Appendix 1

Correspondence

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MC15-219778

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

Dear ~~Mr~~ Philip, Ruddock

Thank you for your letter of 11 August 2015 concerning the remarks of the Parliamentary Joint Committee on Human Rights (the committee) in relation to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015.

The committee's remarks in relation to that Bill are contained in its *Twenty-fifth Report of the 44th Parliament*. My response addressing those remarks is attached.

I note that many of the committee's concerns will have been alleviated by the amendments moved by the Government to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 while it was before Parliament. The Parliament has now passed the Bill and the Act came into operation upon receiving the Royal Assent on 12 December 2015.

Thank you for bringing the committee's views to my attention. I trust the attached information is of assistance.

Yours sincerely

PETER DUTTON 11/01/16

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

Introduction

On 24 June 2015, the Government introduced an initial version of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 to Parliament. On 30 November 2015, the Government tabled amendments to the Bill, which flowed from the recommendations of the Parliamentary Joint Committee on Intelligence and Security (PJCIS), which reported on 4 September 2015. The amendments introduce additional accountability measures and further strengthen safeguards in relation to provisions of the Allegiance Act. The Bill was passed by the Senate on 3 December 2015 and as such, is referenced to as the 'Allegiance Act' in this response.

The purpose clause in the Bill did not change. It declared that Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared valued of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.

As the basic requisite for participation in and adherence to the values and institutions of Australia's secular democracy, citizenship does not simply bestow privileges or rights, but entails fundamental responsibilities. As set out in the preamble to the current Citizenship Act, Australian citizenship gives full and formal membership of the Australian community and is a common bond, involving reciprocal rights and obligations, uniting all Australians while respecting their diversity. Those who are citizens owe their loyalty to Australia and its people. This applies to those who acquire citizenship automatically through birth in Australia and to those who acquire it through application.

When people engage in terrorism-related behaviour which seeks to advance the ideology of a terrorist organisation and threatens arms of the Australian Government or people, they themselves have renounced their own citizenship by not acting and sharing in the same values and interests as form the fundamental aspects of Australian citizenship.

As stated in the Revised Explanatory Memorandum to the Allegiance Act, a citizen's duty of allegiance is not created by the Citizenship Act but rather, is recognised by it. The Government is of the view that the Allegiance Act is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Rather than respond in detail to the comments of the Parliamentary Joint Committee on Human Rights relating to human rights considered to be engaged by the previous version of the Bill, this response addresses the comments of the Committee which are relevant to the amended Allegiance Act as passed by the Senate, and refers the Committee to the Statement of Compatibility in the Explanatory Memorandum to the amended Bill.

Australian Citizenship Amendment (Allegiance to Australia) Act 2015

1.50 As set out above, the automatic cessation of citizenship engages and limits the right to freedom of movement. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective. In particular, how many people are likely to be affected by these measures and why existing laws and powers are insufficient to protect national security and the safety of the Australian community;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective. In particular, advice is sought as to how decisions will be made by the minister or officials to effectively decide that a person's citizenship has ceased and whether this is the least rights restrictive approach. In addition, specific advice is sought in relation to each of the following offences or conduct, as to how each offence operates in practice and whether it is proportionate that citizenship should cease on the basis of each offence or conduct:**
  - **engaging in foreign incursions and recruitment as defined in Division 119 of the Criminal Code (with specific information given in relation to each offence provision in Division 119);**
  - **sections 80.1(2), 80.2, 80.2A, 80.2B, 80.2C, 91.1, 102.6(2), 102.7(2), 103.1, 103.2 of the Criminal Code; and**
  - **sections 24AB, 27 and 29 of the Crimes Act.**

1.51 The committee also seeks the minister's advice on these questions regarding each of the human rights set out in Part 1 below (articles 9, 12, 17, 23, 25 and 26 of the International Covenant on Civil and Political Rights ['ICCPR'] and article 10 of the International Covenant on Economic, Social and Cultural Rights ['ICESCR']).

I respectfully refer the Committee to the detailed information in the Statement of Compatibility in the Explanatory Memorandum which accompanied the revised Bill, which comprehensively addresses the human rights set out in articles 12, 13, 14, 15, 17, 23, 24 and 26 of the ICCPR and Article 3 of the Convention on the Rights of the Child ('CRC').

As a general statement, any measures restricting freedom of movement in relation to a person in Australia will have a lawful domestic basis. In circumstances where a person has been convicted and sentenced to imprisonment for a specified crime/s such that their continued citizenship is not in the public interest, such measures will be necessary to protect national security, public order, and the rights and freedoms of the Australian community at large. This is consistent with the ICCPR, being explicitly contemplated by Article 12(3) and being proportionate, in the Government's judgement, to the existing and emerging threats to national security which Australia faces.

With regard to a person who is outside Australia when their citizenship has ceased, it is the Government's view that, where a person has objectively demonstrated through their conduct that they have repudiated their allegiance to Australia, any ties they have to Australia for the purposes of Articular 12(4) have been voluntarily severed. Depriving such a person of the right to enter Australia would not be arbitrary, as it would be based on a genuine threat to Australia's security posed by a person.

In response to the Committee's questions regarding how decisions will be made by the Minister that a person's citizenship has ceased, I offer the following advice:

- Subsection 33AA provides that if a person has engaged in a form of conduct with the requisite intention, they will have acted contrary to their allegiance to Australia and renounced their citizenship, thus causing it to automatically cease by operation of law. Subsection 33AA(2) provides a list of relevant conduct which mirrors the terrorism-related offences listed under the *Criminal Code Act 1995 (Cth)*. Subsection 33AA(3) outlines 'intention' to mean where the person undertakes one of the listed forms of conduct to advance a political, religious or ideological cause and to coerce or influence by intimidation an arm of the Australian Government or a foreign government or the public (or a section of the public).

- In considering whether a person has engaged in conduct with the requisite intention, these terms have the same meaning as defined under the Criminal Code and draw only on the factual elements contained in those definitions. As such, conduct will be made out if there is factual evidence which demonstrates that the person has engaged in one of the actions listed at subsection 33AA(2) such as engaged in a terrorist act, recruited for a terrorist organisation or financed a terrorist. Factual evidence will also be drawn on to identify the expressed motivation of the person when engaging in the relevant conduct.

- A similar approach will be adopted under section 35 where a dual national or citizen has acted contrary to their allegiance to Australia by fighting for or being in the service of a declared terrorist organisation and the person's citizenship has ceased automatically by operation of law. Again, factual evidence will also be drawn upon to identify whether a person has undertaken combat with regular forces of a country at war with Australia or has taken up arms for or is in the service of a declared terrorist organisation.

- For both these streams, the Minister will be supported by existing whole-of-government and law enforcement coordination mechanisms that will provide information and intelligence about persons of interest who may be engaging in relevant conduct or fighting for or in the service of a declared terrorist organisation for the purposes of the Allegiance Act.

Upon becoming aware of information indicating that a dual national or citizen has engaged in conduct or is fighting for or is in the service of a declared terrorist organisation which has resulted in the automatic loss of their citizenship, I am required to provide (or make reasonable attempts to provide) written notice to the person that I have become aware of such conduct which has caused the person's citizenship to cease. The notice must also include a basic description of the conduct and the person's rights of review.

Furthermore and at any time after a person has ceased to be a citizen under sections 33AA or 35, I may consider whether to make a determination to rescind the notice and exempt the person from the effect of the section, thus providing for the person's citizenship to be restored. In considering whether to make a determination, I must have regard to:

- the severity of the matters that were the basis of the notice;
- the degree of threat posed by the person to the Australian community;
- the age of the person;
- if the person is aged under 18 – the best interests of the child as a primary consideration;
- whether the person is being or likely to be prosecuted in relation to the matters that were the basis of the notice;
- the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
- Australia's international relations; and
- any other matters of public interest.

The Allegiance Act also requires that natural justice be applied in instances where I decide to consider exercising my power in relation to the making of a determination to rescind a notice or not. Where I make such a determination, I must table a statement to both Houses of Parliament.

Under section 35A and where a dual national or citizen is convicted of a terrorism-related offence, the courts (through trial processes, sentencing and conviction of the individual) will have identified the factual evidence and intention which went to the person's level of engagement and conduct in committing the terrorism-related offence.

Additional parliamentary scrutiny measures and review rights have also been incorporated into the Allegiance Act as a result of recommendations of the PJCIS.

Upon receiving my written notice that their citizenship has ceased due to their conduct, a person will have the right to seek judicial review of the basis on which the notice was made. Specifically, the Federal Court and High Court will have original jurisdiction over matters including whether or not the requisite conduct was engaged in by the person, whether the person engaged in that conduct with the requisite intention and whether or not the person was a dual citizen/national at the time of the conduct. For those individuals convicted of and sentenced in relation to a terrorism-related offence in Australia, I am required to revoke my determination if the conviction is subsequently overturned or quashed by a court and no further appeals can be made in relation to the decision.

The Government is also required to publicly report, every six months, the number of times a notice for loss or revocation of citizenship has been issued under each of the grounds contained in the Allegiance Act, and provide a brief statement of reasons. I will also be required to notify the PJCIS on the issuing of a notice for the loss of citizenship under the Allegiance Act. The PJCIS will also be required to review, by 1 December 2019, on the operation, effectiveness and implications of the application of the provisions under the Allegiance Act.

These oversight mechanisms achieve an appropriate balance between protecting the basic human rights of individuals while ensuring that dual national and citizens who do not demonstrate their allegiance to Australia do not retain the privilege and benefits of Australian citizenship.

1.101 The committee's assessment of the automatic cessation of citizenship powers against articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) (obligations of non-refoulement) raises questions as to whether depriving a person of citizenship, and therefore potentially exposing them to deportation, is compatible with Australia's non-refoulement obligations, given the lack of statutory protection and lack of 'independent, effective and impartial' review of decisions to remove a person.

1.102 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the cessation of citizenship provisions and decisions to remove an ex-citizen will be subject to sufficiently 'independent, effective and impartial' review so as to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.

The provisions of the Allegiance Act are compatible with Australia's non-refoulement obligations.

The Minister's discretionary power to cease a person's citizenship where the person is in Australia will not result directly in them being liable for removal from Australia. Any such liability would come only after the person's lawful status in Australia was rescinded and the person was detained under the *Migration Act 1958* (Migration Act) as an unlawful non-citizen.

Upon my determination to cease a person's citizenship under section 35A of the Allegiance Act, the person will be granted an ex-citizen visa under section 35 of the Migration Act. The ex-citizen visa is a permanent visa allowing the holder to remain in, but not re-enter Australia. The grant of this visa is an automatic process. Any action in relation to the cancellation of this visa on character grounds involves a separate process under the Migration Act. Whether the person engages one of Australia's non-refoulement obligations can be considered as part of deciding whether or not a person should hold a visa. A visa cancellation decision by a delegate of mine will be subject to merits review, and my personal visa cancellation decisions are subject to judicial review. I consider both merits and judicial review to be 'independent, effective and impartial', and where relevant, the review may consider non-refoulement obligations claimed to be owed by Australia.

Should there be cases of individuals convicted of terrorism-related offences who may also engage Australia's non-refoulement obligations, such obligations do not extend to an obligation to grant permanent residency or any particular type of visa in Australia. Rather, for people who are found to be owed a non-refoulement obligation but are ineligible for the grant of a visa on character or national security grounds, Australia will put in place appropriate measures to ensure the protection of the person's human rights while balancing the protection and security of the Australian community. Australia does not intend to resile from its non-refoulement obligations.

PROCEDURAL AND PROCESS RIGHTS

1.128 The committee therefore considers that the automatic loss of citizenship through conduct engages and limits the right to a fair hearing under article 14 of the International Covenant on Civil and Political Rights. The statement of compatibility provides insufficient information to allow a full assessment of this potential limitation, particularly given the unusual construction of proposed sections 33AA and 35(1).

1.129 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the availability of judicial review and the potential for declaratory relief is sufficient for compatibility with the right to a fair hearing in light of the particular construction of sections 33AA and 35(1) (including with reference to where the burden of proof falls and the standard of proof applicable to such proceedings).

1.146 The proposed provisions are likely to be considered 'criminal' for the purposes of international human rights law. Accordingly, the criminal process rights in articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) would apply, including the right to be presumed innocent and the right not to incriminate oneself. The automatic loss of citizenship through conduct as defined by reference to the Criminal Code engages and limits criminal process rights, which form part of the right to a fair trial under article 14 of the ICCPR. This is because the measure does not contain the protection of any of these criminal process rights.

1.147 As set out above, the statement of compatibility does not acknowledge that the right to a fair trial is limited and accordingly does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise 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.**

The right to an effective remedy

1.166 The committee's assessment of the automatic cessation of citizenship powers against article 2 of the International Covenant on Civil and Political Rights (right to an effective remedy) raises questions as to whether a person who has lost their citizenship will have access to an effective remedy.

1.167 As set out above, the automatic cessation of citizenship engages and limits the right to an effective remedy. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **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 respectfully disagree with the views of the Committee and am of the position that the Allegiance Act does not limit a person's right to a fair hearing and a fair trial.

As outlined earlier and upon receiving my written notice to the effect that their Australian citizenship has ceased, a person will have the right to seek judicial review on the basis of which the notice was made. Specifically, the Federal Court and High Court will have original jurisdiction over matters including whether or not the requisite conduct was engaged in by the person, whether the person engaged in that conduct with the requisite intention and whether or not the person was a dual citizen at the time of the conduct.

