trust that this information will be of assistance to your Committee.

Yours faithfully

(George Brandis)

Encl: Responses to matters raised in the Sixteenth Report of the 44th Parliament, 25 November 2014 (Schedule 2, *Counter-Terrorism Legislation Amendment Act (No 1).*)

05 MAR 2015

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Response to the Parliamentary Joint Committee on Human Rights
Sixteenth Report of the 44th Parliament

Counter-Terrorism Legislation Amendment Act (No 1) 2014:
Schedule 2 – amendments to the Intelligence Services Act 2001

Right to privacy

Committee comment (p. 15)

The committee therefore seeks the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to privacy and, in particular, why the amendments are necessary to achieve the legitimate objective of ensuring Australia's national security.

Attorney-General's response

The amendments in Schedule 2 to the *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (CTLA Act) concerning the *Intelligence Services Act 2001* (ISA) relate to the gathering of intelligence in relation to Australian persons overseas. To the extent that such activities could limit the right to privacy, the amendments are permissible limitations because they are necessary and proportionate to addressing the national security concerns and pressing operational requirements faced by the Australian Secret Intelligence Service (ASIS) and the Australian Defence Force (ADF).

In particular, new paragraph 6(1)(ba) of the ISA makes explicit that it is a function of ASIS to provide assistance to the ADF in support of military operations. The express recognition of this function will ensure appropriate transparency and will facilitate the authorisation process for ASIS to provide such support in time critical circumstances.

As noted at paragraph 9 of the Explanatory Memorandum, ASIS intelligence has proved invaluable to ADF operations in the past, pursuant to its general statutory functions under paragraphs 6(1)(a), 6(1)(b) and 6(1)(e) of the ISA:

> *ASIS provided essential support to the ADF in Afghanistan. The support ranged from force protection reporting at the tactical level, through to strategic level reporting on the Taliban leadership. ASIS reporting was instrumental in saving the lives of Australian soldiers and civilians (including victims of kidnapping incidents), and in enabling operations conducted by Australian Special Forces.*

The necessity of the measures in Schedule 2 to the CTLA Act, to deal with the nature of current ADF operations in Iraq (and potential future operations of similar character), was considered in detail by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its advisory report on the (then) Bill, tabled on 20 November 2014.

In its submission to the PJCIS, ASIS indicated (at p. 7):

> *In light of the rapidly changing and dangerous environment faced by the ADF in undertaking operations against the ISIL terrorist organisation in Iraq, as well as the wider threat posed by organisations such as ISIL, the proposed changes would position ASIS well to provide timely assistance to the ADF, minimise loss of life and to assist others in responding to the threat.*

It also noted (at p. 4):

> *Unlike the ADF's and ASIS's operations for almost 10 years in Afghanistan, in Iraq it is known that a large number of Australian persons are actively engaged with terrorist groups, including ISIL.* [Islamic State of Iraq and the Levant terrorist organisation].

The PJCIS accepted the evidence of ASIS, Attorney-General's Department (AGD) and the Australian Security Intelligence Organsation (ASIO) that new paragraph 6(1)(ba) – together with the ability of the Foreign Minister to issue class authorisations in relation to such activities under paragraphs 8(1)(a)(ia) and (ib) and subsection 9(1A) – is necessary to ensure that ASIS can provide support to the ADF in such operations in a timely way. The PJCIS concluded, at p. 47 of its report:

> *The Committee supports the proposed amendments to the IS Act to explicitly provide for ASIS support to ADF military operations and to enable ASIS to support these operations with greater agility. The Committee recognises that the situation in Iraq, where it is known that there are a large number of Australians either fighting for or providing support to terrorist organisations, has significant implications for the ADF.*[1]

Any engagement of the right to privacy is proportionate to the legitimate security objective to which the measures are directed. AGD and agencies gave evidence of the extensive, applicable safeguards to the PJCIS, which concluded that these measures are appropriate. In particular, before authorising ASIS support for ADF operations, the Minister must be satisfied under subsection 9(1) that there are satisfactory arrangements in place to ensure that ASIS only engages in activities relating to its statutory functions and that the nature and consequences of those activities are reasonable. The PJCIS acknowledged (at pp. 41-42) the evidence of AGD and agencies that the consideration of privacy impacts of a proposed activity or activities forms part of the authorisation criteria under this provision.

In addition, under subsection 9(1A), the Minister can only issue an authorisation if satisfied that the Australian person or class of Australian persons is, or is likely to be, involved in one

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1 Further analysis of the need for a class authorisation power in relation to ASIS's activities in support of the ADF is documented extensively in the PJCIS's advisory report at pp. 30-32 and pp. 47-48. The PJCIS accepted the evidence of ASIS (submission 17), AGD (submissions 5, 5.1 and 5.2) and ASIO (submission 10) on this issue. The Committee may wish to consult this evidence.

or more of the activities set out in paragraph 9(1A)(a), which includes activities that are or, are likely to be, a threat to security, per subparagraph 9(1A)(a)(iii). The term 'security' is defined in subsection 9(7) by reference to the meaning of that term under the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). These requirements ensure that Ministerial authorisations are limited to the collection of intelligence in relation to activities that are of a serious nature.

Further, ASIS is subject to privacy rules made by the Foreign Minister under section 15 of the ISA, which regulate the communication and retention of intelligence information concerning Australian persons.[2] ASIS's activities in requesting and undertaking activities in accordance with a Ministerial authorisation issued under section 9 of the ISA are also subject to the independent oversight of the Inspector-General of Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). Subsection 10A of the ISA further requires ASIS to provide reports to the Minister on activities undertaken in accordance with an authorisation issued under section 9 within three months of the authorisation ceasing to have effect or being renewed. The PJCIS concluded that these measures are appropriate.

The conclusions of the PJCIS support the Government's view that these measures are necessary and proportionate.

Right to an effective remedy

Committee comment (p. 16)

The committee therefore seeks the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to an effective remedy, and in particular why the limits imposed on human rights by the amendments are necessary to achieve the legitimate objective of ensuring Australia's national security.

Attorney-General's response

Section 14 of the ISA may impact upon the right to an effective remedy to the extent that it provides members or agents of an ISA agency with an immunity from civil or criminal liability in relation to activities undertaken in the proper performance of their agency's functions. Such activities cannot be the subject of prosecution or civil action in Australia.

The amendments made by Schedule 2 to the CTLA Act do not change the application of section 14 to activities carried out by ASIS, in accordance with a Ministerial authorisation, to support the ADF in a military operation. Contrary to the Committee's suggestion (at pp. 15-16 of its report), the amendments do not confer upon ASIS a "new" statutory function, but rather make explicit that the functions of ASIS include the provision of

2 These rules are publicly available on ASIS's website: http://www.asis.gov.au/Privacy-rules.html

assistance to the ADF in support of a military operation. As such, the immunity under section 14 has always applied to ASIS's activities in support of the ADF under its functions in paragraphs 6(1)(a), 6(1)(b) and 6(1)(e) of the ISA. The enactment of an explicit statutory function in paragraph 6(1)(ba) does not change the activities which attract immunity under section 14.

