Appendix 1

Correspondence

ATTORNEY-GENERAL

CANBERRA

MC15/03490

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
PO Box 6100, Parliament House
CANBERRA ACT 2600

17 SEP 2015

Dear Chair Philip

Thank you for the letter of 3 March 2015 from the then Chair of the Parliamentary Joint Committee on Human Rights (the Committee), Senator Dean Smith, providing the *Nineteenth Report of the 44th Parliament,* concerning the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Bill).

I would like to take this opportunity to again 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 requests for further information.

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

Yours faithfully

(George Brandis)

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

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

National security law and indirect discrimination

Right to equality and non-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. In particular, the Committee has requested information regarding specific policy and administrative arrangements, and any relevant training or guidance, that applies to law enforcement officers in exercising the expanded or amended powers.

As noted in my response to the Committee of 17 February 2015, the enforcement of counter-terrorism laws is subject to the operations of a number of government agencies, principally the Australian Security Intelligence Organisation (ASIO), the Australian Federal Police (AFP) and the Australian Border Force (ABF) (previously known as the Australian Customs and Border Protection Service (ACBPS)).

With regards to ASIO special powers relating to terrorism offences, section 34C(1) of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) requires the Director-General to prepare a written statement of procedures to be followed in the exercise of ASIO's questioning and questioning and detention warrants under Division 3 Part III of the ASIO Act.

The current statement of procedures, which is a legislative instrument, was approved by the former Attorney-General Philip Ruddock in 2006 and is publicly available on the Federal Register of Legislative Instruments. A copy of the statement of procedures is at **Annexure A**.

In addition to the statement of procedures, ASIO has drafted and complies with extensive internal policies and procedures relating to the implementation of questioning and questioning and detention warrants. ASIO also has administrative arrangements in place with the AFP in relation to the exercise of powers conferred by ASIO's questioning and questioning and detention warrants.

ASIO are also subject to the Attorney-General's guidelines issued pursuant to section 8A of the ASIO Act, which must be observed by ASIO in the performance of its functions. A copy of the guidelines is at **Annexure B**. Paragraph 10.4 of the guidelines requires ASIO to, wherever possible, collect information using the least intrusive techniques and to undertake inquiries and investigations with due regard to cultural values, mores and sensitivities of individuals of particular cultural or racial backgrounds, consistent with the national interest.

ASIO staff members are required to comply with ASIO's Professional Conduct and Behaviour Strategy which takes a multifaceted approach to addressing all forms of

inappropriate behaviour including discrimination and harassment. Staff members are able to undertake a range of training courses relating to cultural awareness and understanding.

The AFP's approach to equality and non-discrimination begins with its people. A strong focus of recruitment in recent years has been attracting people from diverse cultural and linguistic backgrounds so that the AFP workforce best reflects the diverse community that it serves.

Beyond this and irrespective of background or rank, all AFP appointees are subject to the AFP Integrity Framework which encompasses four pillars: prevention, detection, investigation/response and continuous learning. Part V of the *Australian Federal Police Act 1979* (Cth) (AFP Act) sets the professional standards of the AFP and establishes procedures by which AFP conduct and practice issues may be raised and dealt with, including holding AFP appointees to account for any action that may amount to discrimination.

The AFP's Commissioner's Order on Professional Standards (CO2) sets out the standards expected of AFP appointees both in the performance of their duties and off-duty conduct. The AFP Core Values and the AFP Code of Conduct require all AFP appointees to exercise their powers and conduct themselves in accordance with legal obligations and the professional standards expected by the AFP, the Government and the broader community, including acting in a non-discriminatory manner. The AFP Code of Conduct provides that an AFP appointee must act with fairness, reasonableness, courtesy and respect, and without discrimination or harassment, in the course of AFP duties. Every member exercising police powers makes an oath of office in which the member affirms that they will faithfully and diligently exercise and perform all powers and duties as a sworn member without 'fear or favour' and 'affection or ill will.'

The AFP employment character guideline also defines the minimum AFP character standards for potential applicants across all AFP roles and responsibilities. Applicants are assessed per subsection 24(2) of the AFP Act in relation to their character and his/her ability to comply with the AFP's professional standards both in an official and private capacity.

The AFP College, via Learning & Development, develops and conducts cultural and language programs, including the Islamic Awareness Workshop. These workshops address Islamic beliefs, culture, doctrine, history and current issues as well as incorporating presentations on Muslim communities. These workshops are delivered across Australia and focus on the non-discriminatory application of the law through cultural understanding and respecting the Muslim community in order to achieve mutual goals through fairness and collaboration.

The AFP conducts training for its appointees as an ongoing priority in relation to any significant body of legislative change and this has recently included the new powers and offences as a result of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (Foreign Fighters Act).

There is mandatory online legislation training (regarding the above Act) for members of the Counter-Terrorism Portfolio and the new legislation and associated powers/offences have been integrated into the AFP's Counter-Terrorism Investigators Workshop (CTIW) and Advanced Counter-Terrorism Investigator Program (ACTIP). AFP Learning & Development Portfolio conducts these programs.

For example, the CTIW has been delivered once in 2015 with an additional four planned for the 2015-16 financial year. Two ACTIPs are planned to be delivered in Sydney and Melbourne in 2015 and one in Brisbane in the first half of 2016.

AFP's Counter Terrorism Portfolio in conjunction with AFP Legal have also delivered 'CT roadshows' across Australia to each Joint Counter-Terrorism Team (JCTT members include AFP, state police and intelligence partners) as well as other AFP appointees in general regarding powers and offences under the Foreign Fighters Act.

Since the enactment of the Foreign Fighters Act, the AFP has developed an extensive range of supporting governance, advisory documents and training tools to address powers afforded to the AFP under the Act, including:

- delayed notification search warrants
- new arrest thresholds and offences
- preventative detention orders
- control orders, and
- stop search and seize powers.

The AFP Investigator's Toolkit (the toolkit) is the central resource for AFP appointees to access information, templates, forms and guides relating to AFP investigations. The toolkit has a specific page dedicated to counter-terrorism investigations providing up-to-date and continuously revised information, inclusive of the provisions of the Foreign Fighters Act and the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014*. For example, within the toolkit the following resources can be found:

- AFP National Guideline on delayed notification search warrants
- AFP National Guideline on control orders
- AFP Commissioner delegations for the purposes of Part 1AAA *Crimes Act 1914*
- AFP Operational Summary of the Foreign Fighters Act, and
- The AFP Pocketbook Guide for Counter-Terrorism Investigations.