For those individuals who have been convicted of a terrorism-related offence, I will also be required to revoke my determination of cessation of citizenship if the conviction is subsequently overturned or quashed by a court and no further appeals can be made in relation to the decision.

The prohibition on double punishment

1.156 The committee's assessment of the automatic cessation of citizenship powers against article 14(7) of the International Covenant on Civil and Political Rights (prohibition on double punishment) raises questions as to whether depriving a person of citizenship will act as a double punishment.

1.157 As set out above, the automatic cessation of citizenship may engage and limit the prohibition on double punishment. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the measures are compatible with article 14(7).

I respectfully disagree with the views of the Committee that in considering the terrorism-related conduct of a person who is offshore, including if they are fighting for or in the service of a declared terrorist organisation, such provisions are of a criminal nature and therefore act as a double punishment.

Section 33AA of the Allegiance Act is administrative in nature and applies consequences that arise automatically in response to a person acting inconsistently with their allegiance to Australia. As explained earlier and in considering whether a person has engaged in terrorism-related conduct for the purposes of section 33AA, these terms have the same meaning as defined under the Criminal Code and draw only on the factual elements contained in those definitions. As such, conduct will be made out if there is factual evidence which demonstrates that the person has engaged in one of the actions listed at subsection 33AA(2) such as engaged in a terrorist act, recruited for a terrorist organisation or financed a terrorist. Factual evidence will also be drawn on to identify the expressed motivation of the person when engaging in the relevant conduct.

In addition, the Allegiance Act also provides for a person's right to seek judicial review of the basis on which the notice was made and which provides a further safeguard in the application of these provisions. Specifically, the Federal Court and High Court will have original jurisdiction over matters including whether or not the requisite conduct was engaged in by the person, whether the person engaged in that conduct with the requisite intention and whether or not the person was a dual citizen at the time of the conduct.

The prohibition on retrospective criminal laws

1.179 The committee's assessment of the automatic cessation of citizenship powers on conviction for certain offences, against article 15 of the International Covenant on Civil and Political Rights (ICCPR) (prohibition on retrospective criminal laws) raises questions as to whether the provisions should apply to conduct that occurs prior to the bill becoming law.

1.180 As set out above, the automatic cessation of citizenship on conviction may engage and limit the prohibition on retrospective criminal laws which is an absolute right. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the measures are compatible with article 15(1) of the ICCPR.

A recommendation of the PJCIS was the inclusion of amendments to provide for conviction-based provisions to apply retrospectively for relevant offences that had occurred prior to the commencement of the Allegiance Act. In supporting retrospectivity in relation to convictions, the PJCIS stated:

> *'... the Parliament has introduced legislation with retrospective effect in special circumstances, and these laws have been held to be legally valid. The Committee notes the Bill's purpose is to ensure the safety and security of Australia and its people and to ensure the community of Australian citizens is limited to those who continue to retain an allegiance to Australia. ... on balance the Committee determined these to be special circumstances. The Committee formed the view that past terrorist–related conduct, to which persons have been convicted under Australian law, is conduct that all members of the Australian community would view as repugnant and a deliberate step outside of the values that define our society. ... In addition, the Minister's decision would include a current assessment of whether the person's past conviction reveals that they have breached their allegiance to Australia and whether it is contrary to the public interest for them to remain a citizen.'*

The application provisions of the Allegiance Act provide for section 35A to apply to dual nationals or citizens who, in addition to being currently convicted of a specified offence with a sentence of at least 6 years imprisonment, may also apply to dual nationals or citizens who have been convicted of a specified offence with a sentence of ten years or more and which conviction has been handed down within the last ten years. The Government accepted this amendment was necessary to ensure coverage of people recently convicted of and sentenced in relation to very serious terrorism-related offences which show a clear repudiation of allegiance to Australia.

CHILDREN

Obligation to consider the best interests of the child

1.199 The committee's assessment of the automatic cessation of citizenship powers against article 3 of the Convention on the Rights of the Child ['CRC'] (best interests of the child) raises questions as to whether the draft provisions are compatible with Australia's obligation to consider the best interests of the child in all actions concerning children.

1.200 As set out above, the automatic cessation of citizenship engages and limits the obligation to consider the best interests of the child. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise 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.**

1.201 The committee also seeks the minister's advice on these questions in relation to the rights contained in articles 7, 8 and 12 of the Convention on the Rights of the Child (right to a nationality and right of the child to be heard), as set out below.

Multiple rights

1.216 The committee's assessment of the discretionary ministerial power to revoke the citizenship of a child following a parent's automatic cessation of citizenship under the bill against Australia's obligations under the International Covenant on Civil and Political Rights raises questions as to whether the limitation on rights is justifiable.

1.217 As set out above, the discretionary ministerial power to revoke the citizenship of a child engages and limits multiple rights. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective. In particular, advice is sought as to how decisions will be made by the minister or officials to remove a child's citizenship and whether this is the least rights restrictive approach.**

1.218 The committee also seeks the minister's advice on these questions in relation to the specific rights contained in articles 3, 7, 8 and 12 of the Convention on the Rights of the Child (best interests of the child, the right to a nationality and the right of the child to be heard), as set out below.

- **Obligation to consider the best interests of the child (above)**
- **The right to nationality (above)**
- **The right of the child to be heard in judicial and administrative proceedings (above)**

The Allegiance Act does not apply to a child under 10 years of age. Further, and in accordance with a recommendation of the Parliamentary Joint Committee on Intelligence and Security, a child's citizenship will not be revoked following the revocation of their parent's citizenship where the parent has been convicted of a terrorism-related offence. Where the Allegiance Act may apply to a child between the ages of 10 to 14, it does so in conformity with established norms in the Criminal Code.

Furthermore, there are a number of safeguards built into the Allegiance Act which include:

- Providing written notice to the child (including their parents or legal guardians) of the conduct which has caused their citizenship to cease. The notice must also include a basic description of the conduct and the person's rights of review;
- Providing the Minister with a discretionary power to determine whether to rescind the notice and exempt the child from the effect of the section, thus providing for their citizenship to be restored. In considering whether to make a determination, the Minister must have regard to, among other matters, the best interests of the child as a primary consideration; and
- Providing for natural justice in instances where the Minister decides to consider exercising their power in relation to the making of a determination to rescind a notice or not. Where the Minister makes such a determination, they must table a statement to both Houses of Parliament.

ATTORNEY-GENERAL

CANBERRA

MC15-009963

25 FEB 2016

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

Dear Mr Ruddock Philip

Thank you for your letter of 1 December 2015 from the Parliamentary Joint Committee on Human Rights (the Committee) concerning the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 (Bill).

In its *Thirty-second Report of the 44th Parliament* (the Report) the Committee considered the Bill, and has sought advice regarding the human rights compatibility a number of components of the Bill.

In response to the Committee's request, I enclose detailed responses to the issues raised in the Report. I trust this information is of assistance to the Committee.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

Attorney-General's response to the Parliamentary Joint Committee on Human Rights

Thirty-second Report of the 44th Parliament

Counter-Terrorism Legislation Amendment Bill (No. 1) 2015

Introduced into the Senate on 12 November 2015

Portfolio: Attorney-General

Contents

Introduction

The Counter-Terrorism Legislation Amendment Bill (No.1) 2015 (the Bill) was introduced into the Senate on 12 November 2015. On 1 December 2015, the Parliamentary Joint Committee on Human Rights (the Committee) considered the Bill in its Thirty-second Report of the 44TH Parliament (the report).

The Committee may also wish to note that on 15 February 2016 the Parliamentary Joint Committee on Intelligence and Security (PJCIS) reported on its inquiry into the Bill. The Government is presently considering the 21 recommendations made by the PJCIS.

Schedule 2—Extending control orders to 14 and 15-year-olds

Paragraphs 1.46 to 1.89 of the report consider the human rights compatibility of the extension of the control order regime to 14 and 15-year-olds.

Background

Control orders are an important element of Australia's counter-terrorism strategy and have been a protective and preventative measure available to law enforcement since 2005. The Government supports recommendation 26 of the COAG *Review of Counter-Terrorism Legislation* (COAG Review), which recommended the retention of control orders (with additional safeguards and protections).

The proposed amendments in Schedule 2 of the Bill extend the regime to 14 and 15 year olds, and also include additional safeguards in recognition of the lower age. These additional safeguards are also extended to 16 and 17-year-olds—who are already covered by the regime but without the additional safeguards.

Accordingly, the human rights compatibility statement for these amendments focuses on the extension of the existing regime to 14 to 15-year-olds.

As noted above, the PJCIS has completed its inquiry into the Bill, which included consideration of Part One of the Independent National Security Legislation Monitor's (INSLM) January 2016 report on control order safeguards. The Government is presently considering the reports of the INSLM and the PJCIS.

Legitimate objective

The availability of control orders as a measure to manage and mitigate the risk or threat of certain activities being undertaken by young people at risk of engaging in violent extremism is reasoned and supported by evidence.

Recent counter terrorism operations have unfortunately shown that people as young as 14 years of age can pose a significant risk to national security through their involvement in planning and supporting terrorist acts.

In this context, it is important that our law enforcement and national security agencies are well equipped to respond to, and prevent, terrorist acts. This is the case even where the threats are posed by people under the age of 18 years.

The Australian Federal Police (AFP) submission to the PJCIS, dated 15 December 2015, discusses the operational context for the proposed amendments:

> Recent events have clearly demonstrated the vulnerability of young people to ideologies espousing violent extremism. Law enforcement and intelligence partners have observed both the attraction of terrorist groups to minors, as well as the 'grooming' of minors by adults. With the internet providing easy access to propaganda and recruiters, both domestic and international, through social media, young people are at risk of falling prey to terrorist groups who promise a sense of purpose, belonging and excitement. Worryingly, law enforcement is also observing that adults are increasingly looking to use young people to evade law enforcement surveillance and/or attention. [1]

Control orders provide significant benefits to the community by placing limits and controls on the behaviour of a person identified as being a risk to the safety and security of the community. The amendments in the Bill that propose targeted monitoring of individuals the subject of a control order (discussed later) will contribute to these benefits by facilitating the monitoring of such individuals.

Control orders can also assist the person subject to the control order by ensuring individuals who have engaged in conduct or activities of concern can remain in the community and largely continue with their ordinary lives (for example, attend school, work, and places to participate in cultural and religious practices), while being required to discontinue or minimise activities which may enable or encourage them to participate in terrorist activity. Maintaining connection to society through participation in ordinary activities is of benefit to the individual, both in relation to their personal interests and from a remedial perspective.

The vulnerability of young people to violent extremism demands proportionate, targeted measures to divert them from extremist behaviour. It is appropriate and important that all possible measures are available to avoid a young person engaging with the formal criminal justice system to mitigate the threat posed by violent extremism. Consequently, the ability to use control orders to influence a person's movements and associations, thereby reducing the risk of future terrorist activity, addresses a substantial concern and the regime is aimed and targeted at achieving a legitimate objective.

Rationally connected

The proposed expansion of the scheme to cover 14 and 15-year-olds is rationally connected to the legitimate objective of managing and mitigating the risk posed by a young person where laying charges is not justified, appropriate or possible.

The overriding need to protect the community from harm means that law enforcement must identify emerging threats and constantly balance the need to investigate and collect evidence while a terrorist threat develops, against the need to protect the community from the impact should the threat be realised.

In the current fluid and evolving terrorism threat environment, police may have sufficient intelligence to establish serious concern regarding the threat posed by an individual or group, but may not have sufficient evidence to commence criminal prosecution. In these circumstances other mechanisms, including control orders, provide a mechanism to manage the threat in the short to medium term. Control orders should be considered as a

[1] Publicly available on the PJCIS website:
<http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security>

tool that can be used in conjunction with and complementary to other options, including criminal prosecution and countering violent extremism programs.

Proportionate

The control order regime, including its extension to 14 and 15 year old persons of security concern, is reasonable and proportionate to achieve the objectives mentioned above.

While a control order can be sought where there is a threat, there is no requirement that the threat be imminent. However, a control order can only be issued if the court is satisfied that each of the requested obligations, restrictions and prohibitions is reasonably necessary and reasonably adapted and appropriate to protecting the public from a terrorist act or preventing support or facilitation of a domestic terrorist act or hostile activities overseas.

A control order is a preventative measure, and is not intended to be punitive or used as a substitute for prosecution. Where a person poses a significant risk to the community and there is sufficient evidence to charge a person with an offence, criminal prosecution will be pursued.

Best interests of the child consideration

Subsection 104.4(1) of the *Criminal Code Act 1995* (Criminal Code) provides the test for making an interim control order. When deciding whether to impose a control order on a young person, the issuing court must be satisfied on the balance of probabilities that, for example, the order will substantially assist in preventing a terrorist act or the person has engaged in particular conduct, such as participating in training with a listed terrorist organisation. In addition, the court must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on a person by the order are reasonably necessary, and reasonably appropriate and adapted for the purposes of protecting the public from a terrorist attack, preventing the provision of support for or the facilitation of a terrorist attack or preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

Proposed subsection 104.4(2) of the Criminal Code specifies matters the court must consider when determining what is "reasonably necessary, and reasonably appropriate and adapted". These matters are the impact of the particular obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances), and if the person is 14 to 17 years of age—the best interests of the person. Given the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances), and if the person is 14 to 17 years of age—the best interests of the person, are both listed as factors the court must consider, it is clear that such considerations are important and should carry weight over other possible considerations (with the exception of national security or protecting the community from terrorism). This is why the Explanatory Memorandum referred to the best interests of the person as a 'primary' consideration. However, it is appropriate that the court has the ability to consider any possible relevant factor and determine what weight it should be given.