Nonetheless, the Committee has asked why an immunity from legal liability is necessary for staff members and agents of ASIS when undertaking authorised activities for the purpose of providing assistance to the ADF in support of a military operation (at p. 16). Without such an immunity, ASIS could not gain close access to relevant targets, as such access could itself constitute an offence. (For example, associating with a member of a terrorist organisation, or participating in training with a terrorist organisation are offences against Part 5.3 of the *Criminal Code 1995*. Security offences such as the terrorism-specific offences in Part 5.3 of the Criminal Code are of particular relevance in the context of the ADF's current operations against the ISIL terrorist organisation in Iraq, given that this organisation is a listed terrorist organisation under Division 102 of the Criminal Code.) The protection from legal liability conferred by section 14 is therefore essential to ensure that ASIS can provide assistance to the ADF without being exposed to legal liability that would otherwise preclude it from collecting critical intelligence (notwithstanding the existence of a Ministerial authorisation to do so, following receipt of a written request for ASIS's support from the Defence Minister under paragraph 9(1)(d), as well as the agreement of the Attorney-General in accordance with paragraph 9(1A)(b)).

There are also extensive legislative safeguards to ensure that the scope of the legal protection conferred by section 14 is proportionate to the nature of the activities carried out by the relevant staff member or agent of the agency. Section 14 applies only to the actions of an ISA employee or agent undertaken in the course of the proper performance of their agency's functions.

Activities to produce intelligence on, or which will, or are likely to, have a direct effect on an Australian person undertaken in support of the ADF must be specifically authorised under section 9. In order to issue an authorisation, the Minister must be satisfied that the activity is necessary for the proper performance by ASIS of its functions. The Minister must be further satisfied that satisfactory arrangements are in place to ensure that the activity does not extend beyond what is necessary for the proper performance by the agency of its functions, and that satisfactory arrangements are in place to ensure that the consequences of the proposed activities are reasonable.

The actions of a staff member or an agent of an ISA agency are also subject to independent oversight by the Inspector-General of Intelligence and Security under the IGIS Act. Under subsection 14(2B) of the ISA, the IGIS may give a written certificate, certifying any fact relevant to the question of whether an act was done in the proper performance of a function of an agency. Subsection 14(2C) provides that such a certificate is prima facie evidence of the relevant facts in any proceeding.

Right to life

Committee comment (p. 18)

The committee therefore seeks the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to life, and in particular whether the limits imposed on human rights by the amendments are proportionate to achieving the legitimate objective of ensuring Australia's national security.

Attorney-General's response

The Committee has suggested (at paragraph 1.67 of its report) that the ISA may authorise the 'targeted killing' of Australian persons overseas and thereby engage and limit the right to life. It has also asserted that the Statement of Compatibility does not explain the necessity or proportionality of any such limitations. The Government does not accept any suggestion that the ISA engages and limits the right to life. This issue was examined in detail by the PJCIS in its inquiry into the (then) Bill. Consistent with the evidence of AGD and agencies to that inquiry, the PJCIS rejected the suggestion that the ISA authorises any agency to engage in, or provide support for, the targeted killing of Australian citizens. The PJCIS stated (at p. 47 of its report):

> *The Committee acknowledges the concerns raised by some submitters that the proposed amendments will facilitate so-called 'targeted killings'. The Committee does not accept this evidence, noting that the proposed amendments do not change the role of ASIS in any way that would enable ASIS to kill, use violence against people, or participate in so-called 'targeted killings'. The Committee also notes that the ADF must abide by its Rules of Engagement at all times during its overseas engagements.*[3]

Subsection 6(4) of the ISA prohibits ASIS staff members or agents from planning for, or undertaking, activities that involve violence against the person. The ordinary meaning of the term 'violence' clearly extends to any targeted killing of an individual.[4] While the note to subsection 6(4) clarifies that this provision does not prevent ASIS from being involved with the planning or undertaking of such activities by other organisations, it is important to note that ASIS's cooperation with other organisations is subject to the limitations in sections 13 and 13A of the ISA, as well as the limitations on the functions and activities of ASIS in sections 11 and 12.

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3 See also the PJCIS's summary of AGD and ASIS's evidence at pp. 44-46 of its report (and AGD's and ASIS's submissions to that inquiry – submissions 5, 5.1 and 5.2, and submission 17). The Committee also implied (at paragraph 1.67 of its report) that ASIS could use 'targeted killings' as an alternative to arrest or trial. The Government does not accept this view, as the ADF remains bound by its Rules of Engagement and there is no support for the practice of 'targeted killing' within the ISA.

4 For example, the term 'violence' is defined by the Macquarie Dictionary to cover "rough or injurious action or treatment": Macquarie Dictionary (Sixth Edition, October 2013).

These limitations are additional to the authorisation criteria in section 9 of the ISA, particularly those in subsection 9(1), which require the Minister to be satisfied that the activity or activities will be necessary for the proper performance of the agency's functions, and that there are satisfactory arrangements in place to ensure that any activities will not exceed those which are necessary, and the nature and consequences of any such activities will be reasonable.

In addition, in the specific context of ASIS providing support to the ADF in accordance with authorised activities for the proper performance of ASIS's functions under paragraph 6(1)(ba) of the ISA, any use that the ADF may make of intelligence provided by ASIS are governed by the ADF's rules of engagement. These rules are developed in consultation with the Office of International Law within AGD to ensure their consistency with international law, including international humanitarian law.

The amendments enacted by Schedule 2 do not expand the functions of ASIS or any other ISA agency, nor do they change the longstanding prohibition on ASIS participating in violence under subsection 6(4). All that is changed is the method by which the Minister is able to authorise ASIS to undertake activities which relate to their functions.

Rights to equality and non-discrimination

Committee comment (p. 19)

The committee therefore seeks the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to equality and non-discrimination, and in particular whether the limits imposed on human rights by the amendments are in pursuit of a legitimate objective, and are proportionate to achieving that objective.

Attorney-General's response

The amendments in Schedule 2 to the ISA allow the Foreign Minister to authorise ASIS to undertake activities in relation to, or which directly affect, a class of Australian persons, for the purpose of providing assistance to the ADF in support of a military operation. The Committee has suggested (at paragraph 1.75 of its report) that these amendments may allow the Foreign Minister to authorise ASIS to undertake activities in relation to, or directly affecting, a class of persons in a way that is directly or indirectly discriminatory. This suggestion is incorrect.