In April 2015 the AFP's Pocketbook Guide for Counter-Terrorism Investigations (V5) was updated to set out key Commonwealth powers available to police under the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth), as well as other powers and offences that may be applicable in Australian-based counter terrorism operations. This Pocketbook Guide has been widely distributed within the AFP. The AFP also advises that AFP National Guidelines are currently in the process of being amended by AFP's Counter-Terrorism Portfolio in response to the acquisition of new legislative tools, including delayed notification search warrants and stop, search and seize powers. This includes the National Guidelines on Preventative Detention Orders and Control Orders.

On 1 July 2015 the Australian Customs and Border Protection Service (ACBPS) and the Department of Immigration and Border Protection (DIBP) was consolidated into the single Department of Immigration and Border Protection. The Australian Border Force (ABF), a single frontline operational border agency, has been established as the new frontline agency within the Department to protect Australia's border and manage the movement of people and goods across it.

The Foreign Fighters Act amended the *Customs Act 1901* (Cth) (Customs Act) to:

- permit detention of an individual where an officer has reasonable grounds to suspect that the person has committed, is committing or intends to commit a serious Commonwealth offence (an offence punishable on conviction by imprisonment for 12 months or more)
- permit detention of a person who is, or is likely to be, involved in an activity that is a threat to national security or the security of a foreign country, and
- extend the time period within which an officer is obliged to inform a detained person's family or another person has been increased from 45 minutes to two hours.

The detention powers are not new to ABF officers. The amendments made by the Foreign Fighters Act to the Customs Act expanded on existing powers to provide for detention on national security grounds. Officers exercising these powers will have undergone substantial six month entry level training consisting of both class room and on the-job instruction (National Trainee Training or NTT). That training includes a focus on statutory powers exercised by officers under the Customs Act and other legislation, and includes training in the exercise of detention powers.

The NTT course curriculum includes:

- APS Values and Code of Conduct
- cultural awareness, equity and diversity
- counter-terrorism awareness
- powers of officers
- elements of offences
- Part 1C, *Crimes Act 1914*
- general search techniques
- on the job training — consolidation and practice of legislation and powers
- questioning techniques
- travel document information and indicators, and
- detection and search.

As part of the NTT, officers are provided with detailed written materials and procedures relevant to the exercise of their statutory powers, including their detention powers. These written materials are also available to officers at any time through the DIBP intranet.

These written materials include:

- Operational Training and Development Practice Statement
- Detention and Search of Travellers Instruction and Guideline — outlining recording requirements, detainee rights, roles of officers and registrations and powers
- Powers of Officers in the Passenger Environment Instruction and Guideline, and
- Powers of Officers in the Seaports and Maritime Environment Instruction and Guideline.

The materials reflect that officers need to be able to search travellers in a range of circumstances in order to maintain the integrity of border controls but are required to do so in a way that reflects community expectations for the preservation of civil liberties and privacy of all persons.

Additionally, divisions responsible for operational activities issue notifications to communicate policy or procedural changes and urgent operational advice to operational personnel. The Strategic Border Command (SBC), which is responsible for a large range of ABF's operational activities before, at and after the border, issues operational notifications to advise officers of changes to procedure and practice. For example, SBC issued an operational notification regarding the expanded detention powers when the legislative amendments came into effect.

Officers who are authorised to carry firearms undergo specific, additional training. Once authorised, each officer must be successfully re-certified every 12 months to continue that authorisation. Many officers working in maritime command areas, as well as the Counter Terrorism Unit (CTU) teams at the eight major international airports, are use of force trained.

The use of force curriculum includes the following elements:

- Legislation and Powers
    - Authority to carry arms and power to use force
    - Power to detain
    - Power to physically restrain
    - Power of arrest
    - Powers in the Maritime Environment
    - Use of force under various legislation
    - Power to enter and remain on coasts
    - Executing a search or seizure warrant
    - Power to remove persons from a restricted area
    - Power to remove vehicles
    - Implications of misuse of power
- Officer response, communication and de-escalation, and
- Defensive tactics and the use of personal defensive equipment.

Over the past several years the ACBPS, now the ABF, has made significant investment in reforming its workplace culture and in strengthening the integrity and professionalism of its workforce. This has included a number of both legislative and administrative measures

applying specifically to ABF personnel. In addition, all ABF officers are engaged under the *Public Service Act 1999* (Cth) (Public Service Act) and, as such, are required to abide by the Australian Public Service (APS) Values and Code of Conduct.

The *Australian Border Force Act 2015* (Cth) replaced the Customs Administration Act on 1 July 2015. The new Act retains provisions that allow the Secretary and the Commissioner to make directions with respect to Immigration and Border Protection employees, including in respect of professional standards. A proven failure to comply with these directions is a breach of the Code of Conduct and may result in the imposition of a sanction under the Public Service Act.

One new feature of the ABF, provided for by the legislation, is that the ABF Commissioner is able to require officers of the ABF to take an oath or affirmation. The intention of this new power is to further support a professional and ethical culture and provide a clear up-front marker about the standards of conduct and professionalism expected. An ABF officer who has subscribed to an oath or affirmation must not engage in conduct that is inconsistent with the oath or affirmation. Proven instances of inconsistent conduct will amount to breaches of the Code of Conduct and may give rise to disciplinary action in accordance with Public Service Act.

The ABF requires its officers to undertake annual mandatory training covering officer integrity, conduct and professional standards. This includes training regarding the standards of conduct and behaviour expected of officers both as APS employees and as officers of the ABF. An officer who exercises his or her powers in a manner that is discriminatory on grounds of race, ethnicity, religion or any other unlawful ground under anti-discrimination legislation will have acted both in breach of the directions and the code of conduct and may face disciplinary action.

Given the extensive training, guidance and administrative arrangements that the relevant government agencies have in place in relation to the expanded and amended powers, I consider that operation of the counter-terrorism laws will, in practice, be compatible with the rights to equality and non-discrimination.

Schedule 1

Extension of powers subject to sunset provision — ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers

I note that the Committee reiterated its recommendation that the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers be reviewed by the Independent National Security Legislation Monitor (INSLM) and Parliamentary Joint Committee on Intelligence and Security (PJCIS) to establish that they are necessary and proportionate to achieving the legitimate objective of national security. I also note that the Committee separately recommends that a statement of compatibility be prepared for the ASIO special powers regime, control order regime,

preventative detention order regime, and police stop, search and seizure powers noting that they have not previously been subject to a human rights compatibility assessment.

As I noted in my earlier response to the Committee's *Fourteenth Report of the 44th Parliament*, the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 made amendments to require the INSLM to review these powers by 7 September 2017, and to require the PJCIS to undertake a further review by 7 March 2018.

The Committee may wish to note that paragraph 8(1)(a) of the *Independent National Security Legislation Monitor Act 2010* (Cth) states that the INSLM, when performing their functions, must have regard to Australia's obligations under international agreements including human rights obligations.

