Responses from legislation proponents — Report 1 of 2019

THE HON DAVID COLEMAN MP
MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MS18-010903

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

Dear Mr Goodenough Ian

Thank you for your letter dated 28 November 2018 requesting my response in relation to the human rights compatibility of the Migration Amendment (Strengthening the Character Test) Bill 2018.

My response for the Committee's consideration is attached.

Yours sincerely

David Coleman

13 / 12 / 2018

Response to the Parliamentary Joint Committee on Human Rights — Migration Amendment (Strengthening the Character Test) Bill 2018

Non-refoulement obligations and the right to an effective remedy

1.18 The preceding analysis indicates that the proposed expansion of the minister's power to cancel or refuse a visa is likely to be incompatible with Australia's non-refoulement obligations and the right to an effective remedy.

1.19 The committee therefore seeks the advice of the minister as to:

- **whether decisions to remove a person once a visa has been refused or cancelled pursuant to the proposed expanded powers to cancel or refuse a visa is compatible with Australia's non-refoulement obligations in light of section 197C of the Migration Act; and**

- **whether decisions to remove a person once a visa has been refused or cancelled pursuant to the proposed expanded powers to cancel or refuse a visa is subject to sufficiently 'independent, effective and impartial review' so as to comply with Australia's non-refoulement obligations and the right to an effective remedy.**

I note the Committee's view that non-citizens whose visas are cancelled under the proposed designated offence ground in section 501 of the *Migration Act 1958* (Migration Act), introduced by the Bill, may engage Australia's international obligations relating to protection against *refoulement*, including the right to an effective remedy.

Non-refoulement

Australia is committed to its international obligations and does not seek to resile from or limit its *non-refoulement* obligations. The amendments do not affect the substance of Australia's adherence to these obligations and as such the Department will not enforce the involuntary removal of a non-citizen where it would be in breach of our *non-refoulement* obligations. The removal of a non-citizen whose visa has been refused or cancelled pursuant to the proposed expanded grounds to cancel or refuse a visa will be compatible with Australia's *non-refoulement* obligations in light of section 197C of the Migration Act.

Further, the amendments do not, and are not intended to, affect opportunities set out elsewhere in the Migration Act and in policy, which enable the Government to be satisfied that a person's removal will not breach Australia's *non-refoulement* obligations, such as:

- consideration of *non-refoulement* obligations as part of the discretion whether to refuse or cancel the person's visa on character grounds – pursuant to a Ministerial Direction made under section 499 of the Migration Act;

- consideration of whether the applicant meets the definition of a refugee or the complementary protection criteria under the Migration Act as part of the protection visa process;

- consideration of whether Australia's *non-refoulement* obligations are engaged, as part of the pre-removal clearance for persons on a removal pathway, leading to consideration of visa options; or

- consideration of the use of the Minister's personal powers under the Migration Act to intervene in a case when the Minister thinks it is in the public interest to do so.

I note the committee's concerns regarding the amendment's interaction with Australia's *non-refoulement* obligations in light of section 197C of the Migration Act. Section 197C does make it clear that, in order to exercise the removal powers under section 198 of the Act, an officer is not bound, as a matter of domestic law, to consider whether or not a person available for removal engages Australia's *non-refoulement* obligations before removing that person. It is an officer's duty to remove an unlawful non-citizen as soon as reasonably practicable.

However, this is because issues that engage Australia's *non-refoulement* obligations are identified and appropriately managed before an unlawful non-citizen becomes available for removal. Prior to a non-citizen's removal, a removal availability assessment and other pre-removal clearance processes are undertaken by the Department to ensure Australia acts in accordance with our international obligations — including identifying and managing any *non-refoulement* obligations. If these pre-removal processes were to identify *refoulement* concerns, the person would not be available for removal while visa and ministerial intervention options are explored.

Additionally, because the removal power under section 198 of the Migration Act does not specify a removal destination, it is open to the Department to explore whether it is reasonably practicable to meet our *non-refoulement* obligations by removing the non-citizen to a third country. It may also be possible to remove a non-citizen who engages Australia's *non-refoulement* obligations if we receive reliable Government assurances that the individual will not face specified types of harm if returned to their country of origin.

Right to remedy

While I note the Committee's concerns in regards to the right to remedy, it is the Government's position that while merits review is an important safeguard in many circumstances, there is no express requirement under the ICCPR or the CAT for merits review in the assessment of *non-refoulement* obligations. To the extent that obligations relating to review are engaged in the context of immigration proceedings, I take the view that these obligations are satisfied where either merits review or judicial review is available. There is no obligation to provide merits review where judicial review is available.

The cancellation or refusal of a non-citizen's visa under section 501 of the Migration Act, and their subsequent detention and removal, follows a well-established process within the legislative framework of the Migration Act, and is supported by robust policy and procedures.