I refer the Committee to the PJCIS's Advisory Report on the Bill (now Act) as tabled on 20 November 2014. The PJCIS accepted the evidence of AGD and agencies that the amendments will not permit direct or indirect discrimination against classes of persons. (For example, the amendments will not permit authorisations to be issued for ASIS to undertake activities in support of the ADF in relation to a class of Australian persons, where that class is defined by reference to persons' racial or religious affiliation). As the PJCIS

acknowledged, there are four main limitations which prevent the class authorisation power from being exercised in a discriminatory fashion (at pp. 36-37 of that Committee's report):

> *First, the Defence Minister must request the authorisation in writing and will set out in this request the class of Australian persons for whom ASIS's assistance is sought in relation to a specified ADF military operation.*
>
> *Secondly, the Foreign Minister must be satisfied that the other authorisation criteria in subsections 9(1) and 9(1A) are satisfied... Further, the Minister must be satisfied that the particular activities of a class of person in relation to whom the authorisation is sought fall within one or more of the activities prescribed in paragraph 9(1A)(a).*
>
> *Thirdly, the agreement of the Attorney-General is required in relation to a class of Australian persons before an authorisation is issued... The Attorney-General's Department noted that at this point, the proposed class of Australian persons will have been scrutinised by three Ministers.*
>
> *Fourthly, a class cannot include anyone who is not engaged in the specified activity or activities.*[5]

These limitations illustrate that classes of Australian persons who are the subject of an authorisation must be defined by reference to the action they have engaged in as prescribed in paragraph 9(1A)(a). The actions in that paragraph do not, in any way, relate to a person's religious, ethnic or ideological status or persuasion. Hence, there is no permissible means by which subsection 9(1A) could enable direct or indirect discrimination because its sole focus is on a person's engagement, or likely engagement, in the activities specified in paragraph 9(1A)(a). As the PJCIS acknowledged, when ASIS assistance is provided to the ADF in support of military operations, the relevant limb of the activity test in paragraph 9(1A)(a) will invariably be that in subparagraph 9(1A)(a)(iii), which prescribes activities that are or are likely to be a threat to security. There is no reasonable basis upon which to draw or infer a connection between a person's racial, religious or ideological status or persuasion and their engagement or likely engagement in activities that are, or are likely to be, a threat to security.

Further, ASIS's actions in requesting a Ministerial authorisation in relation to a class of Australian persons pursuant to its functions under paragraph 6(1)(ba), and in undertaking activities in reliance on that authorisation (including the identification of individual Australian persons within the relevant class), are subject to the independent oversight of the IGIS under the IGIS Act. ASIS must also provide reports to the Minister under section 10A within three months of the authorisation ceasing to have effect or being renewed.

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5 See further: Attorney General's Department, *Supplementary Submission 5.1* to the PJCIS at pp. 4-5.

Prohibition against torture and cruel, inhuman or degrading treatment or punishment

Committee comment (p. 21)

The committee therefore recommends that, to be compatible with human rights, the ISA be amended to explicitly provide that no civil or criminal immunity will apply to acts that could constitute torture or cruel, inhuman or degrading treatment or punishment as defined by the Convention Against Torture.

Attorney General's response

Consistent with the conclusions of the PJCIS on this matter in its advisory report on the (then) Bill,[6] there is no intention to amend the ISA in the manner recommended by the Committee.

The Committee appears to assume that the limited protection from legal liability in section 14 of the ISA must expressly exclude conduct constituting torture, or cruel, inhuman or degrading treatment or punishment in order to be compatible with Australia's obligations under the Convention Against Torture. Any express exclusion is, however, not required. The ISA does not, under any circumstances, authorise an agency to engage in such conduct, nor provide any immunity for such conduct. Accordingly, any activities undertaken by a staff member or an agent of an ISA agency that constitute torture or cruel, inhuman or degrading treatment or punishment are subject to criminal liability, including under the torture offences in Division 274 of the *Criminal Code 1995*.

The ISA expressly provides that agencies can only undertake activities for the purpose of the proper performance of their statutory functions, and cannot undertake activities that are not necessary for that purpose (per section 12). The relevant responsible Minister can only provide authorisations for agencies to engage in relevant activities where he or she is satisfied of the following requirements under subsection 9(1):

- the activities are necessary for the proper performance of a function of the agency;
- there are satisfactory arrangements in place to ensure that nothing will be done beyond what is necessary for the proper performance of a function of the agency; and
- there are satisfactory arrangements in place to ensure that the nature and consequences of the acts undertaken in reliance on the authorisation will be reasonable, having regard to the purpose for which they are carried out.

Further, the protection from legal liability in section 14 is expressly confined to staff members or agents of an agency who undertake acts in the proper performance of the agency's functions.

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6 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (November 2014), p. 47 at [3.67]. See also Attorney-General's Department, Supplementary Submission 5.2 to the PJCIS inquiry, pp. 3-4.

As the PJCIS acknowledged in its advisory report on the (then) Bill (at p. 47) and as expressly identified in the Explanatory Memorandum (at p. 29), there can be no sensible suggestion that conduct constituting torture or cruel, inhuman or degrading treatment or punishment is necessary for – or even relevant to – the proper performance of the relevant agencies' functions under the ISA. Such an interpretation is plainly contradicted by the ordinary meaning of the term 'proper' in relation to the performance of agencies' functions,[7] and the text and wider context of the ISA – having particular regard to the nature of agencies' functions under sections 6, 6B and 7.[8]

Rather, by limiting the scope of agencies' functions and activities (and the attendant protection from legal liability) to acts that are necessary for the proper performance of an agency's functions, the ISA evinces a clear intention that conduct constituting torture or cruel, inhuman or degrading treatment is subject to criminal and civil liability. This includes liability under the specific offences in relation to torture in Division 274 of the Criminal Code, which give domestic legal effect to Australia's international obligations under the Convention Against Torture. The amendments to the ISA, enacted by Schedule 2 to the CTLA Act, do not change this position in any way.

Secondly, as the PJCIS further observed, paragraph 6(4)(b) of the ISA confers an additional safeguard in relation to the conduct of activities by ASIS in recognition of its role as a human intelligence collection agency. This provision prohibits ASIS from planning for, or

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7 For example, the Macquarie Dictionary (Sixth Edition, October 2013) defines the term 'proper' as meaning "conforming to established standards of behaviour or manners; correct or decorous". In addition, in the unlikely event that the meaning of the phrase 'proper performance of the agency's functions' was considered to be ambiguous *vis a vis* torture, this would engage the presumption that legislation is to be interpreted consistently with Australia's human rights obligations: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 1983 CLR 273 at p. 287 (per Mason CJ and Deane J). There is nothing in the text of the provisions of the ISA concerning the functions of agencies, nor evident in the wider context of the ISA, to suggest that Parliament intended the ISA should be read inconsistently with Australia's international obligations to prohibit torture, including those under the Convention Against Torture. (Such a presumption is additional to the ability to consult extrinsic materials to the legislation in accordance with section 15AB of the *Acts Interpretation Act*. Relevant extrinsic materials include the Explanatory Memorandum to the Bill, which makes specific reference to this matter at p. 29.)

