Appendix 1

Correspondence

The Hon Greg Hunt MP

Minister for the Environment

MC15-035709

The Hon Philip Ruddock MP
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Parliamentary Joint Committee on Human Rights
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22 OCT 2015

Dear Mr Ruddock Phil

Thank you for your letter of 8 September 2015 in which you seek advice about the human rights compatibility of the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015.

My response to your request is attached.

I trust the information provided is helpful.

Yours sincerely

Greg Hunt

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1.28 The committee's assessment of the removal of extended standing for judicial review of decisions or conduct under the *Environment Protection and Biodiversity Conservation Act 1999* against article 12 of the International Covenant on Economic, Social and Cultural Rights (right to health and a healthy environment) raises questions as to whether the measure limits the right, and if so, whether that limitation is justifiable.

In my view, the removal of the extended standing provisions does not engage the right to health in Article 12 of the International Covenant of Economic, Social and Cultural Rights (ICESCR). This is because removing the extended standing provisions does not change the extent of environment protection established by the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and people who have a legitimate interest in environmental approval decisions made under the EPBC Act will still be able to bring an action under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), the *Judiciary Act 1903* (Judiciary Act) or to the High Court under s 75 of the Constitution.

As already noted in the Statement of Compatibility with human rights in the explanatory memorandum, the definition of aggrieved persons in the ADJR Act will remain unchanged. The ADJR Act defines an aggrieved person as including a person whose interests are adversely affected by the decision, failure to make a decision or conduct related to the making of decisions. A person will have standing to seek judicial review under the Judiciary Act if the person has a private right or can establish that he or she has a 'special interest in the subject matter of an action' (being an interest over and above that of the general public). For these reasons, a range of persons will continue to have standing to seek judicial review of decisions made under the EPBC Act.

While ICESCR does not define 'health' for the purposes of Article 12, the Government notes the views of the UN Committee on Economic Social and Cultural Rights (CESCR) expressed in General Comment No 14, *The Right to the Highest Attainable Standard of Health* (2000), that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life. These are considered by the CESCR to include the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions and access to health-related education and information, including on sexual and reproductive health.

While environmental conditions may be important in guaranteeing the right to health and for a range of other purposes, the CESCR's statements do not have the effect of re-characterising the right to health as a right to health and a healthy environment. Furthermore, environmental conditions are no more significant than other underlying determinants of health outlined by the CESCR.

Australia has some of the most effective environmental laws in the world. In the Government's view, the amendments to the EPBC Act do not change the protection for matters of national environmental significance. The EPBC Act requires that persons who propose to take an action that has, may have or is likely to have a significant impact on a matter of national environment significance seek approval before taking the action. The proposed amendments do not change Australia's high environmental standards, or the process of considering and, if appropriate,

granting approvals under the EPBC Act. There are also no changes to State and Territory environmental approval regimes which operate in conjunction with the EPBC Act.

In my view, given that the Bill does not change the extent of environment protection established by the EPBC Act and people who have a legitimate interest in environmental approval decisions will still be able to bring an action through other means, the right to health is not engaged by this Bill, and consequently, not limited.

1.29 As set out above, the measure may engage and limit the right to health and a healthy environment as the Bill removes extended standing for judicial review of decisions or conduct under the Environment Act. The statement of compatibility does not justify that possible limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for the Environment as to whether the Bill limits the right to a healthy environment and, if so:

- **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.**

I do not consider that the Bill limits the right to health, as described above.

In my view, the changes are aimed at achieving a legitimate objective, namely bringing the arrangements for standing to make a judicial review application under the EPBC Act, into line with standard arrangements for permitting judicial review challenges to the Commonwealth administrative decisions as provided for under the ADJR Act and the Judiciary Act.

The intent of judicial review is to ensure that the law is correctly applied. There is though an emerging risk of the extended standing provisions being used to deliberately disrupt and delay key projects and infrastructure developments. Such actions are not proportionate to the original purpose of the extended standing provisions. The Bill seeks to mitigate this risk while still allowing review of decisions through the ADJR Act and the Judiciary Act.

The repeal of section 487 of the EPBC Act applies in relation to applications for judicial review made under the ADJR Act after the Bill is enacted, regardless of when the decision to which the application relates was made. Therefore the repeal of section 487 does not affect any existing applications for judicial review.

