Appendix 3

Correspondence

The Hon. Barnaby Joyce MP

Deputy Prime Minister
Minister for Agriculture and Water Resources
Leader of The Nationals
Federal Member for New England

Ref: MC17-002587

28 APR 2017

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough Ian,

Thank you for your letter of 28 March 2017 regarding the comments of the Parliamentary Joint Committee on Human Rights on the Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017 (*Report 3 of 2017*). I note the Committee requested further information on provisions that reverse the evidentiary burden of proof (item 30) and compatibility of strict liability offences with the right to be presumed innocent (item 126).

Please find below my response to the Committee's comments. In addition, I have enclosed my response to the Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) included in *Scrutiny Digest 4 of 2017,* which addressed similar matters.

Right to the presumption of innocence (reverse burden provisions)

The Committee was concerned that the statement of compatibility did not adequately explain why the reverse burden provision in item 30 of the Bill is a permissible limitation on the right to be presumed innocent, as protected by article 14(2) of the *International Convention on Civil and Political Rights* (ICCPR).

Section 270 of the *Biosecurity Act 2015*, as amended by item 27 of the Bill, provides that a person in charge or the operator of a vessel contravenes the provision if the vessel discharges ballast water (whether in or outside of Australian seas for Australian vessels, and in Australian seas for foreign vessels). Item 30 of the Bill provides exceptions (offence specific defence) to the offence under section 270, stating that the offence does not apply if certain conditions are met and certain plans are in place.

The exceptions set out by item 30 of the Bill are:

- peculiarly within the knowledge of the defendant, as the defendant (the person in charge or the operator of the vessel) will have access to the appropriate information and documentation, such as the vessel's records, to show that conditions have been fulfilled, such as the ballast water was discharged at a water reception facility (section 277 of the Act), or that the discharge was part of an acceptable ballast water exchange (section 282 of the Act), and

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- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish that the conditions have been fulfilled, as the defendant (the person in charge or the operator of the vessel) will have the easiest access to appropriate records to show that conditions set out by the exception have been fulfilled.

The statement of compatibility in the Explanatory Memorandum to the Biosecurity Bill 2014 discussed sections 271, 276, 277, 279, 282, and 283 of the Act, which provide exceptions to the offence of discharging ballast water in Australian seas, as provided for in section 270 of the Act.

In relation to item 30 of the Bill, it remains necessary that the defendant (the person in charge or the operator of the vessel) bears the evidential burden in order to achieve the legitimate objective of ensuring the biosecurity risk associated with ballast water is appropriately managed in Australian seas. The reversal of the evidential burden of proof is reasonable and proportionate to the legitimate objective because the knowledge of whether the defendant has evidence of the exception will be peculiarly within their knowledge and comes within the terms for the reverse burden provision to appropriately apply. For these reasons, the reversal of the evidentiary burden of proof is a permissible limitation on human rights.

I also draw the Committee's attention to the revised Explanatory Memorandum to the Bill that was tabled in the Senate on 29 March 2017. The revised Explanatory Memorandum included a revised statement of compatibility, which addresses the reverse burden offence in proposed section 270 (item 30 of the Bill). The revised Explanatory Memorandum also contemplates the government amendment to the Bill, which was introduced in and passed by the House of Representatives on 28 March 2017.

Compatibility of strict liability offences with the right to be presumed innocent

The Committee commented that the statement of compatibility for the Bill has not sufficiently addressed whether the strict liability offence in proposed section 299A (item 126 of the Bill) is a permissible limitation on human rights (see Article 14(2) of the ICCPR). The Committee has therefore requested the following further information:

- whether the strict liability offence is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the strict liability offence is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

The statement of compatibility in the Explanatory Memorandum to the Bill currently states:

> *Item 126 introduces a reporting requirement when a vessel disposes of sediment in Australian territorial seas to ensure safety of the vessel in an emergency or a saving life at sea situation, or because disposal has been accidental or is needed to avoid or minimise pollution from the vessel. The person in charge of the vessel, or the operator of the vessel, commits a strict liability offence if a report of the incident is not made to the Director of Biosecurity.*

The strict liability offence proposed by item 126 of the Bill is essential for enforcing the report of a disposal of sediment where the disposal is:

- for the purpose of ensuring the safety of the vessel in an emergency or saving life at sea;
- accidental; or
- for the purpose of avoiding or minimising pollution from the vessel.

The strict liability offence is compatible with the right to be presumed innocent, as this information would be peculiarly within the knowledge of the defendant. The defendant (the person in charge or the operator of a vessel) will have access to the appropriate information, to detail why the disposal of sediment was necessary due to safety, accident or pollution. Further, it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the circumstances of the disposal, as the defendant (the person in charge or the operator of the vessel) will have the easiest access to appropriate records to show that the disposal related to safety, accident or pollution and that the requirement to report has been met.

Disposal of sediment within Australian territorial seas could pose a significant biosecurity risk, which may need to be managed and monitored. Without the strict liability offence, a report of disposal of sediment may not occur, making it difficult to identify any such biosecurity risk. The requirement to report a disposal of sediment relating to safety accident or pollution is necessary to manage the risk in an appropriate and timely manner.

There is a strong public interest in appropriately managing biosecurity risks and preventing serious damage to Australia's marine environment and adverse effects to related industries. The strict liability offence is necessary to achieve this legitimate policy objective because it aims to deter a failure to report a disposal of sediment relating to safety, accident or pollution.

Thank you for drawing this matter to my attention. I trust this information confirms the relevant measures in the Bill are appropriate in relation to the matters to which they are applied.

Yours sincerely

Barnaby Joyce MP

Enc.

The Hon. Barnaby Joyce MP

Deputy Prime Minister
Minister for Agriculture and Water Resources
Leader of The Nationals
Federal Member for New England

Ref:

27 MAR 2017

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley Helen,

The Senate Scrutiny of Bills Committee has requested further information about measures in the Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017 (the Bill) (Scrutiny Digest 3/17 at paragraphs 1.12 to 1.20). I have provided the relevant information below.