The report expresses concern that the regime would not prevent an order being made that separates a child from their family or requires them not to attend a particular school (paragraph 1.77). While that is technically correct, in practice the court would not make an order including such restrictions unless they were in the best interests of the child, and it was reasonably necessary and reasonable appropriate to do so. It is difficult to contemplate a scenario in which that could occur, particularly given the requirement for the court to consider the impact on the child's personal circumstances and the child's best interests.

The report also considers whether the ability of the court to impose a curfew on a person amounts to a deprivation of liberty (paragraphs 1.78 to 1.81). In this context it is important to note that the Bill does not change the 'curfew' provision in any way. Indeed that provision was amended in 2014 to implement a Council of Australian Governments' Review of Counter-Terrorism Legislation recommendation to clarify the maximum period of a curfew on the face of the legislation. Accordingly, while a court could impose a curfew of up to 12 hours, the court could only do so if satisfied that such a restriction would be in the best interests of the child, and was reasonably necessary and reasonable appropriate and adapted to mitigating the risk of terrorism or foreign fighting or the support or facilitation of terrorism or foreign fighting.

Recommendation one of the PJCIS report considers the best interests of the child consideration. The Government is presently considering the PJCIS report and its recommendations.

Schedule 2—Court-appointed advocate for young persons

Paragraphs 1.90 to 1.106 of the report consider the human rights compatibility of court appointed advocates for young persons.

Background

As noted in the report, the court appointed advocate model is based on the Family Court's independent children's lawyer (ICL) model (paragraph 1.99). While the court appointed advocate is not the young person's legal representative, nothing in Division 104 or elsewhere prohibits a young person (or any other person the subject of a control order) from engaging an independent legal representative.

Legitimate objective, rationally connected and proportionate

The court appointed advocate model in the Bill seeks to achieve the following outcomes:

- ensure the controls imposed by the control order and the consequences of failing to comply with them is fully explained to the child by an independent person (noting that interim control orders are generally obtained on an ex parte basis, such that the young person would not likely have legal representation at the time of service). The AFP will continue to be required to provide this and other information to the child at the time of service
- ensure there is an independent person who can provide the court with an assessment about what is in the child's best interests, and
- ensure, particularly in circumstances where the child does not have separate legal representation, that there is a legally qualified person from whom the child can seek advice, and who can adduce evidence and make submissions for the child during proceedings.

On 14 December 2015, the PJCIS requested the Department to review the submissions made by bodies such as the Law Council of Australia and the Gilbert and Tobin Centre of Pubic Law and respond to the issues raised. On 15 January 2016, the Department provided the PJCIS with a supplementary submission which sought to address each of those sets of issues. A number of the submissions discuss the court appointed advocate model and the PJCIS has asked the Department to consider whether an alternate model is feasible. The Department has advised the PJCIS that an alternate model may help address the concerns raised in those submissions, although any alternate model would be subject to agreement by the States and Territories under the requirements of the 2004 Inter-Governmental Agreement on Counter-Terrorism Laws.

Recommendation two of the PJCIS report considers the court appointed advocate model. The Government is presently considering the PJCIS report and its recommendations.

Schedule 5—'Imminent' test and preventative detention orders

Paragraphs 1.107 to 1.130 of the report consider the revised test for imminence in subsection 105.4(5) of the Criminal Code.

Background

Preventative detention orders (PDOs) are protective tools that are designed to achieve the following legitimate objectives:

- prevent an imminent terrorist act from occurring, or
- preserve evidence of, or relating to, a recent terrorist act.

Legitimate objective, rationally connected and proportionate

Currently, the issuing authority must be satisfied there are reasonable grounds to suspect that a terrorist act is imminent and is expected to occur, in any event, at some time in the next 14 days. The problem with this test is that even where police have grounds to suspect a person has the capacity to carry out a terrorist act at any time, neither the AFP nor the issuing authority may have information as to the time that has been selected to carry out that act – if indeed a time has been selected. For example, if a terrorist is prepared and waiting for a signal or instruction to carry out their act, the AFP may not be able to identify when that signal or instruction will be sent. Indeed the terrorist themselves may not know. Under the existing test, the AFP may not be able to seek a preventative detention order without information as to the expected timing. Accordingly, there is an operational gap in ability to deal with terrorist acts that are not planned to occur on a particular date, even where the preparations for that terrorist act may be in their final stages, or complete. The legitimate objective of the amendments is to address this gap so that the objectives of the preventative detention order regime can be realised.

As the AFP noted in their submission to the PJCIS, if the point in time that an incident will take place is not known, the issuing authority may not be satisfied the act is expected to occur sometime in the next 14 days. The proposed amendment addresses this issue by placing the emphasis on the capacity for an act to be carried out in the next 14 days. If a terrorist act is capable of being carried out, and could occur, within 14 days, that terrorist act will meet the definition of an 'imminent terrorist act'. Accordingly, the proposed amendment ensures the AFP has the ability to apply for a PDO to safeguard the public against such risks where they are identified. The inclusion of a 14-day timeframe in which the act could occur retains the imminence requirement, but focusses on the capability of a person to commit a terrorist act, as opposed to the specific time in which the terrorist act is expected to occur. Accordingly, the amendments are rationally connected and proportionate to the objective of preventing imminent terrorist acts and the need to ensure the utility of the preventative detention order regime to achieve that objective.

Furthermore, existing requirements that the AFP member and issuing authority must be satisfied of under existing subsection 105.4(4) ensure the PDO regime remains a proportionate, protective tool to counter immediate threats to national security. To obtain a PDO, an AFP member must demonstrate that the order will "substantially assist in preventing a terrorist act occurring" (paragraph 105.4(4)(c)) and that detention is "reasonably necessary" for the purpose of preventing the terrorist act (paragraph 105.4(4)(d)). The issuing authority must be similarly satisfied of both requirements.

These proportionality requirements ensure that law enforcement agencies must make a case for why the significant limitations on an individual's freedoms under a PDO are justified in each instance. Viewing the proposed amendment to subsection 105.4(5) in the context of the PDO framework as a whole demonstrates that the safeguards in place protect against the inappropriate use of the regime.

Recommendation fifteen of the PJCIS report considers the threshold for obtaining a PDO. The Government is presently considering the PJCIS report and its recommendations.

Schedule 8 —Monitoring compliance with control orders

Paragraphs 1.131 to 1.160 of the report consider the human rights compatibility of the monitoring compliance with control orders regimes.

Background

The former INSLM noted in his 2012 report that the efficacy of a control order depends largely upon the subject's willingness to respect a court order, and that in the absence of the ability to effectively monitor a person's compliance with the terms of a control order, there is no guarantee that a person will not breach the order or go on to commit a terrorist offence.

These comments acknowledge the limitation of existing Commonwealth coercive powers such as physical searches, telecommunication interception and surveillance devices, which are only available for the purposes of investigating an offence that has already been committed or where there is information that an offence about to be committed.

The proposed new monitoring powers respond to the former INSLM's concerns by creating targeted monitoring regimes that apply only to a person in relation to whom a superior court has already decided the relevant threshold for issue of a control order have been met and who therefore, by definition, is of security concern. These targeted regimes will facilitate monitoring of the person's conduct to mitigate the risk of breaches of control orders and, consequently, to mitigate the risk of the person engaging in preparatory acts, planning and terrorist acts.

It is imperative that our law enforcement agencies have adequate powers to monitor a person's compliance with the conditions of the control order. Without sufficient powers to monitor compliance, community safety may be put at risk if the person does not choose to comply with the conditions of the order and breaches go undetected.

Legitimate objective, rationally connected and proportionate

Currently, law enforcement agencies can only apply for a search warrant, or a warrant to use telecommunications interception or a surveillance device, if it is suspected that an offence has occurred or there is information indicating an offence is about to occur. These traditional powers do not fit the changing environment in which we live. The ability to use search, telecommunications interception and surveillance powers only after an offence is suspected of being committed undermines the preventative and protective purposes of control orders. The breach of the conditions of a control order may mean a person has been able to plan, prepare for, progress, or provide support to, terrorist plots or related activity, regardless of whether a terrorist act has occurred.

Physical search, telecommunications interception and surveillance powers are particularly relevant to monitoring a person's compliance with obligations, prohibitions and restrictions in relation to:

- the possession of specified articles or substances
- communication or association with specified individuals
- access or use of specified telecommunications or technology, including the internet, and
- the carrying out of specified activities.

Clearly, these obligations, prohibitions and restrictions can be critical to reducing the ability of a person to commit an offence and separating them from others who may encourage, or be involved in, terrorist activity. Where a person seeks to conceal their contravention of such conditions, search, telecommunications interception and surveillance powers are the most effective and efficient means of detecting breaches.

The Bill strikes an appropriate balance between enabling search, telecommunications interception and surveillance powers to be used to monitor compliance with control orders conditions, and ensuring there is sufficient accountability and oversight of the use of these powers.

However, recommendations nine, ten and eleven of the PJCIS report consider a number of aspects of the proposed monitoring warrant regime, including additional safeguards and accountability mechanisms. The Department is presently considering the PJCIS report and its recommendations.

Schedules 9 and 10 — Monitoring compliance with control orders

The Committee has specifically asked for information to assist in determining that the limitation on the right to privacy is proportionate to the objective.

The objective of the proposed new monitoring warrant framework is to ensure that a person who is subject to a control order is prevented from engaging in any activity related to terrorist acts and terrorism offences. The monitoring warrant powers are subject to appropriate restrictions which guarantee that the use of power is a proportionate limitation on the right to privacy.

The Bill requires the issuing authority to balance a number of different considerations, including whether there are any alternative methods that would be likely to assist the agency, in making the decision to issue the warrant. The warrants can only be issued once a number of thresholds are met. These thresholds include a requirement that the issuing authority must have regard to the possibility that the person:

- has engaged, is engaging, or will engage, in a terrorist act
- has provided, is providing, or will provide, support for a terrorist act
- has facilitated, is facilitating, or will facilitate, a terrorist act
- has provided, is providing, or will provide, support for the engagement in a hostile activity in a foreign country
- has facilitated, is facilitating, or will facilitate, the engagement in a hostile activity in a foreign country
- has contravened, is contravening, or will contravene, the control order, or
- will contravene a succeeding control order.

This threshold is designed to ensure that the issuing authority has regard to evidence of both a specific risk or propensity of the person engaging in such conduct or breaching the order, as well as evidence that there is a general risk or propensity that the person will engage in such conduct

or breach the control order. In making this decision, the issuing authority may consider a range of information, potentially including:

- whether there specific or general evidence indicating that there is a possibility that the person may engage in the conduct the control order is intended to prevent, or may breach the control order
- evidence pre-dating the issuing or service of the control order, including the grounds on which the control order was issued, that may indicate such a possibility, notwithstanding the fact that the control order has subsequently been issued and/or served, and
- evidence about whether other persons subject to control orders have engaged in conduct the control order is intended to prevent, or have breached their control order, to the extent such evidence may indicate whether there is a possibility of the person in question may engage in such conduct or breach the extant control order.

In essence, these cumulative factors require the issuing authority to balance privacy concerns with the extent to which monitoring would assist in preventing terrorist and related acts. This test constrains the use of the monitoring warrant powers to ensure that it is only used in circumstances where it would be reasonable and necessary.

In addition to this proportionately test, B-Party warrants are subject to further requirements to those that apply to other interception warrants:

- the person subject to the control order must be likely to communicate with the person whose service is to be intercepted
- the issuing authority must be satisfied that the agency has exhausted all other practicable methods of identifying the telecommunications services used, or likely to be used, by the person subject to the control order, or that interception of the service used by the person subject to the control order would not otherwise be practicable, and
- the maximum period of 45 days for B-Party warrants is half that of the period applicable for other interception warrants, which acknowledges that B-Party interception involves a potential for greater privacy intrusion of persons who, though in contact with persons of interest, may not be involved in the commission of an offence.

The option for agencies to defer reporting maintains a level of transparency that is not at the expense of operational effectiveness. Due to the generally small number of control orders likely to be in force at any one time, immediate public reporting may enable an individual to determine or speculate as to whether they are subject to covert surveillance. However, if the Minister determines not to include the information in the Annual Report, then the chief officer of an agency is under a positive obligation to request the Minister to include the information in the next report if appropriate. All information must still be reported to the Minister, and the Minister must decide whether to report.

The Government notes the Committee's observation that the control order warrants under the SD Act can impact on third parties. The Government will amend the Statement of Compatibility to ensure this is appropriately reflected.

Further, recommendations nine to thirteen of the PJCIS report consider a number of aspects of the proposed monitoring warrant regime, including telecommunication inception and surveillance device warrants. The Department is presently considering the PJCIS report and its recommendations.

