Appendix 1

Correspondence

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MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS15-029756

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
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Parliament House
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Dear ~~Mr~~ Philip, Ruddock

Thank you for your letter of 1 December 2015 concerning the remarks of the Parliamentary Joint Committee on Human Rights (the committee) in relation to the Migration Regulations 1994 - Specification of Required Medical Assessment - IMMI 15/119 [F2015L01747].

The committee's remarks are contained in its *Thirty-second Report of the 44th Parliament*.

I also refer to your letter of 2 November 2015, in which you sought an update on the progress of the response to the committee's remarks in its *Twenty-second Report of the 44th Parliament*, concerning the Australian Border Force Bill (now Act) 2015. I apologise for the delay in responding.

My response addressing the committee's remarks regarding the Migration Regulations 1994 - Specification of Required Medical Assessment - IMMI 15/119 [F2015L01747] and the Australian Border Force Bill 2015 is attached.

Thank you for bringing the committee's views to my attention.

Yours sincerely

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Australian Border Force Act 2015

Organisational suitability assessment (OSA)

1.46 The committee seeks further information as to the content and nature of any proposed OSA, including the information required to be disclosed as part of the assessment, which individuals will be required to complete the OSA and the consequences of an adverse OSA for that individual's employment. In light of this, the committee seeks further information as to the human rights compatibility of imposing an OSA requirement under the bill.

As part of measures to increase the Department's resistance to corruption and establish a strong integrity framework, the Secretary is able to direct Immigration and Border Protection (IBP) workers to undertake an organisational suitability assessment (OSA) (known as employment suitability screening) and, where an Employment Suitability Clearance (ESC) is held, to meet ongoing requirements. The requirement to obtain and maintain an ESC reflects the Department's operating environment.

The Committee states that 'It is unclear why such assessments are required across the department when such assessments are not routinely applied in other Commonwealth departments.'

The Australian Government's Protective Security Policy Framework (PSPF), and specifically the *Personnel Security Guidelines* (October 2014), requires Commonwealth agencies to undertake general employment screening to determine personnel's suitability to be entrusted with Australian Government resources as well as agency specific checks to mitigate any personnel security threats applicable to the agency that are not addressed by general employment screening.

Agencies are to identify checks necessary to mitigate additional agency personnel security risks where these are not addressed by minimum employment screening.

> 'Some examples of character checks may be, but are not limited to:
>
> - drug and alcohol testing
> - detailed financial probity checks, including wealth and credit checks
> - psychological assessment
> - agency specific questionnaires or other tests related to the industry, and
> - partial or full exclusions under Part VIIC of the *Crimes Act 1914* (Cth), the Spent Convictions Scheme relating to engagement in positions covered by specific legislations to which exemptions are given.'

Further, the PSPF provides that agencies '...are to manage and assess the ongoing suitability of all personnel'. The requirements of the PSPF regarding employment suitability screening are distinct from, and additional to, the requirement on agencies to ensure that personnel with ongoing access to Australian Government security classified resources hold security clearances at the appropriate levels. Employment suitability screening, known as OSA, was in place for a number of years for all staff of the former Australian Customs and Border Protection Service (ACBPS). The requirement to hold and maintain an ESC is the Department's additional employment

suitability screening measure, consistent with the PSPF and reflecting the particular vulnerabilities and risks faced by the Department, including the Australian Border Force (ABF).

The Department is responsible for managing the integrity of the Australian border, a national strategic asset, which requires significant trust. To retain the confidence of the Government and community the Department must maintain a culture resistant to corruption.

The ESC process seeks to identify integrity risks based on a person's character and the detection of any criminal associations. Employment suitability screening may require IBP workers to declare any family, friends or associates whose activities, for example a criminal history or associations with organised crime or an Outlaw Motorcycle Gang, may be relevant to the assessment of the worker's organisational suitability and the assessment of the worker's honesty, integrity and trustworthiness.

Noting the Department's role, the restrictions on Articles 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR) are therefore necessary in the interests of national security, public safety, public order and the protection of the rights and freedoms of others.

I acknowledge that some associations are unavoidable and it is intended that relevant policies would not require IBP workers to relinquish close familial ties. Together with the worker, my Department will conduct a risk assessment of the individual's circumstances and the risk posed by maintaining a declarable association with a family member.

I consider that restrictions imposed on IBP workers, such as having to cease an association or declare further contact with such persons, is proportionate to the interests of national security as there are procedures and protections in place to ensure that the right to freedom of association is not unduly restricted. For example, aftercare arrangements are put in place where risks identified during employment suitability screening can be adequately and cost effectively mitigated or managed. This provides support to employees in terms of offering an alternative to not being granted an ESC.

Furthermore, strict protocols and procedures for conducting employment suitability screening and rules of procedural fairness apply. Under the screening process arrangements, employees with an adverse decision are provided with the reason/s for the outcome and an opportunity to respond. Any responses are reviewed by the decision maker prior to making the decision. The only exception to this is if it relates to a matter otherwise protected by law.

The direction to obtain and maintain an ESC requires an employee to provide personal information about themselves and their associates in the form of a questionnaire so that screening can be undertaken to assess if an employee is suitable from an integrity and character perspective.

I consider the requirement to provide personal information, which may also impact on a person's reputation and that of other people, to be proportionate to the interests of national security as there are procedures and protections in place to ensure that the rights to privacy and reputation are not unduly restricted.

Personal information obtained from an ESC screening process may be accessed by members of the Employment Suitability Team, and members of the Integrity and Professional Standards Branch, on a strict 'need to know' basis and is stored in appropriately rated and secure containers and IT systems. It is essential for members of the Employment Suitability Team to disclose personal information to facilitate checks with a range of law enforcement, intelligence and regulatory agencies. Personal information collected, used, disclosed and stored during screening processes is in accordance with the *Privacy Act 1988* (the Privacy Act) and Part 6 of the *Australian Border Force Act 2015* (ABF Act).

Drug and alcohol testing

1.55 The committee considers that the imposition of a drug and alcohol testing regime across the Department of Immigration and Border Protection engages and limits the right to privacy. As noted above, the statement of compatibility has not sufficiently justified this limitation for the purposes of international human rights law. The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the measure is a proportionate means of achieving the stated objective, particularly whether there are effective safeguards over the measures.

Preventing the movement of illicit substances and prohibited and restricted goods across the border is a core element of the Department's responsibilities. Where individuals are privately participating in activities that include the use and possession of illicit drugs, this behaviour is in conflict with official duties.

The introduction of drug and alcohol testing is part of a broader Drug and Alcohol Management Programme put in place by the Department. This programme meets the Australian standards for drug and alcohol testing and includes an education component to ensure IBP workers are aware of their responsibilities and rights. The Department has worked closely with staff and their representatives to develop policies that are transparent, fair and consistent and allow the Department to ensure the integrity of the process and the test results.

In the absence of a positive test, details of IBP workers subject to drug and alcohol testing will only be accessible to:

- members of the Drug and Alcohol Management Programme team;
- the laboratory technicians analysing the collected samples; and
- the Medical Review Officer.

Where an IBP worker returns a positive test, the matter is referred to the Integrity and Professional Standards Branch for assessment against the APS Code of Conduct.

In relation to drug and alcohol testing procedures, each sample is only identified by a reference number, therefore neither the laboratory staff nor the Medical Review Officer know the identity of the person being tested until the Medical Review Officer verifies a sample has returned a 'positive' test. Prior to a test being positive, only members of the Drug and Alcohol Management Programme team are able to match a reference number to an individual staff member.

Further, the information is only used by, or disclosed to, other workers/agencies in accordance with the Australian Privacy Principles. The medical provider is also required to comply with the requirements under the Privacy Act in collecting, using and disclosing personal information.

Prior to action being taken by the Department, the person being tested is given an opportunity to discuss the results with the Medical Review Officer. This information is used by the Medical Review Officer in determining whether a verified positive result is within acceptable parameters considering any declaration made by the individual being tested.

Any other information revealed about the person during this process is only transmitted to the Department where it is determined the information is likely to cause a significant hazard to the workplace and there is a direct relationship to the individual's functions and potential integrity. An example may include where a worker in a designated 'use of force' position has not declared that they are taking medications that the Medical Review Officer considers may impact on their ability to use a firearm.

The Committee states that whilst '...drug and alcohol testing is not uncommon for law enforcement agencies, it would seem unusual for such a regime to apply across a public service department.... It is not clear...why immigration workers not engaged in the ABF should be subject to such a regime.'

Drug and alcohol testing was introduced to the former ACBPS with the amendment of the *Customs Administration Act 1985* in 2012. The powers introduced into that Act mirror the powers provided now in the ABF Act. Those powers facilitated a testing regime that applied to the whole of the former ACBPS workforce, and not just persons in frontline, operational positions. It is important to note other agencies that conduct drug and alcohol testing such as the Australian Crime Commission and the Australian Federal Police test their entire workforce, not just operational staff.