Request at paragraph 1.15 – Reversal of evidentiary burden of proof

On this issue, the Committee has requested my advice, as follows:

"As neither the statement of compatibility nor the explanatory memorandum address this issue, the committee requests the Minister's advice as to why it is proposed to use an offence-specific defence (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. "

Right to the presumption of innocence (reverse burden provisions) – Background

Laws which shift the burden of proof to a defendant, commonly known as 'reverse burden provisions', can be considered a limitation of the presumption of innocence. This is because a defendant's failure to discharge a burden of proof or prove an absence of fault may permit their conviction despite reasonable doubt as to their guilt. This includes where an evidential or legal burden of proof is placed on a defendant.

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Reversal of evidential burden of proof under Section 270

Section 270 of the *Biosecurity Act 2015* (the Act), as amended by item 27, provides that a person in charge or the operator of a vessel contravenes the provision if the vessel discharges ballast water (whether in or outside of Australian seas for Australian vessels, and in Australian seas for foreign vessels). Item 30 provides exceptions (offence specific defence) to the offence under section 270, stating that the offence does not apply if certain conditions are met and certain plans are in place.

The Human Rights Compatibility Statement within the Explanatory Memorandum to the Act discussed sections 271, 276, 277, 279, 282 and 283 of that Act, which provide exceptions to the offence of discharging ballast water in Australian seas, as provided for in section 270 of the Act.

The exceptions set out by item 30 are:

- peculiarly within the knowledge of the defendant, as the defendant (the person in charge or the ship's operator) will have access to the appropriate information and documentation, such as the ship's records, to show that conditions have been fulfilled, such as the ballast water was discharged at a water reception facility (section 277), or that the discharge was part of an acceptable ballast water exchange (section 282), and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish that the conditions have been fulfilled, as the defendant (the person in charge or the ship's operator) will have the easiest access to appropriate records to show that conditions set out by the exception has been fulfilled.

It remains necessary that the defendant (the person in charge or the ship's operator) bears the evidential burden in order to achieve the legitimate objective of ensuring the biosecurity risk associated with ballast water is appropriately managed in Australian seas. The reversal of evidential proof is reasonable and proportionate to the legitimate objective because the knowledge of whether the defendant has evidence of the exception will be peculiarly within their knowledge and comes within the terms for the reverse burden provision to appropriately apply.

Request at paragraph 1.20 – Strict liability

On this issue, the Committee has requested my advice, as follows:

"The committee requests the Minister's advice as to why the proposed penalty for the strict liability offence in item 30 is double that which is considered appropriate in the Guide to Framing Commonwealth Offences."

Even though the Committee has asked for my advice in relation to item 30, that item does not seek to insert a strict liability offence subject to a proposed penalty of 120 penalty units. However, item 126 of the Bill, which proposes to insert new section 299A into the Act, does seek to insert a strict liability offence subject to a proposed penalty of 120 penalty units. As the Committee referred to item 126 of the Bill at paragraph 1.16 of its consideration of the Bill in Scrutiny Digest 3/17, I have answered the question from the Committee as if it referred to item 126 of the Bill.

Strict liability offences - Background

When 'strict liability' applies to an offence, the prosecution is only required to prove the physical elements of an offence (that is, they are not required to prove fault elements), in order for the defendant to be found guilty. The defence of honest and reasonable mistake of fact is available to the defendant (see section 9.2 of the *Criminal Code Act 1995*).

The Guide provides, relevantly, that although the penalty applied to a strict liability offence should not exceed 60 penalty units for an individual, a higher penalty is available where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment.

Penalty units for strict liability offence under new section 229A (item 126)

New section 299A as inserted by item 126 provides that a person in charge or the operator of a vessel must make a report to the Director of Biosecurity if a disposal of sediment has been made to ensure the safety of the vessel or to save a life, or accidentally, or to minimise or avoid pollution. A person in charge or operator of a vessel commits a strict liability offence if a report is not made in accordance with this section.

This offence is similar to the existing strict liability offence provided by section 284, as amended by items 73 to 75 of the Bill. That section provides for an offence where a person in charge or the operator of a vessel fails to report a discharge of ballast water in similar circumstances as set out by section 299A. Current subsection 284(4) of the Act provides for a strict liability offence with a penalty of 500 units. As provided by the Human Rights Compatibility Statement to the Biosecurity Bill 2014, this penalty is in line with a similar offence provided by section 22 of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (duty to report certain incidents, such as certain discharges of a liquid substance carried by the ship).

The penalty provided by current subsection 284(4) of the Act is proposed to be amended by item 75 from 500 penalty units to 120 penalty units. This approach seeks to better align with matters of similar seriousness, as the original penalty is considered too onerous for such a failure, and is inconsistent with the approach to penalties elsewhere in the same chapter in Chapter 5 of the Act.

As the new offence provided by section 299A is similar to the offence provided by section 284, it is appropriate that the two offences of similar severity be prescribed the same amount of penalty units.

Further, reporting promptly to the Director of Biosecurity enhances Australia's ability to assess any adverse consequences from the incident, and to take steps to minimise any cascade effects if necessary. Contravention of the offence provided by new section 299A, similar to the offence under section 284, could result in severe consequences to Australia's marine environment. A court will still be able to consider the circumstances and significance of the offence to determine whether a lesser penalty than the maximum should be applied.

I trust that this information confirms that the relevant measures in the Bill are appropriate in relation to the matters to which they are applied.

Yours sincerely

Barnaby Joyce MP

PARLIAMENT OF AUSTRALIA
HOUSE OF REPRESENTATIVES

HON BOB KATTER MP

Federal Member for Kennedy

5 May 2017

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
R1.123
Parliament House
Canberra ACT 2600

Dear Chair,

Response to Committee's Report

We write in response to the Parliamentary Joint Committee on Human Rights' ('the Committee') letter dated 28 March requesting a response in relation to the human rights compatibility of the *Consumer Amendment Exploitation of Indigenous Culture) Bill 2017* ('the Bill'), as set out in the Committee's report.

1. Strict liability offence in proposed section 168A(3) (item 4)

The proposed section 168A(3) sets out that the offence in proposed section 168A(1) is a strict liability offence, subject to the offence-specific defence in proposed section 168A(2). Proposed section 168A(1) makes it an offence for a person to supply or offer to supply a thing to a consumer, which is supplied or offered to be supplied in trade and commerce, and where the thing is an Indigenous cultural expression.

