Appendix 3

Correspondence

The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-010471

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

21 MAY 2018

Dear Mr Goodenough Ian

Thank you for your letter of 9 May 2018 regarding the Parliamentary Joint Committee on Human Rights' consideration of the Australian Institute of Health and Welfare Amendment Bill 2018 in Report 4 of 2018. I appreciate the Committee's comments on the Bill and this response seeks to address the key issues raised by the Committee.

The Committee raised concerns about the impact of the Bill on the right to privacy under Article 17 of the International Covenant on Civil and Political Rights. The Committee sought clarification as to whether the collection of health-related information and statistics, and welfare-related information and statistics, included personal information and sought further information on how measures contained in the Bill are a legitimate objective under human rights law, are effective and are proportionate to the stated objectives.

The proposed change, as described in Items 13 and 14 of the Bill, seeks to provide greater autonomy for the Australian Institute of Health and Welfare (the Institute) to collect data relating to its core functions. Section 5 of the *Australian Institute of Health and Welfare Act 1987* (the AIHW Act) specifies that these functions include the collection of health-related information and statistics and welfare-related information and statistics. The proposed change removes the need for agreement to be sought from the Australian Bureau of Statistics for such collections. Instead, there will be ongoing consultation between the two agencies on data collection activities undertaken by the Institute.

The Institute collects personal information as part of its core functions. This information is collected for statistical purposes to support the development of an evidence base across the health, welfare and housing sectors. Specifically, the Institute collects personal information for survey purposes, to maintain health and welfare data sets, to maintain national registers and to undertake data linkage activities for health and medical research. The provision of such information is critical to enhance the quality and usefulness of its reports and publications, noting that the Institute is responsible for the production of over 180 reports covering subject areas; such as health and welfare expenditure, hospitals, disease and injury, mental health, ageing, homelessness, disability and child protection.

There is no change to the data collection activities under this Bill or to the strict privacy obligations which govern such activities. The *Privacy Act 1988* (the Privacy Act) contains guidelines regarding acts or practices that may have an impact on the privacy of individuals. These guidelines, as specified in the Australian Privacy Principles, govern the way in which Commonwealth agencies collect, use and disclose personal information, along with access and security arrangements.

The Institute, as a Commonwealth agency, is required to comply with the requirements of the Privacy Act.

Furthermore, access to personal information is restricted by confidentiality provisions under Section 29 of the AIHW Act. Access to personal information held by the Institute is restricted to Institute staff, to staff of other bodies contracted to undertake specific functions on behalf of the Institute and to anyone outside the Institute with the approval of the AIHW Ethics Committee.

In addition, section 29 of the AIHW Act, prohibits individuals who acquire information, either arising from their employment or doing any act or thing under an arrangement with the Institute, from disclosing (or making a record of) information concerning a person where the disclosure is not made for the purposes of the AIHW Act. It also prevents individuals in receipt of information acquired under the AIHW Act from being required to divulge or communicate that information to a court.

Section 29 also provides criminal penalties for the unauthorised disclosure of personal information where it is not made for the purpose of the AIHW Act. Fines of up to $2,000 or imprisonment for 12 months, or both, apply.

The AIHW Ethics Committee (established under section 16 of the AIHW Act) is responsible for making decisions on the ethical acceptability of proposals that relate to the Institute's activities and Institute-assisted activities (activities engaged in by bodies or persons, other than the Institute). These proposals may include identifiable data (i.e. data that contains personal information) and the AIHW Ethics Committee can impose conditions on the release of such data as it deems appropriate. Researchers are required to complete an Undertaking of Confidentiality should they be provided with access to personal information by the AIHW Ethics Committee.

These legislative provisions are backed by internal policies and procedures at the Institute to protect personal information collected by the Institute. This includes information security and privacy (technical, physical and personnel aspects), data custody, data linkage protocols, data confidentialisation techniques and the release of statistical information. Institute staff and contractors are required to sign confidentiality deeds before being granted access to data.

The Institute also has measures in place to ensure the safe and secure storage of personal information. Electronic and paper records containing personal information are stored in accordance with the Australian Government's Protective Security Policy Framework and record management practices comply with the Australian Government requirements as specified in the *Archives Act 1983*. Physical security policies also provide additional protections and are in place for regulating access to, and the storage of, linked data sets.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

THE HON ALEX HAWKE MP
ASSISTANT MINISTER FOR HOME AFFAIRS

Ref No: MS18-001844

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 letters of 9 May 2018 in which further information was requested on the:

- Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2017 (the Home Affairs Legislation Amendment Bill); and
- Migration (IMMI/003: Specified courses and exams for registration as a migration agent) Instrument 2018 [F2017L01708] (the Migration Instrument).

My response to both requests are attached.

I trust the information provided is helpful.

Yours sincerely

ALEX HAWKE

24 / 5 / 2018

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Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018

Parliamentary Joint Committee on Human Rights – *Report 4 of 2018*
Department Response

1.21 The committee requests the advice as to the compatibility of the measures with the right to liberty, including:

- ***why it is necessary to apply a visa bar to those non-citizens, which the government has attempted to remove from Australia under s198 of the Migration Act;***
- ***whether there are less restrictive approaches than the application of visa bars; and***
- ***whether there are adequate and effective safeguards in place to ensure that a person is not subject to arbitrary detention (including the availability of periodic review of whether detention is reasonable, necessary and proportionate in the individual case, and the circumstances in which a person may apply for particular classes of visas or the visa bar may be lifted.***

The *Migration Act 1958* (the Act) currently imposes bars on all non-citizens preventing them from lodging further protection visa applications in circumstances where a non-citizen has previously had a protection visa cancelled or an application for a protection visa refused. These mechanisms prevent non-citizens, either lawful or unlawful, from lodging ongoing visa applications to inappropriately prolong their stay in Australia and delay their departure.

Currently, where a non-citizen is removed from Australia, but is refused entry into the destination country and the non-citizen is returned to Australia, visa bars continue to apply. However, where the Department of Home Affairs (the Department) has attempted to remove a non-citizen but the removal from Australia cannot be completed, for a reason other than refusal in the destination country, visa bars no longer apply on return to Australia.

The amendments are necessary to ensure that any non-citizen who the Department attempts to remove, but is then returned to Australia, irrespective of the circumstances, is treated in the same way. These arrangements would treat non-citizens as if they had never departed Australia (i.e. that they were continuously in the Migration Zone) and restore them to their previous immigration status. The visa bars are no more advantageous or disadvantageous than if the Department had not attempted to remove the non-citizen.

Visa bars are the least restrictive approach within the Act to achieve the Department's legislative objectives and ensure that the Department is able to re-facilitate the removal of non-citizens from Australia as soon as reasonably practicable.

The Department has safeguards to ensure that non-citizens are not subject to arbitrary detention. The Detention Review Committee conducts formal review of efforts to progress all non-citizens detained in immigration held detention towards status resolution outcomes. The committee ensures that:

- where a non-citizen is managed in a held detention environment, that the detention remains lawful and reasonable;
- the location of the person, whether held detention, specialised detention, community detention or in the community on a Bridging visa, remains appropriate to the non-citizen's situation and conducive to status resolution.
- where a non-citizen is managed in the community, either on a residence determination or through a Bridging visa, community risk is regularly and appropriately considered; and
- regardless of the location, the non-citizen's status resolution progresses and the appropriate departmental services are in place to support an outcome.

The Minister has a personal, non-compellable power to lift a visa bar or grant a visa, if he thinks it is in the public interest to do so. Generally, the Department on behalf of a person makes a request for the Minister to use their public interest powers. However, a non-citizen or a non-citizen's authorised representative can request in writing for the Minister to exercise his public interest power. Requests

are referred to the Minister where they meet the Minister's issued guidelines under section 48B of the Act.

1.27 The obligation of non-refoulement is absolute and may not be subject to any limitations.

1.28 The expansion of the visa bar occurs in a context where there is only a discretionary barrier to refoulement and no provision of access to independent impartial and effective review of whether a removal is consistent with Australia's non-refoulement obligations.

1.29 As such, the visa bar is likely to be incompatible with Australia's obligations under the ICCPR and the Convention Against Torture, which require independent, effective and impartial review of non-refoulement decisions.

1.30 The committee seeks the further advice of the minister as to the compatibility of the expansion of the visa bar with the obligation of non-refoulement (including whether there are mechanisms in place to lift the visa bar where new information has come to light which supports a persons' claim for protection).

The Australian Government takes its international obligations seriously. Australia is party to several treaties that contain both explicit and implicit non-refoulement obligations not to forcibly remove a non-citizen to a place where they may be subjected to persecution or particular forms of harm. The Department does not seek to resile from or limit Australia's non-refoulement obligations under Article 6 and 7 of the ICCPR and Article 3(1) of the Convention Against Torture.

A non-citizen will be not removed from Australia in breach of our non-refoulement obligations.

The pre-removal clearance process is used to review a non-citizen's circumstances and relevant country information to identify whether there is any risk that the proposed removal would breach Australia's international non-refoulement obligations. This process is also used to identify whether there are any protection claims that have not already been assessed by the Department which raise protection issues and whether new information, such as country information, suggests that previously assessed claims may now raise a risk.

Additionally, the Minister has a personal, non-compellable power to lift a visa bar or grant a visa, if he thinks it is in the public interest to do so. This may include where new information has been identified to support a person's protection claim, allowing new protection claims to be assessed by the Department. The Minister has issued guidelines, to outline the circumstances in which he may consider exercising his public interest power under section 48B of the Act and to inform departmental officers about when and how to refer cases. These guidelines are consistent with the intention of the visa bar and cover circumstances where there is new information or significant changes in circumstances, which relates to Australia's non-refoulement obligations.

The form of administrative arrangements in place to support Australia meeting its *non-refoulement* obligations is a matter for the Government. It is the Government's position that there are sufficient procedural safeguards in place for ensuring all non-citizens are afforded an opportunity to have their claims assessed.