8 Further, the ISA is, like all Australian legislation, subject to the presumption of statutory interpretation that the Parliament did not intend to abrogate fundamental common law rights – including the fundamental and long-established rights to personal inviolability and personal liberty – in the absence of a clear intention on the face of the relevant legislation to displace this presumption. (See, for example: *'Marion's Case'* (1992) 175 CLR 218 at 253 per Mason CJ, Dawson, Toohey and Gaudron JJ concerning personal inviolability; and *R v Bolton; Ex Parte Bean* (1987) 162 CLR 514 at 523 per Brennan CJ concerning personal liberty.) The content of such fundamental rights includes conduct of the kind constituting torture and cruel, inhuman or degrading treatment or punishment, recognising that it is a significant incursion into the integrity and autonomy of a person's physical and mental state. In order for the ISA to be interpreted as abrogating these rights, it would be necessary to identify unambiguous and unmistakable language giving effect to this intention – noting that the more serious the interference, the clearer the requisite expression of intention must be: *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241 at 263 (per Black CJ, Sundberg and Weinberg JJ). There is no evidence of such a clear intention on the face of the ISA. There is no inconsistency between these fundamental common law rights (to the extent that they cover conduct constituting torture or cruel, inhuman or degrading treatment or punishment) and the statutory functions or activities of agencies prescribed under the ISA; nor the limited immunity in section 14 for actions done in the proper performance of an agency's functions.

undertaking, activities that involve violence against the person. The Committee has asserted (at p. 20 of its report) that the term 'violence' has a narrower meaning than conduct constituting torture, or cruel, inhuman or degrading treatment or punishment. This is contradicted by the ordinary meaning of the term 'violence'. For example, the Macquarie Dictionary defines the term as encompassing "rough or injurious action or treatment",[9] which would clearly extend to the conduct identified by the Committee at page 20 of its report. This ordinary meaning is also confirmed by the Explanatory Memorandum (at p. 29). As conduct constituting torture or other cruel, inhuman or degrading treatment or punishment is outside the proper performance of all ISA agencies' functions, it necessarily falls outside the scope of the limited protection from legal liability in section 14. Accordingly, such conduct is already subject to criminal offences under Australian law, including specific offences in respect of torture in Division 274 of the Criminal Code. An express exclusion of such conduct under section 14 is, therefore, not necessary to give substantive effect to Australia's obligations under the Convention Against Torture. Further, as the PJCIS recognised, the insertion in section 14 of an express statutory exclusion of conduct that is not, in any case, within the scope of the immunity may also have unintended, adverse consequences for the interpretation of that provision (and potentially for the interpretation of agencies' functions). Accordingly, the Government has no intention to implement this recommendation.

Committee comment (p. 21)

The committee also recommends that, to be compatible with human rights, the ISA be amended to explicitly provide that ASIS must not provide any planning, support or intelligence where it may result in another organisation engaging in acts that could constitute torture or cruel, inhuman or degrading treatment or punishment as defined by the Convention Against Torture.

Attorney General's Response

The Committee has correctly identified that the prohibitions and limitations in subsection 6(4) of the ISA do not prohibit ASIS from being involved with the planning or undertaking of activities of the kind specified in paragraphs 6(4)(a)-(c) by other organisations. This is expressly confirmed in the note to subsection 6(4). However, any such involvement is subject to the requirements of sections 13 and 13A of the ISA. These provisions state that ASIS may only cooperate with another organisation if this cooperation is in connection with the functions of ASIS (section 13), or the functions of the cooperating (Australian) organisation (section 13A).

As mentioned above, the functions of ASIS are not capable of extending to conduct constituting torture, or cruel, inhuman or degrading treatment or punishment. In addition, the functions of the Australian agencies with whom ASIS may cooperate under section 13A are similarly incapable of extending to conduct constituting torture or cruel, inhuman or degrading treatment or punishment. The amendments to the ISA do not, in any way, change this position. For these reasons, the Government will not be amending the ISA to implement

9 Macquarie Dictionary (Sixth Edition, October 2013).

this recommendation. To the extent that the Committee appears to have suggested that such amendments are necessary in order for the ISA to be compatible with the Convention Against Torture, the Government does not accept that position.

THE HON CHRISTOPHER PYNE MP
MINISTER FOR EDUCATION AND TRAINING
LEADER OF THE HOUSE
MEMBER FOR STURT

05 MAR 2015

Our Ref MC15-000575

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

Dear Senator

Thank you for the opportunity to respond to the Committee's *Eighteenth Report of the 44th Parliament* insofar as it relates to the Higher Education and Research Reform Bill 2014 (the Reform Bill).

I note that the Committee has agreed that, for the most part, the measures in the Bill do not limit the right to education, and in some cases the measures in the Bill make a positive contribution to human rights.

However, I note the Committee's concerns about two measures: the reduction in Commonwealth subsidies for new Commonwealth supported students and the removal of the cap on student contribution amounts, which it considers may impact the affordability and accessibility of higher education. The Committee has requested further information that supports the Australian Government's assessment that removing the cap on student contributions will not reduce access to education. The information requested by the Committee is attached.

In summary, the Government does not consider that either measure will limit the right to education or impact negatively on affordability and accessibility. Access to, and affordability of, higher education will continue to be protected by the Higher Education Contribution Scheme (HECS) which will allow students to defer the full cost of their study. Further, there is no requirement to repay any of the student loan debt until their income reaches the minimum repayment threshold of more than $50,638 per year.

The Reform Bill will increase student choice and greatly expand opportunity for many thousands of Australians. The measures to extend Commonwealth subsidies to all eligible students studying undergraduate qualifications at any approved higher education provider will see more than 80,000 additional students per year receiving Commonwealth subsidies. This includes 35,000 bachelor students and 48,000 diploma, advanced diploma and associate degree students. Inclusion of sub-bachelor places in the demand driven funding system will also provide better pathways for students who may not be prepared for higher education, allowing them a greater chance of success.

In addition, the Reform Bill provides for two new scholarships programs: the Commonwealth Scholarship scheme, and a dedicated scholarships fund within the Higher Education Participation Programme. Together, these are expected to assist many disadvantaged higher education students with the cost of undertaking study.

It should be noted that the costs of some courses are likely to decrease as non-university higher education providers gain access to subsidies for the first time. The Council of Private Higher Education Providers stated in its submission to the Senate Education and Employment Legislation Committee that the benefits of Commonwealth subsidies would be passed on to students.

Nevertheless, the loans available to Australian students through HECS will continue to ensure that no student will need to pay upfront for the higher education course of their choice. Evidence from previous changes to Australia's higher education system as well as recent evidence from England shows increased student participation, including of low-SES students, alongside fee rises. The experience in England has been that at the same time as fee caps were increased three-fold the number and proportion of low-SES students undertaking higher education has increased significantly. Further, a large international study prepared by Alex Usher for the European Commission found that where an income contingent loan scheme, such as Australia's HECS, existed there was no negative impact on participation as a result of higher fees.

I thank the Committee for its consideration of the Reform Bill.

Yours sincerely

Christopher Pyne MP

Encl. Response to the Parliamentary Joint Committee on Human Rights

The Higher Education and Research Reform Bill 2014

Concerns of the Joint Parliamentary Committee on Human Rights

The Committee has raised concerns about two of the measures contained in the *Higher Education and Research Reform Bill 2014* (the Reform Bill).

The Committee expressed concern in paragraphs 1.216 and 1.218 of its 18th Report of the 44th Parliament (the Report) that the total cost of education would rise directly as a result of the proposed 20 percent reduction in the subsidy for new Commonwealth supported students and consequently considered that this measure may be incompatible with the right to education.