ATTORNEY-GENERAL

CANBERRA

MS16-000074

The Hon Philip Ruddock MP
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11 FEB 2016

Dear Mr Ruddock Philip

Thank you for your letter of 2 February 2016 seeking advice about the human rights compatibility of the *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* (the Bill), which was considered by the Parliamentary Joint Committee on Human Rights in its *Thirty-third report of the 44th Parliament*.

The Committee has sought my advice in relation to one of the statutory grounds on which a financial agreement can be set aside, included in the amendments. In particular, the Committee has sought advice as to:

- the objective to which the proposed changes are addressed, and why they address a pressing and substantial concern;
- the rational connection between the limitation and that objective; and
- reasons why the limitation is a reasonable and proportionate measure for the achievement of that objective.

I thank the Committee for its considered response on the Bill and provide the following information in reply.

The Family Law Act contains a number of statutory grounds on which a financial agreement can be set aside. As noted by the Committee, the Bill would amend one of these grounds to provide that the court can only set aside an agreement where, if the court did not set aside the agreement, a child would suffer hardship for a specified reason:

- for agreements entered into before separation, the test for hardship would be a 'material change in circumstances that relate to the care, welfare and development of the child of the marriage' (this reflects the current provision), or
- for agreements entered into at the time of separation or after separation, the test for determining hardship would be 'circumstances of an "exceptional nature" that relate to the care, welfare and development of the child of the marriage'.

These changes would not apply retrospectively.

The amendment engages article 3(1) of the Convention of the Rights of the Child, which provides that in all actions concerning children (including by courts) the best interests of the child shall be a primary consideration.

The objective of the proposed amendment is to empower families to take responsibility for their own affairs, without resorting to the family law system, by giving them certainty that their financial agreements will be enforceable. Allowing consenting parties to make mutually agreed decisions about their own financial affairs enables them to avoid the financial and emotional costs and delays of legal proceedings and reduces the impact on the family law courts. The amendment would also improve consistency between when a property order made by the court (including consent orders) can be set aside on the basis of hardship, and when a post-separation financial agreement can be set aside on the basis of hardship.

The 'exceptional circumstances' test is a reasonable and proportionate measure for achieving this important objective for agreements made after relationship breakdown. As noted above, the test for hardship for agreements made pre-separation would not be amended by the Bill. This recognises the different circumstances in which pre- and post-separation financial agreements are made.

For agreements made prior to separation, a substantial period of time may have lapsed and the circumstances of the couple may have changed in ways not contemplated by the original financial agreement. For example, while a couple may not have anticipated having children at the time an agreement was made, they may subsequently have one or more children whose needs may not be reflected in the agreement. The 'material change of circumstances' test is important to ensure that appropriate arrangements are made for children in these and similar circumstances.

For agreements made after separation, parties should be in a position consider their full financial position, including key issues such as their earning capacity, caring obligations, and the future needs of their children. Post-separation agreements should therefore be substantially better placed to ensure appropriate protection for the interests of children. As reopening parental conflict is unlikely to be in the best interests of children, it is appropriate that agreements voluntarily entered into the parties should be binding. However, if circumstances relating to the care, welfare or development of the child do change substantially (for example, by a child developing a disability requiring a high degree of care), this may constitute an 'exceptional circumstance' and it would be open to the court to set aside the financial agreement.

There are safeguards in place to protect the interests of children when their parents' relationship breaks down. For a financial agreement to be binding, each party is required to obtain independent legal advice on the effect of the agreement on that party's rights under the Act. It can be expected that this advice would include how the agreement may affect any children of the relationship.

To the extent that the amendment engages article 3(1) of the Convention on the Rights of the Child, it is a reasonable and proportionate measure to achieve the objective of empowering parties to manage their own financial affairs.

I trust this information is of assistance to the committee. I note that we will amend the explanatory memorandum to the Bill to contain this important information.

Yours faithfully

(George Brandis)

ATTORNEY-GENERAL

CANBERRA

MC15-009961

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9 FEB 2016

Dear Chair Philip

Thank you for your letter of 1 December 2015 seeking advice about the human rights compatibility of the *Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015*.

By virtue of the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*, both ASIO and enforcement agencies must obtain a journalist information warrant prior to authorising the disclosure of telecommunications data relating to a journalist or their employer, where a purpose of the disclosure would be to identify a source. The Regulations further support the independent oversight of the journalist information warrant regime by prescribing important procedural safeguards and detailing matters relating to the performance of the role of Public Interest Advocate.

