Appendix 3

Correspondence

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS17-001272

Mr Ian Goodenough MP
Chair
S1.111
Parliament House
CANBERRA ACT 2600

Dear Ian, Mr Goodenough

Thank you for your letter of 28 March 2017 in which further information was requested on the following:

- Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016; and
- Australian Citizenship Regulation 2016 [F2016L01916]

My response in respect of the above-named bill and Regulation is attached.

I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 16/05/17

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Australian Citizenship Regulation 2016 [F2016L01916]

1.137 ... the committee requests the advice of the Minister for Immigration and Border Protection as to whether the limitation on the right to privacy is a reasonable and proportionate measure for the achievement of its legitimate objective including:

- **whether a less rights restrictive approach such as notation on a citizenship notice that a person 'previously had another name' rather than listing previous names would be feasible;**
- **whether a less rights restrictive approach such as having internal government records regarding previous names would be feasible;**
- **whether the details listed on a passport (which do not list previous names) would be sufficient;**
- **whether there are or could be safeguards incorporated into the measure for people with specific concerns about having previous names listed (such as exceptions);**
- **whether the measure complies with relevant guidelines; and**
- **whether the measure provides sufficient flexibility to treat different cases differently and whether affected groups are particularly vulnerable.**

I note the Committee's views that although the limitation on the right of privacy resulting from this Regulation is for a legitimate objective, there remains a concern that the information that may be included on the back of a notice of evidence of Australian citizenship is not a proportionate limitation. However, I am of the view that the measure (which appears in Regulation 12) is in fact a proportionate response to the legitimate objective of reducing the opportunity for identity fraud and ensuring continuity of identity in the Department of Immigration and Border Protection's (the Department's) records.

In particular, if included, the information would appear on the *back* of the notice of evidence of Australian citizenship. It is not made available to the general public, and it is the individual concerned who has control of the notice of evidence and, consequently, over the disclosure of the information. Notices of evidence of Australian citizenship are generally used when individuals are dealing with government or other bodies and are used as primary evidence to establish the person's identity and citizenship status. This means that the need to disclose any information appearing on the back of a notice of evidence is limited. Persons holding a notice of evidence maintain control over who or what organisation(s) they wish to disclose the notice to and for what purpose.

I note the Committee's suggestion that a less restrictive approach such as not listing previous names and /or having internal government records regarding previous names would be feasible. However, I respectfully consider that these options, and that of only listing those details which appear on a passport, would weaken the integrity of the document which is utilised to provide continuity of a record of an individual's identity. As previously stated to the Committee in the Statement of Compatibility with Human Rights that accompanied the Explanatory Statement to this amendment, I maintain that this measure complies with the relevant Australian Government Guidelines on the Recognition of Sex and Gender. In addition to providing continuity of a record of an individual's identity, as the Committee has noted, the Guidelines propose that - consistent with Australian Privacy Principle 11 - government departments and agencies 'should ensure that an individual's history of changes of sex/gender or name is... recorded and accessed only when the person's history is relevant to a decision being made' (paragraph 38 of the Guidelines refers).

I submit that the Regulation complies with this recommendation as I understand that another body would only access the relevant information - with the consent of the individual concerned - when the information was relevant to a particular decision. Further, an individual's information would only

be recorded at the discretion of the processing officer when that officer considered it was relevant to the notice of evidence.

It is also my view that the processing officer's discretion not to include previous names and/or dates of birth on the back of a notice of evidence is a safeguard which, under policy, supports an individual where there may be concerns regarding the inclusion of certain information. For example, if an officer is satisfied that inclusion of a particular name will endanger the client or another person connected to them, an officer would take that into account in considering whether or not to exercise his or her discretion to include that information on the back of a notice of evidence. There may also be other situations such as cases involving witness protection in which an officer chooses to exercise their discretion not to include a person's previous names and/or dates of birth in the notice of evidence of citizenship.

The Australian Citizenship Act 2007 and the Australian Citizenship Instructions (ACIs) on notice of evidence provide sufficient flexibility for officers to treat different cases differently, including vulnerable individuals such as refugees and transgender persons and persons in witness protection.

1.145 This measure would appear to have a disproportionate negative effect on particular vulnerable individuals, raising questions about whether this disproportionate negative effect (which indicates prima facie indirect discrimination) amounts to unlawful discrimination.

1.146 Accordingly, in relation to the compatibility of the measure with the right to equality and non-discrimination, the committee requests the further advice of the Minister for Immigration and Border Protection as to whether the measure is reasonable and proportionate for the achievement of its objective and in particular the matters set out at [1.137] above.

As detailed above, I maintain that the recording of certain information on the back of a notice of evidence to enhance the identity framework is a reasonable measure which is necessary and proportionate to the legitimate objective of reducing the opportunity of identity fraud.