This strict liability offence is not inconsistent with the presumption of innocence contained in Article 14(2) of the International Covenant on Civil and Political Rights ('ICCPR') because the offence is proportionate to and rationally connected with the pursuit of a legitimate objective. It is therefore a permissible limitation on this right.

a. Legitimate Objective for the Purposes of International Human Rights Law

This legitimate objective is set out in the explanatory memorandum to the Bill. "The purpose of the Bill is to prevent non-First Australians and foreigners from benefitting from the sale of Indigenous art, souvenir items and other cultural affirmations and thereby depriving Aboriginal and Torres Strait Islanders of the rightful benefits of their culture."

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This is a legitimate objective because it aims to address concerns regarding an influx of mass-produced Indigenous-style artwork, souvenirs and other cultural affirmations which purports to be and is sold as authentic Australian indigenous art. Throughout 2016 the Indigenous Art Code and the Arts Law Centre conducted a joint investigation into the sale of Indigenous art or products bearing Indigenous cultural expressions in Australia. From that study, the Arts Law Centre estimates that 'up to 80% of items being sold as legitimate Indigenous artworks in tourist shops around Australia are actually inauthentic.' This led to the 'Fake Art Harms Culture' campaign. The crux of the fake art issue for Indigenous persons is that their culture is being exploited for sale without their consent and arguably sold under false pretences.

In addition, the objective the Bill seeks to achieve is consistent with and in furtherance of Article 11(1) of the United Nations Declaration on the Rights of Indigenous Peoples. Article 11(1) sets out that:

> *"Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature."*

The objective of the Bill is legitimate because it seeks to promote the rights of Indigenous peoples to protect and develop past, present and future manifestations of their culture. By allowing the supply of Indigenous cultural expressions by persons other than Aboriginal and Torres Strait Islanders, the meaning and authenticity of Indigenous cultural expressions are undermined and devalued.

b. Rational Connection to the Objective

The strict liability offence is effective to achieve the above objective because it seeks to limit the circumstances in which a person may supply or offer to supply an Indigenous cultural expression. This is directly related to the protection of Indigenous culture because it will prevent the supply of artefacts, literature of artwork that is unrepresentative of Indigenous culture. It will also ensure that the authenticity of such cultural expressions is retained, thus protecting the past, present and future manifestation of Indigenous culture.

c. Reasonable and Proportionate Means of Achieving the Objective

The inclusion of a strict liability offence is a reasonable means of achieving the objective because requiring the prosecution to prove the existence of a fault element, such as "intention", "recklessness" etc. would not adequately protect Indigenous persons, Indigenous communities and consumers from exploitation. This is because the conduct prohibited by the Bill has the potential to cause widespread detriment to Indigenous communities both financially and culturally. It also has the potential to cause significant loss to consumers. Many consumers purchase Indigenous art or products bearing Indigenous cultural expression in Australia on the understanding that the item they are purchasing is an authorised item or does in fact bear an Indigenous cultural expression.

The strict liability approach is consistent with other provisions of the Australian Consumer Law, including those in respect of unfair practices (the section which the Bill proposes to amend). As outlined in the Explanatory Memorandum to the Australian Consumer Law:

> *"The strict liability nature of these offences reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches these provisions, whether or not he, she or it intended to engage in the contravention."*

The absence of a fault element with respect to the offence is also reasonable in light of Article 11(2) of the United Nations Declaration on the Rights of Indigenous Peoples. Article 11(2) sets out that:

> *"States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."*

This right is set out in terms of requiring redress with respect to cultural and spiritual property taken without *prior* consent. This therefore suggests that creating a strict liability offence is appropriate in these circumstances because it is not difficult for suppliers to ensure they know whether or not the Indigenous cultural expression that they supply is made by or made with the consent of an Indigenous artist and Indigenous community. It simply requires the supplier to ask the producer for certification or confirmation. If the offence was not framed in terms of strict liability but instead required a fault element such as "intention" or "recklessness" this would allow defendants to escape liability in instances where prior consent was not obtained (thus undermining the rights of Indigenous persons as contained in Article 11(2)).

The strict liability offence is also a proportionate means of achieving the above objective because in addition to the defence of an honest and reasonable mistake still being available to a defendant, there is also an offence-specific defence in proposed section 168A(2). This defence provides that where a person has entered into an arrangement with each Indigenous community and Indigenous artist with whom the Indigenous cultural expression is connected, this will not constitute an offence under proposed section 168(1).

Additionally, the strict liability offence is appropriate and proportionate because:

- the offence is not punishable by imprisonment. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* outlines that it is only appropriate for strict liability to apply if the offence is not punishable by imprisonment and that is the case here;
- while the fine imposed is higher than that recommend in the Guide, these fines are consistent with other fines imposed for strict liability offences under the Australian Consumer Law; and
- the offence is narrow and easily capable of avoidance. Suppliers can readily obtain information regarding the origin of products that they supply and should be encouraged to

do so. The defence of reasonable mistake of fact in section 207 of the Australian Consumer Law will also help to protect suppliers which rely on information provided to them when they acquire the art for resale.

2. Reverse burden offence in proposed section 168A(1)-(2)

The offence in proposed section 168A(1)-(2) reverses the burden of proof and places the onus on the defendant to prove their innocence. The proposed offence requires the defendant to prove that the thing was supplied by, or in accordance with an arrangement with, each Indigenous community and Indigenous artist with whom the Indigenous cultural expression is connected. Whilst the Committee notes that consistency with the presumption of innocence in Article 14(2) of the ICCPR generally requires the prosecution to prove each element of the offence beyond a reasonable doubt, proposed section 168A(1)-(2) is not inconsistent with the right to be presumed innocent because it is a permissible limitation on this right.

There is substantial overlap between the analysis above regarding the strict liability offence in proposed section 168A(3) and the analysis below with respect to the reverse burden offence in proposed section 168A(1)-(2).

a. Legitimate Objective for the Purposes of International Human Rights Law

The legitimate objective is the same as outlined above with respect to the strict liability offence and is reflected in the explanatory memorandum to the Bill.

b. Rational Connection to the Objective

The reverse burden offence is effective to achieve the legitimate objective because it seeks to limit the circumstances in which a person may supply or offer to supply an Indigenous cultural expression. This is directly related to the protection of Indigenous culture because it will prevent the supply of artefacts, literature or artwork that is unrepresentative of Indigenous culture. It will also ensure that the authenticity of such cultural expressions is retained, thus protecting the past, present and future manifestation of Indigenous culture.

Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples sets out that "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions". This right is given to Indigenous peoples, not any other peoples. Consequently the requirement to seek permission from Indigenous communities and Indigenous artists ensures that they have ultimate control over their traditional cultural expressions. To permit otherwise could lead to adverse impacts on Indigenous culture through the propagation of Indigenous cultural expressions that are incorrect according to traditional knowledge. This could lead to the erosion or desecration of traditional practices and the inaccurate portrayal of cultural expressions such as Indigenous dance or art. Consequently in these circumstances there is a rational connection between the reverse burden of proof and the objective

of preventing non-Indigenous Australians from benefitting from the sale of Indigenous cultural expressions and undermining Indigenous culture. In this respect, providing Indigenous Australians with the ability to control the supply of their traditional cultural expressions respects the rights provided to them by the United Nations Declaration on the Rights of Indigenous Peoples.

c. Reasonable and Proportionate Means of Achieving the Objective

The offence-specific defence, that imposes a burden of proof on the defendant, is a reasonable and proportionate means of achieving the objective of the Bill because:

- the requirement for consent provides the best protection to Indigenous communities and artists. The fact that suppliers are commercialising Indigenous cultural expressions without obtaining any consent places Indigenous communities and artists in a position of vulnerability and exploitation. This defence focusses on the key issue – whether the relevant Indigenous community and artist has consented to the commercialisation of the indigenous cultural expression with which the community and artist is associated;
- this defence (and the legal burden associated with it) is appropriate because the consent or licensing arrangements in place for the supply of the art is peculiarly within the knowledge of the defendant. It would be a difficult and costly exercise for the prosecution to disprove consent and would necessarily require the prosecution to ensure that no Indigenous person or community had granted consent to the defendant. Such a burden would be unreasonable and make the offence difficult to establish. By contrast, it does not impose any significant burden on the defendant – if they have obtained consent to use the Indigenous cultural expression in the manner in which they have, they should be able to establish this without any real difficulty. If they have acquired the art or products bearing the Indigenous cultural expression from a wholesaler, they can make it a condition of the wholesale purchase that the wholesaler provides evidence of consent.

This approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which relevantly provides that "where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence". The Guide also relevantly provides in this respect:

> *"...the [Scrutiny of Bills] Committee has indicated that it may be appropriate for the burden of proof to be placed on a defendant where the facts in relation to the defence might be said to be peculiarly within the knowledge of the defendant, or where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused."*

We hope this response assists the Committee in reaching a conclusion regarding the human rights compatibility of the Bill.

Yours Sincerely,

Bob Katter MP

Federal Member for Kennedy

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

MS17-001012

18 APR 2017

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair Ian

Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

Thank you for your letter of 28 March 2017 regarding the Parliamentary Joint Committee on Human Rights' consideration of the above Bill in its *Report 2 of 2017*.

I enclose my response to this request, which I trust will assist the Committee in its consideration of the Bill.

Should your office require any further information, the responsible adviser for this matter in my office is Adrian Barrett, who can be contacted on 02 6277 7290.

Thank you again for writing on this matter.

Yours sincerely

Michael Keenan

Encl: Response to request for further information from the Parliamentary Joint Committee on Human Rights - Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

Proceeds of Crime

Compatibility of the measure with fair trial and fair hearing rights

While this bill does not substantially amend the provisions of the POC Act or the MA Act or the application process, human rights concerns remain in relation to these existing Acts. In addition, specifically providing in the bill that a foreign restraining order does not need to be made by a court raises serious concerns about the right to a fair hearing before a person's private property is frozen, seized or subject to restraint.

The bill seeks to amend or expand the operation of a number of Acts in relation to the proceeds of crime. The committee reiterates its earlier comments that the proceeds of crime legislation provides law enforcement agencies with important and necessary tools in the fight against crime. However, it also raises concerns regarding the right to a fair hearing and the right to a fair trial. The committee reiterates its previous view that both the *Mutual Assistance in Criminal Matters Act 1987* and the *Proceeds of Crime Act 2002* would benefit from a full review of the human rights compatibility of the legislation. The committee draws these matters to the attention of the Parliament.

Minister for Justice's response:

The Government continually reviews the *Mutual Assistance in Criminal Matters Act 1987* and the *Proceeds of Crime Act 2002* and will continue to undertake human rights compatibility assessments where Bills amend those Acts.

The Government reiterates that proceeds of crime orders are classified as civil under section 315 of the Proceeds of Crime Act and do not involve the determination of a criminal charge or the imposition of a criminal penalty.

As the Acts were enacted before the *Human Rights (Parliamentary Scrutiny) Act 2011*, they were not required to be subject to a human rights compatibility assessment.

Person awaiting surrender under extradition warrant must be committed to prison

Compatibility of the measure with the right to liberty

The committee notes that a requirement on a magistrate, judge or court to commit a person to prison to await surrender under an extradition warrant engages and limits the right to liberty.

The preceding analysis raises the question of whether the obligation to commit to prison, without providing the court with any discretion not to order commitment to prison in individual cases, is proportionate to the objective of preventing suspects from absconding.

The committee therefore seeks the Minister for Justice's advice as to why the provisions enabling a magistrate, judge or court to commit a person to prison to await surrender under an extradition warrant are framed as an obligation on the court rather than a discretion and how the existing bail process under the Extradition Act 1988 fits with the amendments proposed by this bill.

Minister for Justice's response:

The amendments to sections 26 and 35 of the Extradition Act address the logistics for the execution of a surrender warrant when a person is on bail and a surrender warrant has been issued to surrender the person to an extradition country. The surrender warrant is the instrument that empowers the police to bring an eligible person into custody to await transportation out of Australia.

The amendments to sections 26 and 35 do not affect the existing framework for bail under the Extradition Act. In the extradition context, a magistrate must not release a person on bail unless there are special circumstances justifying such release. The presumption against bail is appropriate given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of alleged offenders to face justice in the requesting country. The requirement to demonstrate 'special circumstances' justifying release provides suitable flexibility to accommodate exceptional circumstances that may necessitate granting a person bail (such as where the person is in extremely poor health).

The Extradition Act does not provide for a person to apply to have their bail extended following the issuing of a surrender warrant and while the person awaits surrender to the requesting country. The amendment clarifies that, following a discharge of bail recognisances, a magistrate, eligible Federal Circuit Court Judges or relevant court is to remand the person to prison to await surrender. The amendment is framed as an obligation on to reflect the unavailability of bail pending logistical arrangements for surrender to the requesting country. If a person seeks to challenge the surrender determination by way of judicial review, the person is able to make a new bail application under section 49C of the Extradition Act to the relevant review or appellate Court. Under section 49C(2) of the Extradition Act a grant of bail by a review or appellate Court terminates each time such a Court has upheld the surrender determination.