Schedules 9 and 10—Use of information obtained under warrant if interim control declared void

The provisions, inserted into the *Surveillance Devices Act 2004* (the SD Act) and *Telecommunications (Interception and Access) Act 1979* (the TIA Act) are intended to address the unlikely scenario where:

- an interim control order has been issued in respect of a person
- a law enforcement agency has duly obtained a monitoring warrant in relation to that person
- under that monitoring warrant, the agency has obtained information that indicates that the person is likely to engage in a terrorist act, cause serious harm to a person, or cause serious damage to property, and
- before the agency can act on that information, the interim control order is considered by a court at a confirmation hearing and declared void *ab initio* pursuant to subsection 104.14(6) of the Criminal Code on the grounds that, at the time of making the interim control order, there were no grounds on which to make the order.

As the existence of a valid control order is a condition for the issuing of a monitoring warrant, the likely effect of a court declaring an interim control order void ab initio pursuant to subsection 104.14(6) of the Criminal Code would be that any monitoring warrants predicated on that control order would also likely be void *ab initio*.

It is a fundamental principle of the Australian legal system that courts have a discretion as to whether or not to admit information as evidence into proceedings, irrespective of the manner in which the information was obtained. As an example, the *Bunning v Cross*[2] discretion places the onus on the accused to prove misconduct in obtaining certain evidence and to justify the exclusion of the evidence. This provision is expanded on in Commonwealth statute,[3] where there is an onus on the party seeking admission of certain evidence to satisfy the court that the desirability of admitting the evidence outweighs the undesirability of admitting it, given the manner in which it was obtained. This fundamental principle reflects the need to balance the public interest in the full availability of relevant information in the administration of justice against competing public interests, and demonstrates the role the court plays in determining admissibility of evidence.

However, the SD Act and TIA Act depart from these fundamental principles, by imposing strict prohibitions on when material under those Acts may be used, communicated or admitted into evidence.[4] Under these Acts, it is a criminal offence for a person to deal in information obtained under these Acts for any purpose, unless the dealing is expressly permitted under one or more of the enumerated and exhaustive exceptions to the general prohibition. These provisions expressly override the discretion of the judiciary, both at common law and under the *Evidence Act 1995*, to admit information into evidence where the public interest in admitting the evidence outweighs the undesirability of admitting it, given the manner in which it was obtained. There is also a risk that these specific provisions might be interpreted, either by a court considering the matter after the fact, or by an agency considering the question *in extremis*, to override the general defence to criminal responsibility under the Criminal Code.

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[2] (1978) 141 CLR 54.
[3] Section 138 of the *Evidence Act 1995* (Cth).
[4] See s 63 of the TIA Act and s 45 of the SD Act.

For this reason, the Bill would insert new section 65B to the SD Act and section 299 to the TIA Act, which would expressly permit agencies to rely on such information to prevent, or lessen the risk, of a terrorist act, serious harm to a person, or serious damage to property. These provisions would also permit such information to be used to apply for, and in connection with, a preventative detention order.

These amendments do not infringe on the right to a fair trial and fair hearing as protected by article 14 of the ICCPR. 'Equality of arms' requires that each party be afforded a reasonable opportunity to present their case under the conditions that do not place them at a substantial disadvantage vis-à-vis another party.[5] This principle essentially denotes equal procedural ability to state the case. These amendments do not engage the 'equality of arms' principle. This is because the amendments do not derogate from, or abridge, existing procedural rights of parties to litigation and would not result in actual disadvantage or other unfairness to the defendant. That is, the amendments do not impact upon opportunities to adduce or challenge evidence or present arguments on the matters at issue.[6]

Accordingly, the provisions are a reasonable and proportionate limitation on the right to a fair trial and fair hearing in article 14 of the ICCPR.

Schedule 15—Protecting national security information in control order proceedings

Paragraphs 1.172 to 1.201 of the report consider amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2014* (NSI Act) that will provide the court with the option to consider national security information in control order proceedings (subject to the rules of evidence and other safeguards) which is not disclosed to the subject of the control order or their legal representative.

Legitimate objective, reasonable and proportionate

The Committee notes at paragraph 1-186 that the main purpose of the bill appears to be to provide for circumstances where the subject of a control order and their legal representative may not be provided with any details *at all* about the information being relied on, but which can still be considered by a court, in control order proceedings. However, this is not the purpose of the amendments.

There are specific provisions in Division 104 of the Criminal Code which set out what information needs to be provided to the controlee, subject to national security redactions. As the Committee notes, subsection 104.5(2A) provides that the interim control order must set out a summary of the grounds on which the order is made, but does not need to include information that would likely prejudice national security. If the AFP elects to confirm the interim control order, under section 104.12A the AFP must provide to the subject of the control order the statement of facts relating to why the order should or should not be made, and an explanation as to why each of the proposed obligations, prohibitions or restrictions should be imposed on the person, that were used in the AFP's application for the interim control order. Paragraph 104.12A(2)(a)(iii) also requires the AFP to serve personally on the person any other details required to enable the person to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the control order.

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[5] *Brandstetter v Austria*, Application No: 11170/84; 12876/87; 13468/87, Strasbourg judgment 28 August 1991 §§41-69.

[6] *H. v Belgium*, Application No: 8950/80, Strasbourg judgment 30 November 1987 §§49-55.

However, these provisions do not require the AFP to provide information that the AFP may seek to protect for reasons of national security.

These specific disclosure provisions operate as protections for the subject of the control order, as they ensure the controlee is provided with timely access to the information used in support of the control order application. The provisions operate in addition to any other applicable procedural rights in federal civil proceedings, such as the normal processes of discovery, in which a party to a proceeding is entitled to obtain much of the material relied upon by the other party. At any stage where disclosure obligations arise, it is up to the AFP to either make a public interest immunity claim or seek to use the protections under the NSI Act to withhold any national security information. Wherever the AFP does so, it must satisfy the court that the non-disclosure of the information is appropriate. Neither the existing Division 104 Criminal Code provisions, nor the NSI Act provisions, permit evidence which a court considers ought to be subject to national security exceptions to be relied upon by the court in making its decision to confirm a control order.

Under the NSI Act, there are existing provisions that enable a court to consider, in a closed hearing, whether national security information may be disclosed and if so, in what form. The court has the discretion to exclude non-security cleared parties, their non-security cleared legal representatives and non-security cleared court officials from the hearing where the court considers that disclosing the relevant information to these persons would likely prejudice national security. If a party's legal representative is not security cleared, does not wish to apply for a security clearance, or a clearance is unable to be obtained in sufficient time before the closed hearing, then the court may still hold the closed hearing and determine the matter without the assistance of a legal representative of the party. Alternatively, the court could decide to appoint a security cleared special counsel to represent the interests of the party during the closed hearing (although there has been no need for a security cleared special counsel to be appointed under the NSI Act to date). However, any information the court decides should not be disclosed under the NSI Act cannot be used in the substantive proceeding.

The purpose of the proposed amendments to the NSI Act is it to provide the court with two further options when the NSI Act has been invoked in a control order proceeding. First, the option to exclude a respondent's legal representative, even if they are security cleared, at the closed hearing to determine if or how the information should be disclosed in the substantive control order proceeding. Second, it provides the option for the court to still consider that evidence in the substantive control order proceeding, even if it cannot be disclosed to the party or their lawyer (whether security cleared or not). The rationale for these amendments is that the evidence may be so sensitive that even a security cleared legal representative cannot see the information.

The AFP's submission to the PJCIS inquiry into the Bill explains the importance of protecting sensitive information, not only to maintain the confidentiality and integrity of law enforcement and intelligence operations and methodologies, but also to maintain the trust with which law enforcement has been provided this information. It also explains that in the current threat environment, it is increasingly likely that law enforcement will need to rely on evidence that is extremely sensitive, such that its disclosure, even to a security-cleared lawyer, could jeopardise the safety of sources and the integrity of investigations. There is a substantial risk that the inability to rely on sensitive information may mean that control orders are unable to be obtained in relation to a person posing a high risk to the safety of the community. Accordingly, the purpose of the amendments is aimed at achieving the legitimate objective of protecting national security information in control order proceedings, the disclosure of which may be likely to prejudice national security.

The amendments to the NSI Act will provide the court with the ability to make three new types of orders to protect national security information that may result in the court being able to

consider information in a control order proceeding that the person the subject of the control order proceeding (or their legal representative) may not see. Prior to making one of these new orders, under paragraph 38J(1)(c), the court must be satisfied that the subject of the control order proceeding has been provided sufficient notice of the allegation on which the control order request is based (even if the person has not been given notice of the information supporting those allegations).

When considering the effect of the proposed amendments to the NSI Act, it is important to consider the proposed amendments as a whole rather than considering the sections in isolation. There are several protections built into the legislation that mitigate any procedural unfairness. Prior to making one of the new orders, the court must consider whether the order would have a substantial adverse effect on the substantive control order proceeding (subsection 38J(5)). This requires the court to contemplate the effect that withholding the information from the respondent or their legal representative will have on procedural fairness for the subject of the control order proceeding. Furthermore, the proposed amendment to subsection 19(4) will confirm that the court has discretion to later order a stay of a control order proceeding, if one of the new orders has been made and later in the proceedings it becomes evident that the order would have a substantial adverse effect on the substantive control order proceeding.

Importantly, the court also has discretion to decide which order to make and the form the order should take. For example, if the AFP proposes to withhold an entire document from the subject of a control order, but use it in support of the control order application, the court may decide that only part of the document may be withheld and used, or that the entire document can be withheld and used but the person must be provided with a summary of the information it contains. This is often referred to as 'gisting'.

Furthermore, the normal rules of evidence apply to evidence sought to be introduced under these new orders, in accordance with the express terms of section 38J and the existing Criminal Code provisions (section 104.28A). The effect of those provisions is that if any material is withheld from the respondent but used in the proceeding, that material must otherwise be admissible as evidence under the normal rules of evidence applicable in control order proceedings. There is also nothing in the new provisions that would dictate to the court what weight it should give to any evidence that is withheld (either in full or in part) from the respondent in the substantive control order proceeding.

Accordingly, the amendments provide an appropriate balance between the need to protect national security information in control order proceedings, and procedural fairness to the person to whom the control order relates. It preserves the independence and discretion of the court and instils it with the powers needed to mitigate unfairness to the subject of a control order proceeding. Further, the court retains its inherit discretion to appoint a special advocate if it is assessed as necessary and appropriate to the circumstances. The amendments are therefore reasonable and proportionate for the achievement of the objective of protecting national security information in control order proceedings.

Recommendations four to six of the PJCIS report consider various aspects of the proposed amendments to the NSI Act. The Government is presently considering the PJCIS report and its recommendations.

ATTORNEY-GENERAL

CANBERRA

MC15-008499

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

11 FEB 2016

Dear Chair Philip

I am writing in response to the letter from the Deputy Chair of the Parliamentary Joint Committee on Human Rights (the Committee) dated 10 November 2015. The letter seeks my advice about the human rights compatibility of the Crimes Legislation Amendment (Harming Australians) Bill 2015 (the Bill).

The Bill will amend the *Criminal Code Act 1995* (the Criminal Code) to extend the retrospective operation of the existing offences of murder and manslaughter of an Australian citizen and resident of Australia overseas to apply to conduct that occurred at any time before 1 October 2002. The Bill is intended to address a gap in Australia's criminal law and will ensure that crimes of murder and manslaughter of Australians can be prosecuted, whenever and wherever they occur.

The Bill was prepared with Australia's obligations under international human rights instruments in mind, including the International Covenant on Civil and Political Rights (ICCPR).

In response to the issues raised in the Committee's *Thirtieth Report of the 44th Parliament*, my advice is set out below.

Absolute liability

As the Committee has noted, the Bill will apply absolute liability to the new elements of the offence provisions, concerning the murder or manslaughter of an Australian citizen or resident of Australia in a foreign country before 1 October 2002. Absolute liability currently applies to elements of the existing offences, which apply to conduct occurring on or after 1 October 2002.

The effect of the Bill's provisions will be that, for a prosecution under section 115.1 (murder of an Australian citizen or resident of Australia) in respect of conduct occurring before 1 October 2002, the prosecution will not need to establish a fault element for the following elements of the offences:

- the victim was an Australian citizen or resident, and
- at the time the conduct was engaged in, the conduct constituted an offence against a law of the foreign country, or the part of the foreign country, in which the conduct was engaged.

For a prosecution of the manslaughter offence in section 115.2 in respect of conduct occurring before 1 October 2002, the prosecution will not need to establish a fault element for the two elements described above, as well as the element 'that the conduct caused the death of another person'.

The Committee has noted that the extended application of absolute liability raises questions as to whether the proposed measures limit a defendant's right to a fair trial. The Committee has queried whether:

- the measures are aimed at achieving a legitimate objective
- there is a rational connection between the limitation and that objective, and
- the limitation is a reasonable and proportionate measure for the achievement of that objective.

The measures are aimed at achieving a legitimate objective. The purpose of the amendments is to ensure that crimes of murder and manslaughter of Australians can be prosecuted, whenever and wherever they occur. The measures in the Bill will ensure that Australia has every legal tool available to seek justice for Australian victims of the most serious crimes by applying Australian criminal law to those responsible for these offences where they occurred before 1 October 2002. The Bill will rectify a gap in our laws and in doing so, address a significant community concern.

There is a rational connection between this objective and the extended application of absolute liability. The measures go directly to achieving the purpose of the Bill. The application of absolute liability is appropriate and required to ensure the effective operation of the offences.