I consider that the reviews to be undertaken will provide the Prime Minister and the Parliament with a robust examination of the powers including consideration of their compatibility with Australia's human rights obligations. Further, any amendments to the powers made subsequent to these reviews, including any proposal to further extend the powers beyond 2018, will require the preparation of a statement of compatibility for consideration by the Committee.

AUSTRAC amendments

I apologise for the oversight and not providing a response to the Committee's request for further information about the proposed AUSTRAC amendments in response to the Committee's *Fourteenth Report of the 44th Parliament*.

Expanding the power of AUSTRAC to disclose information – right to privacy

The amendments to section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) permit AUSTRAC to share financial data with the Attorney-General's Department (AGD) as a 'designated agency' for the purposes of the Act.

I consider these amendments to be aimed at achieving a legitimate objective as they recognise and support the role of AGD as Australia's lead policy agency for AML/CTF. Specifically, they will enable AGD to receive broad statistical information to support the development of a comprehensive and evidence-based AML/CTF regime.

There is a rational connection between the amendments and the objective outlined above, as the amendments rectify a deficiency which inhibited AGD's ability to properly fulfil its role in administering the AML/CTF Act. Previously, as a non-designated agency under the AML/CTF Act, the Act's disclosure regime limited:

- the circumstances under which AGD could access information
- the type of information that AGD could access
- AGD's ability to forward documents containing AUSTRAC information to agencies who were otherwise entitled to access (e.g. AFP, Australian Crime Commission, the Department of Foreign Affairs and Trade), and

- the ability of partner agencies to share AUSTRAC information considered relevant to the development of policy with AGD.

This regime imposed significant constraints on the ability of AGD to efficiently and effectively develop policy in response to emerging money laundering and terrorism financing typologies. The amendments will enable AGD to develop more effective and targeted AML/CTF policy. For example:

- when developing targeted countermeasures against high risk jurisdictions, it is useful for AGD to consider statistical information on how much money is flowing to that jurisdiction, through which entities, and average amounts
- when considering AML/CTF policy responses to overseas corruption, to consider jurisdictions of interest, the quantum and method of fund flows and potentially the range of actors involved, or
- when considering terrorism financing policy responses, to consider the latest trend analysis and intelligence reports produced by AUSTRAC to assess where and how funds are moving.

AUSTRAC supported the proposal to list AGD as a designated agency, noting that providing the Department with designated agency status assisted both AUSTRAC and the AUSTRAC CEO in performing their functions under the AML/CTF Act. In its review of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, the Parliamentary Joint Committee on Intelligence and Security also recognised the legitimate need for AGD to access AUSTRAC information to formulate whole-of-government policy.

I consider the amendments to be reasonable and proportionate in the achievement of their stated objective, while remaining compatible with the right to privacy. Although the amendments will result in the disclosure of AUSTRAC information to a wider class of persons, Part 11 of the AML/CTF Act will continue to provide strict limitations on the use and disclosure of AUSTRAC information. In essence, the AML/CTF Act prohibits the disclosure of AUSTRAC information, regardless of the type or format, unless a specified exception applies.

As a Commonwealth agency subject to the Australian Privacy Principles, AGD has a statutory obligation to properly protect the privacy and security of any personal information it may receive. It has extensive experience in dealing with sensitive information, and has appropriate controls in place to ensure that the integrity of such information is maintained.

AGD has also indicated that certain additional safeguards will be implemented over and above those present in the AML/CTF Act and the *Privacy Act 1988* (Cth). For instance, AGD only intends to seek access to the minimum amount of information necessary to support its policy functions. In general terms, this will be aggregated and de-identified data which will assist in the policy-making process. AGD will also not seek direct access to the AUSTRAC database through a dedicated computer terminal, but will request relevant information through AUSTRAC.

AGD is currently negotiating a formal agreement with AUSTRAC that will specify the terms of AGD's access to information held by AUSTRAC.

Expanding the information that AUSTRAC may disclose to partner organisations – right to privacy

The amendments to Part 11 of the AML/CTF Act remove certain restrictions on AUSTRAC's ability to share information collected under section 49 of the Act with partner agencies.

I consider these changes to be aimed at achieving a legitimate objective as they provide AUSTRAC's partner agencies with greater access to AUSTRAC information – improving their ability to cross-reference it against their own intelligence holdings. This enhanced information-sharing will greatly increase the utility of information gathered by AUSTRAC under section 49, particularly where information is gathered in a systematic way to address particular threats such as foreign fighters. The amendments will also better enable AUSTRAC to carry out its statutory objectives of being a regulator and a gatherer of financial intelligence to assist in the prevention, detection and prosecution of crime.

There is a rational connection between the measures and the objective outlined above, as they address an identified deficiency in Part 11 of the AML/CTF Act. Section 49 of the Act allows a select group of agencies (AUSTRAC, AFP, ACC, Australian Taxation Office and DIBP) to collect additional information from reporting entities on reports provided to AUSTRAC. Previously, however, all information collected under section 49 was subject to a restrictive access regime, which goes beyond the restrictions placed on other AUSTRAC information under Part 11 of the AML/CTF Act.

The initial rationale for the restricted access was to minimise the risk that the subject of a section 49 request became aware that they are of interest to an investigating agency, and to prevent investigations from being prejudiced by the disclosure of the fact that a section 49 information request is in existence. However, since the AML/CTF Act has been in operation, it has been found that these statutory protections have had the unintended consequence of hampering the sharing of information among AUSTRAC's partner agencies. The amendments to Part 11 will now allow AUSTRAC to share valuable information it gathers with partner agencies.

I consider the amendments to be reasonable and proportionate to the achievement of the objectives outlined above, while remaining compatible with the right to privacy – particularly given that the additional restrictions relating to the distribution of section 49 information will remain in place for all other relevant agencies, aside from AUSTRAC. As Australia's AML/CTF regulator and Financial Intelligence Unit, AUSTRAC is best placed to determine the most appropriate method for distributing section 49 information to partner agencies.

In addition, all section 49 information accessed by AUSTRAC's partner agencies will continue to be subject to the same secrecy and access regime in Part 11 of the AML/CTF Act as other AUSTRAC information. These provisions put in place significant safeguards to protect AUSTRAC information and limit its access and disclosure.

Any personal information collected under section 49 remains subject to the provisions of the *Privacy Act* and the Australian Privacy Principles. AUSTRAC continues to ensure that all employees are aware of their obligations under the *Privacy Act*.