ATTORNEY-GENERAL

CANBERRA

27 MAR 2017

MS17-000908

The Hon Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Chair

I refer to the Parliamentary Joint Committee on Human Rights' *Report 2 of 2017* tabled on 21 March 2017, which includes a report on the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (the Bill).

In its report, the Committee has requested further advice as to the compatibility of the measures with rights to enjoy and benefit from culture. Specifically, the Committee has sought comment on whether the measures limit rights to enjoy and benefit from culture for individuals or minorities within claim groups who do not agree with the broader claim group's support for an area Indigenous Land Use Agreement (ILUA) under the *Native Title Act 1993* (the Act). The Committee has requested advice on whether the measure is a reasonable and proportionate measure for the achievement of its apparent objective and in particular:

- whether less rights restrictive measures would be workable;
- whether reasonable scope could be given for minority views; and
- any procedural or other safeguards to protect the right to culture for individuals.

The Committee has also requested further advice as to the compatibility of the measures with the right to self-determination. It notes that the measures appear to promote the right to collective self-determination, but has questions about whether the Bill promotes the right to self-determination in all circumstances and has requested advice on:

- the extent to which the measures promote the right to self-determination in a range of circumstances;
- whether reasonable scope could be given for minority views; and
- whether there has been sufficient and adequate consultation with Aboriginal and Torres Strait Islander peoples about the proposed changes.

The *Native Title Act 1993* and cultural rights

One of the main purposes of the Act is to preserve and protect native title rights. Native title rights are generally communal in nature and there may some tension between the protection and preservation of communal rights and the individual right to enjoy and benefit culture.

The practice of culture and the recognition of native title rights are not necessarily dependent; it is possible for native title holders to engage in a ranger of cultural practice without a native title claim or determination. Indigenous Land Use Agreements (ILUAs) will often facilitate access for such practices regardless of the nature and extent of native title rights likely to be recognised by a court.

Whether less rights restrictive measures would be workable

I have been asked a similar question of the Senate Scrutiny of Bills Committee and provide my response to that Committee here.

ILUAs are a mechanism allowing native title holders and claimants and third parties to agree about the doing of things on land subject to native title. While the exact subject matter of the affected ILUAs is commercial-in-confidence to the parties of those ILUAs, ILUAs can cover a range of matters including agreement about the doing of acts that may affect native title, how native title and other rights in the area will be exercised including how parties will be notified and consulted, and agreement on compensation and other benefits. The effect of the decision has been to bring into doubt the agreements that have been reached on these and other issues, and to raise doubts about the validity of acts done in reliance on the agreement and of benefits transferred or to be transferred in the future. This leaves the ILUAs open to legal challenge.

Allowing the affected ILUAs to remain open to challenge creates great uncertainty about whether agreements struck can continue to be relied upon by both native title holders and third parties. It also raises the prospect of significantly increased costs for the sector both in the form of litigation about the status of affected agreements, which may divert resources away from progressing claims for native title, and potentially the need to re-negotiate ILUAs which may have already taken several years and significant resources to negotiate. Given these consequences I am satisfied that less restrictive measures are not available.

Minority views

Minority views within the claim group are given voice through the authorisation process for an ILUA. The authorisation process involves everyone who holds, or who may hold, native title within the area of an ILUA, and requires those parties to use a traditional decision-making process (where one exists), or a process agreed upon by the group, to decide whether or not to authorise the ILUA. Where a claim group does not authorise an ILUA, the agreement cannot be registered. It is only after the authorisation has occurred that the Registered Native Title Claimant (RNTC) – a smaller group of authorised representatives who manage the claim on behalf of the wider group – must become parties to the agreement, before it can be registered.

The measures in the Bill allow an ILUA to be registered where not every member of the RNTC has become party to the agreement; however, the ILUA must still be authorised before this can occur. Where a claim group authorises an ILUA, notwithstanding minority views, the Act allows for that ILUA to be registered. Requiring unanimity on the part of the claim group before ILUAs can be authorised would slow, or possibly entirely stop, agreement-making under the Act, which would dramatically reduce the financial and other benefits which can flow to native title holders as a result of ILUAs.

Procedural and other safeguards

Part of the statutory functions of Native Title Representative Bodies and Service Providers is to provide dispute resolution services. This mechanism provides support to claim groups unable to agree about the conduct of consultations, mediations, negotiations or proceedings about ILUAs.

The measures in the Bill impose a higher standard on decision-making in relation to ILUAs than existed prior to *McGlade*. Before that decision it was sufficient for a single member of the RNTC to be a party to an ILUA. The Bill strikes a balance between the unanimity requirement in *McGlade* and the previously accepted position that a single RNTC member being party to an ILUA was sufficient.

The *McGlade* decision emphasised the role of the s 66B applicant replacement process as a mechanism for removing members of the RNTC who refuse to sign an ILUA, notwithstanding the fact that the wider group has authorised it. The court noted that it is open to a claim group to remove a person from the RNTC for failing to comply with the claim group's will in that regard. However, the process of obtaining a court order under s 66B is costly, and will often delay the making of agreements for groups, which is already a lengthy and expensive process. Requiring a change in the composition of the RNTC under s 66B in order to ensure that an ILUA can be registered imposes significant transaction costs on native title groups.

The *Native Title Act 1993* and self-determination

Through ILUAs the Act provides a framework for native title holders to use their native title rights in particular ways and to make agreements about how activities on land subject to native title may occur. The measures provide greater control to claim groups as a whole, rather than the individual members of the RNTC, over the making of area ILUAs. If allowed to stand, the *McGlade* decision would have required unanimity among the RNTC, even in circumstances where the broader claim group support the relevant ILUA and have authorised it. Negotiation and authorisation of an ILUA are the appropriate forums for a native title group to consider minority viewpoints.