The Committee also raised concern in paragraphs 1.221 and 1.223 of its Report that the removal of the cap on student contribution amounts may result in a rise in fees and is therefore incompatible with the right to education to the extent that it reduces the affordability (and accessibility) of higher education and, more generally, is inconsistent with the International Covenant on Economic, Social and Cultural Rights (ICESCR) goal for progressive realisation of free higher education. In response to these concerns the Committee sought further information from the Minister about any relevant modelling, case studies or analysis in support of the assessment that removing the cap on student contributions will not reduce access to education.

The concerns of the Committee are addressed below.

Response to the Joint Parliamentary Committee on Human Rights

HECS loans will protect the right to higher education by ensuring access and affordability

The right to education will not be negatively affected by the proposed 20 per cent reduction in the subsidy for new Commonwealth supported students or the removal of the cap on student contribution amounts. The Reform Bill does not restrict accessibility and affordability of higher education. The Higher Education Contribution Scheme (HECS) will continue to ensure that Australian students are able to fully defer the cost of their higher education through income-contingent loans. Eligible students will not need to pay a cent up front for the cost of their tuition, and need not commence repayments until they earn over an estimated $50,638 (in 2016-17). In this way, HECS effectively operates as an insurance mechanism to protect borrowers who participate in higher education but do not subsequently earn sufficient income to repay their debt without hardship.

International evidence suggests that the availability of a strong student loan scheme reduces or eliminates any effects of price increases on accessibility. A 2014 report prepared for the European Commission (the Usher report) explored the impacts of changes to cost-sharing arrangements on higher education students and institutions across nine countries.[1] The Usher report found that there was no trend of declining enrolments after a fee increase, and that in cases where students were able to access financial support, in the form of loans or scholarships, the impact of a fee increase on university applications was negligible.

[1] Usher, Orr and Wespel, 'Do changes in cost-sharing have an impact on the behaviour of students and higher education institutions?', Report for European Union, United Kingdom, May 2014.

Previous changes to tuition fee charges in Australia have also not deterred students from lower socio-economic status (SES) backgrounds from undertaking higher education. A 2008 report by Access Economics found that 'the introduction of HECS and subsequent changes in the level of charges have had minimal impact, both in terms of overall applications and on enrolments by students from lower socio-economic status backgrounds.'[2]

Similar observations were made in relation to the recent experience in England. Many institutions elected to raise their tuition fees to the new maximum amount however this did not affect the proportion of low SES students enrolling in higher education courses, and the participation rates for disadvantaged students in England is higher than ever according to a 2014 report by the UK Independent Commission on Fees.[3]

The reforms will reduce fees for some students

The removal of the cap on student contributions will not result in price increases for all students. In fact, the costs of some courses are likely to decrease, as non-university higher education providers gain access to subsidies for the first time. The Council of Private Higher Education Providers (COPHE) stated in its submission to the Senate Education and Employment Legislation Committee which was conducting an inquiry into the Higher Education and Research Reform Amendment Bill (2014) that the benefits of Commonwealth subsidies would be passed on to students through a reduction in their fees.

The Reform Bill's measures include specific benefits targeted at students facing disadvantage

The Usher report also noted that the increase in funding available to universities allowed them to open up more places, and provide more student support such as academic support or cost of living allowances or bursaries. The combined effect is that the proportion of students from low socio-economic backgrounds undertaking higher education has been observed to increase after a rise in the 'sticker price' of the course. According to information gathered, greater access to scholarships, student loans and other financial support may result in students from disadvantaged backgrounds actually paying less, due to the ability of universities to increase their outreach efforts.

The availability of new scholarships through the proposed new Commonwealth Scholarship Scheme and a new dedicated scholarships fund within the Higher Education Participation Programme (HEPP) is expected to assist many disadvantaged higher education students with the cost of undertaking study. Institutions will be able to provide tailored, individualised support to help disadvantaged students, including help with costs of attending, participating in or succeeding in higher education. These will be allocated to students either as direct scholarship payments or as individualised support, such as assistance with the cost of living, additional tutoring, mentoring or outreach.

Together, the scholarships stream under HEPP and the new Commonwealth Scholarship Scheme are expected to result in additional support, particularly for regional students because all universities will be able to provide support for access and participation through scholarships.

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[2] Access Economics Pty Limited, 'Future Demand for Higher Education', Report for Department of Education, Employment and Workplace Relations, Australia, November 2008.

[3] Independent Commission on Fees, 'Analysis of trends in higher education applications, admissions, and enrolments', United Kingdom, August 2014.

Greater access and success for students through the extension of Government subsidies to sub-bachelor courses

The Review of the Demand Driven Funding System[4] argued that expansion of subsidised places to sub bachelor courses and non-university higher education providers would improve the efficiency of the higher education system by better matching students with courses that suit them and give them the highest chance of success.

The measures in the Reform Bill aim to expand opportunity and choice for students through extension of the demand driven funding system to sub bachelor places at all institutions and bachelor level places at private universities and non-university higher education providers registered by TEQSA. For the first time ever, Commonwealth subsidies will be provided on a demand driven basis for eligible students enrolling in accredited higher education diplomas, advanced diplomas and associate degrees. These qualifications provide effective pathways for disadvantaged students and in many cases are qualifications in their own right (such as engineering technologists, construction managers, and paralegals).

The Review of the Demand Driven Funding System found that the capping of sub-bachelor places, as well as the general restriction on providers that are able to offer sub-bachelor Commonwealth supported places, created incentives for students to enrol in a bachelor degree. This was primarily due to the relative price differential between a (subsidised) bachelor place through a public university and a (non-subsidised) sub-bachelor place through a non-university higher education provider. This occurred even though a sub-bachelor course would better suit their needs and abilities.

Evidence to the review suggested that students who entered via a pathway course often did better than might have been expected, given their original level of academic preparation. At the University of Western Sydney's *UWSCollege* more than 70 per cent of students progress straight into the second year of a bachelor program, often with retention and success results equivalent to their peers who enrol directly into bachelor courses.

In addition, as discussed above, the Council of Private Higher Education (COPHE) has confirmed that their members intend to reduce their tuition fees as a result of access to Government subsidies. An article in *The Australian* on 24 September 2014 stated that fees for private higher education may halve in some cases as COPHE members pass Government subsidies directly on to students as savings.[5]

Based on the evidence provided, neither measure noted by the Committee can be considered to limit the right to education. The right to access higher education will be preserved by the HECS system, as all available evidence suggests that the presence of an adequate loan scheme preserves the accessibility of higher education. Additionally, the affordability of higher education will be maintained by the downward pressure on fees provided by the introduction of subsidies to sub-bachelor courses and private providers. Costs associated with higher education will also be reduced

[4] Kemp and Norton, 'Review of the Demand Driven Funding System', Australia, April 2014.
[5] B Lane, The Australian, 'Fees for private college courses could halve', 24 September 2014

for many students as a result of the targeted scholarship programmes. The measures in the Reform Bill ensure that the right to education, including its accessibility and affordability, will not be limited.