1.35 The committee seeks the advice of the minister as to:

- **the relative weight which will be given to the obligation to consider the best interests of the child in departmental policies and procedures in the context of the proposed measure;**
- **what is the threshold for intervention on the basis that the measure would not be in the child's best interests;**
- **whether there are any procedural safeguards in place to ensure that the obligation to consider the best interests of the child is given due consideration;**
- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **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.**

In planning the removal of a child, the best interests of the minor must be taken into consideration as **'a'** but not **'the' only** consideration. As such, other primary considerations may outweigh the best interests of the child in certain circumstances.

In considering the best interests of the child, during the removal planning, the Department considers the age, mental capacity, maturity, health, welfare and special needs of the minor. The views of the minor is another consideration that can be given due weight in the removal process and in accordance with the maturity of the minor. The amendments to the visa bars will not change these processes or considerations.

The Department also carefully considers the placement of children and their families when facilitating their removal. The Department takes steps to minimise the impact of detention on minors by considering alternatives to held detention such as alternative places of detention, immigration residential housing or immigration transit accommodation. This approach is consistent with paragraph 3 of the Department's Detention Values (**attached**) which prescribe that children and, where possible, their families will not be detained in an immigration detention facility. This is reflected in domestic legislation through s 4AA of the Act, which provides that the Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.

The visa bars treat all non-citizens, including children, as if they had never departed Australia restoring them to their previous immigration status. The visa bars are no more advantageous or disadvantageous than if the non-citizen had not been attempted to be removed from Australia. They achieve the Department status resolution and removal objectives of managing and maintaining the integrity of the migration programme and are a reasonable and proportionate mechanism for consistently managing all unlawful non-citizens including those that the Department must re-progress to remove from Australia.

The Minister maintains his personal and non-compellable power to lift a visa bar or grant a visa, to a non-citizen, including children, if he thinks it is in the public interest to do so.

FACT SHEET

Immigration Detention Values

The Rudd Labor Government has committed to these values by a decision of Cabinet.

These seven key values will inform all aspect of the Department of Immigration Detention Services.

The Government's immigration detention seven key values are:

1. Mandatory detention is an essential component of strong border control.

2. To support the integrity of Australia's immigration program three groups will be subject to mandatory detention:
    a. all unauthorised arrivals, for management of health, identity and security risks to the community;
    b. unlawful non-citizens who present unacceptable risks to the community; and
    c. unlawful non-citizens who have repeatedly refused to comply with their visa conditions;

3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC);

4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, will be subject to regular review;

5. Detention in IDCs is only to be used as a last resort and for the shortest practicable time;

6. People in detention will be treated fairly and reasonably within the law; and

7. Conditions of detention will ensure the inherent dignity of the human person.

These key values will underpin the operations of the Department and those that are contracted to provide detention services in any form.

TREASURER

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

Dear Chair

Thank you for the letter of 9 May 2018 from the Parliamentary Joint Committee on Human Rights about the issues raised in the Committee's *Report 4 of 2018* on the National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018.

I would like to thank you for the opportunity to provide further information on the issues identified by the Committee. I have addressed each of the issues in **Attachment A** to this letter.

I trust that this information will be of assistance to the committee.

Yours sincerely

The Hon Scott Morrison MP
20 / 5 / 2018

Attachment A

Issue: Compatibility of the measure with the right to privacy

The committee seeks further information on:

- **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 proportionate limitation on the right to privacy (including whether the requirement to provide comprehensive credit information is sufficiently circumscribed, and information as to the adequacy and effectiveness of safeguards).**

Explanation

As the Committee notes, the framework that establishes Australia's credit reporting regime is set out in the *Privacy Act 1988* (Privacy Act). The current framework has been in operation since 2014 after amendments were made to the Privacy Act by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Privacy Amendment Act).

The National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018 (the Bill) requires that certain credit providers participate in the existing voluntary system established by the Privacy Amendment Act. The Bill does not establish a new or broader credit reporting system.

The Government Bill seeks to overcome the first mover problem which has meant that credit providers have failed to participate in the voluntary regime. Prior to the Government's announcement a number of credit providers had indicated their intention to participate in the comprehensive credit regime. However, the timeframes were delayed. The Bill will ensure that participation occurs in a more timely and coordinated way.

The Committee specifically asks for more information about the security arrangements between credit providers and credit reporting bodies, the period that data can be retained and a person's correction and review rights.

The Bill includes new security provisions to further guarantee the security and protection of consumer information. The Bill requires that credit reporting bodies store credit information within Australia and, where information is stored on a cloud server, the cloud server will have to be recognised by the Australian Systems Directorate.

These new security arrangements are in addition to the existing protections in the Privacy Act. The Privacy Act imposes requirements on both credit reporting bodies and credit providers to take reasonable steps to protect credit-related information from misuse, interference and loss, and from unauthorised access, modification or disclosure (section 20Q and section 21S of the Privacy Act). The law also currently requires credit reporting bodies to ensure that regular audits of credit providers are conducted by an independent person to determine whether credit providers are taking the required actions.

The Privacy Act also already sets out the period that information can be retained before it must be destroyed (see sections 20V to 20ZA) and includes requirements for both a credit reporting body and credit provider to correct information including at the person's request (see sections 20S to 20U and section 21U to 21W of the Privacy Act).

While the mandatory regime will increase the volume of information in the credit reporting system, this was the volume that was anticipated would be in system as a result of the Privacy

Amendment Act and was contemplated when considering the impacts on an individual's privacy as part of the development of that Act.

For this reason the explanation included in the Statement of Compatibility with Human Rights included in the explanatory memorandum to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 is still relevant in understanding that the measure achieves a legitimate objective and that the limitation on the right to privacy is proportionate. The safeguards included in that Bill remain appropriate.

The relevant excerpts are copied out below:

The Bill implements the ALRC's recommendations to move to a more comprehensive credit reporting system. In this respect, the Bill may limit the prohibition on arbitrary interference with privacy by adding five new categories to the types of personal information that make up an individual's credit information in the credit reporting system. Four of the new categories, which are introduced in the new definition of consumer credit liability information in subsection 6(1), are:

- *the type of credit account opened*
- *the date on which the consumer credit is entered into*
- *the date on which the consumer credit is terminated, and*
- *the current limit of the credit account.*

The fifth category, repayment history information, is added directly to the definition of credit information, at part (c) of clause 6N of the Bill.

The Act currently enables the collection and disclosure of personal information that primarily detracts from an individual's credit worthiness—such as the fact that an individual has defaulted on a loan. This is commonly referred to as 'negative' or 'delinquency-based' credit reporting. The introduction of comprehensive credit reporting is aimed at providing a more balanced and accurate picture of an individual's credit situation than currently exists, providing positive information about a person's credit situation such as when an individual has met their credit payments.

The introduction of more comprehensive credit reporting allows credit providers to access an enhanced set of personal information tools directly relevant to establishing an individual's credit worthiness. This will allow credit providers to make a more robust assessment of credit risk, which is expected lead to lower credit default rates. More comprehensive credit reporting is also expected to improve competition in the credit market, which may result in reductions to the cost of credit for individuals. The amendments will enable legitimate commercial activity, facilitating consumer lending and transactions, and thus the participation of individuals in the economy. These are legitimate objectives.

The Bill introduces a number of safeguards to provide individuals with the tools to access information held about them, and correct any inaccuracies. The Bill also makes improvements to the complaints process, to ensure that the first organisation to receive the individual's complaint is responsible for taking action. In moving to more comprehensive credit reporting it has been recognised that additional safeguards around the use of repayment history information, the fifth new category of information, are also necessary. Repayment performance history will only be available by credit providers who are licensees [and to lenders mortgage insurers in relation to services they provide to credit providers] and subject to the responsible lending obligations in the National Consumer Credit Protection Act 2009.

The Bill continues to state clearly defined and limited uses and disclosures for credit reporting information. The Government did not support the ALRC's recommendation that secondary uses of credit reporting information should be subject to a broad discretion exercised by credit reporting bodies or credit providers. The Government's approach ensures any effect on privacy rights is proportionate and limited by the introduction of specific safeguards, including:

- *only de-identified information can be used for the purpose of research, and the research must be reasonably connected to the credit reporting system, and*
- *the use of credit reporting information for the purposes of pre-screening is expressly limited to the purpose of excluding adverse credit risks from marketing lists.*

Pre-screening is subject to specific requirements, including only the use of negative credit reporting information, the requirement for notice at the time of collection that information may be used for this purpose, an opt out opportunity, and a prohibition on individuals being identified for other direct marketing . Any entity involved in pre-screening must maintain auditable evidence to verify compliance, and which is available to individuals. Pre-screening is also only available to credit providers who are subject to the National Consumer Credit Protection Act 2009.

In the consumer credit environment it is important to achieve a balance between privacy protection and the efficient operation of the credit market. Access to narrowly defined categories of credit information to ensure a more balanced picture of an individual's credit situation, taking into account positive action such as payment, and not just negative information like defaults, and to allow for more effective risk assessment by credit providers is balanced with the enhanced privacy protections set out above.

Any limitations on the prohibition against arbitrary interference with privacy in the Bill are clearly and narrowly defined, for the legitimate purpose of improving the management of personal and credit reporting information, and accompanied by sufficient safeguards to maintain reasonable privacy protections. The measures are reasonable, necessary and proportionate as they ensure the smallest possible set of data is used for the narrowest purposes to achieve the objective of providing a functional consumer credit market.

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP
Federal Member for Bradfield
Minister for Urban Infrastructure and Cities

PDR ID: MC18-004214

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
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CANBERRA ACT 2600

Dear Mr Goodenough Ian

Response to Parliamentary Joint Committee on Human Rights – Road Vehicle Standards Bills

Thank you for your letter of 9 May 2018, seeking my advice on a number of matters related to the assessment of the Road Vehicle Standards Bill 2018 by the Parliamentary Joint Committee on Human Rights (the Committee).

I have attached my response to the matters raised by the Committee regarding the Road Vehicle Standards Bill 2018 Attachment A.

I trust this information supports the Committee in finalising its consideration of the Bill.

I have copied this letter and its attachments to the Committee's Secretariat.