At both the primary decision-making stage of discretionary decisions, and the merits review stage, where available, *non-refoulement* obligations must be considered, where relevant in the case, as part of the requirement to exercise discretion to refuse or cancel a visa on character grounds.

- When considering exercise of the discretionary refusal and cancellation powers under section 501 of the *Migration Act 1958*, the decision-maker is obligated, where relevant, to consider Australia's international obligations, as described in a binding ministerial direction, when making a decision whether to refuse or cancel a visa due to convictions for designated offences.

Eligible persons may seek merits review of a delegate's decision to refuse or cancel their visa on character grounds with the Administrative Appeals Tribunal. While personal decisions by the Minister are not merits reviewable, such decisions can be appealed to the Federal Court.

I respectfully disagree with the Committee's view at paragraph 1.17 that:

> *"…judicial review in the Australian context is not likely sufficient to fulfil the international standard required of 'effective review' of non-refoulement decisions, … in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision maker). The court cannot undertake a full review of the facts (that is, the merits)..."*

The entire purpose of judicial review is to assess whether the primary decision was legally correct, and to determine any error or unfairness in the decision-making process. Courts consider issues such as whether the decision-maker applied relevant tests correctly and whether the decision was illogical or irrational. Judicial review in Australia remains an effective mechanism by which administrative decisions are assessed by a higher authority. Although I agree that judicial review may not consider the merits of a decision, it does not mean that it is not an appropriate means by which decisions are reviewed. I consider that the existence of judicial review is sufficient to provide for the independent, effective and impartial review of decisions made by the Minister which may engage Australia's *non-refoulement* obligations.

As mentioned in the Statement of Compatibility in the Explanatory Memorandum for this Bill, Australia remains committed to its international obligations, and anyone who is found to engage our *non-refoulement* obligations will not be forcibly removed to a place in breach of these obligations. This includes non-citizens who have been subject to visa refusals or cancellations using the designated offence ground.

The amendments are therefore not incompatible with Australia's *non-refoulement* obligations, nor the right to effective remedy for violations of the human rights protected by the relevant treaties.

The right to liberty

1.35 The preceding analysis raises questions as to compatibility of the expanded bases on which a person's visa may be cancelled, the consequence of which would be that the person is subject to immigration detention, with the right to liberty.

1.36 The committee therefore seeks the advice of the minister as to the compatibility of the measures with this right, including:

- **whether the measures pursue a legitimate objective for the purposes of international human rights law (including any reasoning or evidence that establishes the stated objectives address a substantial and pressing concern or are otherwise aimed at achieving a legitimate objective);**

- **whether the measures are rationally connected to (that is, effective to achieve) the objective; whether the measures are proportionate (including in light of the decision of the UN Human Rights Committee in *MGC v Australia*, UN Human Rights Committee Communication No.1875/2009, CCPR/C/113/D/1875/2009 (7 May 2015)).**

The proposed amendments of the Migration Amendment (Strengthening the Character Test) Bill 2018 do not alter detention powers already established in the Migration Act.

As articulated in the Statement of Compatibility, the detention of an unlawful non-citizen as a result of visa cancellation is neither unlawful nor arbitrary under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of time in detention, but whether the grounds for detention are justifiable. A non-citizen can be detained for the purpose of an immigration outcome—such as removal from Australia, while considering the grant or refusal of a visa or eligibility to apply for a visa.

Whether the person is placed in an immigration detention facility, or is subject to other arrangements, is determined by using a risk-based approach. Additionally, Detention Review Managers ensure the lawfulness and reasonableness of detention by reviewing all detention decisions. Detention Review Committees are held regularly to review all cases held in detention to ensure the ongoing lawfulness and reasonableness of the person's detention, by taking into account all the circumstances of the case, including adherence to legal obligations. This regular review takes into account any changes in the client's circumstances that may impact on immigration pathways including returns and removal, to ensure the continued lawfulness of detention and to ensure alternative placement options have been duly considered.

The proposed amendments widen the scope of people being considered for visa cancellation and refusal, and the Government's position is that these amendments present a reasonable response to achieving a legitimate purpose under the Covenant—the safety of the Australian community.

The safety of the Australian community is considered to be both a pressing and substantial concern and a legitimate objective of the Bill.

- This Bill, in part, gives legislative effect to recommendations 15 and 16 of the Joint Standing Committee on Migration's report *'No one teaches you to become an Australian'*. The consultations undertaken by the Joint Standing Committee on Migration are the basis for the Migration Amendment (Strengthening the Character Test) Bill 2018.
- The committee considered 115 public submissions and found that there were community concerns about the escalation of violent crimes, and that serious criminal offences committed by visa holders—such as aggravated burglary, serious assault, sexual offences and the possession of child pornography—must have appropriate consequences.
- The committee recommended that the visas of those who commit these offences be cancelled under section 501 of the Migration Act. However, the sentence-based approach and more subjective limbs of the character test, do not effectively capture people convicted of all serious criminality who also pose an ongoing unacceptable risk to the Australian community, necessitating changes to the character test.