If recklessness was the requisite fault element applying to the particular elements above, it is possible the offences would not capture conduct which should be criminalised, for instance where an offender does not turn their mind to the possibility that the victim of their conduct is an Australian citizen or resident, or that their conduct may constitute an offence in the foreign jurisdiction. These are effectively jurisdictional elements which provide the circumstances in which the offences will apply, rather than elements which go to the essence of the offending.

There are safeguards in the Bill which help ensure that the application of absolute liability is a reasonable and proportionate approach to achieving the Bill's objective. The prosecution will still need to prove other elements of the offence beyond a reasonable doubt, including that the defendant intentionally or recklessly engaged in conduct and that there was a causal connection between that conduct and the victim's death. The Bill also contains a safeguard against double jeopardy and applies the existing requirement of Attorney-General's consent for a prosecution to commence.

Finally, as noted above, absolute liability applies in respect of the existing murder and manslaughter offences in section 115 of the Criminal Code. To not apply the same standard for the application of the offences to conduct occurring before 1 October 2002 would create an undesirable inconsistency in the law.

For these reasons, the application of absolute liability is an appropriate measure and is necessary to achieve the Bill's legitimate objective.

Prohibition against retrospective criminal laws (nature of the offence)

The Committee has also raised questions about the retrospective operation of the measures in the Bill. These are legitimate queries, as retrospective offences challenge a key element of the rule of law – that laws are capable of being known in advance so that people subject to those laws can exercise choice and order their affairs accordingly. The Parliament does not make such offences lightly.

Murder and manslaughter are two of the most serious crimes a person can commit and involve conduct which is universally known to be criminal in nature. Although the Bill would create a criminal law which has a retrospective operation, it only has retrospective operation in a technical sense because there is no jurisdiction in the world which does not recognise within its domestic criminal law a crime of murder or manslaughter, however described.

The provisions have been formulated in this way noting that there are differences in other countries as to what constitutes the offence of murder compared to manslaughter and the fault elements that apply to each offence. It is not possible to take account of the different constructions of murder and manslaughter offences in each country. The Bill's provisions are not intended to apply to conduct that is not classified as murder or manslaughter in the foreign country.

The Bill provides protections to ensure the retrospective operation of the provisions does not apply unfairly, including dual criminality protections in proposed paragraphs 115.1(1)(e) and 115.2(1)(e). The effect of these provisions is that a person will only be liable for an offence of murder or manslaughter in relation to conduct occurring before 1 October 2002 if, at the time they engaged in the conduct, it also constituted an offence against the law of the foreign country. The provisions ensure that a person cannot be prosecuted for conduct that was not otherwise a criminal offence at the time of its commission.

The Committee has observed that the proposed provisions would not require that the conduct constitute manslaughter or murder (or equivalent offences) in the foreign jurisdiction – merely that it is 'an offence'. The Committee raised the possible situation where a person is involved in a joint criminal enterprise (such as burglary) in a foreign country, where an Australian citizen is killed as a result. In such a case, the Committee notes that a person may be subject to a charge of burglary in the foreign jurisdiction, and subsequently face a charge of murder in Australia under the Criminal Code.

I disagree that this situation would occur. For the Australian offences to apply, the conduct would need to satisfy all elements of both the Australian and the foreign offence. This would require the accused's conduct to have caused the death of an Australian citizen or resident, and for the accused to have had intended that the conduct would cause the death of the Australian citizen (or be reckless as to causing that outcome). It is unlikely that the elements of the Australian offence could be made out without that same conduct constituting some form of culpable homicide in the foreign jurisdiction.

If such a situation transpired, the operation of proposed subsections 115.1(1A) and 115.2(1A) would mean that the maximum applicable penalty would be lessened to penalty which applies for the relevant offence in the foreign jurisdiction. This means that, if the relevant offence in the foreign jurisdiction was something less than murder (for instance, manslaughter or some other lesser form of culpable homicide), the maximum applicable penalty would be accordingly set at the level for the foreign offence. Further, the consent of the Attorney-General would be required before a prosecution under these provisions could be commenced.

Prohibition against retrospective criminal laws (penalty provisions)

The Bill provides that the maximum penalties for the extended offences of murder and manslaughter are life imprisonment and 25 years' imprisonment respectively. This is consistent with the maximum penalties for the existing murder and manslaughter offences in section 115 of the Criminal Code.

Consistent with Australia's requirements under article 15(1) of the ICCPR, the Bill provides that where the conduct occurred before 1 October 2002, if the conduct was punishable in the foreign jurisdiction by a term of imprisonment less than life (for offences against section 115.1) or 25 years (for offences against section 115.2), the defendant is entitled to the benefit of that lower penalty. Where the conduct is punishable by a non-custodial sentence in the foreign jurisdiction, the court may impose a term of imprisonment of up to the maximum under the Australian provisions (life and 25 years respectively).

The Committee has noted that, if the conduct is punishable in the other country by a 'lesser' non-custodial sentence (such as a fine, compensation or community service order), the maximum penalty under the Criminal Code will apply.

The seriousness of the offences of murder and manslaughter are such that these offences are always appropriately punished by a period of imprisonment. It is highly unlikely that a person would receive a lesser non-custodial sentence in matters where their conduct caused the death of another person.

Should such circumstances transpire, under the existing sentencing provisions for Commonwealth offences in subsection 16A(2) of the *Crimes Act 1914*, it will be open to a court to consider any possible 'lighter' punishment than imprisonment which would have otherwise been available in the foreign jurisdiction. A court would not be obliged to do so. I believe that this is an appropriate approach, due to the difficulty of anticipating all possible punishments which may be applied in foreign jurisdictions.

I am satisfied that the Bill is compatible with human rights, and that, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

The responsible adviser for this matter in my Office is James Lambie who can be contacted on 6277 7300.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-001027

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

Dear Philip, ~~Mr~~ Ruddock

Response to questions received from the Parliamentary Joint Committee on Human Rights in its Eighteenth Report of the 44th Parliament

Thank you for your letters of 13 February 2015 in which information was requested on the *Australian Citizenship and Other Legislation Amendment Bill 2014* and the *Migration Amendment (Partner Visas) Regulation 2014*.

My response to your request is attached. I have also included a response to the committee's further questions regarding the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* which were raised in the Committee's 14th report.

I trust the information provided is helpful.

Yours sincerely

8/4/15

PETER DUTTON

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014

Schedule 1 – Maritime Powers Act amendments

1.352 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the amendments in Schedule 1 and 5 are compatible with the rights listed at 1.345 above are, and particularly:

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

1.362 The committee therefore considers that the proposed amendments in Schedule 1 are incompatible with Australia's obligations of non-refoulement under the ICCPR and the CAT.

Compliance with Australia's international obligations is to be measured by what Australia does *in toto* by way of legislation, policy and practice. The amendments in Schedule 1 do not change the need to give effect to Australia's international obligations, nor do they require action to be taken that is inconsistent with those obligations.

However, the amendments did seek to ensure that decisions about Australia's international obligations, including how to give effect to those obligations, are made by the executive government. This is both appropriate given the operational context in which these decisions need to be made, and consistent with decision-making generally relating to Australia's sovereignty and overarching national security and national interests. The Australian Government does not seek to take action that is inconsistent with Australia's non-refoulement obligations.

Maintaining the security of Australia's borders is a legitimate objective, and it is clear that maritime operations are rationally connected to that objective. All States, as sovereign nations, are entitled to decide who may enter their territory and the means by which they do so. Maritime operations have been shown to be necessary to achieve the legitimate objective of restoring order to Australia's borders – it is the maritime enforcement operations which have played the primary role in reducing deaths at sea by deterring illegal maritime arrivals. Over the past six years, more than a thousand people have tragically lost their lives at sea while attempting the dangerous journey to Australia in flimsy vessels with the assistance of criminal people smugglers, often with inadequate supplies and equipment. Australia received over 50 000 illegal maritime arrivals in that period, placing significant strain on Australia's migration program. It is also important to note that these maritime powers are necessary to ensure the integrity of Australia's borders and maritime possessions in relation to a range of other threats, such as environmental damage and drug smuggling.

- non-refoulement obligations:
  - Noting the Committee's finding that "the proposed amendments in Schedule 1 are incompatible with Australia's obligations of non-refoulement under the

International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)," it is important to reiterate that these amendments do not require that action be taken which would breach Australia's non-refoulement obligations. The Government takes Australia's international obligations seriously, and does not seek to take action that is inconsistent with Australia's non-refoulement obligations. A great deal of work is done to ensure that decisions made and actions taken under the *Maritime Powers Act 2013* (Maritime Powers Act) comply with Australia's international obligations. As a matter of international law, non-refoulement obligations limit the destination to which people may be sent, but do not require Australia to allow unauthorised entry.

- the right to security of the person and the right to be free from arbitrary detention; (ICCPR 9)
    - These amendments do not limit the right to be free from arbitrary detention – detention under the Maritime Powers Act is not arbitrary. Arbitrariness involves elements of inappropriateness, injustice or a lack of predictability. Any limitation on the freedom of movement of persons detained or otherwise held under maritime powers is not arbitrary. The legislation clearly sets out a range of factors governing the predictability of their application. Consistent with Government policy, any deprivation of liberty will be for the shortest period practicable for the performance of functions and duties to achieve the object and purposes of the Maritime Powers Act. These amendments simply clarify the time during which persons may be detained, and related factors, for the legitimate exercise of powers under the Act, ensuring there is a clear lawful basis for detention at each stage of a maritime operation.

- the prohibition on torture, cruel, inhuman and degrading treatment or punishment; (ICCPR 7)
    - The treatment of individuals in pursuit of the legitimate objective of protecting Australia's borders is carried out in full compliance with Australia's obligations in relation to the humane and dignified treatment of persons.

- the right to freedom of movement; (ICCPR 12)
    - Article 12 of the ICCPR applies to persons "lawfully within the territory of a State". This will not apply to persons engaged in maritime operations in all but the most unusual circumstances. The right to freedom of movement does not bestow a right to enter a country of which a person is not a national.
    - Any restriction on individuals' freedom of movement while on a vessel (for example, being restricted to one part of the vessel) is based on operational necessity and the overriding interest of the safety of the crew and passengers.

- the right to a fair trial; (ICCPR 14) and
    - Where relevant, any person to be charged with a criminal offence will be tried in accordance with normal practice in Australia, and it is open to anyone wishing to challenge their treatment to pursue action in the Australian courts.

- the obligation to consider the best interests of the child. (Convention on the Rights of the Child (CRC) 3 and 10)
    - The best interests of the child are to be a primary consideration in any decision affecting the interests of that child; however, this primary consideration may be outweighed by other primary considerations, such as the maintenance of the order of Australia's borders. The Government does not consider it to be in any child's best interests to be placed on an unseaworthy vessel by criminal people-smugglers seeking to exploit the child's vulnerability for their own ends.
    - The obligation in article 10 of the CRC to deal with applications to enter Australia for the purposes of family reunification positively, humanely and expeditiously does not provide a right to enter a country of which a person is not a national.

Schedules 2 and 3 - Temporary protection visas and safe-haven enterprise visas

1.378 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the proposed provisions for safe haven enterprise visas are compatible with human rights.

The details of Safe Haven Enterprise visas will come before the committee when the Safe Haven Enterprise visa regulations are finalised.

1.382 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the temporary nature of the proposed protection visas complies with Australia's obligations under the ICCPR and the CAT to not place any person at risk of refoulement.

Each time an applicant applies for a Temporary Protection Visa (TPV) they will have their protection claims re-assessed. This process includes an assessment against Australia's obligations under the ICCPR and the CAT. As there is no limit to the number of TPVs that can be granted to a person in respect of whom Australia has protection obligations, the temporary nature of these visas does not increase the risk of refoulement, under either the ICCPR or the CAT.

1.388 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed introduction of temporary protection visas is compatible with the right to health, and particularly:

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

As outlined in the statement of compatibility with human rights the arrangements were aimed at achieving the legitimate objectives of dissuading people from taking potentially life threatening journeys to Australia, as well as the need to maintain the integrity of Australia's migration system and protect the national interest. Both permanent protection visas and family reunion may be marketed by people smugglers as motivators for unauthorised maritime entry to Australia.

The Government notes the committee's concerns regarding possible mental health problems for TPV holders but maintains there is a rational connection between any limitations this policy may place on the right to health and a healthy environment and achieving these objectives, and that these limitations are reasonable and proportionate measures. As outlined in the statement of compatibility with human rights, all applicants will have access to Medicare and mainstream medical services. In addition they will have access to:

- the Government's Programme of Assistance for Survivors of Torture and Trauma (PASTT). PASTT provides direct counselling and related support services, including advocacy and referrals to mainstream health and related services;
    - in rural areas, PASTT has established rural, regional and remote outreach services to enable survivors of torture and trauma to access services outside metropolitan areas;
- the Government's Better Access initiative to receive rebates through Medicare should they wish to access selected mental health services provided by general practitioners, psychiatrists, psychologists and eligible social workers and occupational therapists; and
- the Mental Health Services in Rural and Remote Areas programme (MHSRRA) which provides rural and remote areas with more allied and nursing mental health services. The MHSRRA enables survivors of torture and trauma to access these services in areas of low or little mental health services.

Taking into account the fact that TPV holders will have access to Medicare and mainstream medical services, as well as the additional services listed above, any limitation on TPV holders' right to health is mitigated by the availability of these services, and is reasonable and proportionate to the objective of deterring people from making dangerous boat journeys to Australia.