Yours sincerely

Paul Fletcher

23 / 5 /2018

Enc

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Attachment A

Reversal of Evidential Burden - Compatibility of measures with the right to be presumed innocent

The Parliamentary Joint Committee on Human Rights (the Committee) has sought advice as to the appropriateness of reversing the evidential burden in offence specific defences.

The Committee noted that reverse burden offences are not necessarily inconsistent with the presumption of innocence provided such provisions pursue a legitimate objective, are rationally connected to that objective and are a proportionate means to achieve that objective.

The Committee also notes that while the bill's Explanatory Memorandum includes information about the reverse evidential burdens, the Statement of Compatibility does not identify that the reverse burden offences engage and limit the presumption of innocence.

The Committee has requested additional information about whether the reversal of burden is aimed at achieving a legitimate objective for the purposes of international human rights law; how the reverse burden offences are effective to achieve their objective; whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and whether it would be feasible to amend the measures to remove the burden.

The offence provisions in question - (16(3), 24(3)-(4), 32(2) and 43(2) - have been crafted so they are consistent with the Attorney-General's Department's 'Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers', which provides that a matter should only be included in an offence-specific defence where:

- It is peculiarly within the knowledge of the defendant; and
- It would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

Subclause 16(3) – Entry of non-compliant vehicles on the RAV

This offence prevents vehicles that do not meet the requirements of a Register of Approved Vehicles (RAV) entry pathway from being entered onto the RAV. Paragraphs 16(3)(a), (b), (c) and (d) provide a defence if the only reason that the vehicle did not comply with the entry pathway was due to the use of a non-compliant component represented by its supplier to be covered by a component type approval.

The RAV is the core element of the Bill. It is the means by which a vehicle's approval for provision to the Australian market is recorded and evidenced. Consumers, industry stakeholders and state and territory registration authorities will rely on the RAV to ensure the vehicle provided to the Australian market meets the national road vehicle standards for safety, environmental and anti-theft devices and is suitable to be registered for use on roads.

Road vehicles that do not meet the necessary standards but are placed on the RAV present a significant risk, not only to the individuals using the vehicle, but all road users. Therefore, the offences provided for in subclauses 16(1) and (2) aim to achieve the fundamental objective of the legislation - ensuring road vehicles being provided for the first time in Australia meet the necessary standards.

The reversal of evidential burden proof in relation to subclause 16(3) is rationally connected to this objective for a number of reasons. First, the precise details of the design and manufacture of the vehicle, and the procurement and use of components, is peculiarly within the knowledge of the type approval holder. It is a core requirement of type approvals that type approval holders retain this information in 'supporting documentation', rather than provide all this information to the Department of Infrastructure, Regional Development and Cities (the Department) to gain an approval. While the Department can access this information by requesting it, this is a costly and resource intensive exercise, requiring the Department to obtain a full outline of the design and manufacturing process and spend taxpayer resources to develop a detailed understanding of one type approval holder's production process.

Secondly, an inability to effectively prosecute would undermine the Department's ability to achieve the objective of clause 16. The reversal of evidential burden is reasonable and proportionate - the provision reverses only the evidential, and not the legal, burden of proof. Type approval holders, to whom this offence relates, will already be required under the Act to possess or have access to the relevant documentation, and a detailed understanding of their own processes. That is, they will already be required to hold the information that would be necessary for discharging the evidentiary burden. A circumstance that would require a person to bear an evidential burden would apply almost exclusively to corporations, rather than individuals, because individuals are unlikely to be able to hold the technical information and ensure conformity of production in fulfilment of a type approval holder's obligations.

Drafting this as a defence, rather than as an element of the offence ensures a reasonable balance between efficiency of regulation, safety for consumers, and applying appropriate obligations on approval holders that can supply unlimited numbers of vehicles in Australia. To remove the evidential burden for this provision would undermine the legitimate objects of the Act by limiting the community's assurance of a vehicle's compliance with the national standards when first provided to the Australian market.

Clause 24 - Providing road vehicle for the first time in Australia vehicle not on RAV

Subclause 24(1) makes it an offence for a person to provide a road vehicle to another person in Australia for the first time, if the vehicle is not on the RAV. Vehicles that are not on the RAV have not been declared as compliant with the applicable safety, environmental, and safety standards and pose a significant risk to the user and the community - potentially resulting in serious injury or death. This offence pursues the legitimate objective of limiting risks to the community.

Subclause 24(3) provides for situations where a vehicle that is not on the RAV can be provided to another person. Paragraph 24(4)(a) provides a defence if the person providing the vehicle holds a non-RAV entry import approval for the vehicle. Paragraph 24(4)(b) provides a defence if the road vehicle is manufactured in Australia and the person providing the vehicle makes the recipient aware that either the vehicle is not to be used in transport on a public road or is only to be used on a public road in limited circumstances.

There are a number of reasons for drafting the offence in this way.

First, the core objective of this offence is to make it very clear that provision of vehicles that are not on the RAV is unacceptable, unless in very limited circumstances. The burden of

demonstrating that one of the limited circumstances applies is, rightly, on the person undertaking the activity creating community risk, that is, the person providing the vehicle. This structure ensures the objectives of the offence provisions are met and places a reasonable and proportionate burden on the defendant.

Secondly, applying these matters as a defence is appropriate because the evidence of whether a vehicle was provided in a permissible circumstance is peculiarly within the knowledge of the defendant. For paragraph 24(4)(a), while the Department has access to records of non-RAV entry import approval holders, whether a specific vehicle transacted relates to a non-RAV entry import approval is knowledge peculiarly within the knowledge of the defendant, as determining this requires access to the vehicle. The defendant has access to the vehicle, its sale and importation documents and would therefore be able to easily demonstrate link between the vehicle and non-RAV entry import approval. This makes it significantly more difficult and costly for the prosecution to disprove the link than for the defendant to establish the matter.

Crafting the offence to make these circumstances elements of the offence would undermine the clarity of this serious offence and impose significant burden on the Commonwealth to produce evidence that is (and should) be held by the person undertaking in the risky activity. This would compromise the enforceability of a significant offence provision - risking non-compliance and subsequently, community safety. The structure of this offence is therefore achieving legitimate objectives, is rationally connected to the offending, and is proportionate to the overall purpose of the offence - noting that deliberate contravention of Clause 24 will mostly have a profit motive.

Clause 32 – False or misleading information

Subclause 32(1) creates an offence for providing false or misleading information to another person in purported compliance with the Bill.

This offence clearly sets the Australian Government's expectation that all documents or other information supplied by corporations and individuals in purported compliance with the Bill should be true and accurate, regardless of the materiality of the false or misleading information. Materiality remains a relevant factor, but it is up to the person who provided the false or misleading information to provide evidence that the information was false or misleading in a material particular.

The Government consider that this is a reasonable and proportionate structure for the offence. First, this is a proportionate measure within the broader context of the regulatory framework. Entities regulated by the Bill are given significant freedoms to import and provide vehicles without Government oversight of each vehicle. For example, type approval holders can import thousands of vehicles per year with no individual vehicle checks. In return for such freedoms, the Australian government sets high standards for integrity and honesty, such as requiring all information to be true and accurate. Commensurate with this expectation the evidentiary burden is placed on the person who furnished the false or misleading information initially to provide evidence that the matter was not false or misleading in a material particular. This is a reasonable and proportionate trade-off in the context of the potential scale of community impact incurred should the false or misleading information be of a material nature.

Secondly, this offence is reasonable and proportionate when you consider the context of volumes of information and the cost to Government (and thus the community) of regulatory actions. Approval holders have significant record keeping obligations. For example, type approval holders must maintain supporting information that outlines the entire manufacturing and compliance process – from source material to testing evidence to manufacturing instructions. This information is important for demonstrating compliance with the national road vehicle standards.

The information can be requested to audit compliance with the Bill. Any false or misleading information, regardless of its materiality, can cause significant delays in the auditing of such documentation. The wrong contact details provided for a testing facility or incorrectly recorded qualification of test engineers (although the real qualifications may be compliant) are such examples. The burden to present evidence about the materiality of such false or misleading information – particularly after causing significant delays to an audit – presents an unreasonable cost to Government, a cost that is ultimately borne by the community. Therefore it is reasonable and proportionate that the person providing false or misleading information in the first place has the burden of presenting evidence that the information was not materially false or misleading.

Reducing costs to regulated entities and the community, by providing operational freedoms to approval holders, is rationally connected to the objectives of the Bill. For example, achieving a choice of compliant vehicles in Australia requires a competitive automotive industry hence significant regulatory freedoms being granted. However, such freedom in the face of providing a dangerous good to Australia must come with reasonable and proportionate bearing of certain costs, such as the cost of providing evidence that false or misleading information is not materially false or misleading – if such a defence is required. These measures provide significant benefits to the community through a choice of less expensive and safer vehicles, as well as a fair and proportionate allocation of costs when false or misleading information is provided.

It is important to note that the reversal of evidential burden in this offence is consistent with the *Criminal Code Act 1995* and other Commonwealth legislation that operate in a similar regulatory environment, such as the *Biosecurity Act 2015*.

Clause 43 – Compliance with disclosure notices

Subclause 43(1) creates a contravention of the Bill where a disclosure notice has been given to a person and the person refuses or fails to comply with the notice. The offence does not apply if the person complied with the disclosure notice to the extent that it was possible to comply with it – however, the defendant must bear an evidential burden for this. Only the defendant knows whether they complied with a disclosure notice to the extent to which they are capable of complying. Given this information is peculiarly within the knowledge of the defendant, it is a reasonable and proportionate evidential burden to apply. This is the most effective way of ensuring compliance with disclosure notices, while providing protection to defendants who have legitimate reasons about why they cannot comply further with the disclosure notice.

The reasonableness and proportionality of this reversal of evidential burden is supportable when the broader context of this offence is considered. To get to the situation where an

evidential burden is placed on a defendant, that defendant must have supplied unsafe or non-compliant vehicles in trade or commerce. They must have also refused to voluntarily recall that vehicle for rectification and they must have then failed to fully comply with a request that they provide information about that unsafe good or product. During this period, an unsafe vehicle likely to cause significant injury or death is being provided for use on public roads - presenting a significant risk to all road users. Requiring a defendant in such a circumstance to provide evidence about why they were unable to comply is not only reasonable and proportionate, it goes to the objectives of the Bill to ensure compliant vehicles are being supplied.