The amendments do not of themselves limit a person's right to security of the person and freedom from arbitrary detention. However, to the extent that they may result in a greater number of people having their visa cancelled and being subsequently detained, there is a clear rational connection between an amendment that ensures that the visas of those non-citizens who pose a risk to the Australian community can be considered for visa cancellation and refusal, and the legitimate objective of protecting the safety of the Australian community from those who pose an unacceptable risk. As described above, the appropriateness of a detention placement is considered

in the individual circumstances of each case, which includes the matters the UN Human Rights Committee has raised, such as 'individualised likelihood of absconding, a danger of crimes against others, or a risk of acts against national security'. Further, people who are detained after having their visas refused or cancelled using this new ground will still be able to continue to challenge the lawfulness of their detention in accordance with Article 9(4).

Prohibition on expulsion without due process

1.45 The preceding analysis raises questions as to the compatibility of the expanded visa cancellation powers with the prohibition on expulsion without due process.

1.46 The committee therefore seeks the advice of the minister as to the compatibility of the expanded visa cancellation powers with this right, in particular for persons who have their visa cancelled without natural justice under section 501(3) of the Migration Act for having committed a 'designated offence'. This includes further information as to:

- **whether expanding the visa cancellation power to cancel visas where a person commits a 'designated offence' pursues a legitimate objective;**
- **whether this measure is rationally connected to (that is, effective to achieve) the objective;**
- **whether the measure is proportionate (in particular, safeguards to ensure that non-citizens who have their visa cancelled pursuant to the proposed measures in the bill will have a sufficient opportunity to be heard prior to expulsion, including an opportunity to be heard as to the minister's exercise of discretion and as to the minister's decision that visa cancellation is in the national interest).**

The amendments proposed in this Bill do not alter cancellation or refusal powers of either the Minister or delegates, nor the associated rights to natural justice and review.

The majority of discretionary decisions to cancel or refuse a visa on character grounds are made under section 501(1) for refusals and section 501(2) for cancellations. Such decisions afford natural justice prior to the making of the decisions, allowing the person to comment and provide any supporting documents or evidence to the Department as to why their visas should not be cancelled or refused, and provide any countervailing considerations. This is the case for both decisions made by the Minister personally, and decisions made by delegates of the Minister.

In a limited number of cases, a non-citizen's visa may be considered for refusal or cancellation by the Minister personally under section 501(3), without natural justice, where the Minister is satisfied that refusal or cancellation is in the national interest. National interest is determined by the Minister personally, and the Minister's satisfaction that a decision is in the national interest must be attained reasonably.

Although such decisions to refuse or cancel the visa under section 501(3) are made without affording the non-citizen an opportunity to provide reasons as to why their visa should not be cancelled or refused or any countervailing considerations, the non-citizen is entitled to seek revocation of the decision. Further, it is open to the Minister to make a decision to revoke the cancellation or refusal if the non-citizen satisfies the Minister that they pass the character test.

With regard to the Committee's concerns about who can seek revocation of a decision made personally by the Minister under section 501(3), if the person's visa is cancelled or refused under section 501(3) while they are onshore, the non-citizen may make representations about possible

revocation of the decision within seven days of being given written notice of the Minister's decision, provided the non-citizen is in immigration detention. It is open to the non-citizen to request removal from Australia to await the outcome of their revocation request while offshore. For non-citizens who were outside Australia when their visa was cancelled or refused under section 501(3), there is no impediment to their initiating a request for revocation from outside Australia provided the statutory timeframes and other format requirements are met.

The Minister is required to cause notice of the making of the decision whether or not to revoke a section 501(3) decision to be laid before each House of Parliament within 15 sitting days of that House after the day of the decision. If representations seeking revocation are not made, notice of this fact must also be laid before each house of Parliament within 15 sitting days of that House after the last day on which the representations could have been made.

Judicial review is also available to affected persons who seek review within 35 days of being notified of the decision. During judicial review, the Court could consider whether or not the power given by the Migration Act has been properly exercised. For a discretionary power such as a personal decision by the Minister under the Migration Act, this could include the consideration of whether the power has been exercised in a reasonable manner. As mentioned above, I disagree with the Committee's view that judicial review may not be an "effective remedy".

I note the Committee's concerns as to whether expanding the visa cancellation power to cancel visas where a person commits a 'designated offence' pursues a legitimate objective and is proportionate to that objective.

This Bill is based upon the findings of a Joint Standing Committee on Migration, which has identified that certain serious offences, the designated offences of this Bill, represent an unwillingness by the non-citizen to be part of a cohesive society, and that those who commit these offences be appropriately considered for cancellation. These offences have a significant impact on their victims and the wider community.