Whilst the ABF carries out significant law enforcement functions, including detecting and disrupting the importation of prohibited narcotics, the Department underpins and supports the ABF's operation in every way. Additionally there is ready and fluid movement of personnel between the Department and the ABF. As such, the risk posed to the integrity of the ABF's functional effectiveness and reputation is not sufficiently managed by restricting drug and alcohol testing to ABF personnel only. Were an employee of the Department to be found to have used a prohibited narcotic, whether that person is working in the ABF or in another departmental role, the reputational risk to the Department as a whole is the same. And from a personnel security risk perspective, an officer in the information technology or intelligence divisions using prohibited narcotics poses just as significant a vulnerability as a frontline officer working in an airport or a cargo examination facility.

The testing regime is proportionate to the interests of ensuring the integrity and reputation of the Department as a whole, thus enhancing community trust in the Department's capacity for managing the integrity of the Australian border, a national strategic asset. To retain the confidence of the Government and community, the Department must maintain a culture resistant to corruption.

The requirement to provide personal information is considered to be proportionate to the interests of national security as there are procedures and protections in place to ensure that the rights to privacy and reputation are not unduly restricted.

The absence of sufficient safeguards and lack of limitations on intrusiveness and the retention of records

The *Australian Border Force (Alcohol and Drug Tests) Rule 2015* (the Rule) requires that a drug or alcohol test conducted for section 34, 35 or 36 of the ABF Act be conducted in a respectful manner, and in circumstances affording reasonable privacy to the IBP worker. The Rule requires that tests must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the test, and that the test must not involve the removal of more clothing than is necessary for the conduct of the test, and more visual inspection that is necessary for the conduct of the test. Further, if practicable, the test must be conducted by a person of the same sex as the IBP worker. In collecting a hair sample for a drug test, the authorised tester must use the least painful technique known and available, must only collect the amount of hair necessary for the conduct of the test, and cannot collect the sample from the IBP worker's genital or anal area or buttocks.

The Rule limits the amount of information that may be collected from a drug or alcohol test conducted for section 34, 35 or 36 of the ABF Act to information relating to the detection of alcohol or prohibited drugs. A body sample or other record relevant to a test must be kept in a secure location unless destroyed in accordance with the Rule. A positive body sample (one that does indicate the presence of alcohol or prohibited drugs) must be destroyed no later than two years from the day of the test. A negative body sample must be destroyed no later than 28 days after the day of the test. The two year retention period for a positive test allows for disciplinary action and any contest of such actions that may follow a positive result. Other records relating to an alcohol or drug test may be retained until such time as the IBP worker to whom the record relates ceases, for any reason to be an IBP worker.

The lack of criteria about what the Secretary or ABF Commissioner might consider in prescribing a prohibited drug

The concern of the committee is noted; however, it is not always appropriate to be overly prescriptive in primary legislation. I consider that the benefits of providing a definition are outweighed by the risks arising from evolving and changing nature of the drug environment.

Providing a definition of a 'prohibited drug' will confine the ability of the Department to meet the challenges presented by new drugs and will undermine the ability of the Department to maintain a drug free workplace. Defining the term by legislative instrument will provide a lawful and flexible mechanism to allow the Secretary and ABF Commissioner to respond quickly to this ever-changing environment.

Further, this instrument is a disallowable instrument in accordance with the *Legislative Instruments Act 2003* and is subject to scrutiny by Parliament. Any determination made by the Secretary or ABF Commissioner will be subject to oversight by Parliament.

Declaration of serious misconduct

1.60 The committee considers that excluding provisions of the Fair Work Act engages and limits the right to just and favourable conditions of work. The committee considers that the statement of compatibility has not explained the legitimate objective of the measure. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether Part 4 of the bill is compatible with the right to just and favourable conditions of work, 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.

Section 32 of the ABF Act provides that the Secretary or the ABF Commissioner may make a written declaration of serious misconduct where the Secretary or the ABF Commissioner reasonably believes that an employee's conduct or behaviour amounts to serious misconduct and is having or is likely to have a damaging effect on the professional self-respect or morale of some or all of the APS employees in the Department or the reputation of the Department. This power may only be exercised once a person's employment has been terminated by the Secretary or delegate, and does not reduce the obligation on the Department to accord the person a fair process in determining whether or not they have breached the Code of Conduct, and, if they have, whether they should be dismissed as a sanction for that breach.

The declaration cannot be used for behaviour that falls short of the definition of serious misconduct. Serious misconduct is defined as corrupt conduct engaged in, a serious abuse of power, or a serious dereliction of duty, or any other seriously reprehensible act or behaviour, whether or not acting, or purporting to act, in the course of the worker's duties. This definition is consistent with the definition that was in the *Customs Administration Act 1985*, and the definition currently in the *Australian Crime Commission Act 2002* and the *Australian Federal Police Act 1979*.

It is intended that the serious misconduct declaration will minimise the risk of reinstatement. Although reinstatement may be rarely ordered in practice, formally under the *Fair Work Act 2009* it is the remedy of first resort: see s. 390. Therefore, the application of the Fair Work Act may result in the person having to be reinstated, and reinstated relatively quickly. This poses significant risks to the Government and the community in light of the expanded law enforcement role of the Department, and that the workforce is exposed to increased attempts by criminal elements to penetrate, compromise and corrupt officers. In the first place, if the Fair Work Commission's review of a dismissal were to result in a person being reinstated, this would send a mixed signal to the community and the workforce about the tolerance of serious misconduct within the Department. Avoiding sending this message, and enhancing the ABF's capability to deal with serious misconduct, should be upheld as a legitimate objective in the same way the limitation on Part 3-2 of the Fair Work Act was upheld when it was introduced in section 15A of the *Customs Administration Act 1985*. In the second place, to the extent that the Fair Work Commission's unfair

dismissal jurisdiction operates speedily, so that a person can be reinstated within a couple of months, there is a risk that a person could be returned to the workforce before the Department has been able, for example, to implement measures to prevent the particular mechanism for corruption exploited by the person being reinstated. Equally, there is a risk that a person, who, for example, has engaged in seriously reprehensible behaviour, could be returned to the workforce before morale in the Department, or the Department's reputation in the community, has had a chance to recover.

The limitation regarding Part 3-2 of the Fair Work Act is reasonable and proportionate because alternative avenues remain to seek remedies (though only exceptionally a remedy similar to reinstatement) under Part 3-1 (general protections claims). The ABF Commissioner's written declaration of serious misconduct will be a reviewable decision under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The option of judicial review under ADJR Act should be considered an adequate alternative because it provides a mechanism to ensure that the decision to terminate employment was reasonable in the circumstances, with less chance that the Government and the community is exposed to the risk that an employee who has engaged in corrupt conduct is reinstated to a position of public trust and confidence.

This provision mirrors the declaration provision that applied to former ACBPS employees, both those in operational roles and non-operational roles, under section 15A of the Customs Administration Act and it is proposed to replicate its effect across the integrated Department. Section 15A of the Customs Administration Act was modelled on the declaration of serious misconduct provisions applicable to Australian Crime Commission and Australian Federal Police staff. The provision was introduced into the Customs Administration Act in 2012 as part of a series of measures designed to increase the resistance of the ACBPS to corruption and to enhance the range of tools available to ACBPS to respond to suspected corruption. At this time the Committee scrutinised this provision and was satisfied that this measure is compatible with the right to an effective remedy. It is therefore appropriate to reiterate that while Article 2(3)(a) of the ICCPR is based on the premise that any person who has their rights or freedoms violated shall have an effective remedy, Article 2(3)(b) qualifies this right more prescriptively. Article 2(3)(b) states that the right shall be *'...determined by competent judicial, administrative or legislative authorities, or by any competent authority provided for by the legal system of the state and to develop the possibilities of judicial remedy.'* In the same way that former ACBPS workers were still considered to have an avenue to seek redress for their dismissal through the ADJR Act, workers affected by section 32 of the ABF Act have the same avenue to develop the possibilities of judicial remedy to their dismissal.

<u>Delaying the date of resignation</u>

1.66 The committee considers that giving the secretary and the ABFC the power to delay resignation to complete an investigation into serious misconduct engages and limits the right to just and favourable conditions of work. The committee considers that the statement of compatibility has not explained the legitimate objective of the measure. The committee therefore

seeks the advice of the Minister for Immigration and Border Protection as to whether Part 3 of the bill is compatible with the right to just and favourable conditions of work, 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.**

Provisions in the ABF Act allow the Secretary or ABF Commissioner to defer an employee's date of resignation by up to 90 days from written notification of resignation by the employee where the Secretary or ABF Commissioner reasonably believes an employee has engaged in serious misconduct or is being investigated for such conduct. This enables the finalisation of any investigation, determination of breach of the APS Code of Conduct and consideration of whether to impose the sanction of termination of employment.

Under current provisions of the Public Service Act, an investigation into a breach of the APS Code of Conduct can continue after an APS employee has resigned. However, there is no provision to apply a sanction to the person once they are no longer an employee. This provision allows the resignation to be delayed so that any investigation can be concluded, and where warranted, a sanction can be applied.