Privilege against self-incrimination

The Committee has sought advice as to whether the limitation under clause 42 of the right not to incriminate oneself is a reasonable and proportionate measure to achieve the clause's objective of allowing timely gathering of information on road vehicles or road vehicle components that may pose a danger to the public.

The Government acknowledges the privilege against self-incrimination is an important common law and international law principle that provides an individual with the right not to answer questions or produce materials which may incriminate them. However, in certain circumstance this privilege may be subject to limitations if such limitation pursues a legitimate objective and is rationally connected to that objective and is a proportionate way of achieving that objective.

The Committee has sought advice as to whether the persons and information that may be subject to compulsory disclosure are sufficiently circumscribed with respect to the objective of the measure, being to allow timely gathering of information on road vehicles or road vehicle components that may pose a danger to the public.

First, it is not possible to further limit the persons to whom a compulsory disclosure notice can be issued without undermining the objective. It is necessary for a disclosure notice to be given to a person who supplies road vehicles or approved road vehicle components of a particular kind in trade or commerce, if there is a safety or compliance concern relating to such a vehicle or component. The scope of this power is sufficiently narrow – it does not capture anyone who supplies vehicles, only those who do so in trade or commerce, and it requires that the person has supplied a vehicle with a safety defect or other non-compliance. Therefore the scope of persons captured by the provision is reasonable and proportionate to the objectives.

Secondly, the broad scope of information that can be obtained through a disclosure notice under s 42 is necessary to achieve the objective of the provision. Information relevant to whether a vehicle has a safety defect or demonstrates non-compliance varies greatly. Given the complexity of road vehicles and their supply chains, relevant information could range from information about a source material (such as quality of steel), customer complaints through dealership service departments, evidence of testing results or the calibration metrics on a specific piece of machinery.

Given the breadth of relevant circumstances and information, listing all the types of information that can be requested would risk missing vital or unique information that was not considered when drafting the list. This would unreasonably limit the achievement of the objective of the clause - to gather all relevant information on dangerous vehicles or components in a timely manner to mitigate risks to the community.

Thirdly, the use of disclosure notices is reasonable when compared to alternative approaches. While in some cases it may be feasible to obtain information by other means (for example, through a warrant), the additional time taken to obtain such information may significantly increase the risk to public safety. If the privilege is not abrogated, the Commonwealth's ability to manage risks through a responsive, evidence-led approach would be significantly reduced, and the safety of road users could be put at serious risk.

Fourth, the offence includes a use immunity, which reduces the impact of the limitation, without undermining the objective. The Committee has noted that clause 42 of the Bill provides for 'use immunity', that is, information given to the Department under a disclosure notice cannot be used as evidence against that individual. However, clause 42 does not provide for 'derivative use immunity'. This means that information or evidence indirectly obtained as a consequence of a person's incriminating evidence can be used in criminal proceedings against the individual. The Committee has asked whether a derivative use immunity is reasonably available.

Including a derivative use immunity for this offence is not appropriate in the broader context of ensuring that the Bill is able to meet its objectives.

The Bill, including clause 42, has been drafted to be consistent with the existing requirements of the *Australian Consumer Law*, which overlaps to some extent with the recalls scheme set out in the Bill. This is designed to prevent suppliers of road vehicles 'legislation shopping' by pressuring regulators to use legislation with more lenient compliance tools.

A disclosure notice is used in situations where information about unsafe or non-compliant vehicles is not forthcoming from vehicle suppliers - presenting an immediate risk of harm to the community. A derivative use immunity may provide an incentive for non-compliant suppliers to initially withhold information from the regulator, then use the subsequent disclosure notice to 'confess' to other serious non-compliance. This is not appropriate in the context of the serious community harm that can be caused by any delay.

It should be noted, providing for derivative use immunity may prevent the Department from sharing information with other Departments or State and Federal Police. Such an agency will also be bound by any derivative use immunity. In the event that the other agency wished to commence criminal or civil penalty proceedings against that person, it would not be able to make use of any evidence derived as a result of the originally received information. It would also face the additional evidentiary hurdle of establishing that no use was made of the shared information in obtaining the evidence to be relied upon in the prosecution. This is particularly concerning as the Department will continue to collaborate with the Australian Competition and Consumer Commission where information raises consumer protection issues.

Circumstances where an individual will be required to provide evidence are exceptional. The suppliers most likely to be subject to disclosure notices are type approval holders. To obtain a type approval, an individual or body corporate must demonstrate control over the entire

design and manufacturing process of a vehicle. It is very unlikely that an individual will be able to meet these requirements and therefore unlikely to be impacted by this clause.

Given costs imposed on the community by potential 'legislation shopping'; any incentives to delay providing information about unsafe vehicles; additional burdens imposed on the prosecution of non-compliant entities and the limited likelihood of individuals having to disclose information, it is the Government's view that the public benefit in the removal of the derivative use immunity outweighs the limited loss of personal liberty in this case.

Clause 41 – Disclosure Notices - Compatibility of the measure with the right to privacy

The Committee has inquired as to the types of information that may be subject to a disclosure notice, including whether it may include personal or confidential information.

As the Minister responsible for the Bill will have the power to issue a recall notice, any information that assists the Department in informing the decision maker whether to issue a recall notice, often in urgent circumstances, must be readily available. Careful consideration has been made when drafting the Bill to balance the rights of individuals against the ramifications of non-compliance in circumstances potentially requiring a recall.

As outlined above, the type of information that may be requested through a disclosure notice will depend on the nature of each individual matter the Department investigates. Indeed, it is reasonable and proportionate that a wide range of information can be requested under a disclosure notice in order to capture all relevant information about an unsafe vehicle or component. At times this may, incidentally, include personal or confidential information.

For example, a disclosure notice may be issued when the Department reasonably believes that vehicles supplied by a type approval holder has a defective steering assembly that will likely cause injury to a person if it fails. In such circumstances, the Department may seek technical information from the type approval holder, such as evidence about the construction of the assembly and information about whether the type approval holder was aware that the steering wheel assembly had caused injuries. In seeking such information from the type approval holder, personal or confidential information may be received. For example, emails to the type approval holders from customers detailing their experiences with the steering assembly may be provided as a result of the disclosure notice. This could provide the vital information needed to establish the need for and ensure a successful vehicle recall.

While this means that a number of people's right to privacy may be limited, the general community is provided a level of protection of their right to life and right to health by the Government's ability to respond to serious issues quickly.

Imposing a limitation on capturing personal or confidential information, while possible in this clause, would undermine the objective of the clause in two ways. First, it risks vital information not being provided that goes to the safety of a vehicle or component, on the basis that it may contain personal information. Secondly, it would provide a screen for suppliers of dangerous road vehicles or components to hide behind when responding to a disclosure notice by being able to claim that relevant information cannot be provided due to the presence of personal or confidential information.

The proportionality and reasonableness of the clause has a number of other factors that must be considered when utilising disclosure notices that may collect personal information.

The Department, when considering whether to issue a disclosure notice, will have regard to whether the information, documents or evidence are necessary and relevant to the investigation. Consideration will also be given to whether the relevant information, documents or evidence are likely to be otherwise available, including whether it is likely to be provided voluntarily.

However, the voluntary production of information, documents and evidence is not always appropriate. For example, it may not be appropriate in circumstances where:

- it is important that the Department's decision making on investigations relating to recalls has confidence it has full and complete information on key issues in circumstances where voluntary requests will not deliver the same confidence;
- a party may have previously failed to respond or respond fully to a voluntary request;
- the Department has information from other sources that is inconsistent with information voluntarily provided by the party under investigation or an informal review;
- the Department has concerns that a voluntary request will be met with delays or protracted negotiations impacting on the Department's ability to carry out its functions and appropriately act to address to risk of community harm;
- a party does not want to cooperate with the Department; or
- critical information required by the Department will be most efficiently sought through the use of a disclosure notice.

Prior to issuing a disclosure notice, the Department will also consider:

- whether there is a risk that the information, documents or evidence may otherwise be destroyed, not provided or provided only on terms unacceptable to the Department;
- whether it may be appropriate to issue a disclosure notice to obtain such information or documents from a potential respondent for evidentiary purposes, including obtaining oral evidence under oath or by way of affirmation;
- whether it is appropriate to use other powers to obtain the information, documents or evidence (e.g. search warrant powers or wait for any future discovery process); and
- the burden of the disclosure on the recipient, including time and cost considerations.

The Bill also provides safeguards such as:

- The Department cannot issue a disclosure notice unless it has a "reason to believe" that a supplier is capable of giving information, producing documents or giving evidence in relation to those vehicles or components;
- The Disclosure Notice must be in writing and in the form prescribed by the regulation (if any);
- A person appearing before a person issuing a disclosure notice to give evidence under oath or affirmation may be legally represented; and
- Self-incriminating information, documents or answer given in response to a Disclosure Notice cannot be used against the person who gave evidence if they are an individual, unless the person has committed an offence in very limited circumstances prescribed under paragraph 42(2)(d) of the Bill.

This overarching legal framework for personal information also includes robust oversight arrangements for the handling of personal information. Central to the oversight regime are judicial review, the Commonwealth Ombudsman and the Privacy Act 1988 (Privacy Act). The Department will be required to collect, handle and store such information in accordance with the *Privacy Act 1988*, including the *Australian Privacy Principles*. Departmental officers that receive personal and confidential information are also bound by the Public Service Act 1999 and the Australia Public Service Code of Conduct.

The Department is also under an implied legal obligation to use information, documents or evidence provided in response to a disclosure notice for the purposes for which the notice was issued, the purpose being to assist the Department in investigating a possible recall under Part 3 of the Bill and to reach a view as to whether such a recall notice is necessary. This obligation reflects the legal requirement that statutory powers are to be used for proper purposes.