Schedule 2

Cancellation of welfare payments

I apologise for the oversight and not providing a response to part of the Committee's request for information about the cancellation of welfare amendments in response to the Committee's *Fourteenth Report of the 44th Parliament.*

Right to social security and the right to an adequate standard of living

Article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises that the State may subject economic, social and cultural rights to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.

The welfare cancellation measures may limit the rights of affected persons to social security under Article 9 of the ICESCR by providing the Attorney-General with the power to make individuals ineligible for social security benefits where they have been the subject of a passport refusal or a passport or visa cancellation on security grounds. I consider that this power is rationally connected and is reasonable, necessary and proportionate to achieving the legitimate objective of ensuring that funds, specifically social security payments, are not able to be made available to support terrorist acts, terrorists or terrorist organisations.

The powers are only available when an individual has been subject to a passport refusal or passport or visa cancellation on national security grounds. When deciding whether to issue a Security Notice to the Minister for Social Services seeking the cancellation of social security payments, the Attorney-General must have regard to whether welfare payments are being, or may be used for a purpose that might prejudice the security of Australia or a foreign country. Accordingly, there is a rational connection between the exercise of the power and the legitimate objective, being the prevention of funding of terrorism-related activities.

Similarly, the measures may limit the rights of affected persons to an adequate standard of living under Article 11 of the ICESCR by providing the Attorney-General with the power to make individuals ineligible for social security benefits where they have been the subject of a passport refusal or a passport or visa cancellation on security grounds. Where an individual has been the subject of an adverse security assessment and security agencies have identified a link between their receipt of social security and conduct of security concern it is appropriate that access to social security is restricted. Individuals who choose to use their social security payments to support terrorist acts, terrorists or terrorist organisations should not continue to receive social security. If that funding is being used to support terrorism-related activities then it is not being used for the purposes of providing an adequate standard of living. Individuals who are the subject of a Security Notice and become ineligible for social security

can still seek employment to support an adequate standard of living. I consider this power is rationally connected and is reasonable, necessary and proportionate to achieving the legitimate objective of ensuring that funds, specifically social security payments are not able to be made available to support terrorist acts, terrorists or terrorist organisations.

The power to cancel welfare is therefore compatible with the right to social security and the right to an adequate standard of living.

Right to equality and non-discrimination

As noted above, the power to prevent the use of funds, including social security, to fund terrorism-related activities is a legitimate objective.

While Australia has a range of obligations to ensure equality and non-discrimination, including Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2(2) of ICESCR most relevantly requires States Parties to ensure that all of the rights under that Covenant, including to social security, are provided without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. However, not all distinctions in treatment will constitute discrimination if the justification for the differentiation is reasonable and objective. In order for differential treatment to be permissible, the aim and effects of the measures must be legitimate, compatible with the nature of the Covenant rights, solely for the purpose of promoting the general welfare in a democratic society and there must be a reasonable and proportionate relationship between the aim to be realised and the measures.

I consider the power to cancel social security benefits is consistent with Australia's obligations in relation to rights to equality and non-discrimination as the measures do not attach to a particular category of person. They apply equally to anyone who is refused an Australian passport or is the subject of a passport or visa cancellation on security grounds regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The measures therefore do not discriminate and are consistent with these obligations.

TREASURER

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Dear Mr Ruddock

On 17 September 2015, you wrote to my predecessor seeking advice as to the human rights compatibility of a number of instruments made by him.

All of the instruments in question fall into one of two categories: annual Determinations for National Specific Purpose Payments (NSPPs) for 2013-14; and monthly Determinations for National Partnership payments (NPs) made over the period December 2014 to June 2015.

2013-14 National Specific Purpose Payments

NSPPs are payments made by the Commonwealth to the states and territories that are to be used in specifically agreed sectors, in accordance with the *Federal Financial Relations Act 2009* (the FFR Act). The FFR Act requires the Treasurer to determine the total payment amounts for each NSPP in 2013-14 by applying a relevant indexation factor to the total payment amounts from 2012-13.

The determination and payment of NSPPs assist in the realisation of a number of human rights:

• Both the NSPP for schools and the NSPP for skills and workforce development promote the right to education (art 13, International Covenant on Economic Social and Cultural Rights (ICESCR); art 28, Convention of the Rights of the Child (CRC) and art 24, Convention on the Rights of Persons with Disabilities (CRPD)), and the full realisation of the right to work through vocational training (art 6, ICESCR and art 27, CRPD).

• The NSPP for housing services promotes the right to an adequate standard of living (specifically in relation to housing) (art 11, ICESCR; art 27, CRC and art 28, CRPD).

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•The NSPP for disability services promotes:

– the right of children with disabilities to education, training and health care (art 23, CRC and art 7, CRPD);

– rights concerning the ability of persons with disabilities to live independently and be included in the community (art 19, CRPD);

– rights concerning the personal mobility of persons with disabilities (art 20, CRPD);

– rights concerning the habilitation and rehabilitation of persons with disabilities (art 26, CRPD); and

– the right to take part in cultural life (art 30, CRPD).

I do not consider that either the determination or payment of NSPPs has a detrimental impact on any human rights.

National Partnership Payments (December 2014 – June 2015)

NPs are payments made by the Commonwealth to the states and territories to support the delivery of specified outputs or projects, facilitate reforms, and to reward them for undertaking nationally significant reforms. The FFR Act requires the Treasurer to determine NP amounts to be paid to each state and territory. As these payments are generally made on the 7th day of each month, the Treasurer usually makes an NP determination at least once a month.

NP amounts are generally only determined, and then paid, once a state or territory achieves pre-determined milestones or performance benchmarks as set out in the relevant National Partnership Agreement. As shown in the table below, the Commonwealth provided NP funding to the states and territories across a variety of sectors during 2014-15. Further information on the various National Partnership Agreements that make up these totals can be found in the 2014-15 Final Budget Outcome.

Sector	Total value of NPs in 2014-15 ($m)
Health	1,338
Education	750
Skills and workforce development	395
Community services	902
Affordable housing	638
Infrastructure	4,874
Environment	531
Contingent liabilities	522
Other purposes	3,732
Total	**13,681**

It is difficult to assess the human rights compatibility of the determination and payment of NP amounts. The amounts paid to each state and territory vary each month; this reflects the fact that payments are made as individual states and territories meet varying milestones or benchmarks, as stipulated in the various National Partnership Agreements.