The Minister's power under section 501(3), if used in a particular case, is an established process that is a reasonable response to achieving a legitimate objective, which is the safety of the community. Any such decision will be made only if it is required in the national interest and any limitation of procedural rights is therefore proportionate to the circumstances involved in the particular case.

Rights to respect for the family and best interests of the child

1.53 The preceding analysis raises questions as to the compatibility of the expanded visa cancellation powers with the right to protection of the family and the obligation to consider the best interests of the child as a primary consideration.

1.54 The committee therefore seeks the advice of the minister as to the compatibility of the measures with these rights, including:

- **whether the measure pursues a legitimate objective;**
- **whether there is a rational connection between the limitation of these rights and that objective;**
- **whether the limitation on the right to protection of the family and the obligation to consider the best interests of the child is proportionate (including safeguards to ensure that the best interests of the child are considered as a primary consideration, and any**

other information as to how the minister will consider protection of the family and the rights of children when making a decision).

The decision to refuse or cancel a visa for committing a 'designated offence' may result in the separation of family members and the cancellation and/or removal of minors (those under the age of 18 years).

However, the amendments do not change the framework within which the character refusal and cancellation powers operate. Section 501 of the *Migration Act 1958* applies to all visa holders and visa applicants regardless of age.

If a non-citizen fails the character test for convictions relating to designated offences, a discretion then exists to cancel or refuse a non-citizen's visa. Delegates making a decision on character grounds are bound by a ministerial direction, and delegates must consider the best interests of minor children in Australia as a primary consideration when making a decision to cancel or refuse a visa. Other relevant considerations may include the effect the decision may have on other immediate family members in Australia, along with other factors such as the risk the non-citizen poses to the Australian community. This discretion will continue to form part of the decision making process.

These discretionary refusal and cancellation powers must be exercised with natural justice, except in the exercise of the s501(3) power in the national interest as explained above. Prior to any decision to refuse (under s501(1)) or cancel (under s501(2)) a visa of a person who fails the character test because of this new ground, the affected person will be issued a notice advising them of the intention to consider cancellation or refusal of their visa, and provided with the opportunity to comment and submit any supporting documents or evidence to the Department as to why their visas should not be cancelled or refused and to raise any countervailing considerations.

The best interests of minor children in Australia are, and will remain, a primary consideration in any discretionary decision to refuse or cancel a minor's visa on character grounds.

Right of a person to remain in their 'own country'

1.59 The preceding analysis indicates that the expansion of visa refusal and cancellation powers may limit the right to freedom of movement and in particular the right of a person to remain in their 'own country'. The statement of compatibility does not acknowledge that this right is engaged by the bill.

1.60 The committee therefore seeks the advice of the minister as to the compatibility of the measures with this right, including:

- **whether the measure pursues a legitimate objective;**
- **whether there is a rational connection between the limitation on the right to freedom of movement and that objective;**
- **whether the limitation on the right to freedom of movement is proportionate (including by reference to the UN Human Rights Committee's decision in *Nystrom v Australia*, UN Human Rights Committee Communication No.1557/2007,**

CCPR/C/102/D/1557/2007 (1 September 2011), and any other reasons why the measures may be proportionate).

While in most cases Australia will not be a non-citizen's 'own country' for the purposes of Article 12(4), I acknowledge that this phrase has been interpreted broadly by the UN Human Rights Committee and that the drafting history of the provisions supports the interpretation that "own country" goes beyond mere nationality.

The strength of a non-citizen's ties to the Australian community (including the length of their residence), is a consideration included in the binding ministerial direction, which must be taken into account by decision-makers when they consider cancelling a visa on discretionary grounds under section 501 of the Migration Act. This will continue be the case when considering visa cancellations using the proposed designated offences ground.

Right to privacy

1.68 The preceding analysis indicates that expanding the definition of 'character concern' to include persons who have committed a 'designated offence' engages and limits the right to privacy.

1.69 The committee therefore seeks the advice of the minister as to compatibility of the measure with this right, including:

- **whether the measure pursues a legitimate objective;**
- **whether there is a rational connection between the limitation of the right to privacy and that objective;**
- **whether the limitation on the right to privacy is proportionate.**

The Bill amends section 5C of the Migration Act, expanding the definition of *character concern*, it also extends the circumstances in which the Department can collect and disclose identifying information for the purpose of identifying non-citizens who are of character concern.