While the Department may use information and documents in its investigations and subsequent legal proceedings arising from its investigation, the Department will treat personal and confidential information responsibly and in accordance with the law.

For these reasons, the limitation on the right to privacy that is caused by the power to issue disclosure notices is reasonable, proportionate and has safeguards. In order to achieve the objective of receiving all relevant information quickly and efficiently, the disclosure clause is, by necessity, drafted to capture a wide variety of possibly unique information. While the necessary breadth of the clause may lead to the disclosure of personal information, this is not central to its intention. In addition, the Commonwealth has a robust legislative framework in place to deal with the handling of personal information received via a disclosure notice. Therefore, the clause represents a reasonable and proportionate means to achieve a legitimate objective.

Minister for Revenue and Financial Services
Minister for Women
Minister Assisting the Prime Minister for the Public Service
The Hon Kelly O'Dwyer MP

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

Dear Mr Goodenough Ian

Thank you for your letters on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) dated 9 May 2018, drawing my attention to the Committee's *Report 4 of 2018* which seeks further advice on the following legislation:

- Treasury Laws Amendment (2018 Measures No. 4) Bill 2018; and
- Treasury Laws Amendment (Enhancing ASIC's Capabilities) Bill 2018.

Treasury Laws Amendment (2018 Measures No. 4) Bill 2018

As noted by the Committee in its Report, Schedule 1 to the Treasury Laws Amendment (2018 Measures No. 4) Bill 2018 (the Bill) seeks to introduce a range of strict liability and absolute liability offences. The Committee has sought advice about the following:

- whether the strict liability and absolute liability offences are aimed at achieving a legitimate objective for the purposes of human rights law;
- how these measures are effective in achieving the objectives; and
- whether the limitation on the right to be presumed innocent introduced by the strict liability and absolute liability offences is proportionate to achieve the stated objective.

Schedule 1 to the Bill - Achieving a legitimate objective for the purposes of human rights law

As noted by the Committee, Schedule 1 introduces a strict liability offence for employers who fail to comply with a direction from the Commissioner to pay a superannuation guarantee charge (the direction to pay). An employer will not commit an offence if they took all reasonable steps within the required period to both comply with the direction and to ensure that the original liability was discharged before the direction was given.

Schedule 1 also allows the Commissioner to direct an employer to attend an approved education course where that employer has failed to comply with their superannuation guarantee obligations (the education direction). Failure to comply with the education direction is an absolute liability offence.

This schedule provides the Commissioner with additional tools to enforce compliance with the existing obligations to pay amounts in respect of the superannuation guarantee. The additional penalties that can apply under these new directions provide additional incentives to employers to ensure that they are fully compliant with their existing superannuation guarantee obligations.

The direction to pay will only apply to a narrow subset of employers with serious contraventions of their obligations to pay superannuation guarantee liabilities and whose actions are consistent with an ongoing and intentional disregard of those obligations. Such behaviour undermines the integrity of the superannuation system.

Ensuring compliance with superannuation guarantee obligations forms a legitimate objective for the purposes of human rights law because, unlike other debts owed to the Commonwealth, the ultimate beneficiaries of the superannuation guarantee payments are individuals. Any amounts of superannuation guarantee charge paid by the employer to the Commissioner are distributed to the superannuation funds of employees who did not receive the minimum level of contributions from their employer.

Schedule 1 to the Bill - whether the offences are effective in achieving the objective

The measures contained in Schedule 1 to the Bill introduce strict liability and absolute liability offences.

Importantly, the approach taken with the directions is consistent with the existing offences that apply in respect of other failures to comply with tax related obligations. In this respect, the education direction is inserted into the existing framework for the offence for failing to comply with tax related obligations. This offence is already framed as an offence of absolute liability. The direction to pay is framed as a separate offence of strict liability to reflect the different penalty framework that is to apply to that offence.

Applying strict liability and absolute liability to these offences substantially improves the effectiveness of ensuring employer compliance with existing and future superannuation guarantee obligations which are required by superannuation and taxation laws. The provisions have a rational connection to their objectives as they will act as a significant and real deterrent to those entities who fail to meet their superannuation guarantee obligations.

The direction to pay is only intended to be applied to employers who have the capability to pay but have consistently refused to pay. Those who are not capable of paying will be covered by the applicable defence, provided they have taken reasonable steps to try and discharge the liability. The ability to prosecute employers with a history of continuously and wilfully failing to pay their superannuation guarantee liabilities will reduce instances of non-compliance in the future.

The maximum penalties for these offences are below the threshold for penalties specified in the *Guide to Framing Commonwealth Offences,* with the exception of the 12 months imprisonment penalty for the offence of failing to comply with the direction to pay. This penalty is justified on the basis that the offence relates to continuous failures to pay the superannuation guarantee liability. The penalty is comparable to the highest tiered penalty that currently applies to offences under section 8C of the *Taxation Administration Act 1953* (for the failure to comply with certain requirements under a taxation law). These penalties are provided for by section 8E and apply different penalties to first, second, and third or subsequent offences. An employer who commits a first offence is liable to a fine of up to 20 penalty units; a second offence attracts a fine of up to 40 penalty units; and a third or subsequent offence attracts a fine of up to 50 penalty units and/or imprisonment of 12 months.

Schedule 1 to the Bill - proportionality of offence with stated objective

The Committee states in its Report that the relevant offences in Schedule 1 to the Bill engages and limits the right to the presumption of innocence by imposing strict liability and absolute liability offences.

While a strict liability and absolute liability offence removes the requirement for a fault element to be proven before a person can be found guilty of an offence, the prosecution must still prove all of the physical elements to the offence before a Court will impose any criminal liability.

The strict liability offence in Schedule 1 to the Bill is considered appropriate and proportionate in the context of ensuring greater compliance with superannuation guarantee obligations. Defences are provided where reasonable steps have been taken by the employer, however, outside of these defences there are no reasons for an employer not to pay their employee's superannuation guarantee contribution.

The absolute liability offence in Schedule 1 to the Bill is appropriate and proportionate in the context of ensuring compliance with superannuation guarantee obligations. There are no reasons for an employer not to attend the education course under the direction beyond those covered by subsection 8C(1B) of the *Taxation Administration Act 1953* which provides that an offence does not occur if an employer is not capable of complying with the education direction.

Schedule 5 to the Bill - achieving a legitimate objective for the purposes of human rights law

Schedule 5 to the Bill enables the Commissioner to seek a Court order to compel an entity to comply with the existing tax law requirement to provide a security deposit for an existing or future tax related liability. The measure introduces a strict liability offence for failing to provide security where ordered to do so by the Federal Court. A

person will not commit an offence where they are not capable of complying with the order.

This measure addresses instances of non-compliance with the security deposit rules which predominantly arise where the value of the security deposit (which reflects the value of the tax related liability) exceeds the existing penalty for failing to provide the security deposit. Entities who fail to comply with a Court order risk committing a criminal offence resulting in criminal penalties. These consequences provide appropriate incentives to ensure compliance with the Court order and reflect the seriousness of a failure to comply.

This is a legitimate objective for the purposes of human rights law because it addresses the underlying non-compliance by taxpayers who actively avoid paying their tax related liabilities. These taxpayers have already committed an offence under the tax law for failing to comply with the existing security deposit requirement.

Schedule 5 to the Bill - whether the offence is effective in achieving the objective

Applying strict liability to this offence will substantially improve the effectiveness of ensuring taxpayer compliance with existing and future tax related liabilities required under the tax law. The provision has a rational connection to the objective as it will act as a significant and real deterrent to those entities who fail to comply with a Federal Court order to provide the security. It is also consistent with the existing offence for failing to comply with tax related obligations, which as noted above, are subject to an offence of absolute liability.

The maximum penalty for this offence is below the threshold for penalties specified in the *Guide to Framing Commonwealth Offences,* with the exception of the 12 months imprisonment penalty. This penalty is justified on the basis that the offence relates to failing to comply with a Federal Court order. This penalty ensures that appropriate consequences apply to entities that refuse to comply with an order that has been made against them by the Federal Court. The amount of the penalty and the application of strict liability is the same as the offence for refusing to comply with other Court orders and the associated penalty that are already imposed under sections 8G and 8H of the *Taxation Administration Act 1953.* Applying the same consequences in respect of a Federal Court order to provide security ensures a consistent outcome between the two sets of rules and is appropriate as they both deal with failures to comply with Court orders.

Schedule 5 to the Bill - proportionality of offence with the stated objective

The Committee states in its Report that the relevant offence in Schedule 5 to the Bill engages and limits the right to the presumption of innocence by imposing strict liability and absolute liability offences.

While a strict liability offence removes the requirement for a fault element to be proven before a person can be found guilty of an offence, the prosecution must still prove all of the physical elements to the offence before a Court will impose any criminal liability.

The strict liability offence in Schedule 5 to the Bill is appropriate and proportionate in the context of ensuring greater compliance with orders made by the Court to provide security to the Commissioner for an outstanding tax related liability. There are no

reasons for a taxpayer to not comply with the Court order beyond those covered by the applicable defence of not being capable of complying.

Treasury Laws Amendment (Enhancing ASIC's Capabilities) Bill 2018

As noted by the Committee in its Report, Schedule 2 to the Treasury Laws Amendment (Enhancing ASIC's Capabilities) Bill 2018 (the EAC Bill) seeks to remove the requirement for the Australian Securities and Investments Commission (ASIC) to engage staff under the *Public Service Act 1999* (PS Act).

The Committee has sought advice about the following:

- 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;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including whether less rights restrictive measures may be reasonably available and the sufficiency of any relevant safeguards; and
- whether the measure is compatible with Australia's obligations not to take any backwards steps (retrogressive measures) in relation to the right to just and favourable conditions of work.

The EAC Bill is consistent with the findings in the Financial Services Inquiry, and fulfils the Government's commitment to implement the recommendations made by the ASIC Capability Review to support more effective recruitment and retention strategies.