However, in general, the provision of NPs could be said to assist the advancement of:

- the right to education (art 13, ICESCR; art 28, CRC and art 24, CRPD),
- the full realisation of the right to work through vocational training (art 6, ICESCR and art 27, CRPD).
- the right to an adequate standard of living (art 11, ICESCR; art 27, CRC and art 28, CRPD).
- the right to the highest attainable standard of physical and mental health (art 12(1), ICESCR; art 24, CRC and art 25, CRPD).
- the right of children with disabilities to education, training and health care (art 23, CRC and art 7, CRPD);
- rights concerning the ability of persons with disabilities to live independently and be included in the community (art 19, CRPD);
- rights concerning the personal mobility of persons with disabilities (art 20, CRPD);
- rights concerning the habilitation and rehabilitation of persons with disabilities (art 26, CRPD); and
- the right to take part in cultural life (art 30, CRPD).

I do not consider that either the determination or payment of NPs has a detrimental impact on any human rights.

The Hon Scott Morrison MP

14/10/2015

AUSTRALIAN SENATE

David Leyonhjelm
BVSc LLB MBA
Liberal Democrats Senator for NSW

19 October 2015

The Hon Philip Ruddock MP
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Dear Mr Ruddock,

Thank you for your letter of 8 September regarding your committee's report on the *Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015*, which I introduced with Senator Day.

In your report you state that my Bill 'limits the right to just and favourable conditions of work', 'limits the right to an adequate standard of living', and represents 'indirect discrimination against women and young people'.

As outlined in my explanatory memorandum, my bill 'only affects the circumstances in which certain employers will be required to pay penalties above the base wage'. This means you are effectively arguing that the base wages in the affected industries do not constitute just and favourable conditions of work, do not provide an adequate standard of living, and represent discrimination against women and young people.

For you to make this extraordinary argument, you presumably have a view as to the minimum base rate in the affected industries that constitutes just and favourable conditions of work, provides an adequate standard of living, and avoids discrimination against women and young people. Please advise what this wage rate is.

Given the negative relationship between regulated wages and employment, as outlined by the Shadow Assistant Treasurer in the *Australian Economic Review* in March and June 2004, I also invite you to indicate how much unemployment would be created by a requirement to pay this wage rate. Further, please advise whether the unemployment created would include women and young people.

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I note that governments in many developed countries do not impose base rates of pay, below which it is illegal to employ people. Governments that do impose such base rates generally set them at levels well below those in Australia. Base rates of pay in Australia are many multiples above the level of NewStart. Moreover, there is no bar on negotiating higher wages through enterprise bargaining.

Your report goes on to state 'the committee considers that there is likely to be a less rights restrictive alternative to achieving the stated objectives of the bill, such as wage subsidies or incentive payments for hiring eligible job seekers'.

This appears to reflect a desire by the committee to impose costs on the taxpayer, and to define human rights as an entitlement to other people's money (such as a right to social security) rather than the right of an individual taxpayer to retain his or her property. It would be helpful if you could confirm whether this understanding is accurate and to comment on its general applicability.

I have copied this letter to Peter Harris AO, the Chairman of the Productivity Commission, as I anticipate he may be interested in hearing your view that a proposal to reduce penalty rate requirements in certain industries — a proposal very similar to a recommendation in the Commission's draft report on the workplace relations framework — represents a violation of human rights.

He may also be interested in your committee's statement that 'employees in these industries often have little bargaining power over the conditions of their employment' — a statement apparently in conflict with the aforementioned draft report. I encourage you to outline to Mr Harris any concerns you have with the Commission's draft report.

Finally, I have copied this letter to Coalition Senators on the committee, Senators Canavan and Smith, to draw attention to the statements published in their name. I have also copied this letter to the Minister for Employment, Senator the Hon Michaelia Cash, and to the Bill's co-sponsor, Senator Bob Day.

Yours sincerely,

David Leyonhjelm

ATTORNEY-GENERAL

CANBERRA

MC15-003652

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

17 SEP 2015

Dear Chair Philip,

Thank you for your letter of 18 March 2015 regarding further review by the Parliamentary Joint Committee on Human Rights of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014. I apologise for the delay in responding.

The Data Retention Bill passed both Houses of Parliament on 26 March 2015 and received Royal Assent on 13 April 2015. The Act now incorporates a number of features which respond to concerns raised by the Committee which I have highlighted below. In a number of respects, the views of the Government continue to depart from those of the Committee or its members. I have sought to explain the Government's reasoning in relation to those matters.

I would like to thank the Committee for its constructive contribution to the robust public debate on the data retention legislation. I am confident that the Act properly balances the need to retain data to underpin the efforts of agencies to protect the community with appropriate privacy protections and strong oversight arrangements.

Data set to be retained

Consistent with the Committee's view that the data set to be retained should be detailed in primary rather than delegated legislation, section 187AA of the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (the Data Retention Act) now specifies the information or documents that service providers must retain. Any amendments to the data set must be referred to the Parliamentary Joint Committee on Intelligence and Security for review.

Definition of content

The Data Retention Act does not define content. I acknowledge the Committee's view that an exclusive definition of the term 'content' may not be required where the data set is set out in the primary legislation, as is now the case. As detailed in my earlier submission to the Committee, defining the types of data to be retained under the data retention scheme is more privacy protective than defining 'content'. The risk in defining 'content' is that any new types of information that emerge as a result of rapid technological change would fall outside the defined list. They would then be excluded from the meaning of content and the protections that apply to it.

The data set included in the Data Retention Act specifically excludes information that is the content or substance of a communication. In particular, paragraph 187A(4)(b) provides that service providers are not required to retain information that details an address to which a communication was sent that was obtained by the carrier only as a result of providing a service for internet access. This provision ensures that service providers are not required to keep records of the uniform resource locators (URLs), internet protocol (IP) addresses and other internet identifiers with which a person has communicated via an internet access service provided by the service provider.

Privacy protections

The Government maintains the view that access to telecommunications data should not be limited to investigations of complex or serious crimes, specific serious threats or the investigation of serious matters. Applying different timeframes to data access based on offence types would introduce a layer of complexity and inconsistency of application that would affect the efficacy of the data retention regime as a whole.

The various elements of the data set are relevant to all investigations; not just investigations of the most serious offences. Subscriber information, such as name and address information, is often the first source of lead information for further investigations, helping to identify potential suspects and to indicate whether an offence has been committed and the nature of that offence. Historical data also provides critical evidence needed to demonstrate to a court that the elements of a particular offence have been met, including whether a person communicated with a particular individual or organisation.

Rather than limit the range offences for which data can be accessed, the Act includes a range of additional privacy protections. Section 180F of the *Telecommunications (Interception and Access) Act 1979* has been amended to include a more stringent requirement that authorising officers be satisfied on reasonable grounds that the particular disclosure or use of telecommunications data being proposed is proportionate to the intrusion into privacy. In making a decision, authorised officers are required to consider the gravity of the conduct being investigated, including whether the investigation relates to a serious criminal offence.