PARLIAMENTARY SECRETARY
TO THE PRIME MINISTER

Reference: C15/20325

26 MAR 2015

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

Dear ~~Senator Smith~~ Dean

Thank you for your letter dated 3 March 2015 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Omnibus Repeal Day (Spring 2014) Bill 2014 (the Bill). I welcome this opportunity to address the Committee's questions on the Bill as presented in the *Nineteenth Report of the 44th Parliament*.

The Committee seeks advice on the proposed changes to the Telecommunication Act 1997 to remove the consultation requirement when changing disability standards.

The proposed repeal of subsections 382(1) and (5) of the *Telecommunications Act 1997* (the TC Act) forms part of a broader program of reform of statutory consultation requirements in the Communications portfolio. The reason for the removal of bespoke consultation requirements is that such requirements are unnecessarily duplicative in light of the consultation requirements in section 17 of the *Legislative Instruments Act 2003* (the LI Act) which sets the standard consultation requirements for all Commonwealth legislative instruments.

The provisions proposed for repeal mandate a variety of inconsistent approaches with respect to the time and method of consultation. The various provisions proposed to be repealed are prescriptive rules. The consultation periods in question range from 14 to 60 days. Some of the consultation provisions require publication on a website; some require publication in multiple newspapers. There is no policy rationale for this inconsistency, which introduces unnecessary inflexibility and imposes costs without corresponding benefits above those supplied by the standard consultation arrangements in Part 3 of the LI Act.

The standard requirements in section 17 of the LI Act apply across all legislation that does not have separate consultation provisions, not only in the Communications portfolio but

across the Commonwealth. In the Communications portfolio, section 17 of the LI Act has been used to ensure that appropriate consultation has been undertaken. The proposed repeal is intended to simplify, shorten and harmonise the law, in accordance with the objectives of the Government's deregulation agenda.

The Communications portfolio has taken a consistent approach to the reform of statutory consultation requirements. The provisions proposed to be amended include many that have no special relevance to persons with disabilities. This standard approach is consistent with the goal of ensuring the right to equality before the law for people with disabilities is on an equal basis with others in the community.

Subsections 382(1) and (5) of the *Telecommunications Act 1997*

In determining whether any consultation is appropriate, the rule-maker would ensure that any persons likely to be affected by the proposed instrument had an adequate opportunity to comment (subsection 17(2) of the LI Act refers).

Accordingly, section 17 of the LI Act, while not identical to the provisions being repealed, provides a statutory mechanism for those with an interest in disability standards, including persons with disabilities, to comment on those standards, notwithstanding the repeal of subsections 382(1) and (5) of the TC Act. For example, the provisions being repealed require the Australian Communications and Media Authority (ACMA), before making a disability standard under 382 of the TC Act, to try to ensure that any interested person has adequate opportunity (of at least 60 days) to make representations about the proposed standard, and for ACMA to give due consideration to these representations. Section 17 of the LI Act provides a separate statutory mechanism for those with an interest in a standard to comment on those standards. Both section 382 of the TC Act and section 17 of the LI Act are framed in terms of "practicable" consultation, meaning that the differences between the two approaches are not as significant as they may appear.

It is also worth noting that Part 5 of the LI Act sets out a tabling and disallowance regime which facilitates parliamentary scrutiny of legislative instruments. The consultation undertaken in relation to any legislative instrument is required to be set out in the associated explanatory statement and, accordingly, if the Parliament is dissatisfied with that consultation, the instrument may be disallowed.

The Committee has also sought advice on the repeal of the review requirements in the Stronger Futures in the Northern Territory Act 2012 (SFNT Act) and in Part 10 of the Classifications (Publications, Films and Computer Games) Act 2005 (Classifications Act).

The policy objective of these elements of the legislation is to support Indigenous people in the Northern Territory to live strong, independent lives, where communities, families and children are safe and healthy, including reducing alcohol-related harm.

The repeal of review requirements in both the SFNT Act and Part 10 of the Classifications Act is machinery in nature – as such, it does not engage any applicable human rights, including those identified by the Committee at paragraph 1.153 of the *Nineteenth Report of the 44th Parliament*. The amendment relating to the assessment of licensed premises also does not engage any rights or freedoms, as any changes to licensing arrangements remain a matter for the Northern Territory Government and the Northern Territory Licensing Commission.

The repeal of the legislated review requirements does not mean that Stronger Futures measures will not be closely monitored and assessed. The operation of individual elements, which form part of the Stronger Futures package, is regularly monitored in conjunction with the Northern Territory Government. As the Committee is aware, the Commonwealth is also undertaking a revision of the Stronger Futures National Partnership Agreement in collaboration with the Northern Territory Government. This is currently underway.

The revision process includes a critical assessment of the effectiveness of the Stronger Futures National Partnership Agreement and overtakes the need for the review requirement provisions to remain in legislation.

Further to this, I understand that an inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities is being conducted by the House of Representatives Standing Committee on Indigenous Affairs. Submissions on Northern Territory alcohol laws were provided for the inquiry's consideration, from the Northern Territory Government, private individuals and a range of stakeholder groups.

Yours sincerely

CHRISTIAN PORTER

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24 March 2015

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CRICOS Provider No. 00120C

Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
Canberra ACT 2600

via email: human.rights@aph.gov.au

Dear Chair

Academic Misconduct Rules [F2014L01785]

I refer to your letter dated 3 March 2015 to the Vice Chancellor, to which I have been instructed to reply.

The University takes seriously its obligations to provide access to higher education to all students of merit and appreciates the work of the Joint Committee scrutinising Federal legislative instruments.

As a preliminary issue, as I indicated in an e-mail to the Secretariat, the extract of the report of the Joint Committee, included with your letter, makes an incorrect assumption: '*Last day to disallow: 26 March 2015'*. The University's legislation is exempt from disallowance under subsection 44(2) of the *Legislative Instruments Act 2003* – you may wish to correct the Joint Committee's records? The University appreciates this issue is not relevant to the work of the Joint Committee in scrutinising University Statutes and Rules.

The report of the Joint Committee queries whether an interim exclusion of a student from some or all of the University's facilities, pending the conclusion of an inquiry into serious academic misconduct derogates from the "right to (higher) education", as outlined in Article 13 of the International Covenant on Economic, Social and Cultural Rights:

> *13(c) Higher education shall be made equally accessible to all, on the **basis of capacity**, by every appropriate means, and in particular by the progressive introduction of free education;*

Following on the reference in Article 26 of the Universal Declaration:

> *26(1)…….. and higher education shall be equally accessible to all on the **basis of merit**.*

I have included a reference to these Articles due to the inclusion of the highlighted phrase – not contained in descriptions of the right to education at non-tertiary levels. Merit, or "capacity" as it is used in the ICESCR, is the antithesis of cheating and is an important focus of the Rules under question.

The complete text of Rule 10 is:

> **10 Interim exclusion by the Deputy Vice-Chancellor**
>
> 10.1 Subject to sub-rule 10.2, the Deputy Vice-Chancellor may, by written notice, deny a student in relation to whom an allegation of academic misconduct has been made access to all or any of the facilities of the University, or to any part of the University premises or to any activities conducted by or on behalf of the University.
>
> 10.2 The Deputy Vice-Chancellor must not deny a student access under subrule 10.1 unless he or she considers that the alleged academic misconduct is of a **serious** nature.