It enables the Department to address incidences of serious misconduct, including corruption, through an investigation and subsequently to terminate an employee if serious misconduct is found to have occurred. This is considered an important demonstration to employees, the Government and the wider community of the Department's commitment to professionalism and high standards of integrity and its unwillingness to tolerate conduct that threatens these values.

The right to work includes the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts. Rights in work include the enjoyment of just and favourable conditions of work. I consider that this measure does not unduly restrict the right to work or rights in work because the effect of this provision would not require the employee to continue or resume duties during the period of investigation. It is intended that an employee who is being investigated for serious misconduct would be suspended from duties in accordance with section 28 of the Public Service Act and regulation 3.10 of the *Public Service Regulations 1999*.

Reporting of serious misconduct

1.69 In order to assess the compatibility of a direction that may require immigration and border protection workers to declare their associations, the committee requests a copy of the draft order and detailed information as to how the department proposes to implement the order in practice.

The provision of the ABF Act which enables the ABF Commissioner to issue directions requiring an IBP worker to report alleged serious misconduct or alleged criminal activity, by or involving an IBP worker, replicates a similar power that applied to employees of the former ACBPS under the Customs Administration Act. The

Customs Administration Act provision was introduced in 2012 as part of a package of integrity measures designed to increase the resistance of the ACBPS to corruption and to enhance the range of tools available to the ACBPS to respond to suspected corruption. At the time of the proposed amendments to the Customs Administration Act in 2012, the Committee scrutinised this provision and was satisfied that this measure is compatible with the right to minimum guarantees in criminal proceedings.

The former ACBPS Chief Executive Officer issued a direction in reliance on the Customs Administration Act provision in late 2012. That direction operated without incident, and was supported by internal guidelines and instructions.

On 1 July 2015, the Department relevantly published an Associated Document to the Instruction and Guideline on Employment Suitability Screening, regarding Declarable Associations which provides further information, as does the Secretary's Direction (under subsection 55(1) of the ABF Act) on Integrity Measures. These documents are available on the Department's website at the following link:

http://www.border.gov.au/about/access-accountability/integrity

1.77 The committee considers that the provisions that require an immigration and border protection worker to disclose information at the direction of the departmental secretary of ABFC [sic] even if that information would incriminate them, engages and limits the right to a fair trial. The committee considers that the statement of compatibility has not justified the abrogation of the protection against self-incrimination. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the limitations on the right to freedom from self-incrimination are compatible with 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 a reasonable and proportionate measure for the achievement of that objective.**

The intention of the power of the Secretary and the ABF Commissioner to impose mandatory reporting requirements is to promote full disclosure by IBP workers of misconduct which they observe or are involved in, so that action can be taken against IBP workers involved in corruption. Mandatory reporting contributes to a culture that does not ignore or condone corruption, serious misconduct or illegal activities, and where staff are supported to speak up. It is important that the Department be able to act on and undertake further investigations in relation to information obtained under these powers.

The effect of a derivative use immunity would be to ensure that any information derived by the Department, or another law enforcement agency, from a self-incriminatory disclosure could never be used to take action against the person who made that disclosure. Due to the nature of corruption offences, there are often few or no witnesses other than those directly involved in the corrupt conduct, and it may be difficult to obtain evidence other than that derived from the person's admissions.

If a person makes admissions of corrupt conduct under this provision, and that admission is substantiated by further investigations undertaken based on that admission, it is important that appropriate action can be taken against the person.

The ABF Act provides for the Secretary or the ABF Commissioner to be able to issue directions about mandatory reporting as well as other matters regarding the administration and control of the Department and the ABF. In the course of considering the application of the abrogation of the privilege against self-incrimination, a deliberate decision was taken to limit the breadth of orders to which the potential provision would apply. This reflected the approach under the Customs Administration Act. I consider that the current provision provides a balance between the public benefit in compelling the provision of information concerning possible corrupt activity affecting the Department and the privilege against self-incrimination.

<u>Secrecy and disclosure</u>

1.87 The committee considers that as the secrecy offence provision contains an evidentiary burden on the accused that the provision engages and limits the right to a fair trial. This has not been addressed in the statement of compatibility. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the offence provisions which include a reverse evidentiary burden is compatible with 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 a reasonable and proportionate measure for the achievement of that objective.**

Part 6 of the ABF Act does not change or alter what any criminal prosecution of an alleged breach must prove. An individual who is subject to a prosecution remains innocent until found guilty by a court and the offence in no way limits a defendant's right to a fair trial or limits their right to be presumed innocent. The onus remains on the prosecution to prove each element of the offence beyond reasonable doubt. If the defendant is claiming a defence to a breach of the prohibition on recording or disclosure of protected information, he or she bears the evidential burden in relation to whether one or more of the exceptions applied to his or her recording or disclosure. This evidential burden of proof in relation to exceptions to an offence is set out in subsection 13.3(3) of the *Criminal Code*, not Part 6 of the ABF Act. That is that any defendant who wishes to deny criminal responsibility bears an evidential burden in relation to that matter. This evidential burden applies to all offences across the Commonwealth. An evidential burden in relation to a matter means the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

The secrecy and disclosure provisions of Part 6 of the ABF Act reflect section 16 of the Customs Administration Act which regulated the disclosure of protected information and provided an offence of prohibited disclosure of protected information punishable by a maximum penalty of two years imprisonment. As the Explanatory

Memorandum for the ABF Act noted, the Department, including the ABF, creates, receives and uses critical and important information on a daily basis, including critical intelligence and personal information, much of which is sensitive and complex. As such, it is appropriate that measures that were in place when the ABCPS was a separate agency be applied to the Department as a whole. As noted above with respect to alcohol and drug testing, the Department underpins and supports the ABF's operation in every way and as such, the receipt, creation and use of sensitive and complex information is not limited to personnel in the ABF, but rather are spread throughout the Department. For these reasons, I consider that the secrecy offence pursues a legitimate aim. That is to ensure the integrity of the Department's handling of protected information by appropriately deterring other entrusted persons from engaging in conduct which leads them to breach the prohibition.

Given that aim of the secrecy offence, I consider that the burden to be borne by a defendant in denying criminal responsibility by adducing or pointing to evidence that suggests a reasonable possibility that an exception exists to a given disclosure, is reasonable and proportionate to achieving the aim of the secrecy offence. I further note that the provision is consistent with those of other agencies with law enforcement and national security responsibilities, such as the AFP.

For these reasons, I consider that the new strict liability offence is not inconsistent with the presumption of innocence set out in article 14(2) of the ICCPR.

1.93 The committee considers that the secrecy offence provision engages and may limit the right to an effective remedy as public interest disclosure of potential human rights abuses by employees or contractors of the department may be the only way in which potential human rights abuses come to the attention of the public and the relevant authorities. The engagement of the right to an effective remedy is not addressed in the statement of compatibility. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the offence provisions is [sic] compatible with the right to an effective remedy, 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.**

The *Public Interest Disclosure Act 2013* (PID Act) provides protection to 'whistleblowers' who provide information in breach of the provisions of Part 6 of the proposed ABF Act, where the disclosures are made in accordance with the PID Act. This protection is the same as that which was provided previously in respect of breaches of section 16 of the Customs Administration Act.

The secrecy offence provided by Part 6 of the ABF Act provides several exemptions to the offence, including if the disclosure is done in accordance with Part 6 itself, or if the disclosure is required or authorised by or under a law of the Commonwealth, State or Territory. The PID Act will, in certain circumstances, protect an entrusted person who discloses protected information in contravention of Part 6 of the ABF Act

(for example if the disclosure was made by an entrusted person who was not authorised to make the disclosure under sections 44 and 45 of the ABF Act).

Under the PID Act, the disclosure must relate to 'disclosable conduct'. 'Disclosable conduct' is set out in section 29 and includes, for example, conduct engaged in by a public official in connection with their position as a public official that contravenes a law of the Commonwealth. The disclosure must also be a 'public interest disclosure', the requirements for which are set out in section 26 the PID Act. For example, a person may only make an external disclosure provided all of the following requirements are met:

(a) the discloser previously made an internal disclosure regarding the information being disclosed externally; and

(b) the discloser believes that either:

the investigation (under Part 3) was inadequate; or

the response to an investigation was inadequate; or

the investigation was not completed within the time limit (90 days, or longer if extension

granted - section 52 of the PID Act); and

(c) disclosure is not, on balance, contrary to the public interest (see section 26(3) of the PID Act); and

(d) no more information is publically disclosed than is reasonably necessary to identify the instance(s) of disclosable conduct; and

(e) the information does not consist of, or include intelligence information (defined in section 41 of the PID Act); and

(f) none of the conduct with which the disclosure is concerned relates to an intelligence agency.

The PID Act provides immunity from any civil, criminal or administrative liability for making the disclosure in accordance the PID Act. Therefore, even if disclosure under the PID Act breaches Part 6 of the ABF Act, the entrusted person would not be subject to criminal liability for the offence under Part 6.

