THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS17-001272

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

Dear Ian, Mr Goodenough

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

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

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

I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 16/05/17

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Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

1.41 The committee notes that the obligation of non-refoulement is absolute and may not be subject to any limitations.
1.42 The committee notes that the measure does not provide for merits review of decisions relating to the grant or cancellation of protection visas, and therefore may be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to the compatibility of this measure with the obligation of non-refoulement.

As the Committee has noted, and as was outlined in the Statement of Compatibility with human rights which accompanied the Explanatory Memorandum to this Bill, the amendments preserve the existing merits review framework without removing or otherwise diminishing a visa applicant or former visa holder's access to merits review of a refusal or cancellation decision in relation to them. Decisions made under the Migration Act that were reviewable by the Administrative Review Tribunal (AAT) before 1 July 2015, such as decisions made by a delegate to refuse or cancel a visa (including a protection visa) on character grounds under section 501 of the Act, remain reviewable by the AAT but in its General Division. Decisions reviewable before 1 July 2015 by the Immigration Assessment Authority (IAA) remain reviewable by the IAA.

Likewise, I again note that in receipt of a valid review application from a protection visa applicant or former protection visa holder, the Migration and Refugee Division (MRD) of the AAT is required, as was the former RRT, to conduct the review of the refusal or the cancellation decision in accordance with the procedures provided for in Part 5 as amended. The MRD is also required to ensure that any protection claims put forward by the protection visa applicant or former protection visa holder are appropriately assessed in determining whether Australia's protection obligations are engaged.

The additional amendments proposed by this Bill to certain provisions in Part 5 are minor and merely clarify the operation of those provisions without adversely affecting the right of access to merits review or, in cases involving review of protection visa refusal or cancellation decisions, how the review applicant's protection claims are assessed.

Although it is acknowledged that merits review is not available for all decisions relating to protection visas, I consider that the existence of judicial review is sufficient to provide for the independent, effective and impartial review of decisions which may engage Australia's non-refoulement obligations. I respectfully disagree with the Committee's view that 'judicial review is not sufficient to fulfil the international standard required of "effective review" in the context of non-refoulement decisions'. There is no express requirement under the International Covenant on Civil and Political Rights (ICCPR) or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to provide 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.

Any persons found to engage Australia's non-refoulement obligations will not be removed in breach of those obligations. However, the form of administrative arrangements in place to support Australia meeting its non-refoulement obligations is a matter for the Government.

1.51 The committee notes that the obligation of non-refoulement is absolute and may not be subject to any limitations.
1.52 The committee notes that the measure limits the ability of the Administrative Appeals Tribunal to provide effective merits review of decisions relating to the grant of protection visas, and therefore may be incompatible with Australia's obligations under the [ICCPR] and the [CAT] of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions. The committee therefore seeks the advice of the minister as to the compatibility of this measure with the obligation of non-refoulement.

A key aim of merits review generally is that it needs to be economical, just and efficient. This amendment maintains efficiency in the merits review process. The measure will not impact on the just resolution of claims in that new claims and evidence can still be considered in certain circumstances.

As noted in the Government's response on the mirror provision (section 423A) in the Migration Act to the Committee's Alert Digest No. 8 of 2014 concerning the *Migration Amendment (Protection and Other Measures) Bill 2014*, section 423A does not limit the AAT to the facts and evidence before the original decision-maker. Rather, it clarifies the manner in which the AAT is to consider any new claims and evidence presented to it. Likewise, under new section 358A, applicants may continue to introduce new claims and evidence to support their application at the review stage. If the AAT is satisfied that there is not a reasonable explanation for not providing the information at the primary stage, then it will draw an inference unfavourable to the credibility of the new claims or evidence raised. Such a measure certainly does not impact the independence, effectiveness or impartiality of the AAT, and instead supports the resolution of applications fairly and efficiently.

It is the Government's position that it is reasonable to expect claims and supporting evidence to be provided as soon as possible. It is also reasonable to seek an explanation as to why claims and evidence were not presented at the earliest available opportunity.

Further, and as noted above, any persons found to engage Australia's non-refoulement obligations will not be removed in breach of those obligations; the form of administrative arrangements in place to support Australia meeting its non- refoulement obligations is a matter for the Government.

1.59 The committee notes that the obligation of non-refoulement is absolute and may not be subject to any limitations.
1.60 The committee also notes that the right to an effective remedy, which includes the right to independent, effective and impartial review, is further limited by the proposed amendments to the Immigration Assessment Authority process, which provide that individual applications need not be treated separately.
1.61 Accordingly, the committee seeks the advice of the Minister for Immigration and Border Protection as to whether hearing family applications together (without the consent of the applicants) will ensure the review process under the Immigration Assessment Authority provides for effective review of such claims so as to comply with Australia's non-refoulement obligations.

As noted in the Statement of Compatibility with human rights which accompanied the Explanatory Memorandum to this Bill, the amendments to Part 7AA relating to review and sending of documents in relation to fast track reviewable decisions for family groups that have been referred together promote administrative efficiency, but do not displace or remove the IAA's obligation to consider the protection claims of each member of the referred family group. I respectfully disagree with the Committee's view that this limits the right to independent, effective and impartial review. As pointed out in my Second Reading Speech in relation to this Bill, 'permitting the IAA to review the decisions in relation to family members together does not mean that the IAA is bound to do so'. Further, I do not see how the implication that the IAA would lack independence, effectiveness or

impartiality by the option of reviewing two or more fast-track reviewable decisions together could be borne out by the proposed measure. The greater the extent of the relevant information held by the IAA in relation to a decision under review, the greater the likelihood that the decision will be fair and accurate.

Again, and as noted above, any persons found to engage Australia's non-refoulement obligations will not be removed in breach of those obligations. The form of administrative arrangements in place to support Australia meeting its non- refoulement obligations is a matter for the Government.