As noted in the Statement of Compatibility, permitting the collection and disclosure of identifying information, such as photographs, signatures and other personal identifiers as defined in section 5A of the Migration Act, for the purpose of identifying persons of character concern, is a reasonable and proportionate measure to achieve the intended operation of the character provisions for purpose of protecting the Australian community. The amendments may result in the collection of information about additional persons than previously. As explained above, the amendments are necessary to ensure that non-citizens who pose an ongoing risk to the Australian community are identified and appropriately considered for visa refusal or cancellation. Any interference with the privacy of a person who has been convicted of a designated offence, in order to help identify them, would therefore not be unlawful or arbitrary.

Information from various state and territory agencies, including those responsible for justice administration, law enforcement and correctional institutions, is crucial to determinations as to whether specific individuals pass or do not pass the character test which was set out in section 501 of the Migration Act.

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

The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-026840

10 JAN 2019

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
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Dear Mr Goodenough

I refer to your correspondence of 05 December 2018 on behalf of the Parliamentary Joint Committee on Human Rights requesting further information in relation to the *National Health (Privacy) Rules 2018* (Privacy Rules).

The Privacy Rules promote the protection of human rights by providing specific privacy safeguards for individuals' information collected under the Medicare Benefits Schedule (MBS) and the Pharmaceutical Benefits Scheme (PBS). Where MBS and PBS data are used and/or linked, this occurs in limited and controlled circumstances. Any limitation of the right to privacy is minimal and proportionate to the benefit and integrity of Australia's health system. The Privacy Rules represent an element of the privacy matrix regarding MBS and PBS data that is under the purview of the Australian Information Commissioner.

I would like to emphasise that the Privacy Rules have been remade in substantively the same terms as the *2008 Privacy Guidelines for the Medicare Benefits and Pharmaceutical Benefits Programs* (Guidelines), subject to updates discussed below. The Privacy Rules are intended to maintain the current regulatory arrangements over the short term, as my Department has indicated an intention to review the arrangements under section 135AA of the *National Health Act 1953* (which provide for the making of the Privacy Rules). Consequently, the Privacy Rules contain a self-repealing provision and will sunset in three years (on 1 April 2022).

The Rules update the Guidelines so they more accurately reflect the practical administrative arrangements between my Department and the Department of Human Services, in particular, machinery of government changes in relation to the division of responsibilities for Medicare compliance. The regulatory requirements for the use and linkage of information remain substantively unchanged from the Guidelines and this includes information for health policy and medical research in certain circumstances.

The Guidelines were made after a period of review undertaken by the Office of the Australian Information Commissioner (then the Office of the Australian Privacy Commissioner). This included a stakeholder and public consultation process to consider community attitudes towards the handling of information including MBS and PBS claims information. As such, when the Guidelines were made, there was significant consideration of whether the use and/or linking of information allowed for compliance purposes was proportionate, useful and in line with public expectations of information use and security at that time.

Further limited consultation was undertaken in relation to the making of the Privacy Rules to maintain the current arrangements in the short term.

Australia has one of the best healthcare systems in the world and is well-supported by a medical workforce that is highly trained and dedicated. The Commonwealth funds Medicare so that when Australians need to access health services they can do so, through a system that is affordable and accessible. Commonwealth expenditure on the MBS and PBS is now more than $36 billion per year. Medicare compliance activities ensure that public money is not lost to waste, inappropriate practice or fraud. The Privacy Rules identify certain limited or exceptional circumstances under which claims information may be linked and used, including for the enforcement of the criminal law and the protection of the public revenue. The Privacy Rules set out strict requirements as to the handling, use and linking of information, including requirements relating to use of the Medicare PIN, destruction of records and reporting on linkages.

The potential benefits of linking MBS and PBS data has been noted by numerous enquiries including the House of Representatives Standing Committee on Health and the Senate Select Committee on Health, particularly for health and medical research.

More generally, linking data offers enormous potential for providing new insights into people's health and wellbeing that would otherwise be difficult or expensive to obtain. These new insights can in turn drive the development of new, relevant policies and practices that make a real difference to the lives of Australians. Linking data can also identify patterns of unwarranted variation in care with inefficient use of MBS or PBS relative to clinical pathways. This could lead to changes in MBS or PBS item descriptions with improved efficiency and patient outcomes.

An example of the benefits from data linking is through pathways-style research, where analysis of patients through the health system can ascertain the contribution of each component of their treatment to their health outcomes. Only linked administrative data provides the required level of detail to undertake this type of research effectively. Pathways analysis may be used to inform new service delivery models, programs or funding reform and provide information to clinicians and patients to support their decision-making about care options, all with the aim of maximising the health outcomes for patients and the consequent improved value from investments made in their care.

Individuals may complain to the Australian Information Commissioner about a breach of the Rules, as this constitutes an interference with privacy under the *Privacy Act 1988*. Given this safeguard, and the narrowly-prescribed circumstances in which information may be used, any limitation of the right to privacy is minimal and proportionate to the benefit and integrity of Australia's health system.

I trust this this information clarifies matters raised by the Committee.