1.98 The committee considers that the offence provision limits the right to freedom of expression as it would restain [sic] an individual from discussing information gained in the course of their work with the department, including discussions that may be in the public interest. The limitation of this right was not justified in the statement of compatibility. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the bill is compatible with the right to freedom of opinion and expression, 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.**

By restricting 'entrusted persons' from communicating protected information, the secrecy and disclosure provisions limit freedom of expression. However, this restriction is considered necessary for the protection of public order and Australia's national security as the Department and the ABF within it will regularly create, receive and use sensitive and complex information including intelligence and personal information.

I consider that this measure is a proportionate and reasonable way to achieve this objective as the provision includes a comprehensive framework to regulate the disclosure of this information in appropriately controlled circumstances.

Migration Regulations 1994 - Specification of Required Medical Assessment - IMMI 15/119 [F2015L01747]

1.229 As stated above, the committee understands and supports the importance of protecting the Australian community from public health risks and containing public expenditure on health care and services; and considers that appropriate health checks are required in order to better promote the right to health. However, as the instrument is not accompanied by a statement of compatibility, the committee does not have enough information before it to establish if the instrument does impact disproportionately on persons with disabilities and, if so, whether any such disproportionate effect is justifiable.

1.230 The committee considers that the requirement for medical assessments for temporary visa applicants engages and may limit the right to equality and non-discrimination under articles 2 and 26 of International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities.

1.231 Noting that the instrument was not accompanied by a statement of compatibility, 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.**

The Committee has sought comment regarding recent changes to the health examinations that applicants for an Australian visa are required to complete in order to determine whether they meet the immigration health requirement.

These changes are aimed at achieving a legitimate objective

Almost all applicants for a visa to Australia are required to meet the health requirement in order to:

- protect the Australian community from public health risks (principally, active Tuberculosis – TB);
- contain public expenditure on health care and community services; and
- safeguard access to health services in short supply.

The Government applies a risk based approach to determine which visa applicants must complete immigration health examinations. This approach is known as the 'health matrix'. Health matrix settings are based on a number of factors including, but not limited to, the applicant's country of citizenship and its TB incidence rate, their intended activities in Australia and their proposed length of stay. The health matrix settings are reviewed and updated periodically.

A key focus of the health matrix is to ensure that immigration screening arrangements remain appropriately targeted and that Australia's low incidence of TB can be maintained. TB continues to be a serious worldwide public health threat and is now the greatest killer worldwide due to a single infectious agent. Australia has one of the lowest TB rates in the world despite increasingly large numbers of migrants from affected countries. The health matrix is important to the effectiveness of these processes.

Rational connection between the limitation and objective

It is noted that the particular instrument referred to has since been revoked, and replaced by instrument IMMI 15/144 [F2015L01826]; however, the replacing instrument has the same effect. The updates to the health matrix are designed to:

- more efficiently facilitate visa grant for hundreds of thousands of temporary entrants on a yearly basis while continuing to safeguard the Australian community from public health threats (in particular, TB);
- focus resources on higher risk cohorts with stay durations of six months or more, rather than on higher volume, shorter stay caseloads, such as Visitor visa holders, about whom clinical advice indicates are considered less likely to present with active TB while onshore; and
- align Australia's health screening settings more closely with those of our Five Country Conference (FCC) partners, which also have low rates of TB.

The Committee may wish to note that, as a result of these changes, the Department of Immigration and Border Protection (the Department) expects that approximately 40,000 less visa applicants will need to undertake immigration health examinations. This is primarily because, under the previous settings, high risk visa applicants were required to undertake a medical assessment if they were planning to stay in Australia for *three months or more.* Under the new settings, high risk visa applicants only need to undertake medical assessments if they intend to stay in Australia for *six months or more.* For low risk applicants, the settings continue to provide that, under ordinary circumstances, no health examinations are required for temporary visa applicants, regardless of the intended stay period.

As a result of updated TB data (which is informed by World Health Organization (WHO) data), and the shift to a two-tier health matrix, a small number of countries were reassigned to the high risk level, where they had previously been considered low or medium risk. These countries, places or former countries include: *Anguilla, Antarctica, Brazil, Colombia, Fiji, Greenland, Honduras, Libya, Maldives, Martinique, Panama, Singapore, St Barthélemy, St Martin, St Pierre and Miquelon, St Vincent/Grenadine, Suriname, Venezuela and Yugoslavia.*

As per current arrangements, additional health examinations may be requested based on relevant information known to the Department – for example, a declaration that the applicant may need medical treatment in Australia, or an intention to work in or visit a healthcare facility during their stay.

A reasonable and proportional measure for the achievement of that objective

The changes to the health matrix were informed by clinical expertise, and were endorsed by the National Tuberculosis Advisory Committee (NTAC) as well as the Chief Medical Officer of the Department of Health. The new health matrix settings take into account global TB prevalence rates, based on WHO data. I consider the new health matrix settings are reasonable and proportionate to the legitimate objective of reducing the incidence of TB in Australia.

As noted above, one aspect of the new health matrix settings is a move from a three month threshold to a six month threshold for screening high risk visa applicants. This change, while aimed at facilitating faster visa processing for a large number of visa applicants, also reflected clinical advice that moving to a six month stay screening threshold would not increase the risk of TB transmission.

One of the key purposes of the health requirement is to protect the community from public health risks. This goal is consistent with the International Covenant on Economic, Social and Cultural Rights, in particular, articles pertaining to the control of diseases and the creation of conditions which would assure medical service and medical attention in the event of sickness.

As the Committee notes, the Convention on the Rights of Persons with Disabilities (CRPD) refers to the right for persons with a disability not to be discriminated against on health grounds. The instrument's health requirement is consistent with the formal declaration of Australia's understanding of the CRPD. Australia's migration health requirement is universal.

Where a person has a specific medical condition (other than TB) this condition in itself will not result in failure to meet the health requirement. There is no explicit focus on disability, and this has not changed under the updated health matrix. As with any visa applicant with an ongoing health condition, a person with a disability may fail to meet the health requirement if a Medical Officer of the Commonwealth assesses their condition as likely to:

- result in significant health care and community service costs; or
- prejudice the access of Australians to health care or community services.

In addition, some visa subclasses allow for the Department to consider whether the health requirement should be waived, including for persons with a disability.

The Committee also noted the International Covenant on Civil and Political Rights (ICCPR), which promotes equality and prohibits discrimination on personal attributes. Under the health matrix settings, the types of health examinations that visa applicants need to undertake depend on a number of factors including:

- the type of visa that they are applying for;
- the length of their intended stay in Australia;
- the applicant's country for the purpose of TB risk levels (including countries they may have visited);
- their intended activities in Australia; and
- any special circumstances that may be applicable.

Given the broad spectrum of factors which determine whether visa applicants must undertake immigration health examinations, the arrangements are not considered to discriminate against particular groups or personal attributes, or to unreasonably discriminate on the basis of disability, in light of the legitimate objective of reducing the incidence of TB in Australia.

The Hon Christian Porter MP
Minister for Social Services

MC15-013667

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

15 MAR 2016

Dear ~~Mr Ruddock~~ Philip

Thank you for your letter of 11 August 2015, seeking advice from the former Minister of Social Services, the Hon Scott Morrison MP, in relation to the matters raised in the Joint Committee on Human Rights' (the committee's) Twenty-fifth Report of the 44th Parliament. The committee has requested additional advice in order to further consider the impact of the proposed amendments to Paid Parental Leave (PPL) payments included in the Fairer Paid Parental Leave Bill 2015 on the right to social security, right to work and the right to maternity leave, and the right to equality and non-discrimination. I am replying to your letter as this matter now falls within my portfolio responsibilities. I regret the delay in responding.

Schedule 1 – Adjustment for primary carer pay, etc.

The objective of the proposed amendments included in Schedule 1 of the Bill is to create savings. As you are aware, the Australian Government remains committed to returning the Budget to surplus as soon as possible and as a result, I have had to look for areas where money can be saved.

Currently, new parents (usually birth mothers) are able to receive payments under the PPL scheme of up to 18 weeks at the rate of the National Minimum Wage (that is, up to $11,826) regardless of whether they also receive primary carer pay[1] from their employer.

Given the tight budgetary position of the Government and the need to apportion payments to families in the most fair and effective manner, the current arrangement is no longer sustainable and expenditure will be more effective in other areas. Expanding government investment in areas such as child care helps advance rights relating to choice, independence and the opportunity to work. There is widespread community support for this investment, but we need to fund this from somewhere.

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[1] *Primary carer pay* is an employer payment under the terms of an employee's employment payable because the employee is expecting to give birth, or to be the primary carer for a child who has not yet turned one or who has been adopted by the employee or entrusted to their care as part of an adoption process.

The proposed amendments in this Bill will target PPL to those new parents who need it most because they do not have access, or have only limited access, to paid leave from their employer to care for a newborn or recently adopted child. This change will deliver almost $1 billion in savings that can be redirected to other key areas to support families, such as child care.