The amendments in the EAC Bill provide that the ASIC Chairperson is able to engage ASIC staff directly under the ASIC Act rather than under the PS Act. The amendment has no impact on the requirement for ASIC to comply with the universal employment protections provided under the *Fair Work Act 2009* (FW Act). These protections will continue to apply to ASIC staff engaged by the ASIC Chairperson in the same way they apply to all other individuals employed in Australia.

Removing the requirement for ASIC to employ people under the PS Act will promote greater operational flexibility, bringing ASIC into line with the other financial regulators (the Australian Prudential Regulation Authority and the Reserve Bank of Australia) that are also able to recruit staff outside of the PS Act.

In order to be effective, ASIC needs to recruit staff with knowledge of, and expertise in, financial markets and financial services. ASIC is therefore often competing against the private sector, as opposed to other public sector agencies, when recruiting suitable staff. Employment under the PS Act restricts ASIC's ability to provide conditions which allow ASIC to be able to compete more effectively in the labour market for suitable staff.

Restraints imposed by the PS Act include:

- Limitations on employment of temporary employees

ASIC can only employ temporary staff under the PS Act for a total maximum period of three years, even though it may require employees for major litigation and other enforcement matters for a longer period of time. The move from the PS Act allows ASIC to employ staff for periods over the entire life of the matter or project. It also allows ASIC to reemploy temporary staff who have the relevant litigation and regulatory experience.

- Limitation on the employment of contractors and consultants

Subsection 120(3) of the current legislation limits the ASIC Chairperson's ability to employ contractors and consultants because:

  - the power to employ consultants and contractors is not able to be delegated, so the Chairperson is the only person able to employ these staff and must do so directly; and

  - the terms and conditions for contractors and consultants must be approved by the Minister.

- Classification structure

The public sector classification and remuneration system is not suited to the work ASIC (and the other financial regulators) undertakes. To recruit and retain staff in positions requiring specialist skills, ASIC needs to be able to separate remuneration from the public sector classified levels. This is particularly important given the significance of the powers delegated to ASIC staff.

- Delegations

The current staffing delegations set out in the PS Act lack clarity and have resulted in ASIC having to seek legislative amendments in 2017. The lack of clarity is an on-going risk.

Maintaining conditions of employment

Schedule 2 to the EAC Bill inserts transitional provisions in Part 25 of the ASIC Act to ensure that the terms and conditions of employment that ASIC employees currently enjoy will remain the same. Terms and conditions of employment are determined by modern awards and enterprise agreements which are negotiated by each agency and not under the PS Act. In this context, the Bill provides that:

- staff who transfer from employment under the PS Act to employment under the ASIC Act retain the same terms and conditions of employment that applied immediately before the commencement date (subparagraph 311(2)(c)(i));

- all accrued entitlements transfer with the staff (subparagraph 311(2)(c)(ii)); and

- the existing Enterprise Agreement remains in force (section 312).

The Enterprise Agreement, which applies to all staff currently employed under the PS Act, provides significantly better conditions including significantly higher wages than the relevant Modern Award, the Australian Public Service Enterprise Award 2015, which provides minimum terms and conditions of employment for employees who work in the Australian Public Service. As stated above, the Enterprise Agreement remains in place. As such there is no change to pay, working conditions, hours of work or paid holidays.

Safeguards for current conditions of employment

The safeguards in place protecting existing ASIC staff's employment conditions under the Enterprise Agreement are set out in the FW Act. In particular, Part 2-4 of Chapter 2, Division 7 sets out the circumstances in which enterprise agreements may be terminated or varied. This cannot take place without the agreement of employees. The next enterprise agreement is coming up for negotiation in 2019.

The move from the PS Act will not change those negotiations at all, as the procedures under which terms and conditions of employment are negotiated are prescribed in the FW Act. The FW Act provides that for the agreement to be approved it must pass the "better off overall" test when compared against the relevant modern award. Similarly, the EAC Bill has no impact on the requirement for ASIC to comply with the Australian Workplace Bargaining Policy.

Accordingly, ASIC employees will continue to enjoy the just and favourable conditions of work that they currently enjoy. Employment under the ASIC Act does not change those conditions.

I appreciate the Committee's consideration of these Bills, and I trust this information will be of assistance to the Committee.

Yours sincerely

Kelly O'Dwyer

THE HON MELISSA PRICE MP
ASSISTANT MINISTER FOR THE ENVIRONMENT

MC18-006549

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

Dear Mr ~~Goodenough~~ Ian,

Thank you for your letter regarding the Parliamentary Joint Committee on Human Rights' consideration of the Underwater Cultural Heritage Bill 2018 (the Bill) in its Report 4 of 2018.

I am pleased to have the opportunity to address the issues raised by the Committee in regards to the compatibility of the Bill with criminal process rights and the presumption of innocence, and have attached the response to the report as requested in your letter.

Thank you for raising this matter.

Yours sincerely

MELISSA PRICE

CC: The Hon Josh Frydenberg MP

Enc

Advice to the Parliamentary Joint Committee on Human Rights in response to questions regarding the Underwater Cultural Heritage Bill 2018

Committee comment

1.116 The committee seeks the advice of the minister as to whether the civil penalty provisions in proposed sections 29(6), 30(6), 31(6), and 35(5) of the bill may be considered 'criminal' in nature for the purposes of international human rights law, addressing in particular whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be considered 'criminal' (including information as to the nature of the sector being regulated and the relative size of the pecuniary penalties in that regulatory context).

1.117 The committee also seeks the advice of the minister as to whether, assuming the penalties are considered 'criminal' for the purposes of international human rights law, the application of the civil standard of proof to the civil penalty provisions in sections 29(6), 30(6), 31(6), and 35(5) is compatible with the presumption of innocence in Article 14(2) of the ICCPR. This includes advice as to whether the limitation on the presumption of innocence pursues a legitimate objective, is rationally connected to this objective, and is proportionate to that objective, and whether the civil penalty provisions could be amended to apply the criminal standard of proof.

Answer

1.116 - *Compatibility of the measure with criminal process rights*

A civil penalty provision may be regarded as 'criminal for the purposes of international human rights law' if the amount of the pecuniary penalty is high, the nature and purpose of the penalty is to punish or deter, and the penalty applies to the public in general. These tests are set out in the Guidance notes of the Parliamentary Joint Committee on Human Rights, Appendix 4 guidance note 2.

Is the penalty classified as criminal under Australian law?

No. Sections 29(6), 30(6), 31(6) and 35(5) are civil penalty provisions. It is not a criminal offence to contravene these sections.

What is the nature and purpose of the penalty?

The penalties proposed in the Underwater Cultural Heritage Bill 2018 (the Bill) aim to deter and punish conduct that could harm protected underwater cultural heritage, and are set at a level reflecting the significant value of the non-renewable heritage resource that would be negatively impacted by a breach of any of the regulated actions. Although the application of the penalty provisions is not expressly limited in the Bill, in practice only a particular sector of the community will be regulated by this Bill, notably natural persons and bodies corporate who possess and or trade in protected underwater cultural heritage or who undertake development actions that may impact protected underwater cultural heritage (for example by physically

damaging, disturbing or removing protected underwater cultural heritage from the marine environment). As such the primary groups likely to offend are limited to a small group of persons or bodies corporate.

What is the scale of the penalty?

The penalty provisions do not carry a penalty of imprisonment. The scale of the pecuniary penalties reflects the intrinsic and social value of protected sites and individual articles that may be possessed or traded and are framed to be an appropriate and proportionate deterrent to natural persons and bodies corporate.

The size of the pecuniary penalties also reflects the broad range and scale of contraventions that can occur such as systemic breaches of requirements to possess a permit (prior to exporting protected underwater cultural heritage), deliberate actions (such as disturbance of a site and the recovery of protected underwater cultural heritage without permit), or a cost of business approach by developers to the total destruction of underwater cultural heritage sites.

The inclusion of civil penalties in the Bill provides an option for an appropriate and proportionate response to the deliberate contravention of provisions protecting underwater cultural heritage. A criminal conviction may result in a disproportionate response which would impact on an individual's current or future ability to work. This scale of the pecuniary penalties give the court flexibility in identifying a suitable penalty for each case on its merits enabling a proportionate response to corporate bodies and individuals.

As the civil penalty provisions in sections 29(6), 30(6), 31(6), and 35(5) are limited to a particular groups of the general public the Bill is considered consistent with Articles 14 and 15 of the ICCPR.

Committee comment

1.117 The committee also seeks the advice of the minister as to whether, assuming the penalties are considered 'criminal' for the purposes of international human rights law, the application of the civil standard of proof to the civil penalty provisions in sections 29(6), 30(6), 31(6), and 35(5) is compatible with the presumption of innocence in Article 14(2) of the ICCPR. This includes advice as to whether the limitation on the presumption of innocence pursues a legitimate objective, is rationally connected to this objective, and is proportionate to that objective, and whether the civil penalty provisions could be amended to apply the criminal standard of proof.

Whether, assuming the penalties are considered 'criminal' for the purposes of international human rights law, the application of the civil standard of proof to the civil penalty provisions in sections 29(6), 30(6), 31(6), and 35(5) is compatible with the presumption of innocence in Article 14(2) of the ICCPR.

Answer

It is considered that no issue of compatibility with the presumption of innocence arises because the provisions are not criminal for the purposes of international human rights law. However, assuming that the civil penalty provisions in sections 29(6), 30(6), 31(6), and 35(5) are considered 'criminal" for the purposes of international human rights law, the Bill would still be

compatible with the presumption of innocence in Article 14(2) of the ICCPR because the provisions are rationally connected to the legitimate objective pursued by the Bill.

advice as to whether the limitation on the presumption of innocence pursues a legitimate objective, is rationally connected to this objective, and is proportionate to that objective,

Answer

The Bill pursues a legitimate objective which is to provide for the identification, protection and conservation of Australia's underwater cultural heritage. Underwater cultural heritage is threatened by a mix of environmental, chemical, biological and cultural processes. The Bill aims to manage the negative impacts to underwater cultural heritage which can be caused by both natural persons and bodies corporate.