Consultation process for the Bill

The consultation process for the Bill was necessarily targeted, given the narrow scope of the measures and their urgency. My department consulted with the peak body representing all Native Title Representative Bodies and Service Providers across the country, the National Native Title Council (NNTC), along with state and territory officials, and peak representative bodies for the mining and agricultural sectors. The NNTC were supportive of the measures and made a submission to the Senate Inquiry into the provisions of the Bill – endorsed by many of the Native Title Representative Bodies and Service Providers – indicating its support. The NNTC and Cape York Land Council also expressed concern that, absent the Bill being passed, the *McGlade* decision will allow individuals to frustrate the will of the group.

I trust this additional information is of assistance.

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

PDR ID: MC17-001391

31 MAR 2017

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 28 March 2017 regarding the Parliamentary Joint Committee on Human Rights' assessment of the Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017 (the Bill).

The Committee has requested further information regarding the strict liability offences contained in Sections 26BCC(3) and(4) of the Bill and the reverse burden provisions in Sections 26BCC(5)-(9) of the Bill.

Strict Liability Offences
26BCC(3) creates an offence for the master and owner of an Annex IV Australian ship where sewage is discharged in the Antarctic Area outside Australia's exclusive economic zone. The purpose of this offence to manage the risk of Australian ships discharging sewage into the pristine waters of the Antarctic. This type of discharge could have a significant adverse impact on the environment, human health, safety and other users of the sea, particularly when a reoccurring activity.

26BCC(4) creates a similar offence, being an offence for the master and owner of an Annex IV Australian ship which discharges sewage in Arctic waters. While Australia does not have the additional burdens of responsibilities for the Arctic area as is the case for the Antarctic under the Antarctic treaty system, the same concerns outlined above in relation to the Antarctic apply to this offence in the Arctic.

Reverse Burden Provisions
26BCC(5)-(9) provide defences to the strict liability offences proposed at 26BCC(3) and (4). These provisions describe exceptions to the strict liability offences and require the defendant to raise evidence about the matters outlined in each provision.

Section 26BCC(5) creates two exceptions. The first is an exception to the strict liability offences where safety of life at sea is endangered. The second exception requires evidence to be presented about the precautions taken throughout a voyage to minimise damage and the decision about the need to discharge sewage.

Section 26BCC(6) creates an exception requiring evidence to be presented about a combination of factors: the location of the discharge and the speed of the ship when the discharge occurs.

Section 26BCC(7) also creates an exception requiring evidence to be presented about a combination of factors: the location of the discharge and the physical nature of the discharge when the discharge occurs.

Section 26BCC(8) creates an exception requiring evidence to be presented about the nature of the sewage discharged.

Section 26BCC(9) creates an exception requiring evidence to be presented about the location of the discharge.

Legitimate objective

The Polar Code is an international agreement negotiated under the auspices of the International Maritime Organization (IMO) that includes mandatory provisions covering pollution prevention measures. These measures are important because as sea ice continues to decline, the polar waters are becoming more accessible to vessel traffic. Shipping activities are therefore projected to increase as a result of natural resource exploration and exploitation, tourism, and faster transportation routes. The increase in shipping presents substantial environmental risks for these fragile marine ecosystems. Therefore, I consider that both the strict liability offences and reverse burden provisions are directed toward a legitimate objective.

Rational connection

In aiming to protect the environment the Polar Code places strict limitations on discharge of sewage and garbage from ships travelling in polar waters. The strict liability provisions in the Bill implement the parts of the Polar Code that reflect these limitations. Prevention of the discharge of untreated sewage from passing ships is a necessary step in protecting these waters and will become more important as traffic increases.

The burden of proof is placed on the defendant in the above provisions of the Bill because the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused and the defendants are best placed to give evidence as to their decision making at the time when a discharge occurs. This is a situation in which the relevant facts are likely to be within the knowledge of the defendant, and in which it could be difficult for the prosecution to prove the defendant's state of mind. The Senate Standing Committee for the Scrutiny of Bills has previously indicated that the burden of proof may be imposed on a defendant under these circumstances. In my view, this approach is also consistent with 4.3.1 of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.

Regarding 26BCC(5), only those present during a particular incident are able to make an assessment as to what is necessary to ensure the safety of life at sea, and the master of the ship is charged with the responsibility for making this judgement. Regarding 26BCC(6), the circumstances surrounding a particular incident, the precautions needed to address that situation, and the assessment undertaken in making a decision, can only be known by those present (specifically the master of the ship). Similarly, regarding 26BCC(7)-(9), the matters described in each of these exceptions is knowable only by those present and charged with decision making responsibilities, being the master of the ship in control of the ship at the time, subject to the direction of the shipowner.

Proportionality

Shipping companies are engaging in a high-investment, high-return commercial activities. Stringent regulatory regimes designed to better manage safety and environment issues throughout the world's oceans are agreed internationally through the IMO, a long-standing international body involving 172 Member States. Those ships travelling through Antarctic and Arctic waters are subject to additional internationally agreed regulatory regimes designed to protect these sensitive waters. Australia has a particular responsibility for parts of the Antarctic waters through the Antarctic Treaty system.

Given the significant consequences of non-compliance for the Antarctic, it is important that the penalty for non-compliance is high enough to be a real incentive to industry. In order to ensure compliance with environmental regimes, high initial outlays by the shipping industry are sometimes required. In these circumstances, and given the very high level of expenditure routinely incurred in shipping operations, it is considered that the strict liability offences and reverse burden provisions contained in the Bill are reasonable and proportionate. Further, these strict liability offences and reverse burden provisions are consistent with other measures in the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

There are no less intrusive measures that could be implemented that would achieve the same environmental outcome. I acknowledge the burden placed on shipowners and masters through these provisions, however I note the benefits that also accrue to industry in protecting the environment in which they operate. I also note the support provided by the maritime industry during the international negotiations relating to the Polar Code conducted under the auspices of the IMO.

Given the above, I consider that the strict liability offences and reverse burden provisions contained in the Bill are aimed at achieving a legitimate objective for the purposes of international human rights law, that the offences and provisions are rationally connected to that objective, and that the limitation is in each case a reasonable and proportionate measure.

I trust this information will be of assistance to the Committee.

DARREN CHESTER

The Hon Greg Hunt MP
Minister for Health
Minister for Sport

Ref No: MC17-006147

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

10 APR 2017

Dear Mr Goodenough Ian

I refer to the request by the Parliamentary Joint Committee on Human Rights (the Committee) of 28 March 2017 for further information about an aspect of the Therapeutic Goods Amendment (2016 Measures No.1) Bill 2016 (the Bill), which amends the *Therapeutic Goods Act 1989* (the Act) to implement a number of reforms arising from the Expert Panel Review of Medicines and Medical Devices Regulation.