The Government considers that taken together the Act and the Regulations appropriately protect human rights, including the right to effective remedy, fair hearing, privacy and freedom of expression, while addressing the need for access to data to assist in serious criminal and national security investigations. The Government considers that the limitations on human rights in the Regulations are reasonable, necessary and proportionate. Detailed responses to the Committee's specific queries are set out, below.

Notification to journalist of a proposed request or application

The Government believes that it is reasonable and proportionate to exclude an affected journalist from providing instructions to a Public Interest Advocate on the substance of an application. Applications for warrants authorising the use of covert investigative powers are ordinarily conducted on an *ex parte* basis. This reflects the public interest in avoiding the kinds of harm that may arise if a party is given advance knowledge of the application and in turn, the existence of an investigation. Such knowledge may, for example, enable and motivate a party or a related-party to flee a jurisdiction, dispose of physical evidence, or alter or cease certain activities, so as to frustrate the investigation.

It is well-established that ex *parte* hearings depart from the adversarial model of justice. However, it is equally well-established that this departure is offset by the fact that *ex parte* hearings generally, and warrant applications in particular, are interim proceedings dealing with preliminary matters in the course of an investigation. Should an investigation proceed to

a prosecution, with potentially greater rights impacts, parties will typically have the ability to contest evidence sought to be admitted by the prosecution, including the basis upon which the evidence was obtained.

The Act and Regulations nevertheless significantly bolster privacy safeguards by ensuring that issuing authorities are required to weigh the public interest in protecting the confidentiality of the identity of the journalist's source, having regard to: the extent to which the privacy of any person would be likely to be interfered with; whether attempts have been made to obtain the information by other means; the gravity of the matter; and submissions by a Public Interest Advocate. Warrant applications do not determine facts, and any evidence obtained pursuant to a warrant and given in evidence in open court, can be challenged during any subsequent proceedings.

The Act also includes robust oversight arrangements. Central to the oversight regime are the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security. The Ombudsman has the power to inspect the records of enforcement agencies to ensure compliance with the Act. The Act includes extensive record-keeping obligations for agencies that will underpin Ombudsman inspections. The Inspector-General likewise has continued oversight of access to data by ASIO. Collectively, the Ombudsman and the Inspector-General of Security assure the public that journalists' information is being accessed lawfully, and in doing so enhance the transparency and public accountability of the journalist information warrant regime.

Summary of further information

The Regulations require the Minister or issuing authority to have regard to specified matters when deciding whether to require an agency to give the further information to the Public Interest Advocate, or a summary of that information (being further information that was originally given to the Minister or issuing authority orally). As outlined at paragraph 91 of the Explanatory Statement, this discretion applies only in where an applicant has given further information to the Minister or issuing authority *orally*, and where it may therefore be impractical for the applicant to ensure that the Advocate is provided that information *verbatim*.

Submissions by an Advocate

The Public Interest Advocate scheme forms an additional safeguard in connection with applications for Journalist Information Warrants. The scheme supplements the requirement that applications be considered and determined by an independent issuing authority, and be oversighted by the independent Commonwealth Ombudsman or Inspector-General of Intelligence and Security, as well as by the Parliamentary Joint Committee on Intelligence and Security. In combination, these safeguards go beyond the safeguards identified in other jurisdictions as being necessary to protect rights in connection with the use of covert investigative powers, including in relation to journalists.[1]

I have considered very carefully concerns about warrants being issued absent a submission by a Public Interest Advocate. However, I am advised that it would be beyond the scope of the regulation-making powers in the Act to prevent warrants being made in the absence of a submission from a Public Interest Advocate. The legislation provides a discretion to the issuing authority as to whether to issue journalist information warrants. It is well-established that the Minister may not make delegated legislation that is contrary to the primary statute.

However, the Regulations include an additional requirement that in circumstances where an

[1] See, for example: *Klass and others v Federal Republic of Germany* (1978) ECHR 5029/71; *Kennedy v United Kingdom* [2010] ECHR 26839/05.

Advocate indicates that he or she is unable to consider an application or request, the agency is required to give a copy to another Advocate. In effect, this requires an agency to continue to approach Advocates until it finds one who is available. The Regulations also put beyond doubt that the Minister or issuing authority may consider an Advocate's submission, or updated submission, even if provided outside the seven-day period for lodgement. Further, the Minister or issuing authority has the discretion to refuse an application without submission from an Advocate.

I trust these clarifications address the concerns raised by the Committee.

Yours faithfully

(George Brandis)