To this end, the Bill will regulate certain conduct in relation to protected underwater cultural heritage, as well as the possession, trade and supply of articles of protected underwater cultural heritage. Under the Bill, persons will be required to possess a permit issued by the Minister to do certain things or engage in certain activities, such as supplying articles of underwater cultural heritage or engaging in certain conduct in a protected zone.

The civil penalty provisions of the Bill pursue this objective by penalising conduct that contravenes the regulatory framework established by the Bill, thereby preventing harm to protected underwater cultural heritage. In this way, the civil penalty provisions of the Bill pursue and are rationally connected to the Bill's legitimate objective.

Finally, the use of civil penalty provisions is proportionate to achieve the stated objective of protecting Australia's unique and irreplaceable underwater cultural heritage in-situ. The penalty amounts have been set at an appropriate level for both individuals and bodies corporate who undertake development activities in the marine environment. Courts will have flexibility in identifying a suitable penalty for each case on its merits enabling a proportionate response to corporate bodies and individuals.

whether the civil penalty provisions could be amended to apply the criminal standard of proof.

Answer

Since the provisions are civil in nature and do not impose criminal penalties, it would not be suitable to amend civil penalties from a 'balance of probabilities' civil standard to a criminal standard of proof, 'beyond reasonable doubt'. The purpose of having a range of civil, criminal and strict liability penalties which may apply to contraventions of the provisions of the Bill is to provide regulatory flexibility in responding appropriately and proportionately to contraventions.

Committee comment

1.122 The committee seeks the advice of the minister as to the compatibility of the strict liability offences with the presumption of innocence, in particular:

- **whether the strict liability offences are aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the strict liability offences are effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation on the presumption of innocence is proportionate to the legitimate objective of the measure.**

Answer

1.122 - *Compatibility of the measure with the presumption of innocence* - Strict liability provisions

As noted by the Committee, strict liability offences can engage and limit the presumption of innocence in Article 14(2) of the ICCPR as they allow for the imposition of criminal liability without the need to prove fault. However, strict liability provisions may be appropriate where they are reasonable, necessary and proportionate to the legitimate objective being sought.

The legitimate objective of the Bill is to establish a regulatory framework to protect Australia's underwater cultural heritage, and to regulate the possession, trade and supply of articles of protected underwater cultural heritage. The Bill will preserve this important cultural asset for future generations. It will also align Australia's regulatory framework with the international best practice standards contained in the 2001 UNESCO *Convention on the Protection of the Underwater Cultural Heritage*.

To this end, Part 3 of the Bill (Regulation of Protected Underwater Cultural Heritage) applies strict liability to a number of offences relating to conduct that contravenes the regulatory regime established by the Bill. For example, strict liability applies to conduct that adversely impacts protected underwater cultural heritage without a permit (proposed section 30(5)), to the supply of articles protected underwater cultural heritage unless authorised by a permit (proposed section 31(5)), and to the importation and exportation of articles of protected underwater cultural heritage unless authorised by a permit (proposed sections 34(4) and 35(4)).

The use of strict liability offences is rationally connected to the legitimate objective of the Bill because the provisions are necessary to ensure the integrity of the regulatory regime in order to prevent potential harm to Australia's protected underwater cultural heritage. Most offences under the Bill encompass a wide range of offence scenarios and severities.

For example, the unpermitted possession, custody or control of protected underwater cultural heritage (proposed section 31) could involve a person holding a single article or thousands of articles and the illegal possession could be a case of a failure to adhere to the statutory procedures or could be associated with the looting of underwater cultural heritage sites. There are legitimate grounds for penalising non-compliance when the person should be, or is, aware of their obligations. In the case of a person having possession of single article and neglecting to follow the known statutory process, and where the elements of a strict liability offence have been determined, the issuing of an infringement notice under proposed section 44(1) (a) would be fairer and less costly to the person.

The use of strict liability is proportionate to achieve the stated objective because the penalty amounts are within reasonable limits. As noted in the Explanatory Memorandum to the Bill, the penalties for the strict liability provisions in the Bill are limited to 60 penalty units for an individual, and do not include imprisonment. Consequently, individuals who contravene a strict liability provision of the Bill will not be subject to unreasonable or unduly harsh penalties, taking into account the Bill's legitimate objective of protecting and conserving Australia's underwater cultural heritage.

Finally, the strict liability provisions of the Bill maintain the defendant's right to a defence. This is because defence of mistake of fact will remain available to a defendant, so that a person cannot be held liable if he or she had an honest and reasonable belief that they were complying with relevant legal obligations. Additionally, the existence of strict liability also does not make any other defence unavailable to a defendant.

For these reasons, the strict liability provisions in proposed sections 29(6), 30(6), 31(6), and 35(5) are considered consistent with Articles 14(2) of the ICCPR.

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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

Dear Chair

Thank you for your letter of 9 May 2018 regarding the human rights compatibility of various instruments (together, the Instruments) made under the *Autonomous Sanctions Act 2011* (the Act).

In conjunction with the *Autonomous Sanctions Regulations 2011* (the Regulations), and various instruments made under the Regulations, the Act empowers the Australian Government to impose measures not involving the use of armed force in response to situations of international concern.

The attached document responds to the request for further advice made by the Parliamentary Joint Committee on Human Rights (the Committee) in *Report 4 of 2018* (the Report).

I also note the recommendations for changes to Australia's sanctions regime which the Committee made in *Report 9 of 2016*. The Government continues to be satisfied that Australia's autonomous sanctions regime is compatible with human rights. The Government has no immediate plans to adopt the measures proposed by the Committee in paragraph 1.285 of the Report but will keep its sanctions regime under review.

I trust the attached information will assist you in concluding your consideration of the Instruments.

Yours sincerely

Julie Bishop

31 MAY 2018

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Attachment A

Response to Parliamentary Joint Committee on Human Rights
Human Rights Scrutiny Report (8 May 2018)

Introduction

The Explanatory Memorandum to the Autonomous Sanctions Bill 2010 states that autonomous sanctions measures have three objectives:

- limiting the adverse consequences of the situation of international concern (for example, by denying access to military or paramilitary goods, or to goods, technologies or funding that are enabling the pursuit of programs of proliferation concern);
- seeking to influence those responsible for giving rise to the situation of international concern to modify their behaviour to remove the concern (by motivating them to adopt different policies); and
- penalising those responsible (for example, by denying access to international travel or to the international financial system).

It is the Government's view that modern sanctions regimes impose highly targeted measures in response to situations of international concern. This includes the grave repression of human rights or democratic freedoms of a population by a government, or the proliferation of weapons of mass destruction or their means of delivery, or internal or international armed conflict. Thus, autonomous sanctions pursue legitimate objectives, and have appropriate safeguards in place to ensure that that any limitation of human rights engaged by the imposition of sanctions is justified.

Section 10 of the *Autonomous Sanctions Act 2011* permits regulations relating to, among other things: 'proscription of persons or entities (for specified purposes or more generally)'; and 'restriction or prevention of uses of, dealings with, and making available of, assets'. The Regulations, which are made within the framework of the *Autonomous Sanctions Act 2011*, permit the Minister to designate a person or entity for targeted financial sanctions and/or declare a person for the purposes of a travel ban, if they satisfy a range of criteria, as set out in regulation 6.

The purpose of a designation is to subject the designated person or entity to targeted financial sanctions. There are two types of targeted financial sanctions under the Regulations:

- the designated person or entity becomes the object of the prohibition in regulation 14 (which prohibits directly or indirectly making an asset available to, or for the benefit of, a designated person or entity, other than as authorised by a permit granted under regulation 18); and/or

- an asset owned or controlled by a designated person or entity is a "controlled asset", subject to the prohibition in regulation 15 (which requires a person who holds a controlled asset to freeze that asset, by prohibiting that person from either using or dealing with that asset, or allowing it to be used or dealt with, or facilitating the use of or dealing with it, other than as authorised by a permit granted under regulation 18).

The purpose of a declaration is to prevent a person from travelling to, entering or remaining in Australia.

Human rights compatibility

The Committee sought further advice as to the compatibility of designations and declarations made pursuant to the *Autonomous Sanctions Regulations 2011* (the Regulations) with the following human rights:

- right to privacy;
- right to a fair hearing;
- right to protection of the family;
- right to an adequate standard of living;
- right to freedom of movement; and
- right to equality and non-discrimination.

In particular, the Committee restated its request as to how the designation and declaration of persons pursuant to the autonomous sanctions regime is a proportionate limitation on the above rights, having regard to the matters set out at paragraphs [1.234] to [1.254] of the Report. The human rights compatibility of the Regulations is addressed by reference to the rights identified above.

Right to privacy

Right

Article 17 of the International Covenant on Civil and Political Rights (the ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence and home.

The use of the term 'arbitrary' in the ICCPR means that any interferences with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the individual circumstances. Arbitrariness connotes elements of injustice, unpredictability, unreasonableness, capriciousness and "unproportionality".[1]

Report

[1] Manfred Nowak, *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 1993) 178.

The Committee has noted that the Regulations engage the right to privacy under Article 17 of the ICCPR, including on the basis that the freezing of a person's assets impacts their individual autonomy. In paragraphs [1.234] and [1.235] of the Report, the Committee expresses the view that the designation and declaration of a person under the autonomous sanctions regime is a 'significant incursion into a person's right to personal autonomy in one's private life'. It notes in particular the freezing of a person's assets, and the requirement for a permit to access their funds for basic expenses.

The Committee also considers the impact of designations and declarations on close family members of a designated and/or declared person. It notes that it may be difficult for these family members to access their own funds for basic expenses (such as household goods), without having to account for the expenditure.

Response

The Instruments are not an unlawful interference with an individual's right to privacy. As noted above, section 10 of the Act permits regulations relating to, among other things: 'proscription of persons or entities (for specified purposes or more generally)'; and 'restriction or prevention of uses of, dealings with, and making available of, assets'. The Instruments are made pursuant to regulation 6 of the Regulations, which states that the Foreign Minister (the Minister) may, by legislative instrument, designate and/or declare a person for targeted financial sanctions and/or travel bans.