Yours sincerely

Greg Hunt

The Hon Sussan Ley MP

Assistant Minister for Regional Development and Territories
Federal Member for Farrer

Ref: MC18-008768

14 DEC 2018

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
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Dear Mr Goodenough Ian

Thank you for your email of 5 December 2018 regarding the *Norfolk Island Legislation Amendment (Protecting Vulnerable People) Ordinance 2018* [F2018L01377] (the Ordinance).

The Ordinance was made in September 2018 and reformed a number of Norfolk Island continued and applied laws, to provide better protections for people who fear domestic or personal violence and to facilitate greater access to justice for vulnerable witnesses and complainants by improving court processes.

The Parliamentary Joint Committee on Human Rights (the Committee) has sought my advice about new section 167F of the *Criminal Procedure Act 2007* (NI), which was inserted by the Ordinance and creates a new offence relating to the publication of certain sensitive information in relation to sexual and some violent offence proceedings. Specifically, the Committee has raised concerns about imposing a legal burden of proof on a defendant for a statutory defence to an offence under that section, and its compatibility with the right to be presumed innocent in Article 14(2) of the International Covenant on Civil and Political Rights.

The Committee has sought advice about:

- whether the imposition of a legal burden on a defendant is aimed at achieving a legitimate objective for the purposes of international human rights law
- how the reverse legal burden is effective to achieve (that is, how is it rationally connected to) the legitimate objective, and
- whether the measure is a proportionate limitation on the right to be presumed innocent (including why a legal burden rather than an evidential burden has been imposed).

I am pleased to provide further advice on these issues.

Offences
New section 167F (Sexual offence proceeding – prohibition of publication of complainant's identity) includes new subsection 167F(2) which provides that it is a defence to a prosecution for an offence against the section if the person proves that the complainant consented to the publication of prescribed information before the publication happened. A note follows that advises that a defendant bears a legal burden in relation to the matter in the subsection (the defence), and refers to section 59 of the *Criminal Code 2007* (NI) (the Criminal Code).

Section 59 of the Criminal Code anticipates the imposition of a legal burden on the defendant in some circumstances, providing that a burden of proof imposed on the defendant is a legal burden where, relevantly, the law expressly requires the defendant to prove the matter. In such cases, the defendant must prove the matter on the balance of probabilities, as per section 60 of the Criminal Code.

Legitimate objective
The new offence in question relates to the disclosure of information about sexual and violent offence proceedings. While the imposition of a legal burden does limit, to some extent, the right of an accused person to be presumed innocent, it does so in a way that furthers other rights, both of the accused person and the complainants. The offences, and associated defence, are designed in pursuit of two legitimate objectives: to protect the complainants' right to privacy, especially given the intensely personal and intimate nature of evidence that is heard in the relevant proceedings, and to protect and further an accused person's right to both a fair trial and to privacy, by preventing the publication of potentially prejudicial material.

Publishing the prescribed information, as outlined in the offence in s167F, would pose a danger to the safety of complainants and their families, and potentially to the families of accused people.

Subsection 167F(2) can also be seen as offering some protection for defendants from a limitation on the presumption of innocence. This is because the defence may serve to limit a defendant's criminal liability, which to be made out only requires proving that a person published relevant material. In this way, the statutory defence provides protection to defendants where consent has been provided for the publication and greater certainty to defendants who may rely on having obtained a person's consent prior to publishing the material.

Reasonable, necessary and proportionate to objective
It is important to note that the legal burden imposed on the defendant in s167F(2) is not in relation to the offence in s167F(1) – it relates only to the making out of the statutory defence of consent, with the burden required to be discharged on the balance of probabilities. The prosecution must still make out the substantive offence in s167F(1), beyond reasonable doubt, in order for the defendant to be found guilty.

The Australian Law Reform Commission in its report *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, acknowledged the appropriateness of placing a legal burden, as opposed to an evidentiary burden, on the defendant where the matter is not an essential element of the offence, or is not central to culpability. This is the case in this instance where lack of consent is not one of the elements of the offence.

I note that the Attorney-General's Department public sector guidance sheet about the presumption of innocence states that '[t]he purpose of the reverse onus provision would be important in determining its justification. Such a provision may be justified if the nature of the offence makes it very difficult for the prosecution to prove each element, or if it is clearly more practical for the accused to prove a fact than for the prosecution to disprove it.'

In the circumstances where consent relates to a particular act, in this case publication of certain material, it follows that, if existing and relevant, consent would be in the knowledge of the person committing the act, in this case the defendant. The existence of that consent will be significantly less difficult and less costly for the defendant to prove, than it is for the complainant or the prosecution to prove that consent does not exist. In addition, given there is a presumption against the publication of sensitive information, the defendant would be, or should be, aware of the need for consent and that he or she may need to rely on such consent, and should therefore be able to produce proof of its existence.