In its *Report 2* of 2017, the Committee sought further information on whether the civil penalty provision in Schedule 12 of the Bill for therapeutic goods manufacturers who provide false or misleading information in response to a request from the Secretary for information or documents about the goods they are manufacturing may be 'criminal' for the purposes of international human rights law (having regard to the Committee's Guidance Note 2) and, if so, whether that provision accords with the right to a fair trial.

This measure (proposed new section 41AF) is clearly identified in the Bill as being a civil penalty, and is plainly distinguishable as such from the corresponding criminal offences in the Bill relating to the same conduct – proposed new sections 41AD and 41AE.

Although the maximum levels of these penalties may appear high, this is designed to reflect the size and nature of the therapeutic goods industry, and the significant health dangers that major problems with medicines and medical devices can cause to patients.

It is very important from a public health perspective that the Act discourage the provision of false or misleading information to the Therapeutic Goods Administration (TGA) in the context of the carrying out of its regulatory functions – including in respect of therapeutic goods manufacturers. If the TGA were to rely on false or misleading information to, for example, elect not to suspend or revoke a manufacturing licence, this could potentially have quite serious consequences for public health and safety.

The new information-gathering power in proposed new section 41AB is needed to support the effective regulation of therapeutic goods manufacturing in Australia so as to safeguard public health, particularly as it relates to informing the TGA about significant matters such as the quality assurance and control measures used by a manufacturer, and whether a manufacturer has been observing the manufacturing principles (as minimum requirements for ensuring quality and safety of therapeutic goods).

The maximum penalty levels for proposed new section 41AF are also consistent with the regime throughout the Act of having civil penalties as an alternative to criminal offences for a range of behaviour that breaches important regulatory requirements. For example, section 9H of the Act (which the Committee considered in its Second Report of the 44th Parliament) sets out a civil penalty for making false statements in, or in connection with a request to vary an entry for a therapeutic good in the Australian Register of Therapeutic Goods, with identical maximum penalty levels to proposed new section 41AF.

It is also important to note that the civil penalty in proposed new section 41AF would not apply to the public in general, but would only arise in the specific regulatory context of manufacturers of therapeutic goods who are licensed under Part 3-3 of the Act.

In addition, proposed new section 41AF does not carry any sanction of imprisonment for non-payment. Section 42YD of the Act makes it clear that if the Federal Court orders a person to pay a civil penalty, the Commonwealth may enforce the order as if it were a judgment of the Court, that is as a debt owed to the Commonwealth.

With these points in mind, this civil penalty provision would not seem likely to be 'criminal' for the purposes of international human rights law and, accordingly, the Committee's question in relation to whether the measure is consistent with the right to a fair trial would not appear to arise.

The Act also protects a person from being required to pay a civil penalty if they have already been convicted of an offence relating to the same conduct, and prohibits criminal proceedings from being started if an order has been made against the person in civil penalty proceedings for the same conduct. Any civil penalty proceedings will be stayed if criminal proceedings relating to the same conduct are, or already have been, started.

In addition, the Act makes it clear that any evidence given by a person in civil penalty proceedings (whether or not any order was made by the Court in those proceedings) will not be admissible in criminal proceedings involving the same conduct.

Thank you for writing on this matter.

Yours sincerely

ASSISTANT MINISTER TO THE TREASURER

Ref: MC17-002896

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 28 March 2017, seeking the Treasurer's advice as to the human rights compatibility of the Federal Financial Relations (National Specific Purpose Payments) Determination 2015-16 (the determination). The Treasurer has asked me to respond on his behalf.

National Specific Purpose Payments (NSPPs) are made by the Commonwealth to states and territories in three specific sectors: disability services, skills and workforce development, and affordable housing. The *Federal Financial Relations Act 2009* requires the Treasurer to make an annual determination of the total payment amount for each NSPP by applying an indexation factor to the total payment amount from the previous financial year. The relevant indexation factors are calculated according to formulas set out in Schedule D to the Intergovernmental Agreement on Federal Financial Relations.

The Committee asked whether there had been any reduction in the funding allocation to the NSPPs since the previous determination (relating to the 2014-15 financial year), which the Committee assessed in early 2016. The total payment amount for each NSPP has increased since 2014-15 (see following table).

Sector	2014-15 ($)	2015-16 ($)	Increase ($)
Disability services	1,393,331,000	1,438,826,000	45,495,000
Affordable housing	1,305,771,000	1,324,052,000	18,281,000
Skills and workforce	1,435,176,000	1,455,484,000	20,308,000

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Had there been a reduction in any of these amounts, the Committee sought advice as to whether that reduction was compatible with Australia's obligation to avoid unjustifiable retrogressive measures in the realisation of economic, social and cultural rights. While no such reduction occurred in 2015-16, a year-on-year decrease in the total payment amount does not necessarily indicate a retrogressive measure in the realisation of human rights. A change in the parameters underlying the indexation formulas could result in a reduced total payment. Other policies and programmes may also have an effect on NSPPs. For example, the NSPP for disability services is likely to decrease in future financial years as states and territories transition to the National Disability Insurance Scheme, even though the total resources that the Commonwealth devotes to disability services will be increasing.

Finally, the Committee sought advice as to whether the determination supports the progressive realisation of economic, social and cultural rights. The determination assists in the realisation of a number of human rights:

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

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

- The NSPP for disability services promotes:

  - the right of children with disabilities to education, training and health care (art 23, CRC and art 7, CRPD);
  - rights concerning the ability of persons with disabilities to live independently and be included in the community (art 19, CRPD);
  - rights concerning the personal mobility of persons with disabilities (art 20, CRPD);
  - rights concerning the habilitation and rehabilitation of persons with disabilities (art 26, CRPD); and
  - the right to take part in cultural life (art 30, CRPD).

I trust this information will be of assistance to you.

The Hon Michael Sukkar MP

19 / 4 /2017

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS17-001344

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Ian,

Dear Mr Goodenough

Thank you for your correspondence of 28 March 2017 in which a further response was requested on the Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016.

My response to your request is attached.

Thank you for raising this matter.