The Data Retention Act will also restrict access to data to specified criminal law-enforcement agencies and to authorities or bodies declared to be an enforcement agency. The changes to the definition of 'enforcement agency' mean that access to retained data is limited to interception agencies, the Department of Immigration and Border Protection, the Australian Securities and Investments Commission, and the Australian Competition and Consumer Commission. Any permanent addition to the list of criminal law-enforcement agencies or enforcement agencies must be effected by legislative amendments and referred to the Parliamentary Joint Committee on Intelligence and Security for inquiry. Any Ministerial declaration to temporarily declare an additional enforcement agency will cease to have effect 40 sitting days after the declaration comes into force.

The Data Retention Act also includes significant new oversight requirements by the Commonwealth Ombudsman, accompanied by extensive additional record-keeping and annual reporting.

Section 182 of the *Telecommunications (Interception and Access) Act 1979* also makes it an offence for a person to use or to disclose telecommunications data where the use or disclosure is not 'reasonably necessary' for the enforcement of the criminal law, a law imposing a pecuniary penalty or the protection of the public revenue. The improper use or disclosure of telecommunications data is a criminal offence punishable by up to two years imprisonment.

Destruction requirements
The Committee also expressed concern about the lack of specific destruction requirements in relation to data accessed under the *Telecommunications (Interception and Access) Act 1979*. The Parliamentary Joint Committee on Intelligence and Security also considered this issue and recommended that my Department review the adequacy of the existing destruction requirements that apply to information and documents accessed under Chapter 4 of the Act and report back by 1 July 2017. The Government has agreed that the Department will conduct this review.

Legal professional privilege
I acknowledge the Committee's response that the proposed data retention scheme will protect legal professional privilege. I note that some Committee members consider that legal professional privilege would be assured only if the legislation includes a non-exclusive definition of the type of data that constitutes 'content' for the purposes of the scheme. As discussed above, the Data Retention Act does not define the term 'content'. However, the data set clearly excludes information that is the content or substance of a communication. As legal professional privilege attaches to the content of communications, rather than to the fact or existence of those communications, the Data Retention Act in no way undermines legal professional privilege.

Independent authorisations or warrants to access to data
I note that while the majority of the Committee considers that the existing authorisation requirements provide sufficient safeguards to address privacy concerns, some Committee members recommend that access to retained data be granted only on the basis of prior independent authorisation.

The introduction of a warrant process (judicial or ministerial) for access to telecommunications data would significantly impede the operational effectiveness of agencies. However, the Government has acknowledged that specific public interest issues associated with the identification of confidential journalists' sources and amended the Data Retention Bill to introduce a journalist information warrant regime. The Act prohibits agencies that do not have a warrant from authorising the disclosure of a journalist's or their employer's telecommunications data for the purposes of identifying a journalist's confidential source.

Notification
The Data Retention Act does not include a requirement for agencies to notify individuals about access to or proposed access to their telecommunications data. The covert investigative powers contained in the *Telecommunications (Interception and Access) Act 1979* are generally used where the integrity of an investigation would be compromised by revealing its existence.

Remedies
The Data Retention Act provides that the *Privacy Act 1988* applies in relation to service providers to the extent that the activities of the service provider relate to retained data. The effect of this requirement is that the Privacy Act and the Australian Privacy Principles (APPs) will apply to all service providers as though they were 'organisations', including service providers that would otherwise be exempt from the Privacy Act under the 'small business operator' exemptions in the Privacy Act.

In particular, service providers will be required to comply with the information security obligations contained in APP 11.1 in relation to all retained data, and will be required to de-identify or destroy retained data at the end of the retention period (except as allowed by APP 11.2). Individuals will also be able to request access to their personal retained data in accordance with APP 12, removing any uncertainty about whether particular types of retained data are personal information.

Privacy protection will be further enhanced by the Data Retention Act through requirements that service providers protect and encrypt telecommunications data that has been retained for the purposes of the mandatory data retention scheme. Encryption will supplement the existing information security obligations under the Privacy Act and the Telecommunications Consumer Protection Code. The Government has also agreed to introduce legislation to enact a mandatory data breach notification scheme.

Conclusion

The Data Retention Act contains a number of additional safeguards that engage and promote privacy rights and the right to freedom of expression while ensuring that the Government meets its obligations under Articles 6 and 9 of the *International Covenant on Civil and Political Rights* to protect the life and physical security of individual Australians.

I would once again like to thank the Committee for its contribution. Should you have any questions please do not hesitate to contact my National Security Adviser, Mr David Mason, on (02) 6277 7300.

Yours faithfully

(George Brandis)

The Hon Christian Porter MP
Minister for Social Services

MS15-001947

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear ~~Mr Ruddock~~ Philip

Thank you for your letter of 17 September 2015 about the human rights compatibility of the following instruments:

- Family Assistance (Public Interest Certificate Guidelines) Determination [F2015L01269]
- Paid Parental Leave Amendment Rules 2015 [F2015L01266]
- Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 [F2015L01267]
- Student Assistance (Public Interest Certificate Guidelines) Determination 2015 [F2015L01268].

With respect to the approach taken to the statement of human rights compatibility, normally the Statement of Compatibility with Human Rights would consider everything that is presented in the instruments. On this occasion it was thought appropriate to remake three of the four instruments to assist users. Since there were relatively few changes to the previous versions of the instruments, the Statements of Compatibility focussed only on the substantive changes. Only the *Paid Parental Leave Rules 2010* were not remade in full due to their length.

I understand that the Committee's key concerns are: whether the limitations on the right to privacy are reasonable and proportionate to the objectives; whether the limitations are rationally connected to legitimate objectives; whether the safeguards protecting information are adequate; and if the least rights restrictive approach is used when sharing personal information.

Issues that the Parliamentary Joint Committee on Human Rights raised about the instruments are considered below.

<u>Legitimate objectives and rational connection with limitations</u>

The purposes set out in the Public Interest Certificate Guidelines achieve various legitimate objectives. The grounds for disclosure are precisely-defined, and are all subject to the condition that information can only be disclosed if:

- it cannot reasonably be obtained from a source other than a Department; and
- the person to whom the information relates has "sufficient interest" in the information.

The term "sufficient interest" is met if the Secretary is satisfied that the person has a genuine and legitimate interest in the information, or the person is a Minister.

It is also important to note that the misuse or unauthorised disclosure of protected information is a criminal offence and can result in a recipient of the information being subject to a maximum penalty of two years imprisonment in the event that they misuse or improperly disclose the information.

Before disclosing information, a delegate needs to consider whether the disclosure is 'necessary' in the public interest and that the disclosure is for one or more of the purposes set out in the Public Interest Certificate Guidelines. This requirement of necessity also limits the kinds of information disclosed.