Having regard to these points, to the extent that the Ordinance may limit human rights, those limitations are reasonable, necessary and proportionate, in pursuit of a legitimate objective.

Thank you for bringing your concerns to my attention and I trust this is of assistance.

Yours sincerely

Hon Sussan Ley MP

MINISTER FOR INDIGENOUS AFFAIRS

Reference: MS18-005251

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
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Dear Mr Goodenough

Thank you for your letter of 28 November 2018 about the further assessment of the Parliamentary Joint Committee on Human Rights (the Committee) of the Social Security Legislation Amendment (Community Development Program) Bill 2018 (the Bill).

Further to the Explanatory Memorandum to the Bill and my letter to you of 4 October 2018 in which I outlined how the proposed amendments increase support to Community Development Program (CDP) participants, and improve employment outcomes in remote Australia, I provide the following response.

I note that the CDP reforms were developed in close consultation with a range of stakeholders, and informed by evaluations of the existing program. This process engaged with a variety of stakeholders, including: CDP participants, local communities and organisations, CDP Service Providers, the Prime Minister's Indigenous Advisory Council, peak bodies, Indigenous leaders, community advocates and academics. The Government considered 40 submissions received in response to the Department of the Prime Minister and Cabinet's (PM&C) Remote Employment and Participation discussion paper. Findings from a previous CDP Senate Inquiry and the 2017 Australian National Audit Office Performance Audit have also been considered.

PM&C has been working collaboratively across Government to ensure these reforms are ready to be implemented by February 2019. Throughout 2018, PM&C has consulted 71 stakeholders on 68 separate occasions about the CDP reforms. In addition, PM&C held two multiple-day conferences at which there was 185 registrations. This consultation has included potential employers, local government, land councils, employment service providers, as well as business.

PM&C's Regional Offices work closely with organisations and communities. I have also visited over 200 communities and regularly meet with remote employers, service providers and communities. Feedback regularly received through all consultations was that reform

should include a focus on reducing interactions with Department of Human Services, creating a simpler system, reducing the current penalties, and providing more jobs.

Right to social security and an adequate standard of living

Whether the measures are aimed at achieving a legitimate objective for the purposes of international human rights law

The measures are aimed at achieving a legitimate, reasonable and necessary objective for the purposes of international human rights law and are consistent with the right to social security and an adequate standard of living. All Australians, including all job seekers in CDP regions currently have and will continue to have access to social security. The measures in the Bill are designed to increase support for CDP participants while assisting them to transition from welfare to work. Job seekers will also benefit from local control with greater decision making for communities and Indigenous organisations. There is no proposed change to the right to social security for any individual in a CDP region.

The CDP reforms also support improved opportunities for employment through a subsidised jobs package, which supports improved standards of living. Further, the CDP and the reforms to the program support general community wellbeing through community engagement, activities to improve the wellbeing of the community and support through the CDP to get health care and ensure children have access to an education.

How the measures are effective and rationally connected to achieve that objective

The measures are effective and rationally connected in achieving the stated objective.

Once the measures in the Bill commence, CDP participants will be subject to a nationally consistent compliance framework and for the purposes of compliance, they will be treated the same as all other activity-tested job seekers in non-remote regions across the country.

The CDP reforms introduce a fairer and simpler system for remote job seekers and there are still protections in place for job seekers. The new arrangements will remove penalties that CDP participants receive for one-off breaches of mutual obligation requirements and ensure that financial compliance penalties will focus on those who are persistently and wilfully non-compliant.

This means that penalties under the Targeted Compliance Framework (TCF) will be significantly reduced – 85 per cent of all penalties (No Show No Pay penalties) in the current framework will be removed and no longer apply. The focus on the CDP reforms and the TCF is on providing more local and community based support to ensure participants receive appropriate assistance to overcome barriers, build their skills and win jobs.

Providers will be required to engage more with job seekers under the TCF which will ensure there is more support available to job seekers before any penalties are issued. Providers also retain discretion to consider reasonable excuses before applying a demerit including because of financial hardship if it is contributing to the non-attendance. The measures in the Bill provide more authority to CDP providers, the local Indigenous organisations operating in remote communities and delivering the program, rather than centralising decision making in the Department of Human Services.

The proportionality of the measures

The measures in the Bill are proportionate in relation to the stated objective. The measures, including the matters specifically noted by the Committee, have been designed so that they

are sufficiently precise to ensure that they only address the matters that they are intended to capture.

The measures in the Bill address the particular needs of unemployed persons in geographically remote and socially and economically disadvantaged areas and encompass a number of safeguards. The safeguards include careful consideration of the legal, policy and practical framework governing mutual obligation requirements and what circumstances will constitute a reasonable excuse. Other general safeguards include the retention of existing protections contained in the social security law as well as the new exemptions for CDP participants undertaking subsidised employment who are still in receipt of an applicable income support payment.