As noted above, an interference with privacy will not be arbitrary where it is reasonable, necessary and proportionate in the individual circumstances.

The imposition of targeted financial sanctions and travel bans is reasonable. The Minister uses predictable, publicly available criteria when designating or declaring a person as being subject to such measures. These criteria are designed to capture only those persons the Minister is satisfied are involved in activities giving rise to situations of international concern, as set out in regulation 6 of the Regulations.

Targeted financial sanctions and travel bans under the autonomous sanctions regime are necessary and proportionate. They are only imposed, by definition, in response to situations of international concern, including where there are, or have been, human rights abuses, weapons proliferation (in defiance of UN Security Council resolutions), indictment in international criminal tribunals, activities that seriously undermine democracy, and threats to the sovereignty and territorial integrity of a State. Given the seriousness of these issues, the Government considers that targeted financial sanctions and travel bans are the least rights-restrictive ways to respond to situations of international concern.

The Government's position is that any interference with the right to privacy as a consequence of the operation of the autonomous sanctions regime is not unlawful or arbitrary.

Right to a fair hearing

Right

Article 14 of the ICCPR protects the right to a fair hearing. The right concerns procedural fairness, and applies where rights and obligations, such as personal property and other private rights, are to be determined.

Report

The Committee has taken the view that that the Regulations engage Article 14 in so far as they limit the avenues available to challenge the designation or declaration of a person under the Regulations. In paragraph [1.236], the Committee reiterates previous human rights analyses, which noted that the process for making designations and declarations under the autonomous sanctions regimes limit the right to a fair hearing because it does not provide for merits review.

Response

The Government's position is that any limitation on the access to merits review is justified. The sanctions regime has the legitimate objective of providing a foreign policy mechanism to the Australian Government to address situations of international concern. The limitation on access to merits review in this context is reasonable as it reflects the seriousness of the foreign policy and national security considerations involved, as well as the nature of the material relied upon.

Further, while merits review is unavailable for a decision to designate and/or declare a person under the Regulations, there are clear procedures for requesting revocation of designations and declarations, and judicial review is available under the *Administrative Decisions (Judicial Review) Act 1976* (the ADJR Act).

In addition, there is a three-yearly review process for targeted financial sanctions and travel bans that ensures that effective safeguards and controls are in place. This three-yearly review process includes a public consultation period, which invites submissions from the public to inform the assessment of whether a person continues to meet the criteria for designation and declaration under regulation 6 of the Regulations.

Finally, a person may apply at any time requesting the revocation of their designation or declaration in the event of changed circumstances or if new evidence comes to light. Failure to make a decision or unreasonable delay following such a request may be grounds for judicial review. Finally, the Minister may review and/or revoke designations and declarations at any time on her own initiative, including when circumstances change or new evidence comes to light.

Right to protection of the family

Right

The right to respect for the family is protected by Articles 17 and 23 of the ICCPR. It covers, among other things, the separation of family members under migration laws, and arbitrary or unlawful interferences with the family.

Limitations on the right to protection of the family under Articles 17 and 23 of the ICCPR will not violate those articles if the measures in question are lawful and non-arbitrary. An interference with privacy of the family will be consistent with the ICCPR where it is reasonable, necessary and proportionate in the individual circumstances.

Report

The Committee has noted that the Regulations engage the right to protection of the family. In paragraph [1.237] of the Report, the Committee notes that a person who is declared under the autonomous sanctions regime for the purpose of preventing the person from travelling to, entering or remaining in Australia will have their visa cancelled pursuant to the *Migration Regulations 1994*. This makes the person liable to deportation which may result in that person being separated from their family, which therefore engages and limits the right to protection of the family.

Response

As set out above, the autonomous sanctions regime is authorised by domestic law and is not unlawful.

As the listing criteria in regulation 6 are drafted by reference to specific foreign countries, it is rare, as a practical matter, that a person declared for a travel ban will have immediate family in Australia and face deportation from Australia.

To the extent that a person has known connections to Australia, the Department of Foreign Affairs and Trade (DFAT) is able to consult with relevant agencies in advance of a designation and declaration to determine the possible impacts of the designation and declaration on any family members in Australia.

To the extent that the travel bans imposed pursuant to the Instruments engage and limit the right to protection of the family in a particular case, the Regulations allow the Minister to waive the operation of a travel ban on the grounds that it would be either: (a) in the national interest; or (b) on humanitarian grounds. This provides a mechanism to address circumstances in which issues such as the possible separation of family members in Australia are involved. In addition, this decision may be judicially reviewed.

Finally, were such a separation to take place, for the reasons outlined in relation to Article 17 above, the position of the Australian Government is that such a separation would be justified in the circumstances of the individual case.

Right to an adequate standard of living

Right

The right to an adequate standard of living is contained in Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* (the ICESCR) and requires States to ensure the availability and accessibility of the resources that are essential to the realisation of the right, namely food, water, and housing.

Article 4 of ICESCR provides that this right may be subject to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. To be consistent with the ICESCR, limitations must be proportionate.

Report

The Committee has noted that the Regulations engage Article 11(1) of the ICESCR. In paragraph [1.238], the Committee considers that economic sanctions (generally) engage and limit Article 11(1) of the ICESCR, as persons subject to such sanctions will have their assets effectively frozen and may therefore have difficulty paying for basic expenses.

Response

The Government considers any limitation on the enjoyment of Article 11(1), to the extent that it occurs, is justified. The Regulations allow for any adverse impacts on family members as a consequence of targeted financial sanctions to be mitigated. As the Committee notes, the Regulations state that the Minister may grant a permit for the payment of basic expenses (among others) if it is in the national interest to do so. The objective of the basic expenses exemption is, in part, to enable the Australian Government to administer the sanctions regime in a manner compatible with relevant human rights standards.

As noted above, DFAT consults relevant agencies in advance of a designation and declaration of a person with known connections to Australia to determine the possible impacts of the designation and declaration on any family members in Australia. Where such impacts are identified, the Minister may issue a permit to ensure that the asset freeze does not adversely affect any person who does not meet the criteria for designation.

The Government considers that the permit process is a flexible and effective safeguard on any limitation to the enjoyment of Article 11(1).

Right to freedom of movement

Right

Article 12 of the ICCPR protects the right to freedom of movement, which includes a right to leave Australia, as well as the right to enter, remain, or return to one's 'own country'.

The right to freedom of movement may be restricted under domestic law on any of the grounds in Article 12(3) of the ICCPR, namely national security, public order,

public health or morals or the rights and freedoms of others. Any limitation on the enjoyment of the right also needs to be reasonable, necessary and proportionate.

Report

The Committee has expressed the view that the Regulations may in certain circumstances engage Article 12(4) of the ICCPR, concerning the right to enter one's own country. In paragraph [1.239], the Committee notes that the power to cancel a person's visa that is enlivened by declaring a person for a travel ban may engage and limit the right to enter one's own country pursuant to Article 12(4) of the ICCPR. According to the Committee, this is because a person's visa may be cancelled (with the result that the person may be deported) in circumstances where that person has a close and enduring connection to Australia such that Australia may be considered their 'own country' for the purposes of the ICCPR, even if that person is not a citizen.

Response

To the extent that Article 12(4) is engaged in an individual case, such that a person is prevented from entering Australia as their 'own country', the Government's position is that the imposition of the travel ban would be justified. As set out above in relation to Article 17 of the ICCPR, travel bans are a reasonable and proportionate means of achieving the legitimate objectives of Australia's autonomous sanctions regime.

Travel bans are reasonable because they are only imposed on persons who the Minister is satisfied are responsible for giving rise to situations of international concern. Thus, preventing a person who is, for example, responsible for human rights abuses in Syria, from travelling to, entering or remaining in Australia, is a reasonable means to achieve the legitimate foreign policy objective of seeking to influence and penalising those responsible for such abuses, and signal Australia's condemnation of such acts. Australia's practice in this respect is consistent with likeminded partners such as the US, the EU, and the UK.

Travel bans are proportionate because while they engage and limit declared individuals' right to freedom of movement, they are the least restrictive means by which to achieve the legitimate objective of influencing and penalising those responsible for giving rise to situations of international concern. As set out above, by denying access to international travel, travel bans seek to influence persons who contribute to situations of international concern, including human rights abuses and weapons proliferation.

Right to equality and non-discrimination

Right

The right to equality and non-discrimination under Article 26 of the ICCPR provides that everyone is entitled to enjoy their rights without discrimination of

any kind, and that people are equal before the law and are entitled without discrimination to the equal and non-discriminatory protection of the law.

Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria, serves a legitimate objective, and is a proportionate means of achieving that objective.

Report

The Committee has taken the view that the Regulations engage Article 26 of the ICCPR to the extent that they result in the indirect discrimination of certain persons on the basis of national origin or nationality. In paragraph [1.284], the Committee expresses the view that the designation or declarations in relation to specified countries in the Instruments appear to have a disproportionate impact on persons on the basis of national origin or nationality. The Committee restates its request for the Minister's advice as to the compatibility of these measures with the right to equality and non-discrimination.

Response

The Government's position is that any differential treatment of people as a consequence of the application of the Regulations does not amount to discrimination pursuant to Article 26 of the ICCPR.

The Government refers the Committee to the listing criteria in regulations 6(1) and 6(2) of the Regulations, and notes that the criteria contained in the Regulation are reasonable and objective. They are reasonable insofar as they list only those States and activities which the Government has specifically determined give rise to situations of international concern. The criteria are also objective, as they provide a clear, consistent and objectively-verifiable reference point by which the Minister is able to make a designation or declaration. The Regulations serve a legitimate objective, as discussed above.

Finally, they are proportionate. As discussed above, the Government's view is that denying access to international travel and the international financial system are a justified and less rights-restrictive means of achieving the aims of the Regulations. The Government does not have information that supports the view that affected groups are vulnerable; rather, they are people the Minister is satisfied are involved in activities giving rise to situations of international concern. Further, there are several safeguards, such as the availability of judicial review and regular review processes, in place to ensure that any limitation is proportionate to the objective being sought.