1.397 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed introduction of temporary protection visas is compatible with the obligation to consider the right to the protection of the family, and with the best interests of the child, and particularly:

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

As stated in the statement of compatibility with human rights, the changes were aimed, among other things, at achieving the legitimate objectives of dissuading people, including minors, from taking potentially life threatening journeys to achieve resettlement for their families in Australia, maintaining the integrity of Australia's migration system and protecting the national interest. Allowing TPV holders who are minors to sponsor family members to migrate to Australia, would likely have the unintended consequence of increasing the number of minors attempting to journey to Australia illegally.

The Government therefore notes the committee's concerns but maintains there is a rational connection between any limitation this policy places on the *best interest of the child* and achieving these objectives, and that, bearing in mind the potential for boat journeys to Australia to be life threatening, these limitations are a reasonable and proportionate measure for achieving these objectives.

Schedule 4 – Fast Track Assessment Process

1.401 The committee therefore requests the further advice of the Minister for Immigration and Border Protection as to whether 'fast track assessment process' is compatible with the obligation to consider the best interests of the child and the right to a fair trial, and particularly:

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

Schedule 4 established a new fast track assessment process for 'fast track applicants', defined as protection visa applicants who entered Australia as unauthorised maritime arrivals on or after 13 August 2012. The Government's objective was to establish an efficient and cost effective process for determining protection visa applications which deters applicants from raising unmeritorious protection claims as a means to delay departure from Australia. As stated in the Explanatory Memorandum to the Act, the measures were aimed at achieving the legitimate objective of enhancing the integrity of Australia's protection status determination framework and preventing abuse of process.

Right to a fair trial

As acknowledged in the Statement of Compatibility with Human Rights, Article 14 of the ICCPR expressly relates only to persons facing criminal charges or suits of law and may not be directly applicable to the administrative assessment of non-refoulement obligations. However, to the extent that Article 14 is engaged, the Government is of the view that the amendments relating to the fast track assessment process are compatible with Article 14.

All fast track applicants, including children, will be afforded a fair and robust assessment of their protection claims by a specially trained departmental officer. As part of this process, all applicants will be afforded procedural fairness and the opportunity to articulate their protection claims, including during an interview, with the assistance of an interpreter if required.

Fast track applicants who receive a fast track reviewable decision, as defined in new section 473BB, will be automatically referred to the Immigration Assessment Authority (IAA) which will conduct a limited form of merits review and will either affirm the decision under review or remit it to my department with directions. The IAA will conduct independent and impartial reviews of decisions and will comply with the requirement to provide procedural fairness. In addition, the IAA has the discretion to consider new information and conduct an interview in exceptional circumstances, for example, where there is a change in circumstances or new information which suggests that there is an increased risk to the applicant.

It is the view of the Government that there is no express requirement under the ICCPR or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to provide merits review in the assessment of non-refoulement obligations. Consistent with this position, the Government considers that the obligation in Article 14, where it is engaged, would be satisfied if either merits review or judicial review is

available to an applicant. As stated in the Statement of Compatibility with Human Rights, the Executive Committee of the UNHCR has expressed the view that asylum processes should satisfy basic requirements including the ability to seek a reconsideration of a protection status determination decision from either an administrative or judicial body.

It is therefore the view of the Government that the fast track assessment process is compatible with Article 14 of the ICCPR as, following a robust and fair assessment of their protection claims, all fast track applicants have the ability to seek judicial review. In addition, the fast track assessment process provides the further safeguard, for the majority of fast track applicants, of access to merits review conducted by the IAA. Finally, all applicants who are refused the grant of a protection visa on character or security grounds have access to merits review conducted by the Administrative Appeals Tribunal (AAT).

Where merits review is not provided to excluded fast track review applicants, the Government considers this to be a reasonable and proportionate measure consistent with the stated objective. This position is discussed in detail below.

Best interests of the child

Article 10 of the CRC requires that where a child makes an application for family reunification, that application is dealt with positively, humanely and expeditiously. To the extent that Article 10 is engaged by the amendments relating to the fast track review process, the Government is of the view that the amendments are compatible with this obligation as all fast track applications will be dealt with positively, humanely and expeditiously. However, the Government has focused this response on Article 3 of the CRC as the Committee's question at 1.401 relates specifically to Article 3 of the CRC and the best interests of the child.

Article 3 of the CRC requires that the best interests of the child be a primary consideration in all actions concerning children. As stated in the Statement of Compatibility with Human Rights, the Government is committed to acting in accordance with Article 3 of the CRC and has established policies and procedures for the fast track assessment process that give effect to this commitment.

First, as part of the fast track assessment process, the government is committed to providing application support through the Primary Application Information Service (PAIS) to those considered most vulnerable including all unaccompanied minors. Access to PAIS is an important safeguard, consistent with the obligation in Article 3, as it ensures that vulnerable children have the necessary support to articulate their claims for protection during the fast track assessment process.

Secondly, all fast track applicants, including children, will be afforded a fair and robust assessment of their protection claims by a specially trained departmental officer. The assessment of protection claims made by, or on behalf of, a child will continue to be conducted in an age-sensitive manner that recognises the special needs of children. As noted in the Statement of Compatibility with Human Rights, this includes providing unaccompanied minors with the support of an independent observer during the protection visa interview.

Thirdly, the majority of fast track decisions will be automatically referred to the IAA which will conduct a merits review of the decision. However, in limited circumstances, a fast track application made by or on behalf of a child may be excluded from the fast track merits review process where the applicant falls within the definition of excluded fast track review applicant in amended section 5(1). Where the child is listed as a dependent on the application of his or her parent, or the child is an applicant in his or her own right but has the support of adult family members throughout the fast track process, the Government's position is that any limitation on merits review, in the limited circumstances where the child is deemed to be an excluded fast track review applicant, is reasonable and proportionate to the Government's objective of enhancing the integrity of the protection status determination process.

However, in the case of vulnerable persons such as unaccompanied minors, new section 473BC provides an important safeguard as I have the ability to determine via legislative instrument that certain cohorts of people who would otherwise be excluded fast track applicants will receive access to the IAA. It is intended that a legislative instrument ensure that all applicants receiving PAIS, which will include all unaccompanied minors, are reviewed by the IAA. This safeguard ensures that the best interests of the child are a primary consideration in determining access to merits review.

In establishing the fast track assessment process, the Government has ensured that the best interests of the child, which include receiving a timely outcome and having their welfare sensitively and appropriately managed throughout the process, are a primary consideration. However, the Government notes the integrity, efficiency and cost effectiveness of the protection status determination framework are also primary considerations. Therefore, to the extent that Article 3 is limited by the amendments relating to the fast track assessment process, the Government is of the view that this outcome is reasonable and proportionate to the stated objective.

1.408 The committee therefore seeks the advice of the minister as to whether the proposed limitation on merits review through the creation of the Immigration Assessment Authority (IAA) is compatible with Australia's obligations under the ICCPR and the CAT of ensuring independent, effective and impartial review of claims to protection against non-refoulement.

Right to merits review of an assessment of non-refoulement obligations

As stated earlier, the Government is of the view that there is no express requirement under the ICCPR or the CAT to provide merits review in the assessment of non-refoulement obligations. To the extent that obligations relating to review are engaged in the context of immigration proceedings, the Government is of the view that these obligations are satisfied where either merits review or judicial review is available. Although merits review may be an important safeguard, there is no obligation to provide merits review where judicial review is available.

Article 13 of the ICCPR states:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except

> where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The Government's position in relation to Article 13 is that the obligation only applies to persons considered to be lawfully in the territory of Australia. Where persons are considered to be lawfully in the territory, the obligation is satisfied by the provision of a robust, open and transparent assessment of non-refoulement obligations by the department followed in most cases by review by the IAA and in all cases by the opportunity for the applicant to seek judicial review in the case of an adverse decision.

To the extent that obligations relating to review under Article 2 of the ICCPR or Article 14 of the ICCPR are engaged in immigration proceedings, the Government's position is that these obligations are also satisfied where access to judicial review is available. Similarly, there is no express procedural obligation in Article 3 of the CAT to provide merits review where non-refoulement obligations have been considered and properly assessed by the department and where judicial review is available.

Where the State Party elects to provide merits review in the assessment of non-refoulement obligations, there is no express obligation to provide a full *de novo* review of the initial decision. Both the ICCPR and the CAT permit the State Party to determine the appropriate mechanism for merits review where sufficient safeguards are in place.

The fast track assessment process and the Immigration Assessment Authority (IAA)

All fast track applicants will be afforded a fair and robust assessment of their protection claims by a specially trained departmental officer. During this process all applicants will be afforded procedural fairness and the opportunity to articulate their protection claims, including during an interview with the assistance of an interpreter if required. All fast track applicants who are refused the grant of a protection visa will receive the reasons for the decision and have the ability to seek judicial review of the decision.

In addition, fast track review applicants who are refused the grant of a protection visa, other than those who fall within the definition of 'excluded fast track review applicant', will have automatic access to independent and impartial merits review conducted by the IAA. The IAA will conduct a limited form of merits review and will either affirm the decision under review or remit it to the department for reconsideration. Although the merits review model of the IAA differs from that of the RRT, the Government's position is that the IAA model is the appropriate model for processing protection claims for persons who entered Australia as unauthorised maritime arrivals on or after 13 August 2012.

In many cases review by the IAA will be limited as it will be conducted on the information provided by the applicant to the department and it will not involve an interview. However, new section 473DD allows the IAA to consider new information in exceptional circumstances and new section 473DC provides the IAA with the discretion to conduct an interview for the purposes of getting new information.

These provisions provide important safeguards which ensure that review by the IAA is effective and that all protection claims are adequately considered prior to any removal of a refused applicant from Australia. As stated in the Statement of Compatibility with Human Rights, the Government intends that the threshold of 'exceptional circumstances' will be satisfied where there is new information that indicates that the applicant may now engage Australia's protection obligations.

The Government is of the view that the provision of a fair and robust initial assessment by the department and access to judicial review for all fast track applicants satisfies Australia's obligations under the ICCPR and the CAT relating to review of administrative decisions. The Government also considers that access to a limited form of merits review by the IAA in the majority of cases is an additional safeguard that further supports compatibility with such obligations.

Finally, as stated in the Statement of Compatibility of Human Rights, the Government's objective in establishing the IAA is to improve the integrity, efficiency and cost effectiveness of merits review and to prevent abuse of process. To the extent that merits review is limited by the proposed amendments, the Government considers that the limitation is a rational, reasonable and proportionate measure to achieve the Government's stated objective. However, for the reasons provided earlier, the Government does not consider that any such limitation would be incompatible with Australia's obligations under the ICCPR or the CAT relating to review of non-refoulement assessments.

1.412 The committee therefore considers that the proposed exclusion of merits review for excluded fast track review applicants is incompatible with Australia's obligations of non-refoulement.

Excluded fast track review applicants

The Government is of the view that there is no express requirement under the ICCPR or the CAT to provide merits review in the assessment of non-refoulement obligations, nor does lack of merits review amount to refoulement.

Clarification regarding internal departmental review

At paragraph 1.411 of the Committee's report, the Committee refers to an internal departmental review system in the excluded fast track review context. I would like to take this opportunity to clarify the internal processes that will apply to excluded fast track review applicants.

Prior to finalising a case involving a possible excluded fast track review applicant and in addition to the department's ordinary quality control checks, such cases will undergo a further legal check of the process within the department. The legal process check will form part of the department's quality control procedures and will be conducted prior to the decision being finalised by the delegate. The legal process check will ensure that draft decisions have adhered to basic administrative law requirements; it will not undertake a 'review' by considering any new information against the previous assessment of the fast track applicant's protection claims.

Schedule 5 Refugees Convention Codification

1.352 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the amendments in Schedule 1 and 5 are compatible with the rights listed at 1.345 above are, and particularly:

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

As the committee has noted, the Refugees Convention and its Protocol are not among the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011* as treaties against which the committee assesses the human rights compatibility of legislation. In the context of this Act, Refugees Convention issues have been raised and addressed in my responses to other Senate Committees.

1.374 The committee therefore requests the advice of the minister as to whether the proposed amendments in Schedule 5 are compatible with Australia's non-refoulement obligations under the ICCPR and the CAT.

The amendments proposed in Schedule 5 to the Act deal with Refugees Convention issues. ICCPR and CAT are dealt with through other provisions of the Act.

Schedule 6 – Children of unauthorised maritime arrivals

1.421 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the designation of children as 'unauthorised maritime arrivals' is compatible with the obligation to consider the best interests of the child and the right to acquire a nationality, and particularly:

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

Best Interests of the Child

The amendments proposed in the Bill clarify that children born to an unauthorised maritime arrival (UMA) in Australia or a Regional Processing Country (RPC) are also UMAs. However, they do not alter the need to conduct a case-by-case assessment of a child's best interests for each child liable for transfer to a RPC, nor do they impose a limitation on the obligation to consider the best interests of the child in ensuing processes. By clarifying that children have a status which is consistent with that of their parents, the proposed amendments recognise the central importance of family in considering a child's best interests, so reducing the prospect of family separation, as in most cases both parents are also UMAs.