Yours sincerely

PETER DUTTON 21/04/17

Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 [F2016L01696]

Committee response

1.53 The preceding analysis indicates that narrowing the definition of 'member of the family unit' engages and limits the right to protection of the family. The minister's response does not sufficiently address whether this limitation is permissible as a matter of international human rights law.

1.54 Accordingly, the committee requests the further advice of the minister as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected) to that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

The Minster notes the concerns raised by the committee in its request for further information and provides the following response to the committee, which is in addition to information previously provided.

As previously noted in the first response, the new definition of Member of the Family Unit (MoFU) is permissible as a matter of international law.

Limiting jurisdictional application of MoFU

In response to the committee comments provided at **Item 1.39,** the Minster advises that these changes are not retrospective. They predominantly apply to persons who:

- are **outside** Australia; and
- do not hold a valid visa that allows for entry into Australia; and
- are seeking to make a new application for a visa to enter Australia.

In relation to the practical application of MoFU, specific grandfathering provisions have been introduced as part of this amendment. These provide that lawful non-citizens living in Australia are not disadvantaged by this change (refer sub-regulation 1.12(5)).

Why the limitation is permissible under international human rights law

The objective of the amendment is to contribute to the effective management of Australia's Migration Programme. Australia has well managed and targeted migration programmes that are designed to meet social and economic needs. It is imperative to ensure that the limited places available in targeted programmes, such as the Skilled Migration Programme and the Family Stream, are directed to those who are most likely to support and deliver on the intentions of the programmes. Extended family members excluded by the new definition of MoFU are able to apply for other visa classes where they meet the eligibility criteria in their

own right. In doing so, the extended family member will be demonstrating their ability to make a positive contribution to Australia.

In addition, the amended definition of MoFU ensures consistency with the current framework for the relatives of Australian citizens and existing permanent residents. The former definition allowed for more generous migration pathways for relatives of new entrants into Australia, who often benefit from differential visa pricing and processing timeframes attributable to the primary applicant. The amendment is thus effective in achieving the legitimate objectives stated, as it promotes the intentions of the Migration Programme and contributes to its effective management.

The new definition predominately applies to non-citizens outside Australia applying for visas to enter Australia. In regard to non-citizens within Australia's jurisdiction, this limitation is a reasonable and proportionate measure to achieve the stated objectives as it:

- includes grandfathering provisions, so that lawful non-citizens in Australia are not disadvantaged by this change (see above)
- does not prevent extended family members who do not meet the new MoFU definition to apply for other visa classes in their own right (see first response to the committee and above)
- is consistent with the arrangements for relatives of Australian citizens and existing permanent residents (see first response to the committee and above)
- is more generous than that of similar nations, who are also signatories to the ICCPR (see first response to the committee)
- will not apply to refugee, humanitarian and protection visas (see first response to the committee).

The Hon Christian Porter MP
Minister for Social Services

MC17-006013

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

21 APR 2017

Dear Mr Goodenough

Thank you for your letter of 28 March 2017 regarding the Joint Committee's Report 2 of 2017 - Class of Visas - Qualifying Residence Exemption. In your letter you seek my clarification as to the extent to which Special Benefit is available to people who are in Australia on a temporary visa and the potential level of support available to them through this payment. I appreciate the time you have taken to bring this matter to my attention.

By way of background, Australia's social security system is different from the contributory systems that operate in other countries. It is a taxpayer-funded, non-contributory system based on the concepts of residence and need. Access to social security payments is generally restricted to people who are Australian permanent residents or citizens residing in Australia.

Temporary visa holders, such as 457 visas, student and tourist visas, are not Australian residents for social security purposes and are ineligible for social security payments. A person on a temporary visa must first formalise their immigration status as a permanent resident if they wish to stay in Australia and have access to social security payments.

There are some exceptions to the general residency rules for certain determined temporary visa subclasses contained in the *Social Security (Class of Visas – Qualification for Special Benefit) Determination 2015 (No. 2)*. This determination lists a number of visa subclasses that may be eligible to receive Special Benefit. These types of visas include temporary protection visa holders, temporary (provisional) partner visa holders and people granted a visa for the purposes assisting Australian authorities in criminal matters related to human trafficking, or slavery.

Illegal Maritime Arrivals (IMAs) who are assessed as engaging Australia's protection obligations and meet other requirements such as health, security and character checks can be granted a temporary humanitarian or protection visa. Holders of a temporary humanitarian or protection visa remain ineligible for mainstream social security payments because of their temporary visa status. Their access to social security payments is limited to Special Benefit and related ancillary payments, such as Rent Assistance, Health Care Card, and family assistance payments.

People in Australia on a temporary (provisional) partner visa are generally subject to a 104-week newly arrived residence waiting period (NARWP) before being eligible for Special Benefit. However, the 104-week Special Benefit NARWP can be waived in circumstances where the temporary partner visa holder is in financial hardship due a substantial change of circumstances beyond their control after they have first entered Australia (e.g. victim of domestic violence).

Special Benefit is a discretionary income support payment that provides financial assistance to people who, due to reasons beyond their control, are in financial hardship and unable to earn a sufficient livelihood for themselves and their dependants. To receive Special Benefit, it must be established that the person is not eligible for any other pension or allowance.

The rate of Special Benefit a person receives is discretionary and depends on their individual circumstances, provided it does not exceed the rate of Newstart Allowance or Youth Allowance that would otherwise be payable to the person. In practice, the Newstart Allowance rate (including supplements) is generally paid to those aged 22 years and over while the Youth Allowance rate is paid to those under 22 years.

To establish whether a person is in financial hardship or unable to earn a sufficient livelihood, an available funds test is applied. A person who requires Special Benefit long-term (more than three months) cannot receive a payment until their available funds are $5,000 or less. For a person who requires the payment on a short-term basis (less than three months), their available funds must be less than their fortnightly rate of payment. Where a person is a member of a couple, the partner's available funds are also included in assessing the person's available funds. In recognition that Special Benefit is a payment of last resort, the value of any in-kind support (such as free boarding and lodging) and income (both earned and unearned) is directly deducted from their maximum rate of payment.

People who receive Special Benefit can be paid for up to 13 weeks from the date of decision. Payment of Special Benefit must then be reviewed before the delegate determines whether payment can continue. If payment of Special Benefit continues, it must be reviewed every 13 weeks, though there is no limit to the length of time a person can receive the payment.

Thank you for raising this matter with me. I trust this information is of assistance.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services