Each of the grounds for disclosure in the Guidelines is reasonable and proportionate. The measures are precisely defined and contain suitable qualifications that ensure they only target the issues they are addressing. This means that any officer making a Public Interest Certificate on the basis of the Guidelines has a tightly-controlled discretion, which is appropriate and proportionate in the circumstances.

In the Department of Social Services, the power to issue public interest certificates is only delegated to senior officers in the Department.

The objectives of the Public Interest Certificate Guidelines broadly fall under the categories of law enforcement (including criminal law, proceeds of crime and threats to Commonwealth staff and property), safety (such as stopping abuse or violence to a homeless young person, and preventing a threat to the life, health or welfare of a person or locating a missing person), welfare (by assisting with income management, ensuring that correct public housing support is received, and assisting with the administration of a deceased estate) and supporting children's education (by ensuring that a child is attending school and that schools have adequate resources).

All of these objectives require that some limitations are placed on the right to privacy in order to address these substantial and often pressing issues.

Another broad objective of the Public Interest Certificate Guidelines is to assist with accountability to Parliament. Policies and programmes are examined to ensure that they are achieving their intended outcomes and are being used appropriately, efficiently and effectively. Accountability to Parliament requires that Ministers have access to sound and comprehensive evidence on which policies and programmes can be developed, implemented and amended over time. In order to achieve this objective, it is necessary to conduct research, statistical analysis and policy development, and progress matters of relevance within portfolio responsibilities.

Ministers require briefing to be accountable to Parliament, to consider complaints or issues raised by a person and to address a mistake of fact. On some occasions, these briefings require protected personal information to be disclosed in order to address the matter being resolved.

Although these requirements mean that some privacy limitations are introduced, they each have a demonstrated and rational connection to the objective of achieving accountability to Parliament.

The attachment to this letter contains more details about the legitimacy of the objectives and the rational connection with the limitations.

Reasonable and proportionate measure for achieving objectives

The limitations on the right to privacy introduced by the Public Interest Certificate Guidelines are minimal when considered in the context of the private and public benefits achieved by each of the objectives.

For example, the provisions in the Guidelines applicable to research and statistical analysis, policy development and briefings to Ministers enable more effectively targeted services to Australians.

Benefits to people whose information is accessed using Public Interest Certificate Guidelines far outweigh the limits to privacy. Examples include resolving cases of missing persons, improving child education, child protection, stopping abuse or violence to a homeless young person, obtaining entitlement to compensation and ensuring that correct benefits are provided by public housing.

When the benefits of these limitations are considered together with safeguards taken to protect personal information, I consider these limitations to be both reasonable and proportionate to achieve the objectives. The attachment to this letter contains further information attesting to the measures being reasonable and proportionate for the achievement of the objectives.

Safeguards to protect personal information

I note the Committee's concerns about the application of the *Privacy Act 1988* (the Privacy Act) to certain recipients of protected information.

Whilst not every recipient of information under a Public Interest Certificate will be subject to the Privacy Act, State and Territory privacy legislation will apply to many recipients of protected information.

While there will be individuals and organisations not subject to any privacy legislation, again I draw the Committee's attention to the criminal sanctions under the *Social Security (Administration) Act 1999* (for example, section 204) and similar provisions in the other three legislative regimes.

Least restrictive rights approach

The least restrictive rights approach is used when providing access to personal information under Public Interest Certificate Guidelines.

Information is only disclosed where necessary and is limited where possible to de-identified information. However, it is not always practicable to disclose de-identifying information for research purposes where, for example, there is a need to follow up with participants for studies that are conducted over a number of years or when linking data between databases.

Determinations

The Committee has queried why methods for further protecting information are not set out in the Guidelines themselves. The purpose of the Guidelines is to list the grounds on which information can be disclosed by the Secretary (or delegate). The administrative processes pursuant to which information should be disclosed are addressed on a case-by-case basis. In relation to disclosures for research purposes, it is standard practice to require undertakings of confidentiality to be provided by the recipients and members of research teams.

Disclosure of personal information relating to homeless children

I note that Convention on the Rights of the Child refers to the need for the disclosure to be in the best interests of the child, rather than that disclosure will not result in harm to the child.

As you have stated, the circumstances when the information can be disclosed include:

1. if the information is about the child's family member and the Secretary is satisfied that the child, or the child's family member, has been subjected to abuse or violence;
2. if the disclosure is necessary to verify qualifications for payments;
3. if the disclosure will facilitate reconciliation between the child and his or her parents; and
4. if necessary to inform the parents of the child as to whether the child has been in contact with the respective department.

Under point 1, I consider that it is in the best interest of the child to not be subject to abuse or violence. It is also not in the best interests of the child to witness abuse or violence being inflicted on another person.

Regarding point 2, I again consider that it is in the child's best interest to receive their correct entitlements to help them to support themselves. It is not in children's interests to allow for overpayments to occur as this may reduce their income later, if repayments are required to be made to the government.

Regarding point 3, I consider that it is in the best interests of the child to facilitate reconciliation in circumstances where harm would not result to the child.

In relation to point 4, I anticipate that a child's parents would only be contacted where this is legally necessary and subject to consideration of the risk of harm to the child.

As outlined above, each of the objectives are aimed at achieving a legitimate objective and there are rational connections between the limitation and objectives. The limitations are relatively minor compared with the benefits resulting from promoting the best interests of the child. Consequently the limitations are both proportionate and reasonable.

Thank you for conveying the Committee's views to me.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

ATTACHMENT

SUPPORTING INFORMATION

This attachment contains further information on the following points:

- legitimate objectives;
- rational connection with limitations on privacy; and
- reasonable and proportionate measures for achieving objectives.

Proceeds of crime, research, statistical analysis and policy development, administration of the National Law and public housing

These provisions have been drafted to ensure that very specific kinds of public interest disclosures can be made.

The objectives that these provisions have been drafted to achieve have been detailed in the explanatory statements and Statements of Compatibility with Human Rights accompanying the four instruments under review. As noted in paragraph 1.25 of the Committee's report, the provisions address legitimate objectives and are rationally connected to these stated objectives.

The measures adopted in these provisions are reasonable and proportionate to the right to privacy. While they impose a limitation on the right to privacy they do so only to a limited and clearly defined degree and it is not open to a delegate to disclose information unless the delegate is satisfied that the clear criteria contained in these provisions have been satisfied. The provisions have been drafted so as to only allow for specific kinds of disclosures. A decision-maker is therefore limited in their ability to disclose information under these provisions.

There are clear limitations on when information can be disclosed and the identity of the recipients of the information.