Senator the Hon Marise Payne
Minister for Defence

Parliament House
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MC17-001287

Chair
Parliamentary Joint Committee on Human Rights
S1.111
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Dear Chair

Thank you for your letter of 10 May 2017 seeking my advice about the human rights compatibility of the *Defence Legislation Amendment (2017 Measures No. 1) Bill 2017* (the Bill), as set out in the Committee's report.

I understand the Committee is seeking advice on whether the civil penalty provisions introduced by the Bill may be considered to be 'criminal' in nature for the purposes of international human rights law and, if so, whether the measures accord with criminal process rights. The measures in Schedule 2 of the Bill insert civil penalty provisions corresponding to each criminal offence in the *Defence Reserve Service (Protection) Act 2001*.

In accordance with the Committee's *Guidance Note 2*, the criteria for assessing whether a penalty is 'criminal' for the purpose of human rights law include the following steps:

- **Step one**: Is the penalty classified as criminal under Australian law?
- **Step two**: What is the nature and purpose of the penalty?
- **Step three**: What is the severity of the penalty?

For the reasons outlined below, I am advised that the civil penalty provisions proposed in the Bill would not be considered 'criminal' for the purposes of international human rights law.

(1) Classification of the penalty under domestic law

The classification of the penalty as 'civil' under domestic law is not determinative. However, if the penalty is 'criminal' under domestic law, it will also be regarded as 'criminal' under international law.

The Bill clearly identifies the penalties as being civil penalties, which are distinguishable from the corresponding criminal offences in the Act relating to the same conduct.

(2) The nature of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee has regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed;
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The civil penalties introduced in the Bill will only apply in employment and similar contexts, and not to the public at large. For the most part, the proposed civil penalties deal with the conduct of employers. The purpose of the civil penalties is to promote the right to safe and healthy working conditions, and to discourage behaviour in civilian employment-like environments that could dissuade a person from providing Australian Defence Force (ADF) Reserve service. The civil penalties are not intended to be punitive or deterrent in nature but, rather, they are intended to bring employers to the discussion table with the employees and Defence, so that an agreement can be reached through mediation.

The type of conduct that will engage the proposed civil penalty provisions includes refusing to employ a person because of their service in the ADF Reserves, dismissing an employee because of their service in the ADF Reserves, hindering an employee from serving in the ADF Reserves, and analogous conduct in other work environments (such as partnerships or contractor relationships).

The Bill also introduces civil penalties to correspond to new criminal offences in the Act, dealing with conduct that amounts to harassment in employment contexts (proposed section 23A) and victimisation because a person has complained or otherwise sought relief under the Act (proposed section 76B). A civil penalty provision is also proposed so that employers are liable for harassment by their employees (proposed section 23B).

(3) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee has regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with the reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed;
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The maximum civil penalty levels proposed are consistent with the range and type of person who are likely to engage in the relevant conduct. The proposed civil penalty provisions are, for the most part, concerned with the conduct of employers and similar, which can range in size from small businesses through to large enterprises, with a corresponding range in turnover and profit. The maximum level of the civil penalty, 100 penalty units, needs to allow for this variation, providing sufficient discouragement even for the largest employers. It is important from a defence capability perspective to discourage conduct by employers and others that could work to dissuade people from joining the ADF Reserves or from providing ADF Reserve service. A person is far less likely to provide ADF Reserve service if they are afraid of adverse consequences in their civilian employment.

For these reasons, the proposed civil penalty provisions appear unlikely to be criminal for the purposes of international human rights law, and the criminal process rights contained in articles 14 and 15 of the ICCPR are unlikely to apply. Accordingly, I have not provided advice as to the compatibility of these civil penalty provisions with criminal process rights. However, I also note that there are safeguards in sections 88 to 91 of the *Regulatory Powers (Standard Provisions) Act 2014* that will apply so that a person found to have committed a criminal offence cannot be subject to a civil penalty for the same conduct, and so that evidence given by an individual in civil proceedings is not admissible against them in criminal proceedings.

Yours sincerely

MARISE PAYNE

26 MAY 2017

The Hon Christian Porter MP
Minister for Social Services

MC17-007459

25 MAY 2017

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

Dear ~~Chair~~ Chair

Thank you for your letter of 10 May 2017 regarding the Committee's report on the Social Services Legislation Amendment Bill 2017. I appreciate the time you have taken to bring this to my attention.

I have noted the comments in the Committee's Report 4 of 2017 in relation to this Bill and have provided my response to these comments in the enclosed document.

I also note that the Bill was passed by both Houses of the Parliament on 29 March 2017 and received Royal Assent on 12 April 2017 as the *Social Services Legislation Amendment Act 2017.*

Thank you again for writing.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

Social Services Legislation Amendment Bill 2017

The Parliamentary Joint Committee on Human Rights, in its 'Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*' report, has sought advice on whether the Social Services Legislation Amendment Bill 2017 (the Bill) is compatible with international human rights law, as defined in that Act. The Bill was passed by both Houses of the Parliament on 29 March 2017 and received Royal Assent on 12 April 2017 as the *Social Services Legislation Amendment Act 2017*.