10.3 A denial of access under this rule is in force for the period specified in the notice, or until the conclusion of the inquiry process, whichever first occurs.

10.4 If the Deputy Vice-Chancellor exercises his or her powers under this rule, he or she must, as soon as is practicable, give to the student:

(a) a copy of the notice; and

(b) a written statement setting out the reasons for the action and advising the student that he or she has a right to apply for review of the decision under the Appeals Rules.

I have highlighted "serious" in the above extract because it seems to have been overlooked by the Joint Committee in its reasons. It is mentioned only once – at paragraph 1.166 and not again, including in paragraph 1.177 when the Joint Committee raises the matter upon which they have sought advice from the University. As an example, at paragraph 1.173 in the Joint Committee states:

> *"The committee is concerned that rule 10, by allowing for the exclusion of a student from the University facilities following an allegation of academic misconduct, without an enquiry have taken place, my limit the rights of all persons to access education"*

With respect to the Joint Committee, the right to access higher education is limited to those who demonstrate merit (not all persons) and the operation of the interim suspension can only occur if the allegations of academic misconduct fall into the category of "serious".

In addition, and before considering the reasons why such a power to suspend is required, the Committee did not address the rights of a student to appeal any interim restrictions that have been applied, before the finalisation of the inquiry. Again, this element of the Rules only received a brief mention in paragraph 1.167 of the Committee's reasons. The appeal right is to provide procedural assurance that the exercise of the power to suspend a student on an interim basis is a proportionate response to the circumstances that have arisen. There is also provision for an appeal to be conducted "on the papers" to allow for the efficient consideration of an appeal that might involve an interim suspension (Appeals Rules 2014, see for eg rules 15 and 18).

The University faces many challenges when dealing with allegations of academic misconduct. For example, the use by a student of IT systems to "hack" into the systems of the University that may contain examination papers or other confidential material that would enable a student to cheat on assessment. Where allegations of that kind are made, suspending the access of the student from the electronic systems of the University is important to preserve the integrity of those systems as well as to gather appropriate evidence.

There are times when students unfortunately become aggressive and threaten witnesses (staff or students) who may be relevant to the inquiry – a student may be excluded entirely from their program or indeed have their academic record at the University completely expunged in certain cases of academic misconduct. Students facing these potential sanctions can seek to influence and harass potential witnesses both "online" and physically, and hence may need to have access to IT facilities suspended or be removed from campus during the inquiry process.

There have also been instances where students have created false identification documents to enable them to enter examination rooms or to inappropriately gain access to parts of the University campus - while allegations of that kind are resolved, it is important for safety and protection of property to remove the student from campus.

These Rules also deal with allegations of research misconduct in doctoral and other programs of higher degree by research. Allegations of research misconduct are quite serious and have the potential to prevent a student from continuing an academic research career. In these cases, evidence needs to be gathered before it is destroyed, removed or disturbed in some way so that the sanctity of the investigation and inquiry process is protected. In some cases this requires the removal of the student alleged to have engaged in misconduct from campus. Such removal can also serve to protect the interests of the student – if there is interference with evidence and they can demonstrate that they were not on campus as a result of obeying the interim suspension thus removing that student from suspicion in relation to the disturbed evidence.

These examples are not exhaustive with experience suggesting that the range of behaviours alters as the circumstances of the study environment change over time. Hence the wide discretion available to the Deputy Vice Chancellor to preserve the integrity of the inquiry processes in matters of serious academic misconduct

The exercise by the University of the power to suspend a student on an interim basis is also subject to external review by bodies like the Federal Court or the Ombudsman.

For all of the above reasons, the University is satisfied that the measure in the Rules is reasonable and proportionate in relation to its objectives and there is a rational connection between the interim power to suspend and the objectives.

If you would like any further information or to discuss these matters in further detail, please not hesitate to contact me.

Yours sincerely

Ken Grime
University Counsel

Australian Government
Australian Customs and Border Protection Service

Chief Executive Officer

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Canberra City ACT 2601

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The Honourable Phillip Ruddock MP
Chair, Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Ruddock

Australian Customs and Border Protection Service – Use of Force Order (2015)

I refer to the Parliamentary Joint Committee on Human Rights *Nineteenth Report of the 44th Parliament* and the committee's request for a response.

The Committee specifically expressed concerns that the use of handcuffs on children may limit the rights of a child, and that the statement of compatibility does not provide sufficient justification of the compatibility of the measure with this right. Accordingly, the Committee requested advice on:

- 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.

In response to the Committee's concerns, I wish to assure the Committee that any situation that would necessitate the handcuffing of a child or young person, would only ever be done so in order to achieve a legitimate objective, and only when reasonable and proportionate to the achievement of that objective, and in accordance with the exercise of statutory powers.

Restraints would only ever be considered in accordance with the Operational Safety Principles and Use of Force Model that states officers will only use the minimum amount of force reasonable and appropriate for the effective exercise of their statutory powers. At its core, the Model requires the use of communications (including negotiation and conflict de-escalation) as the primary consideration in interactions between ACBPS officers and members of the public.

ACBPS has a stringent program of training and annual recertification where it appropriately trains all officers who are required to hold a Use of Force permit.

Operational safety training and competency assessment are conducted in accordance with the Use of Force Order (2015) and delivered only by qualified Operational Safety Trainers. Restraints may only be applied by officers who hold a current Use of Force permit and only in the exercise of statutory powers.

I trust the above information is of assistance to the Committee.

Yours sincerely

Michael Outram
A/g Chief Executive Officer

17th April 2015

THE HON SUSSAN LEY MP
MINISTER FOR HEALTH
MINISTER FOR SPORT

Ref No: MC15-002415

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

Dear Chair Dean

Thank you for your correspondence of 13 February 2015 regarding concerns in relation to the Dental Benefits Rules 2014 and the Health Insurance Legislation Amendment (Optometric and Other Measures) Regulation 2014.

The Australian Government believes Australians deserve a world class health system with access to services provided by highly skilled doctors, nurses and allied health professionals.

This must be underpinned by a strong and sustainable Medicare.

The Government believes that the changes to dental services and Medicare rebateable optometric services appropriately balance the rights of consumers to access affordable health services and the responsibility of the Government to manage health expenditure and to ensure that Medicare rebates are reasonable.

As noted in the *Eighteenth Report of the 44th Parliament: Human Rights Scrutiny Report* (the Report), the right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life. The notion of 'the highest attainable standard of health' takes into account both the condition of the individual and the country's available resources.

Dental Benefits Rules 2014

The Child Dental Benefits Schedule (CDBS) commenced on 1 January 2014, and provides up to $1,000 in benefits, capped over two calendar years, for basic dental services for eligible children 2-17 years of age who satisfy a means test. The CDBS is administered under the *Dental Benefits Act 2008*. Dental Benefits Rules provide for the operational aspects of the programme.

The Dental Benefits Rules 2014 (the 2014 Rules) repeal and replace the Dental Benefits Rules 2013 (the 2013 Rules). Compared with the 2013 Rules, the 2014 Rules make a number of minor amendments to improve the operation of the CDBS.