The administration of the National law, proceeds of crime and public housing provisions are drafted to ensure that information can only be provided to a very limited range of recipients with a legitimate interest in receiving protected information in certain circumstances.

The Department's practice in relation to research disclosures is to disclose information to reputable research institutions including university research schools with expertise in the field of social policy research. Disclosure is facilitated by deeds of confidentiality entered into with all recipients of the information. These deeds of confidentiality reinforce the fact that misuse of protected information is a criminal offence.

Enforcement of laws

The 'enforcement of laws' provisions (e.g. section 9 of the Social Security Guidelines) only allow for disclosure in specified circumstances. Disclosure needs to be for the legitimate purpose of assisting law enforcement agencies in combating serious criminal activity. There are clear restrictions on when these provisions apply and the provisions therefore do not give a decision-maker an unlimited discretion to release protected information. These provisions have been appropriately adapted and place restrictions on the extent to which information can be disclosed. The provisions only allow for disclosure of protected information to a limited range of recipients. Only individuals or entities involved in the enforcement of the laws referred to in the provisions will be able to receive protected information under these provisions.

The enforcement of laws provisions in the Guidelines operate in a similar manner to the exception to Australian Privacy Principle (APP) 6 contained in APP 6.2(e).

Threats to life, health or welfare

Provisions in the Guidelines regarding disclosure to prevent or lessen threats to life, health or welfare give the Secretary (or delegate) the authority to release information in situations where disclosure is for the health and wellbeing of members of the public. It is therefore consistent with human rights such as the right to health.

This provision operates in a similar manner to the permitted general situation set out in Item 1 of the table in section 16A of the *Privacy Act 1988*. It ensures that information can be disclosed to avoid threats to the health and wellbeing of individuals.

Mistake of fact

Provisions to correct a mistake of fact serve the legitimate objective of ensuring accuracy and integrity in the Department's programmes and can only be used in limited circumstances. The provisions regarding the disclosure of protected information are designed to correct a mistake of fact and are therefore reasonable and proportionate and serve a legitimate objective.

Brief a Minister

The provisions for the disclosure of protected information to brief the Minister are only available in limited and clearly defined circumstances.

The provisions only authorise disclosure to the Minister and do not authorise the dissemination of protected information to a broader audience. These provisions are therefore reasonable and proportionate as the scope for disclosure is limited by the criteria that a decision-maker must satisfy before disclosing information.

Disclosure of identifying information to the Minister can be necessary to provide responses to members of the public who have raised questions or issues with the Minister in regard to their payments. Further, only de-identified information will be provided to the Minister where it is not necessary to disclose information about a person's identity. However, de-identifying protected information will not ensure the information ceases to be protected information. 'Protected information' is a broader concept than 'personal information' under the Privacy Act 1988 and even de-identified information will need to be disclosed under a public interest certificate made in accordance with the Guidelines.

Missing or deceased persons

Provisions regarding missing or deceased persons also serve a legitimate public purpose and have been drafted to allow for disclosure only where this is necessary to assist relevant authorities in identifying missing or deceased persons. There is a limitation on when this provision can be used. Information cannot be disclosed if there are reasonable grounds to believe that a deceased or missing person would not have wanted their information disclosed. The provisions are reasonable and proportionate and a decision-maker does not have an open discretion to disclose information. The decision-maker must be satisfied that the criteria in these provisions have been met before relying upon them to disclose protected information.

The ability to disclose information to assist in locating missing persons supports a person's right to health. When a person is missing they can often be without adequate food, water or medical assistance. The disclosure of relevant information to appropriate authorities may assist in locating the person and ultimately ensuring they receive appropriate assistance. Provisions in the Guidelines regarding the disclosure of protected information about missing persons operate in a similar manner to the permitted general situation set out in Item 3 of the table in section 16A of the *Privacy Act 1988*.

School attendance and school infrastructure

The compatibility with human rights of the school attendance and enrolment and school infrastructure provisions has been addressed in relation to the 2014 Guidelines for the disclosure of family assistance protected information. The Statement of Compatibility with Human Rights for the 2014 Family Assistance Guidelines (F2014L00973) can be accessed on the Federal Register of Legislative Instruments (FRLI).

Reparations

Provisions in the Guidelines regarding reparations are beneficial in nature. They allow for the disclosure of protected information where the information will be used by a State, Territory or the Commonwealth Government for the purpose of contacting a person in respect of compensation or other forms of recompense in various reparation processes, including the 'stolen wages' reparations in Queensland.

Family Responsibilities Commission

The provisions regarding the disclosure of protected information for the purposes of the establishment and operation of the Family Responsibilities Commission (FRC) provide for relevant protected information to be disclosed where it is necessary for the purpose of the establishment of the FRC as well as in assisting in the performance of the FRC's functions and exercise of its powers. The provision of protected information facilitates the Cape York Welfare Reform Trials. Disclosure supports the FRC's decision-making, enabling the FRC to correctly identify persons who are within its jurisdiction and ensuring that conferences are held, and decisions are made, on a valid basis. This provision has been drafted to ensure that information can only be disclosed in limited circumstances and for the legitimate objective of facilitating the activities of the FRC. The provision is reasonable and proportionate and serves a legitimate public policy objective.

Vulnerable welfare payment income management

Provisions in the Social Security Guidelines regarding the vulnerable welfare payment income management measure, research and statistical analysis and the APS Code of Conduct were the subject of a statement of compatibility for the 2014 Social Security Guidelines (F2014L01514) and these can be found on FRLI.

Public utilities

Provisions in the Guidelines allowing for the disclosure of protected information to a public utility will only apply in very limited circumstances. The provisions will only apply where a person has previously consented to their original public utility company providing information for the purposes of confirming their entitlement to a concession. A Statement of Compatibility with Human Rights was prepared in relation to the Social Security (F2013L01466) and Student Assistance (F2013L01556) guidelines for 2013 and these can be accessed on FRLI.

Child protection

Provisions in the guidelines regarding child protection allow for the disclosure of information about a parent or relative of a child to State or Territory Child Protection agencies where the agency is seeking to contact the parent or relative. For example, the provisions may apply when a child protection agency is seeking to contact a parent to assist in a court case. Disclosures can only be made under this provision for the legitimate objective of assisting a child protection agency. The provision only allows for disclosure to agencies that carry out child protection functions. Disclosures can only be made for the limited purpose of assisting an agency in getting in contact with the parents of the child.

Matters of relevance

Provisions in the Guidelines for the disclosure of protected information for matters of relevance allow for the disclosure of protected information in circumstances where a person is receiving support or assistance through the welfare system and through other programmes administered by the Department. This allows the Department to use a person's information to help them receive assistance or support through community services funded by the Department. This provision is consistent with the right to Social Security.