Specifically the Committee has questioned the compatibility of the measure at Schedule 3 of the Bill with the right to social security, to an adequate standard of living, and to equality and non-discrimination. This document provides responses to the Committee's request for advice on compatibility of the measure with those rights.

Ordinary Waiting Periods

Schedule 3

- **Extend the Ordinary Waiting Period to Youth Allowance (other) and Parenting Payment; include additional evidentiary requirements for the 'severe financial hardship' exemption from the Ordinary Waiting Period; and remove the ability for claimants to serve the Ordinary Waiting Period concurrently with other waiting periods**

1.149 The preceding analysis indicates that the right to social security and right to an adequate standard of living are engaged and limited by the measure. The above analysis raises questions as to whether the measure is a permissible limitation on those rights.

1.150 The committee therefore seeks further advice from the Minister for Social Services 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 for the achievement of that objective.

1.154 The right to equality and non-discrimination (indirect discrimination) is engaged and limited by the measure by reason of its particular impact on women. The above analysis raises questions as to whether the measure is a permissible limitation on those rights.

1.155 The committee therefore seeks further advice from the Minister for Social Services 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 for the achievement of that objective.

The measure at Schedule 3 of the Bill was originally included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 (the Bill No. 1) and subsequently a number of further Bills prior to being legislated as part of this Bill. The Committee concluded its examination of the measure as included in Bill No. 1 in its *Twelfth Report of the 44th Parliament*. The Committee concluded that the measure was compatible with the right to social security and to an adequate standard of living on the basis of Budget constraints articulated at the time constituting a legitimate objective for the purposes of international human rights law.

Budget repair remains a key focus for this Government as outlined in the Treasurer's Budget speech on 9 May 2017 and the 2017-18 Budget papers. The Government has made, and continues to make, necessary and sensible decisions to keep spending under control in order to return the Budget to surplus. This is important to maintain Australia's AAA credit rating and support longer term economic growth[1]. A number of Budget repair measures that have been legislated to date to help achieve this, including the measure at Schedule 3 of the Bill and other measures designed to ensure welfare payment expenditure is sustainable into the future.

The Ordinary Waiting Period is a period of one week during which claimants with the means to support themselves are expected to do so. As noted in the Statement of Compatibility with Human Rights on the Bill, this reflects a central principle underpinning Australia's social security system that support should be targeted to those in the community most in need in order to keep the system sustainable and fair.

The Ordinary Waiting Period currently applies to Newstart Allowance and Sickness Allowance but this measure extends it to Youth Allowance (other) and Parenting Payment from 1 July 2017. These working age payments play similar roles within the broader welfare payments system – to assist people who are temporarily unable to support themselves through work or have a limited capacity to work due to disability or caring responsibilities for young children[2]. The extension of the Ordinary Waiting Period to these payments will promote a consistent expectation across these similar payment types that people should support themselves in the first instance before drawing on the welfare payments system. Reducing ongoing welfare payment expenditure by encouraging self-support will contribute to Budget repair.

The majority of Parenting Payment recipients are female and therefore the extension of the Ordinary Waiting Period to this payment will have a particular impact on women. Parenting Payment is nonetheless classified as a working age payment and expenditure on Parenting Payment represents nearly a third of estimated total working age payment expenditure in 2017-18[3]. In the context of current fiscal constraints, it is reasonable and proportionate that the Ordinary Waiting Period is applied to this payment, in line with other similar working age payments.

It is important to note that this measure maintains an exemption from the Ordinary Waiting Period for those who are unable to accommodate their own living costs for that one week period because they are in severe financial hardship. The existing severe financial hardship waiver has been modified to better target it to claimants who have experienced a personal financial crisis and are most in need of immediate support, such as those who have experienced domestic violence or have incurred reasonable or unavoidable expenditure. The domestic violence provision in particular is aimed at supporting women, who are more likely to be a victim of domestic violence than men, and ensuring they are able to access support immediately in these circumstances. Additional circumstances that constitute a personal financial crisis may also be prescribed by the Secretary by legislative instrument.

The measure is compatible with the rights to social security, an adequate standard of living, and equality and non-discrimination as any limitation on these rights is proportionate to the policy objective of ensuring a payments system that is well-targeted and sustainable in the context of broader, necessary Budget repair, noting that there will continue to be a safety net for those in need through the new waiver provisions.

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[1] 2017-18 Budget glossies – *Living within our means*, budget.gov.au/2017-18/content/glossies/means/html/
[2] DSS Annual Report 2015-16, Part 2 Annual Performance Statement, pg. 53 – Program 1.10 Working Age Payments, www.dss.gov.au/sites/default/files/documents/10_2016/part_2_annual_performance_statement.pdf
[3] DSS Portfolio Budget Statement, pp. 43-45, https://www.dss.gov.au/sites/default/files/documents/05_2017/2017-18_social_services_pbs_-_final_for_online_and_accessible_publication_-_7_may_17.pdf