Cap on Benefits

At paragraph 1.304 of the Report, the Committee notes that it considers the cap on benefits of $1,000 over two consecutive calendar years may limit the rights to social security and health. The Committee asks for further justification of this limitation.

I would like to clarify for the Committee that the cap on dental benefits of $1,000 for the 2015 and 2016 two calendar year period specified in the 2014 Rules does not represent any change from the cap that would have applied for this period had the 2013 Rules remained in force. The 2013 Rules placed a maximum cap on benefits of $1,000 for the 2014 and 2015 two calendar year period and provided for that amount to continue to apply for each two year period into the future unless a new amount was specified (subrule 14 (9)). The 2014 Rules maintain the existing level of access to dental services subsidised through the CDBS; the cap on benefits does not impose any new limitation on human rights.

I note the Committee's comments that the benefits cap could mean that people who need extensive dental work above the $1,000 limit may not have the means to access all necessary dental care. While the cap limits the benefits available under the CDBS, it is not the only means of financial support for dental services. State and territory governments provide free or low cost dental care to people with pensioner concession cards or health care cards. This provides a safety net for people who have limited means to meet the full cost of dental treatment themselves. Additionally, many states provide dental services to all children, regardless of means.

The objective of the limit on benefits is to balance the need for support for the dental treatment needs of children with maintaining the sustainability of government funding. It is my view that the provision for a benefit limit of $1,000 over two consecutive calendar years is a reasonable and proportionate way to provide sustainable access to an appropriate level of government funding in the context of the broader dental system.

Eligibility for dental services

At paragraph 1.309 of the Report, the Committee seeks advice as to whether the requirement that patients are eligible for Medicare at the time a dental service is provided is likely to lead to some people no longer being eligible for dental benefits.

In accordance with section 23 of the *Dental Benefits Act 2008*, to be eligible for a voucher for CDBS services in a calendar year a person must, on at least one day of the year:

- be aged at least two years but younger than 18 years;
- meet the means test; and
- be eligible for Medicare.

A person cannot be identified as eligible for a voucher for the CDBS for a particular calendar year until after they have met the means test and have become eligible for Medicare. CDBS vouchers apply in respect of a full calendar year (1 January to 31 December) regardless of the date on which they are issued.

The 2014 Rules introduce a requirement that, for a CDBS benefit to be payable, a patient must be eligible for Medicare at the time a dental service is provided. This means that, for a person who became eligible for Medicare part way through the calendar year, they would not be entitled to receive CDBS benefits for any dental services provided before they became eligible for Medicare.

The Committee notes that it considers changes to the eligibility for CDBS benefits engage the right to health and the right to social security. As this amendment only impacts on dental services that have already been provided and paid for without any anticipation of access to dental benefits, it is my view that, in practice, it does not affect the right to health.

The amendment does engage the right to social security because it removes an entitlement to receive a benefit for that dental service; however, the number of people likely to be affected by this amendment, if any, would be negligible. To be affected, a person would have had to receive a dental service in Australia while visiting and then, later that same year, become Medicare eligible, for example, by becoming an Australian resident.

The objective of this amendment is to create consistency with other Commonwealth programmes (such as the Medicare Benefits Schedule (MBS)) in that a person must be eligible for Medicare on the day of service for which a benefit applies. It is my view that this amendment is the most reasonable way to achieve a consistent application of health benefits to support effective administration of government funding and is compatible with Australia's human rights obligations.

Health Insurance Legislation Amendment (Optometric and Other Measures) Regulation 2014

The changes to the Medicare rebateable optometry arrangements commenced on 1 January 2015. The Health Insurance Legislation Amendment (Optometric and Other Measures) Regulation 2014 (the Regulation) provided, among other things, for the MBS rebate for all optometry services to be reduced by five per cent, and the charging cap that applied to optometrists was removed, enabling optometrists to set their own fees for Medicare rebateable services. The Medicare rebateable optometry services are administered under the *Health Insurance Act 1973*.

The Regulation amends the Health Insurance (General Medical Services Table) Regulations.

<u>Reduction in MBS fees and removal of the charging cap</u>

At paragraph 1.346 of the Report, the Committee notes that it considers that the reduction in MBS fees for optometry services and the removal of the charging cap for optometry services limits the right to health and social security. The Committee seeks further justification for these limitations.

In the last decade, spending on Medicare has more than doubled from $8 billion in 2004 to around $20 billion today, yet the Australian Government raised only around $10 billion from the Medicare levy in 2013-14. Ten years ago, the Medicare levy covered 67 per cent of the cost of Medicare, but it now covers only 54 per cent. Medicare spending is projected to climb to $34 billion in the next decade to 2024. I consider that this projected increase in spending represents a pressing concern for Australia and the Australian Government is working to make Medicare sustainable for the future and responsibly managing Australia's Budget is a legitimate objective for the Australian Government. The reduction in Medicare fees for optometric services and the removal of the cap will achieve a savings of $89.6 million over four years. These savings will contribute to an overall reduction in Medicare spending into the future.

The reduction in the rebate reflects efficiencies gained within the optometry profession over the years due to new technologies and techniques which support more cost-effective services. The reduction in the Medicare fees result in a decrease of only a few dollars per service. For the most common service, a comprehensive eye examination which is claimed when clinically necessary, this means a reduction in the rebate of about $3.55 for the service. I consider that reducing the Medicare fees for optometric services is a reasonable and proportionate way to assist in achieving an overall reduction in Medicare expenditure into the future.

Removing the charging cap for optometrists also means that individual optometrists can make their own business decisions according to their own and their patients' circumstances, including whether to continue bulk-billing patients. This will align the rules governing charging by optometrists with those applying for other health professions in the Medicare scheme. The Government believes that it is not unreasonable for patients who can afford it to contribute a modest amount to their service.

The optometry sector is highly commercialised and competitive. In 2013-14, 97 per cent of Medicare rebateable optometric services were bulk-billed and this rate has been relatively stable over the years. To identify whether these measures would significantly increase out-of-pocket costs for optometry services, my Department commissioned ACIL Allen Consulting to undertake an analysis of optometry services in Australia. The report *Optometry Market Analysis* found that the market is extremely competitive even in regional areas, with 75 per cent of all practices having at least one competitor within 500 metres and 95 per cent having competitors within 10 kilometres.

The strong competitive market means that the reduction in the fees and the removal of the cap is unlikely to increase patient contributions significantly or reduce access to Medicare rebateable optometric services. It is expected that the majority of optometry services will continue to be bulk-billed, including in regional areas. A full copy of the report is available at www.acilallen.com.au/projects/14/health-care/124/optometry-market-analysis.

The MBS also provides additional benefits for people with high out-of-pocket costs for out-of-hospital services through the Medicare safety nets. Services provided by optometrists are eligible for Medicare safety net benefits.

For the reasons outlined above, I believe that these measures are not incompatible with Australia's human rights obligations as they are reasonable and proportionate in achieving a legitimate objective. The Government is committed to protecting Medicare and to ensuring that it continues to provide access to high quality health care.

Yours sincerely

The Hon Sussan Ley MP

19 MAR 2015