The best interests of each UMA child are considered prior to any action to transfer the child to a RPC through a Pre-Transfer Assessment and an additional Best Interests Assessment for Transferring Minors to a RPC (Best Interests Assessment). These assessments support the application of sections 198AD and 198AE of the Act, that is, they are used to consider whether it is reasonably practicable to transfer a minor or whether they should be referred to me for possible consideration of my public interest discretion to exclude the minor from being transferred to a RPC. In particular, the Best Interests Assessment is used to consider whether appropriate support and services are available in the RPC to meet the needs of the individual child. The assessment identifies whether there are barriers to the minor being transferred to a RPC, and, if it is considered not reasonably practicable at that time, the minor may be recommended for consideration for transfer at a later date.

The amendments achieve a legitimate objective of strengthening the government's existing IMA policies, which are aimed at deterring IMAs from seeking to enter Australia illegally. They do this by clarifying that the children of UMAs, born in Australia or in a RPC, have a migration status consistent with their UMA parent(s). It is the government's view that the amendments do not impose limitations in respect of the best interests of the child.

Right to a nationality

The proposed amendments in the Bill do not affect Australian citizenship law. In particular, a UMA born in Australia will continue to have access to Australian citizenship if they would otherwise be stateless.

If a UMA child born in Australia has never been a citizen or national of any country, and is not entitled to the citizenship or nationality of a foreign country, he or she is eligible for Australian citizenship by conferral under the statelessness provision [subsection 21(8) of the *Australian Citizenship Act 2007* (the Citizenship Act)]. Applications made pursuant to subsection 21(8) are fee-free. A person does not need to be in Australia to lodge an application for Australian citizenship, nor when an application made under subsection 21(8) is decided. Furthermore, the general residence requirement (Section 22 of the Citizenship Act) has no application to such applications under subsection 21(8). Stateless children born in Australia to UMAs who wish to apply for Australian citizenship are required to follow the same application processes and meet the same eligibility requirements as any other stateless person born in Australia.

Not all children born to UMA parents in Australia will be eligible for Australian citizenship under the statelessness provisions, because not all UMAs are stateless. In many cases, a child born in Australia or a RPC to a UMA parent who does have a nationality will be eligible for the same citizenship held by their father and/or mother.

Schedule 7 – Capping protection visas

Right to security of the person and freedom from arbitrary detention

1.427 The committee therefore seeks the further advice of the Minister for Immigration and Border Protection as to whether the cap is compatible with the right to freedom from arbitrary detention, and particularly:

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

It is the view of the Government that a person would not be kept in detention simply because a cap on certain visa grants was in place, accordingly there is no incompatibility between the capping provision and the right to freedom from arbitrary detention.

The proposed amendment to ensure that I am able to place a statutory cap on the Onshore component of the Humanitarian programme is aimed at achieving the legitimate objective of appropriately managing the Humanitarian programme. In the past, when more Protection visas than the Humanitarian programme allowed for were granted, it meant that there were fewer visa grants in the Special Humanitarian programme. This reduced places available from those people who waited offshore, and provided an incentive for IMAs to use people smugglers to get to Australia. It is appropriate for the Government to be able to manage the proportion of visas granted onshore and offshore, noting that the proposed amendments do not require me to place a cap, nor do they impose a cap, rather they ensure that I am able to should I so choose.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-001080

The Hon. Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
Federal Member for Berowra
Parliament House
CANBERRA ACT 2600

Philip,

Dear ~~Mr~~ Ruddock

I refer to the letter of 3 March 2015 from the former Chair of the Parliamentary Joint Committee on Human Rights, Senator Dean Smith. This letter refers to the committee's comments on the compatibility with human rights of the Migration Amendment (Character and General Visa Cancellation) Bill 2014 in the Committee's nineteenth report of the 44th Parliament.

My response addressing the committee's questions raised in the report is attached. I hope that it assists the committee in its role to examine this legislation for compatibility with human rights.

Thank you for raising this matter.

Yours sincerely

PETER DUTTON

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

Non-refoulement obligations and the right to an effective remedy

1.65 To the extent that 'independent, effective and impartial' review including merits review is not provided in relation to non-refoulement decisions, the proposed expansion of visa cancellation powers may be incompatible with Australia's non-refoulement obligations.

1.66 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the expanded visa cancellation powers or decisions to remove a person once a visa has been cancelled are subject to sufficiently 'independent, effective and impartial' review so as to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.

Whilst noting the committee's concerns, it is the Government's position that while merits review can be an important safeguard, there is no express requirement under the ICCPR or the CAT for merits review in the assessment of non-refoulement obligations.

As stated previously, Australia does not seek to resile from or limit its non-refoulement obligations. Nor do the amendments affect the substance of Australia's adherence to these obligations. Expanded cancellation powers do not alter the framework within which decisions are made. Where a delegate of the Minister makes a decision to cancel or refuse a visa under section 501 of the *Migration Act 1958* (Act), that decision is merits reviewable through the Administrative Appeals Tribunal (AAT). At either the primary decision or review stage, non-refoulement obligations must be considered as part of the requirement to exercise the discretion to refuse or cancel a visa. Further, both departmental delegates and AAT members are bound by Ministerial Direction 65, which in part requires non-refoulement obligations to be considered. While personal decisions of the Minister are not merits reviewable, such decisions can be appealed to the Federal Court on the basis the Minister has made an error of law when making the decision. Further, there are other mechanisms within the Act which provide the Government with the ability to address non-refoulement obligations before removal. This occurs through the protection visa process or the Minister's personal public interest powers in the Act.

The amendment does not, and is not intended to, affect opportunities set out elsewhere in the Act which enable the Government to be satisfied that a person's removal will not breach Australia's non-refoulement obligations. These Act amendments are not incompatible with Australia's non-refoulement obligations.

Right to liberty

1.77 The committee therefore considers that the expansion of visa cancellation powers, in the context of Australia's mandatory immigration detention policy, limits the right to liberty. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise 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.**

The amendments introduced strengthen the visa cancellation provisions; they do not alter the detention powers or framework already established in the Act. The Statement of Compatibility (SOC) outlined the Government's position that the detention of unlawful non-citizens as the result of visa cancellation is neither unlawful nor arbitrary *per se* under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. The amendments widen the scope of people being considered for visa cancellation or refusal, and the Government's position is that these amendments present a reasonable response to achieving a legitimate purpose under the Covenant – the safety of the Australian community.

The SOC further stated that the character and cancellation provisions were amended in order to address the risk to the Australian community posed by non-citizens of character, integrity or security concern. The safety of the Australian community, particularly in the current security environment, is considered to be both a pressing and substantial concern and a legitimate objective. The cancellation of a non-citizen's visa in circumstances where they present a risk to the Australian community, and their subsequent detention prior to removal, follows a well-established process within the legislative framework. I would reiterate, as stated in the SOC, the amendments do not limit a person's right to security of the person and freedom from arbitrary detention. However to the extent that it may be interpreted as limiting the obligations in Article 9 of the ICCPR, there is clearly a rational connection between ensuring non-citizens who present a risk to the Australian community can be considered for visa cancellation or refusal and the legitimate objective of protecting the safety of the Australian community from those who pose a risk to it. Further, people who are affected by these measures will still continue to be able to challenge the lawfulness of their detention in accordance with Article 9(4).

Right to freedom of movement

1.86 The committee therefore considers that the expansion of visa cancellation powers may limit the right to freedom of movement and specifically the right of a permanent resident to remain in their 'own country'. As set out above, the statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise 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 disagree with the committee's view that the reference to a person's own country is not necessarily restricted to the country of one's citizenship. It is the Government's position that a person who enters a State under that State's immigration laws cannot regard the State as his or her own country when he or she has not acquired nationality in that country. In any event, the enhanced cancellation and refusal powers are limited to visa cancellation and refusals only and therefore do not fall within article 12(4). Further, the non-citizen's ties to the Australian community, including their length of residence is taken into account when considering the cancellation or refusal of their visa. The amendment is therefore compatible with human rights because it is consistent with Australia's human rights obligations

Right to freedom of association

1.95 The committee therefore considers that the amendment providing that a person will not pass the character test on the basis of group membership or association limits the right to freedom of association. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

A finding that a person does not pass the character test based on an association with a specific person, group or association is not in itself a decision to refuse or cancel a visa. Rather, it then enlivens the discretion whether or not to cancel a visa. As articulated in the SOC this amendment is targeted specifically at non-citizens who have associations to criminal motorcycle gangs, terrorist organisations, organised criminal groups, people smuggling, people trafficking, or involvement in war crimes, genocide or human rights abuses. It is the Government's position that these types of associations or memberships may present a risk to

the Australian community or represent a national security risk. The Government therefore considers it reasonable that non-citizens with these types of memberships or associations are thoroughly scrutinised and assessed in order to determine the level of risk these associations might pose to the Australian community. There is no intention that this new association ground will be used to cancel or refuse the visas of non-citizens who do not pose a risk to the Australian community. As stated in the SOC, creating a disincentive for non-citizens to associate with criminal organisations, or other people involved in criminal activity is seen as reasonable, proportionate and necessary, and has a rational connection to the legitimate objective of protecting the Australian community.

Right to freedom of opinion and expression

1.103 The committee therefore considers that the lowering of the threshold for the character test where there is a 'risk' that a person would incite discord in the community limits the right to freedom of expression and opinion. As set out above, the statement of compatibility does not justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:

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

A finding that a person does not pass the character test based on the risk a person would incite discord in the community is not in itself a decision to refuse or cancel a visa. Rather, it then enlivens the discretion whether or not to cancel a visa. It is the Government's position that lowering the existing risk threshold in this provision of the character test is an appropriate response to the current security climate as the right to freedom of expression may have an express limitation for the purposes of national security, public order, public safety, public health or morals and the respect of the rights or reputation of others. In any event, lowering the risk threshold in this way does not regulate a person's ability to express certain views.

Departmental delegates are instructed to consider these grounds against Australia's well established tradition of free expression. However, where a non-citizen's opinions may attract strong expressions of disagreement or condemnation from the Australian community, the views of the community will be a consideration in terms of assessing the extent to which particular activities or opinions are likely to cause discord or unrest.

The Australian Government will not tolerate public statements from non-citizens that encourage or advocate violence against other people, or violence as a legitimate form of political expression. It is the Government's position that lowering this risk threshold is entirely appropriate and aimed as the legitimate objective of protecting public safety. Lowering the risk threshold will ensure non-citizens who may pose a risk to the Australian community by advocating violence are thoroughly scrutinised and the risk they pose is properly assessed. As such, to the extent that there may be any limitation on the right to freedom of expression, there is a clear and rational connection between allowing a thorough assessment of risk and the legitimate aim of protecting public safety. The Government

believes this limitation is a reasonable and proportionate measure to ensure public safety, particularly in the current security environment.

Right to privacy

1.115 The committee therefore considers that the requirement to provide personal information for the purposes of the character test limits the right to privacy. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **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.**

Section 501 of the Act sets out the basis upon which a person could be found to not pass the character test. Section 501L of the Act is clearly limited to the Minister requesting information from a State or Territory agency, that the agency can reasonably acquire, and where the information is *relevant* to the assessment of whether or not a non-citizen passes the character test. In this regard, I do not agree with the committee's view that this represents a broad and unconstrained requirement to share personal information.

I would reiterate that this legislative provision puts beyond doubt that my department has a legislative basis upon which to obtain information relevant to a non-citizen's character. To the extent that this is a limitation of person's right to privacy, there is rational connection between this limitation and the Government's objective of protecting the Australian community from the risk of harm by a non-citizen who is suspected of not passing the character test. It is reasonable and proportionate that State, Territory and Federal Government departments are able to share information about non-citizens who may do harm or engage in criminal activity where that information is relevant to the assessment of that person against the character test.

This amendment does not alter the way in which information received by the Government in relation to non-citizens is used, disclosed and stored. My department has in place a Privacy Policy to address its obligations regarding collection, use and disclosure of personal information, and sets out how the department complies with its obligations under the *Privacy Act 1988*. All personal information held by my department is stored in compliance with Australian Government security requirements and includes the department's processes being the subject of mandatory reporting processes and protocols in accordance with guidelines issued by the Privacy Commissioner.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-001898

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

Dear Philip, Mr Ruddock

I refer to your letter of 24 March 2015 concerning the remarks of the Parliamentary Joint Committee on Human Rights (the committee) in relation to the *Migration Amendment (2014 Measures No.2) Regulation 2014*, and the *Migration Amendment (Subclass 050 Visas) Regulation 2014*.

The committee's remarks are contained in its *Twenty-first Report of the 44th Parliament*. My response addressing the remarks is attached.

Thank you for bringing the committee's views to my attention. I trust the attached information is of assistance.

Yours sincerely

PETER DUTTON 01/05/15

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

Non-refoulement obligations

1.59 The committee... seeks the advice of the Minister for Immigration and Border Protection as to whether imposing additional criteria to be satisfied before a visa can be granted, including a protection visa, complies with Australia's non-refoulement obligations under the [International Covenant on Civil and Political Rights] and the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment].

Regulation 2.03AA provides that, where a person is required to satisfy either or both of Public Interest Criterion (PIC) 4001 or 4002 for grant of a visa, the person must provide a statement from an appropriate authority about his or her criminal history and a completed approved Form 80 (*Personal particulars for assessment including character assessment*), if requested by the Minister. A waiver of the requirement to provide the criminal history statement is available where the Minister is satisfied that it is not reasonable for the applicant to provide it.