Right to social security

The committee's report explains that access to social security is required when a person has no other income and has insufficient means to support themselves and their dependants. Analysis by my Department of data from the PPL evaluation[2] indicates that 53 per cent of new parents will not be affected by this measure and therefore will not have their right to social security limited in any way. Of the remaining parents, their rate of PPL will be reduced in accordance with the primary carer pay that they receive from their employer. While I accept that this will result in a reduction in the support that they receive through the PPL scheme, it does not mean that these parents will have insufficient means to support themselves and their dependants. These new parents will have at least the same amount of paid parental leave as those new parents who are supported through the PPL scheme. Given this, and given the crucial objective to create savings to allow expenditure in other key areas of benefit to families, I see this as a reasonable and necessary change and am confident that there are sufficient protections in place through the provision of income support and family assistance to support the social security rights of these parents.

Right to work and the right to maternity leave

The proposed amendments do not interfere with the existing rights under the *Fair Work Act 2009* to access 12 months of unpaid parental leave without loss of employment or seniority within the workplace, noting that Australia has a reservation in relation to Article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination Against Women.

The evaluation of the PPL scheme found that, following the introduction of PPL, higher income mothers did not significantly change the amount of leave they took after the birth or adoption of their child. In contrast, mothers who were on lower incomes, self-employed or casually employed significantly extended the time they took off work after the birth of their child.[3]

Further analysis undertaken by my Department using the PPL evaluation survey data shows that those mothers with higher incomes are more likely to have access to primary carer pay and that mothers who were on lower incomes, self-employed or casually employed were less likely to have access to primary carer pay.

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[2] The analysis of the impact of the measure on PLP claimants used PPL evaluation survey data that was undertaken as part of the overall PPL evaluation. The analysis was based on responses from a two wave survey of over 4,000 mothers who had a baby in October or November 2011. Surveys were undertaken when the babies were about 7 months old and again when the babies were 13 months old. The impact assessment factored in incomes changes (i.e. incomes were increased to 2014-15 values). The estimates of numbers affected were derived by extrapolating information from PPL evaluation survey data to the PPL population as a whole. The PPL evaluation survey data was sample data that was nationally representative of PPL eligible mothers.

[3] PPL Evaluation, final report, pages 4-5, available at: https://www.dss.gov.au/our-responsibilities/families-and-children/programmes-services/paid-parental-leave-scheme/paid-parental-leave-evaluation-phase-4-report

As detailed earlier, there is a substantial concern in the community and in government that access to affordable quality child care is a barrier to participation for many women. Increasing workforce participation and, through this, opportunity, is a priority approach for all working age people. As the safety net already provided by the scheme will remain in place for women most in need, the measure is considered reasonable and proportionate because it will contribute savings to be redirected to deliver other measures considered in the community to be more effective ways of increasing participation opportunity – and therefore the progressive realisation of rights. As identified in the 2015 Intergenerational Report, increasing workforce participation is a core priority for maintaining and improving standards of living.

Right to equality and non-discrimination
The changes detailed in this Bill preserve the existing safety net of the value of 18 weeks' payment at the National Minimum Wage for eligible primary carers, primarily benefiting mothers. The changes do not interfere with the existing rights under the *Fair Work Act 2009* to access 12 months of unpaid parental leave without loss of employment or seniority within the workplace, leaving the key protection against discrimination in place. The continuation of the PPL scheme remains a clear reminder that it is appropriate and desirable to take time out from the workplace to care for a newborn or newly adopted child.

Evening out the access to paid maternity leave is considered reasonable and proportionate as it contributes savings to other measures that are beneficial to women. Targeting expenditure remains an essential part of balancing the distribution of available resources with the most effective measures for addressing barriers and creating opportunity.

Schedule 2 – employer opt-in
The report indicates that the Committee previously sought further information from the Minister for Small Business in relation to the compatibility of the opt-in measure with the right to social security, right to an adequate standard of living, right to work and right to equality and non-discrimination, as part of the Paid Parental Leave Amendment Bill 2014.

I understand that the Committee concluded its consideration of these matters as a result of the information provided by the Minister. I note and thank the Committee for its advice that it is usual expectation that such additional information should be included in future statements of compatibility for similar measures, as in the case of this Bill.

Thank you for raising these matters.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

The Hon Darren Chester MP
Minister for Infrastructure and Transport
Deputy Leader of The House
Member for Gippsland

PDR ID: MC16-001513

15 MAR 2016

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

Dear ~~Mr Ruddock~~ Philip

Thank you for your letter of 23 February 2016 regarding the Parliamentary Joint Committee on Human Rights request for further advice on the *Shipping Legislation Amendment Bill 2015* (the Bill).

I note the Committee's assessment that the Bill raises questions as to whether its measures are a justified limitation on the right to just and favourable conditions of work.

While I note the further questions raised in the report, I can only reiterate that the Australian Government considered that the measures contained in the Bill were reasonable, necessary and proportionate to achieving the legitimate objective of ensuring efficient and reliable coastal shipping services as part of the national economy.

The Bill would have resulted in significant positive impacts across the Australian economy. With regards to Australian jobs specifically, a more competitive and efficient coastal shipping industry as a result of the Bill would have led to more jobs in the whole economy, as well as in the on-shore maritime industry specifically.

In addition, a cost benefit analysis commissioned by the Department of Infrastructure and Regional Development measured the impact of the proposed reforms as being an economic benefit of $667.4 million over a 20 year period. The economic benefits therefore justify the measures contained in the Bill. Unfortunately, however, the Bill was defeated in the Senate in November 2015.

Thank you again for taking the time to write and inform me of your concerns on this matter.

Yours sincerely

DARREN CHESTER

The Hon Christian Porter MP
Minister for Social Services

MC15-014051

15 MAR 2016

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

Dear Chair

Thank you for your letter of 10 November 2015 seeking advice regarding the human rights compatibility of the Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2015. I appreciate the time you have taken to bring these matters to my attention.

The Committee requested clarification on three aspects of the measures proposed in the Bill. Please find below the requested details.

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.

The objective of the family payment reform measures is to ensure that the family payments system remains sustainable in the long term. The United Nations Committee on Economic, Cultural and Social Rights recognises that a social security scheme should be sustainable, and that the conditions for benefits must be reasonable and proportionate.

The Australian income support system relies more heavily on income testing and directs a higher share of benefits to lower-income groups than any other country in the Organisation for Economic Cooperation and Development (OECD).

As a result, Australia has one of the most targeted and efficient systems of social security benefits of any OECD country. Australia gives over 12 times more in transfer payments to the poorest fifth of households than to the wealthiest fifth of households (see insidestory.org.au/how-fair-is-australias-welfare-state).

As outlined in the McClure review, despite this highly effective targeting, demographic changes are expected to place pressure on the budget, meaning it is important to ensure that costs are constrained. Similarly, the report notes there is also an opportunity to contribute to economic growth through measures that promote greater levels of participation and improved labour force productivity.

The need to constrain costs is supported by analysis of the 2015-16 Budget by Dr Shane Oliver, the Chief Economist of AMP Capital. This analysis highlighted that government spending increased rapidly between 2006-07 and 2008-09 and has not been unwound, meaning that current government spending was exceeding revenue. Without corrective action, this situation will impact the ability of the economy to respond to any future downturns or to withstand the impacts of demographic shifts that are expected to create further pressure on government spending (see www.ampcapital.com/olivers-insights/may-2015/the-2015-16-australian-budget).

Whether there is a rational connection between the limitation and the objective

While overall spending on social welfare continues to increase as a share of Gross Domestic Product (GDP), Australia still spends comparably less than the OECD average, largely as a result of this targeted approach. Australian spending on social welfare increased from 10.2 per cent of GDP in 1980 to 19 per cent in 2014, compared to the OECD average of 15.4 per in 1980 and 21.6 per cent in 2014.

However, when considering just family assistance payments, Australian spending has been consistently above the OECD average as a share of GDP.

This increasing share can also be seen in the composition of social spending from 1980 to 2009. As a share of GDP, government spending on family assistance in Australia has tripled from 0.9 per cent in in 1980 to 2.7 per cent in 2012, the most recent year for which comparable data is available (see OECD social expenditure database stats.oecd.org).

The number of families who receive Family Tax Benefit has declined over time, down from 1.72 million in 2010-11 to 1.62 million in 2012-13. Despite this decline in the number of recipients, the cost continues to rise with expenditure increasing by almost a billion dollars over the last three financial years for which data is available, up from $18.9 billion in 2010-11 to $19.8 billion in 2012-13.

Whether the limitation is a reasonable and proportionate measure for the achievement of that objective

The Australian Government supports families with the direct costs of raising dependent children through Family Tax Benefit Part A or youth income support payments, with a family's rate of assistance determined by family income. These payments have the primary objective to ensure that all children have access to a basic acceptable standard of living.

Family assistance provides additional support to families with one main income through Family Tax Benefit Part B to recognise and support the role of parents and other carers as carers and members of the workforce. The design of Family Tax Benefit Part B has a workforce participation focus and is not based on a family income test, but a primary earner and a secondary earner income test.