The Committee has also drawn attention to the application of reasonable excuse provisions. Providers maintain the ability to use discretion in determining whether a job seeker has a valid reason for not meeting their requirements, and whether or not they had a reasonable excuse for not notifying their provider in advance if they could not attend.

As noted in the Explanatory Memorandum to the Bill, CDP participants will continue to have access to reasonable excuse provisions in circumstances where the failure to meet mutual obligation requirements is due to drug or alcohol misuse or dependency. This is in recognition of the lack of availability of drug and alcohol rehabilitation services in remote Australia.

CDP participants will also be supported by CDP providers, local Indigenous organisations, operating in remote communities. The increased decision-making role for local providers, rather than the Department of Human Services, involves communities directly in job seeker compliance. Local providers understand the remote communities they are living and working in, and will use this understanding in working with remote job seekers, including through any consideration of demerits under the Targeted Compliance Framework.

The reforms to the CDP also include more flexibility for job seekers, so they can structure their activity requirements differently, allowing activities to be undertaking outside ordinary hours or over different days to best meet the needs of remote job seekers.

The 6,000 subsidised jobs in remote Australia will only be available to CDP participants and will grow the size and capacity of the remote labour market and support the development of more local businesses (leading to further employment opportunities other than the subsidised jobs component of the CDP reforms). The subsidised jobs package is part of a pathway to employment and is intended to enable participants to experience what it is like to work in a real job, and develop further skills and experience, while still accessing a level of support from employers and CDP providers.

Under the CDP, almost 30,000 job outcomes have been supported for CDP participants. This is significantly more than the number of subsidised jobs. The subsidised jobs program will complement and not replace existing jobs in remote communities by providing businesses, including local Indigenous businesses, the opportunity to apply for additional positions. Therefore, the subsidised jobs package will increase employment outcomes, in addition to the job outcomes that will continue to be delivered without subsidies. The Government is also focused on increasing demand for local job seekers through policies including the Indigenous Procurement Policy and requirements for employment targets in government contracts.

The CDP responds to the unique social and labour market circumstances in remote communities. All job seekers across Australia have mutual obligation requirements, regardless of where they live. However, how a job seeker meets these requirements varies based on a range of factors, including whether the job seeker is living in remote or non-remote Australia. The requirements in remote Australia are in response to the differing labour

markets and availability of jobs. Regular active participation has been called for across remote communities to ensure strong engagement in communities, and no passive welfare.

I am confident that the design of the measures is consistent with international human rights law obligations and, as such, the Government is not considering any amendments to the Bill at this time.

Conclusion in relation to the right to social security and an adequate standard of living

The Bill is consistent with the right to social security and the right to an adequate standard of living, particularly as it is specifically designed to counter the risks of long-term unemployment and welfare dependency in remote job markets. Increased opportunities for employment, more local support and engagement and a fairer and simpler mutual obligation system are all measures that will support the objective of reducing long term unemployment and welfare dependency.

Right to equality and non-discrimination

CDP and the Bill itself are consistent with the right to equality and non-discrimination. The position of the Government is that both the existing CDP and the Bill do not disproportionately impact Aboriginal and Torres Strait Islander people. Similarly, the position of the Government is that both the existing CDP and the Bill do not disproportionately impact job seekers living in remote Australia as opposed to non-remote job seekers (be they Indigenous or non-Indigenous).

The Committee has sought further advice on a number of specific matters on the basis that the Bill may have a disproportionate impact on certain participants. As the Government position does not align with this characterisation of the Bill I wish to clarify a number of aspects of the measures to demonstrate their consistency with the right to equality and non-discrimination.

The CDP is designed around the unique social and labour market conditions found in remote Australia. It supports the specific needs of participants in remote Australia to build skills, address barriers and contribute to their communities through a range of flexible activities. It also supports remote job seekers with transitioning into paid employment which will assist with combatting long term unemployment in remote areas. This transition will ensure CDP participants are subject to the same compliance framework as their non-remote counterparts. I reiterate that the CDP reforms were developed in close consultation with a range of stakeholders.

The measure is therefore reasonable, necessary and proportionate to achieve the legitimate objectives of the CDP and the Bill as outlined above. Accordingly, both CDP and the Bill itself are consistent with the right to equality and non-discrimination.

Right to work

I acknowledge the Committee's examination of the consistency of the measures with the right to work, particularly the analysis of the applicable safeguards and the importance of their careful application in due course.

Again, thank you for the further opportunity to address the matters raised by the Committee in relation to the right to social security and an adequate standard of living and the right to equality and non-discrimination. I am also grateful to the Secretariat of the Committee for their assistance in relation to this matter.

Yours sincerely

NIGEL SCULLION

21 December 2018