Regulation 2.03AA made no change to the requirement for existing visa applicants to be assessed against either or both of PIC 4001 or PIC 4002 where applicable. Historically, there have been numbers of visa applicants who have not completed the Form 80, or have not provided the information requested about their criminal history. Within the previous statutory framework, there was no mechanism to compel an applicant to provide the requested information, thus limiting the ability of the Department of Immigration and Border Protection (the Department) to comprehensively assess whether a visa applicant presented a character or security risk. The amendment ensures that a visa applicant who is required to satisfy PIC 4001 and/or PIC 4002 is also required to provide the documentation required to assess these PICs if requested by the Minister, with a waiver of the request available in certain circumstances.

This amendment has not changed the long-standing practice in relation to people seeking protection, being that protection visa applicants will not be required to obtain a criminal history statement from an authority in a country from which protection is sought. It is important to note that under existing and long-established policy guidelines, there are already waiver provisions in place to this effect.

It is also the case that the amendments have no impact on the independent, effective and impartial review of visa decisions. Whether or not merits review is available to a visa applicant of a Departmental decision depends on other provisions in the *Migration Act 1958* (the Migration Act). This means that merits review may be available to a visa applicant refused a visa due to a failure to satisfy either regulation 2.03AA or the applicable clause in Schedule 2 to the *Migration Regulations 1994* (the Migration Regulations) that requires satisfaction of PIC 4001 and/or PIC 4002, as has always been the case. As part of the review process, the merits review body will be able to consider whether it was reasonable for the applicant to be required to provide evidence of their criminal history from an appropriate authority in their home country.

As stated in my response to the committee's *Nineteenth report of the 44th Parliament*, whilst noting the committee's concerns, it is the Government's position that while merits review can be an important safeguard, there is no express requirement under the International Covenant on Civil and Political Rights (ICCPR) or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for merits review in the assessment of non-refoulement obligations. Australia does not seek to resile from or limit its non-refoulement obligations. Nor do the amendments affect the substance of Australia's adherence to these obligations. Further, there are other mechanisms under the Migration Act which provide the Government with the ability to address non-refoulement obligations. These include through the protection visa application process, the Minister's personal public interest powers in the Migration Act, and International Treaties Obligation Assessments that take place prior to a person's involuntary removal from Australia to confirm compliance with Australia's non-refoulement obligations, if such an assessment has not previously occurred.

It is the Government's view that this regulation amendment is not incompatible with Australia's non-refoulement obligations.

Right to liberty

1.66 The committee... considers that imposing additional criteria to be satisfied before a visa can be granted, in the context of Australia's mandatory immigration detention policy, limits the right to liberty. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise 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.**

The Government is of the view that the imposition of the additional criteria in regulation 2.03AA does not engage or limit the prohibition against arbitrary detention. This amendment is aimed at the minority of non-protection visa applicants who do not provide the required documents, and is applicable where a visa applicant does not comply with reasonable requests made by the Department for the purposes of assessing them against PIC 4001 or PIC 4002. The amendment ensures that a visa applicant who is required to satisfy PIC 4001 and/or PIC 4002 is also required to provide the documentation required to assess these PICs if requested by the Minister, with a waiver of the requirement available in certain circumstances.

This amendment is not intended to change long standing practices in relation to people seeking protection from Australia. It is important to note that under existing and long-established policy guidelines, there are already provisions in place to provide that a protection visa applicant is not required to obtain a statement from an appropriate authority, such as a penal certificate, in relation to a country from which they are claiming protection.

Regulation 2.03AA made no change to the requirement for existing visa applicants upon whom PIC 4001 and/or PIC 4002 are imposed, to be assessed against those PICs in order for character and security risks to be assessed. As stated in my response to the committee's *Nineteenth report of the 44th Parliament*, the safety of the Australian community, particularly in the current security environment, is considered to be both a pressing and substantial concern and a legitimate objective. The refusal to grant a visa in circumstances where the applicant presents a risk to the Australian community, and their subsequent detention as an unlawful non-citizen prior to removal from Australia, is undertaken within a well-established legislative process. I would reiterate, and as previously stated in the Regulation's Statement of Compatibility with human rights, that the amendments do not limit a person's right to security of the person and freedom from arbitrary detention. To the extent that it may be interpreted as limiting the obligations in Article 9 of the ICCPR, there is a clearly rational connection between ensuring that non-citizens in Australia who present a risk to the Australian community can be considered for visa refusal on character grounds, and the legitimate objective of protecting the safety of the Australian community from those who may pose a risk to it. Further, people who are affected by these measures will continue to be able to challenge the lawfulness of their detention in accordance with Article 9(4). As noted above, the amendments also have no effect on the availability of review of visa refusal decisions.

This regulation amendment does not alter the detention powers or framework already established in the Migration Act. The Statement of Compatibility which accompanied the Explanatory Statement to the Regulation outlined the Government's position that the detention of unlawful non-citizens as the result of visa refusal is neither unlawful nor arbitrary under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. While the amendments provide that a small number of visa applicants may be considered for visa refusal, it is the Government's position that these amendments present a reasonable response to achieving a legitimate purpose– being the safety of the Australian community.

Right to freedom of movement (right to return to Australia)

1.75 The committee... considers that the expansion of the exclusion criteria may limit the right to freedom of movement and specifically the right of a permanent resident to return to their 'own country'. As set out above, the statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise 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.**

As stated in my response to the committee's *Nineteenth report of the 44th Parliament*, I respectfully disagree with the committee's view that the reference to a person's own country is not necessarily restricted to the country of one's citizenship. It is the Government's position that a person who enters a State under that State's immigration laws cannot regard the State as his or her own country when he or she has not acquired nationality in that country. The expansion of the 'exclusion criteria' to include all character cancellation decisions is limited to visa cancellations only. It is the Government's view that this does not fall within article 12(4) of the ICCPR because the legislation has not been extended to matters of Australian citizenship. In deciding whether or not to cancel a non-citizen's visa, a decision-maker will take into account the non-citizen's ties to the Australian community, including their length of residence. The amendment is therefore compatible with human rights because it is consistent with Australia's international human rights obligations.

Obligation to consider the best interest of the child.

1.81 The committee considers that the regulation engages and limits the obligations to consider the best interest of the child. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the regulation may be regarded as proportionate to its stated objective. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the obligations to consider the best interests of the child.

It is possible that a minor could have his or her visa cancelled under section 501, 501A or 501B of the Migration Act, however, it would be rare that a person under the age of 18 would be considered against the character test in subsection 501(6) of the Migration Act. Policy guidelines on minors who may not pass the character test in subsection 501(6) of the Migration Act relevantly state:

> The fact that the person is under 18 must be given significant consideration. Therefore, the whereabouts of the minor's parents will be crucial in deciding whether to pursue visa cancellation or refusal for the minor. Under policy, cancellation or refusal should not be pursued if that decision would result in the minor being separated from their parents or legal guardians, unless the minor does not pass the character test because of an extremely serious offence.
>
> Cancellation or refusal may be considered appropriate in cases involving less serious offences where the decision would not result in the minor being separated from their parents or legal guardians. An example would be a 16 year old who is in Australia as the holder of a student visa and whose parents live in the home country.

In circumstances where a minor is being considered for visa cancellation under section 501 of the Migration Act (or sections 501A or 501B), the individual's legal guardians would also be included in any procedural fairness process, and the person's age when they committed the act(s) that brought them within the scope of the character test would be a relevant factor to consider when exercising the discretion to cancel their visa. As stated in the Statement of Compatibility for this Regulation, the Minister's delegates and Administrative Appeals Tribunal members making a decision under section 501 are bound by a Ministerial Direction made

under section 499 of the Migration Act which requires a balancing exercise of countervailing considerations.

In all visa cancellation decisions based on the character test, the best interests of the child are a primary consideration. While rights relating to children generally weigh heavily against visa cancellation, there will be circumstances where this may be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record or past behaviour or associations.

The decision to cancel a non-citizen's visa under section 501 of the Migration Act relates only to the individual who has been found to not pass the character test. Any associated visa holder of a non-citizen who has had their visa cancelled under the character provisions, such as a spouse or child, would continue to hold their visa, and would not be subject to consequential visa cancellation under any provision of section 501. Therefore, a minor would not be subject to an exclusion period under SRC 5001 due to imposition of the character provisions in section 501 on an associated visa holder.

MINISTER FOR INDIGENOUS AFFAIRS

Reference: MC16-011213

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

Dear Mr Ruddock

Thank you for your letter dated 2 February 2016 regarding the Parliamentary Joint Committee on Human Rights' assessment of the Social Security Legislation Amendment (Community Development Program) Bill 2015 (the CDP Bill).

As outlined in the Explanatory Memorandum, the changes proposed in the CDP Bill promote rights to social security, an adequate standard of living, to work and are consistent with the right to equality and non-discrimination. To the extent (if any) that they may limit human rights, those limitations are reasonable, necessary and proportionate to support job seekers in remote Australia, by strengthening the existing incentives for remote job seekers to actively engage with their income support activity requirements and opportunities to participate and remain in paid work. Please see Attachment A for further information on the Bill's compatibility with human rights.

There has been significant interest in participation in phase one of the reforms and I have met with providers in Queensland, New South Wales, Western Australia, South Australia and the Northern Territory to explain the proposed model, as has the Department of the Prime Minister and Cabinet. All CDP service providers have attended a two-day meeting with Departmental staff and myself in February 2016 as part of ongoing engagement with providers. The meeting included consultation on the proposed reforms and the feedback and input that I received during this meeting will inform the design of the legislative instrument. My Department will continue to work closely with CDP providers over the coming months.

The measures in the CDP Bill are reasonable and proportionate to achieve its objectives. They apply equally to all job seekers who reside in remote income support regions in Australia, the measures in the CDP Bill are non-discriminatory and are not a special measure.

Please note that I have committed to making further information in relation to the detail of the scheme available to members of Parliament before debate of the CDP Bill and expect to circulate consultation papers on the proposed CDP penalties scheme and compliance framework by mid-March. I will also make these papers available to the committee at this time.

Thank you for the opportunity to respond to your concerns.

Yours sincerely

NIGEL SCULLION

23 / 2 / 2016

Further information on the compatibility of the CDP Bill

The new obligation and penalty arrangements promote the right to social security by helping job seekers avoid future compliance action and therefore, receive income support payments to a greater extent.

The current national job seeker compliance framework is not well suited to the needs of remote job seekers. The Department of the Prime Minister and Cabinet (PM&C) receives consistent feedback from communities and provider organisations that:

- Current arrangements are not easily understood by remote job seekers which means that behavioural change happens slowly, if at all.
- The current compliance system arrangements mean jobseekers experience long delays. Having to interact with a compliance system that is run from major cities potentially thousands of kilometres away makes it difficult to apply the necessary agility and immediacy to overcome the pervasive welfare reliance in remote Australia.
- Communities want arrangements that better combine income support with employment opportunities and community development projects, with sufficient community control to ensure participation can be maximised.

As a result of current compliance arrangements, job seekers do not understand the link between attending activities and receiving income support. Therefore, behaviour is not changing. This is indicative of a historically high trend in non-attendance and disengagement with employment services in remote Australia. At end of June 2015, 22 per cent of all financial penalties nationally were applied to CDP participants. In early July 2015, less than 5 percent of the CDP caseload attended their activity. By the end of December 2015 attendance had improved but was still tracking low, at just under 25 per cent. Despite the increase in application of penalties under CDP, attendance in activities remains disproportionately low.

The changes proposed in the CDP Bill will simplify the system and make it easier for job seekers in remote Australia to understand the link between attendance at CDP activities and income support payments. These changes will also enable, through legislative instruments, the application of a simpler compliance framework that is tailored to the unique social and labour market conditions in remote Australia. Ultimately, these changes will make it easier for these job seekers to understand their obligations and also help them to avoid compliance penalties.

In addition, the CDP Bill makes it possible for penalties to be applied in the same week by a locally based decision maker with direct and more immediate access to job seekers. This more immediate relationship between payments and attendance is designed to encourage job seekers to attend more of their activities so that they incur fewer penalties.

It is also worth noting that the arrangements do not limit the right to social security as the changes proposed in the CDP Bill do not reduce the general entitlements of job seekers or make their obligations more onerous. For instance, the reforms will not change the amount a job seeker is entitled to receive (their maximum basic rate) or their hours of obligation.

The protections afforded to job seekers in relation to review and appeals processes will remain substantively the same as existing arrangements under the social security law. Review processes will be in place, with PM&C responsible for reviewing provider decision making on payments and compliance (similar to review processes within the Department of Human Services (DHS)). Other protections with respect to reviews of payment decisions and financial penalties, including recourse to the Administrative Appeals Tribunal, will be retained.

Appropriate safeguards against unnecessarily limiting a person's right to social security such as clear, consistent guidelines for providers and robust external review processes will be in place to ensure that decision-making does not lead to inconsistent treatment of job seekers. In addition, section 1061ZAAZ(2)(ii) of the CDP Bill requires the Minister to consider whether there is social and economic disadvantage within the proposed region prior to determining a remote income support region. A limitation (if any) is reasonable, proportionate and necessary to achieve the legitimate objectives of the CDP Bill in addressing entrenched welfare and disadvantage in the relevant region.

In addition, any limitation is proportionate to achieve the Bill's objective, as the reforms are designed to overcome the inherent imbalance in employment opportunities and consequential disadvantage experienced in parts of remote Australia.