The level of financial support provided by Family Tax Benefit Part B is higher for families with a youngest child aged four and under in recognition of the higher need for parental provision of direct care of children, and reduced when a youngest child turns five (moving into compulsory education) and primary carers have a greater capacity to move into the workforce or increase their workforce participation.

Where a youngest child has reached the age of 13, the Government considers it appropriate to expect primary carers to engage in the workforce, or increase their workforce participation. While this measure will reduce a family's rate of family assistance once their youngest child turns 13, this measure does not limit an individual's right to social security and they will retain access to income support or social security payments for themselves, and assistance for dependent children through Family Tax Benefit Part A or youth income support payments. The proposed changes also acknowledge that grandparent and single parent carers may have more difficulty increasing workforce participation, and this is why these families would continue to receive a level of assistance once the relevant children turn 13.

Under current rules, Family Tax Benefit customers need to provide estimated annual income to receive their entitlement by fortnightly instalment, with their actual entitlement determined after an entitlement year through the reconciliation process. The Family Tax Benefit supplements were announced in 2004 (when there was a budget surplus of over $13 billion) in response to high levels of reconciliation debt experienced by the Family Tax Benefit population. This debt was often due to families not being able to accurately predict changes in income or changes in circumstances such as a return to work. In comparison, individuals in receipt of income support have their entitlement determined on base year parental income (verified income from a previous financial year) and fortnightly personal income.
The phasing out of the Family Tax Benefit supplements recognises that the Government's investment in service delivery reform such as Single Touch Payroll will provide real time verification of a customer's income, which will improve the accuracy of income reporting and negate the need for an end-of-year reconciliation process for Family Tax Benefit and the supplements to offset the risk of debt.

The proposal reduces the annual Family Tax Benefit Part A package available to a family but increases the level of indexed fortnightly assistance, ensuring that families will not experience a reduction in fortnightly assistance and will continue to be able to meet the day-to-day costs of raising their children.

In the context of ensuring the long-term sustainability of the family payments system in the current budget position, the changes proposed are both reasonable and proportionate measures.

Thank you again for bringing your concerns to my attention.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

The Hon Christian Porter MP
Minister for Social Services

MC16-001683

15 MAR 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 2 February 2016 regarding the committee's consideration of the Social Services Legislation Amendment (Miscellaneous Measures) Bill 2015 in its *Thirty-third Report of the 44th Parliament* and the committee's request for my advice about the human rights compatibility of this bill.

I note from the committee's report that it is seeking my specific advice on the proposed changes in the bill concerning study requirements for Youth Allowance (student) or Austudy.

My advice on the matters referred to in paragraphs 1.72 and 1.73 of the committee's report (page 16) is at **Attachment A.**

I thank the committee for its work and for seeking my advice on these matters.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

Parliament House Canberra ACT 2600 Telephone (02) 6277 7560 Fax (02) 6273 4122

Social Services Legislation Amendment (Miscellaneous Measures) Bill 2015

The Parliamentary Joint Committee on Human Rights, in its 'Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*' 33rd report, has sought advice from the Minister of Social Services on whether measures contained in Schedule 3 of the Social Services Legislation Amendment (Miscellaneous Measures) Bill 2015 (the Bill) are justified in their limitation of human rights, as defined in the Act. Schedule 3 seeks to amend the *Social Security Act 1991* such that in assessing a qualification for Youth Allowance (student) or Austudy, two or more courses of education for a person cannot be aggregated to satisfy the requirement to undertake full-time study.

The Committee has requested further justification of the measure's limitation on human rights based on evidence of how the measure's stated objective is addressing a substantial concern and achieving a legitimate objective; the connection between the limitation on human rights and this objective, and whether the limitation is reasonable and proportionate. This document provides responses to the Committee's request for advice on these matters.

Right to social security

This measure engages the right to social security under article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by restricting the make-up of a full-time study workload to a single course or courses that are offered together under a formal arrangement by the relevant tertiary institution as one course of study.

The intent of the requirement that a student be undertaking a full-time study workload in order to qualify for student income support (Youth Allowance (student) or Austudy) is to ensure government support is provided to the recipient for a standard duration of time that will allow them to complete their course of education and enter the workforce. Under article 4 of the ICESR, economic, social and cultural rights may be subject to only such limitations that are compatible with the nature of those rights and solely for the purpose of promoting the general welfare in a democratic society. The targeting of social security payments to those who are in need is an important element in the sustainability of Australia's welfare system.

Social security assistance is available to full-time students subject to their completing their course within a standard duration determined by the full-time workload. Income support for students is not available to those who are undertaking a part-time study workload as they have the capacity to self-support by taking up paid work opportunities in addition to their study. Should a student choose to enter into two or more part-time courses of study, which may be in unrelated or non-complementary areas, they will not complete their study within a standard full-time study timeframe (three or four years) and study may go on for an extended period.

To the extent that this measure may limit the right social security, this limitation is reasonable and proportionate to the Government's objective of targeting social security assistance for students to those who are undertaking a specific course of study, for a limited period of time, in order to obtain specific skills and qualifications and enter the workforce.

The right to education

Article 13 of the ICESCR guarantees the right to education. This measure does not limit a person's right to education "for the full development of human personality and sense of dignity" as described in article 13 of the ICESCR. However it does place a limitation on a student's access to social security, beyond the acquisition of skills and qualifications in a reasonable timeframe that will enable them to enter the workforce.

This measure does not place a limitation on people undertaking combined courses where a formal arrangement exists to offer the course as one course of study, with two qualifications/awards (for example, a combined Bachelor of Commerce/Bachelor of Finance or dual/double degrees), which have related/complementary subjects and hence provide formal qualifications that enhance a person's employment and career prospects.

The proposed amendments affirm the objective of government income support for students, which is to support people undertaking full-time study in a course that will provide them with a qualification within the standard duration of a course. Income support for tertiary students is designed to support their right to education to the extent that it allows them to gain formal qualifications to be able to enter the workforce.

The proposed changes are reasonable and proportionate for the achievement of the objective

The proposed changes preclude financial support to students that are studying in such a manner that they will not gain formal qualifications from their part-time courses within the allowable time for one of the courses.

The proposed changes are proportionate and will only affect a small number of students enrolled part-time in more than one course. Under the 'allowable time' rules, a student is only eligible to receive student payments for the standard full-time duration of their course, plus an additional semester or a year depending on the length of the course units. For example, a student undertaking a three-year Bachelor level course may be eligible to receive Austudy payments for a maximum period of three and a half years, based on a course with units of six months in length.

The limitation that this Bill seeks to apply is reasonable and proportionate for encouraging students seeking income support to configure their studies to qualify them for employment in their chosen field within a reasonable timeframe.

The Hon Christian Porter MP
Minister for Social Services

12 FEB 2016

MC15-012890

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 13 October 2015 on behalf of the Parliamentary Joint Committee on Human Rights regarding the human rights compatibility of the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015. I appreciate the time you have taken to bring this matter to my attention.

In your letter you raise an assertion that the removal of the 'conscientious objector' exemption to the immunisation requirements may engage and limit the human right to freedom of thought, conscience and religion. You note that the statement of compatibility which accompanies the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 does not provide information on whether there is a rational connection between this possible limitation and the objective of encouraging immunisation and thereby preventing the spread of infectious diseases.

The rationale of the changes made by the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 is to effect practical changes that reflect the Australian Government's policy position that immunisation is an important public health measure for children, their families and the community. The aim of this policy is to further increase immunisation rates in the Australian community and therefore increase the right to health of the overwhelming majority of individual Australians by providing high community rates of immunisation against infectious diseases. This new policy will strengthen the definition relating to conscientious objection and introduce a link between vaccination and some welfare benefits, as a mechanism designed to reinforce the importance of immunisation as a matter of public education and increase rates of vaccination to enhance the protection of public health. These outcomes are sought to be achieved by providing a level of encouragement and incentive for families to more thoroughly inform themselves about the importance of immunising their children and then pursue the course of action to immunise their children.

The Government recognises that parents have the right to decide not to vaccinate their children. Nothing in the present policy approach prevents such a decision being made, however, if they make such a decision as an objector to vaccinations, their decision will mean they are no longer eligible for some government financial assistance. Importantly, an individual is not prohibited from maintaining their vaccination objection; although they will not receive some family assistance they may otherwise receive. For example, the Family Tax Benefit Part A supplement is currently $726 per year. This is a relatively small financial cost to the vaccination objectors family, particularly when compared to the cost that the spread of crippling, debilitating and deadly diseases has on our health

system and community and particularly when it is noted this is public tax-payer funded welfare money.

The financial consequences of losing access to Child Care Benefit and Child Care Rebate are not insubstantial, however, this is a proportionate policy reasonably matched to the purpose of ensuring the highest possible immunisation rates at the country's child care and early learning centres.

Additionally, you have asked that I advise whether this possible limitation to the human right to freedom of thought, conscience and religion is reasonable and proportionate for the achievement of the objective of encouraging vaccination, in particular that it is the least right restrictive approach to achieving the aim of this new policy. As noted above, there is no limitation whatsoever on freedom of thought or conscience, rather the Government has determined to no longer allocate taxpayer funded welfare payments to reward freely made decisions that diminish public health outcomes.

Further, it should be noted that article 18(3) of the International Covenant on Civil and Political Rights states that a freedom to manifest religion or beliefs may be limited by law when it is necessary to protect public safety and the health of others. It is the Government's view that when an individual decides not to vaccinate their child they are putting their child and the community at risk of infectious diseases. Following these changes, the only exemptions will be those on medical grounds i.e. where the child is unable to be vaccinated or unable to benefit from vaccination.

The Government has previously introduced policy which has improved immunisation coverage in Australia, for example through the initial linkages between immunisation and family assistance payments. However, allowing vaccination objectors to be exempt from these requirements has allowed an increase in vaccination objectors from 0.23 per cent of the population in 1999, to 1.77 per cent in 2014. This suggests that this exemption is encouraging a section of the population to avoid the vaccine requirement.

Additionally, successive governments have placed mutual obligations on recipients of social security payments. The rationale for this is that mutual obligation encourages behaviours beneficial to individuals and the broader community. For example, in order to receive Family Tax Benefit for teenagers aged between 16 and 19 years, they must be enrolled in full-time secondary study. This is to encourage teenagers to stay in school and obtain their Year 12 Certificate, as evidence shows that those teenagers who finish their education or get a trade are better off in the long term.

The overwhelming body of medical and scientific evidence supports the promotion of vaccination for the prevention of potentially crippling, debilitating and deadly diseases. By allowing the continuation of an exemption from immunisation as a vaccination objector, the Government would contradict its position that immunisation is an important public health policy. The choice not to vaccinate on the grounds of vaccination objection is neither supported by public health policy nor medical research. It is therefore important that these views, which put others' right to health at risk, should not be encouraged or accepted by Government.

It is my view that the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 is compatible with human rights because it advances the protection of the right to physical health, and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

Thank you again for raising this matter with me.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

The Hon Darren Chester MP
Minister for Infrastructure and Transport
Deputy Leader of The House
Member for Gippsland

PDR ID: MC16-001432 17 MAR 2016

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

Dear Mr Ruddock

Thank you for your letter of 25 February 2016 seeking advice about the compatibility of the following legislative instruments with Australia's human rights obligations:

Aviation Transport Security (Prohibited Cargo – Yemen) Instrument 2015 [F2015L02056];
Aviation Transport Security (Prohibited Cargo – Somalia) Instrument 2015 [F2015L02057];
Aviation Transport Security (Prohibited Cargo – Egypt) Instrument 2015 [F2015L02058];
Aviation Transport Security (Prohibited Cargo – Bangladesh) Instrument 2015 [F2015L02072]; and
Aviation Transport Security (Prohibited Cargo – Syria) Instrument 2015 [F2015L02073];

The Committee has sought my advice as to:

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

I thank the Committee for raising these matters and offer the following information in reply.

In December 2015, the then Deputy Prime Minister and Minister for Infrastructure and Regional Development, the Hon Warren Truss MP, exercised powers under Part 4, Division 6A of the *Aviation Transport Security Act 2004* to prohibit air cargo originating from, or transiting through Yemen, Somalia, Egypt, Bangladesh and Syria.

The prohibitions are a preventive security measure, based on the Australian Government's understanding of the aviation security threat and risk environments in these countries. In assessing the potential risks, the Government has drawn on information from intelligence sources and international partners.

The prohibitions on air cargo from Syria, Egypt, Yemen and Somalia are commensurate with bans imposed by like-minded countries, including the United States and Canada. The prohibition on air cargo from Bangladesh is based on advice from the UK Department for Transport regarding poor aviation security practices at Hazrat Shahjalal Airport in Dhaka in addition to intelligence reporting of a specific terrorist threat relating to air cargo.

Although Australia does not have direct flights from any of the countries subject to the restrictions, international air cargo arrangements are complex, with cargo subject to trans-shipment and consolidation along the supply chain. This means that high-risk air cargo originating from, or transiting through, these countries could be transported to Australia.

The prohibitions apply to air cargo only. Cargo sent to third countries by sea, rail, or land freight is not restricted and the measures do not apply to passengers or their baggage. Consequently, people living in Australia who are originally from the affected countries may continue to receive goods from these countries via other transport means. I am advised that a number of exporters are using these alternative arrangements to ship goods originating from these countries to Australia.

The Government believes the action taken is a necessary precautionary measure that addresses air cargo security risks without imposing undue restrictions on the international movement of goods. The Government is monitoring air cargo security developments closely and will review the prohibitions as necessary.

I trust that this advice is of use to the Committee.

Yours sincerely

DARREN CHESTER

SENATOR THE HON MITCH FIFIELD

MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS
MINISTER ASSISTING THE PRIME MINISTER FOR DIGITAL GOVERNMENT
MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

The Hon Philip Ruddock MP
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Radiocommunications (27 MHz Handphone Stations) Class Licence 2015 [F2015L01441]

Dear Chair Philip

Thank you for your recent letter concerning the Parliamentary Joint Committee on Human Rights (the Committee)'s consideration of the *Radiocommunications (27 MHz Handphone Stations) Class Licence 2015* instrument made by the Australian Communications and Media Authority (ACMA) on 4 September 2015.

The conditions set out at paragraph 6(g) of the Class Licence (the licence condition) provide that a person must not operate a handphone station, being a radiocommunications device for the purposes of the *Radiocommunications Act 1992* (the Act):

- in a way that would be likely to cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or seriously affronted; or
- for the purpose of harassing a person.

The Committee considers that the proposed conditions may be incompatible with the right to freedom of expression for users of these devices. However, the Committee acknowledges that this right may be subject to limitations, provided that such limitations pursue a legitimate objective such as the protection of public order or public morals.

I have addressed the Committee's concerns about these limitations in turn below.

1. Is the proposed measure in the Instruments aimed at achieving a legitimate objective?

As stated at page 6 of the Explanatory Statement for the Class Licence, the proposed measure aims to achieve two legitimate objectives: (i) protection of public order; and (ii) protection of public morals.

(i) Protection of public order

Handphone stations are radiocommunications transmitters that allow for point-to-multipoint communication. They may be used to communicate material to more than one person at a time. Persons who are not the intended recipients of a communication may also overhear the communication, either deliberately or fortuitously. These features create a risk that a handphone station may be misused. For example, a handphone station might conceivably be used to incite crime or violence or general panic, or it might be used to vilify a person or group of persons. Such communications may pose risks to public order.

Handphone stations are frequently used as a vital communication tool where no other carrier service is available, for instance, by bushwalkers, or by sporting participants in remote locations. It would be undesirable for legitimate users of handphone stations to be deterred from use of the service due to seriously alarming, seriously affronting or harassing communications by other users.

The licence condition (which is drafted to reflect the terms of the equivalent statutory licence condition applying generally to radiocommunications transmitters in paragraph 108(2)(d) of the Act is designed to address these risks to public order. The protection of public order under such circumstances is considered a legitimate justification for imposing a reasonably proportionate limit on the right to freedom of expression for users of devices authorised by the Class Licence.

(ii) Protection of public morals

The operation of a handphone station under the Class Licence may result in transmissions being received and heard by the public at large, including minors. Transmissions may be heard which are entirely unsolicited, as transmissions occur over publicly accessible spectrum, transmitters and receivers may be used for a wide variety of communication purposes, and transmissions from handphone stations are generally not encrypted or otherwise protected.

As a result, there may be circumstances in which such transmissions cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or affronted, or to feel harassed, thereby posing a threat to the protection of public morals. The Class Licence advances the objective of protecting public morals, which is expressly identified as a permitted restriction on the right to freedom of expression (Article 19(3)(b) of the International Covenant on Civil and Political Rights).

The radiofrequency spectrum is a finite public resource, which is subject to competing demands. Hence, access to it is necessarily limited, and such access is regularly given subject to conditions about the matters and content that may be transmitted using the spectrum. It is also noted for completeness that this Class Licence, of itself, does not fetter any freedom of expression generally; it merely restrains the transmission of a particular type of communication on a specific device, namely, 27 MHz Handphone Stations.

The Australian Communications and Media Authority (ACMA) has a discretionary power to issue class licences which can authorise the use of particular radiocommunications devices in particular parts of the radiofrequency spectrum on a shared basis (section 132 of the Act), subject to compliance with the conditions of the class licence.

Class licences can be a particularly efficient method by which use of parts of the radiocommunications spectrum can be authorised, noting that class licences are not issued to individual users (that is, members of the community are able to avail themselves of the authorisation granted by a class licence), class licences do not involve licence fees, and accordingly class licences involve minimal administration on the part of operators of devices, and on the part of the Commonwealth.

In the absence of a relevant class licence made by the ACMA, users of handphone stations would need to individually apply to the ACMA for an apparatus licence (under section 99 of the Act) to authorise operation of that device, unless another class licence also authorised their use. In such circumstances it is relevant that paragraph 108(2)(d) of the Act imposes precisely the same limitation on the right to freedom of expression for apparatus licensees as that imposed by the licence condition at issue.

The Committee has previously observed that the inclusion of a limitation on the freedom of expression in one Australian law does not necessarily justify the inclusion of that limitation in another Australian law. In this case, however, there is a strong justification for the Class Licence to include the same condition as appears at paragraph 108(2)(d) of the Act. If handphone stations were not licensed by the Class Licence they would be licensed by individual licence. If they were licensed by individual licence they would be subject to the licence condition at paragraph 108(2)(d) of the Act. The class licensing method maximises the administrative convenience of licensees, and the Commonwealth, as it avoids any need for persons to make individual applications for a licence. But that choice of licensing method should not have the effect of allowing these radiocommunications transmitters to be any more liable to cause risks to public order or public morality than would occur under the default licensing method of individual licence. A licence condition that reflects paragraph 108(2)(d) of the Act therefore promotes a level playing field among like devices that have like purposes and uses, and it provides a uniform level of protection for the public with respect to these devices.

Effect of other laws

In its report the Committee has said (at [1.391]) that:

> [section 474.17 of the *Criminal Code 1996* (the Criminal Code)] makes it an offence for a person to use a carriage service in a way that a reasonable person would regard as being menacing, harassing or offensive. A 'carriage service' would include the operation of a 27 MHz headphone station. As there is already a broad offence in the Criminal Code there appears no need to include the provision as a condition of the licence (breach of which becomes a criminal offence).

As the Committee notes, a carriage service is defined in section 7 of the *Telecommunications Act 1997*; as 'a service for carrying communications…'. As the use of handphone stations does not generally require the involvement of a 'carriage service', ordinarily, section 474.17 of the Criminal Code will not apply to the operation of handphone stations.

Even if the Criminal Code were to be applicable to prohibit the same behaviour, it is well recognised that licence conditions may usefully reflect provisions in the criminal law and may usefully supplement those criminal provisions (see for example the recent decision of

the High Court in *ACMA* v *Today FM (Sydney) Pty Ltd* [2015] HCA 7).

A breach of the Class Licence constitutes the offence of operating a radiocommunications device otherwise than as authorised by a class licence without a reasonable excuse under section 46 of the Act. The ACMA is also empowered to issue an infringement notice for a breach. The penalties applicable are ordinarily appropriate and proportionate to the breach of the licence condition. The disincentive provided by the licence condition provides a disincentive for operators of handphone stations to make transmissions that breach the licence condition. The disincentive directly supports the objectives of protecting public order and public morals. Under a class licensing approach, the ACMA has no other powers that can be used to achieve these objectives.

2. Is there a rational connection between the limitation on the right to freedom of expression and these legitimate objectives?

The instrument proposes a limitation which provides a disincentive for handphone station users to make transmissions that breach the licence conditions. The disincentive directly supports the objectives of protecting public order and public morals. The ACMA has advised that aside from imposing a licence condition, it has no other powers that can be used to achieve the objectives.

3. Is the limitation a reasonable and proportionate measure for the achievement of the objective?

The Class Licence provides a standing authority for users of handphone stations to communicate on designated segments of the radiofrequency spectrum. The licence condition is a proportionate means by which the objectives can be achieved for the reasons outlined above.

Thank you for bringing the Committee's concerns to my attention. I trust this information will be of assistance.

Yours sincerely

MITCH FIFEILD

13/12/15

SENATOR THE HON MITCH FIFIELD

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Human rights compatibility of Radiocommunications Class Licences

Dear Mr Ruddock Philip

Thank you for your letter of 2 November 2015 concerning the twenty-sixth human rights scrutiny report of the Parliamentary Joint Committee on Human Rights (the Committee). I apologise for the delay in responding.

The Committee raised questions about conditions contained in the following Instruments made by the Australian Communications and Media Authority (ACMA):

- the Radiocommunications (Citizen Band Radio Stations) Class Licence 2015, made on 15 June 2015; and
- the Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015, made on 29 June 2015.

The conditions (the 'proposed measure') require that a person operating a citizen band (CB) radio or amateur station must not operate the station:

- in a way that would be likely to cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or seriously affronted; or
- for the purpose of harassing a person.

The Committee considers that the proposed measure limits the right to freedom of expression for users of these devices. However, this right may be subject to limitations, provided that such limitations pursue a legitimate objective such as protection of public order or public morals.

I have addressed each of the Committee's concerns about these limitations in turn below.

1. Is the proposed measure in the Instruments aimed at achieving a legitimate objective?

The proposed measure aims to achieve two legitimate objectives: (i) protection of public order; and (ii) protection of public morals.

(i) Protection of public order
There may be circumstances in which a device authorised by a class licence is used to incite crime, violence, or mass panic, and thereby causing a reasonable person, justifiably in all the circumstances, to be seriously alarmed or affronted. The protection of public order under such circumstances is considered a legitimate objective for imposing a limit on the right to freedom of expression for users of devices authorised by the Instruments.

(ii) Protection of public morals
The operation of a transmitter under a class licence may result in transmissions being received and heard by the public at large, including minors. Hearing transmissions may be entirely unsolicited, as transmissions occur over publicly accessible spectrum, transmitters and receivers may be used for a wide variety of communication purposes, and transmissions may not be encrypted.

As a result, there may be circumstances in which such transmissions cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or affronted, thereby posing a threat to the protection of public morals.

The radiofrequency spectrum is a finite public resource, which is subject to competing demands. Hence access to it is necessarily limited, and such access is regularly given subject to conditions about the matters and content that may be transmitted using the spectrum. For example, freedom of expression is limited by:

- paragraph 108(2)(d) of the *Radiocommunications Act 1992* (the Act), which imposes the same limitation on the right to freedom of expression for users of other communication devices that have been authorised under apparatus licences,
- the responsibilities of persons providing broadcasting services under the *Broadcasting Services Act 1992.*

The Committee has observed that the inclusion of a limitation on the freedom of expression in other Australian laws does not justify the inclusion of the limitation in the Instruments. Nevertheless, these examples are brought to the Committee's attention because they have the same aim of protecting public morals as the measures contained in the Instruments.

For these reasons, the conditions are aimed at achieving a legitimate objective of protecting public morals by minimising the risk that the general public will receive and hear unsolicited communications that might seriously alarm or affront a person, where those communications are made using a scarce public resource.

2. Is there a rational connection between the limitation on the right to freedom of expression and these legitimate objectives?

The Instruments propose a limitation which provides a disincentive for licensees and authorised persons to make transmissions that breach the licence conditions. The disincentive directly supports the objectives of protecting public order and public morals. The ACMA has advised that aside from imposing a licence condition, it has no other powers that can be used to achieve the objectives.

3. Is the limitation a reasonable and proportionate measure for the achievement of the objective?

The Instruments provide a standing authority for users of citizen band and amateur radio stations to communicate on designated segments of the radiofrequency spectrum.

The ACMA advises that the limitation is considered a reasonable and proportionate measure for achievement of the objectives for the following reasons:

(i) If authorisation for transmissions was provided not by the Instruments but instead by issuing apparatus licences to individual users, the same limitation on the right to freedom of expression would apply as specified under section 108(2)(d) of the Act.

(ii) The proposed measure is the only power available to the ACMA for the purpose of protecting public order and public morals in instances where transmissions are made using the radiofrequency spectrum, which is a scarce public resource.

(iii) The CB band of spectrum is a limited resource. There are numerous users wanting to utilise the CB band, both commercially (such as transport companies) and recreational (amateur radio users and visitors).

(iv) Transmissions occur over publicly accessible spectrum and can be heard at large by the community. Accordingly, it is possible for transmissions which use aggressive and offensive language to offend generally prevailing community standards. It is essential that users who broadcast offensive material do not exercise their right to freedom of speech or use this limited public resource in a manner that limits the freedom of speech of users who are broadcasting socially acceptable material that complies with general prevailing community standards.

(iv) The right to freedom of expression is only limited in relation to the content of a transmission made by a device authorised by the Instruments. The right is otherwise unfettered by the Instruments.

(v) A breach of the licence conditions in question may constitute the offence of operating a radiocommunications device otherwise than as authorised by a class licence without a reasonable excuse under section 46 of the Act. The penalty for such an offence is imprisonment of up to two years if the offender is an individual or 1,500 penalty units otherwise. However, a person may, if served with an infringement notice by an authorised person under the *Radiocommunications Regulations 1993*, pay a penalty of two penalty units if the person is an individual, or three penalty units in any other case. If an infringement notice is not given, or is given but not paid, then the decision to prosecute a person for such an offence would be made by the Commonwealth Director of Public Prosecutions.

Thank you for bringing the Committee's concerns to my attention. I trust this information will be of assistance.

Yours sincerely

MITCH FIFIELD
17/3/16