Appendix 1

Correspondence

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS15-001027

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Philip,

Response to questions received from the Parliamentary Joint Committee on Human Rights in its Eighteenth Report of the 44th Parliament

Thank you for your letters of 13 February 2015 in which information was requested on the *Australian Citizenship and Other Legislation Amendment Bill 2014* and the *Migration Amendment (Partner Visas) Regulation 2014*.

My response to your request is attached. I have also included a response to the committee's further questions regarding the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* which were raised in the Committee's 14th report.

I trust the information provided is helpful.

Yours sincerely

8/4/15

PETER DUTTON

Power to revoke Australian citizenship due to fraud or misrepresentation

1.28 The committee therefore considers that the proposed discretionary power to revoke Australian citizenship without a court finding limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

The government agrees that the obligation to consider the best interests of the child is engaged, however, it considers that the obligation is not limited by the proposed revocation power. Rather, the same obligation to consider the best interests of the child would attach to a revocation decision under proposed section 34AA of the *Australian Citizenship Act 2007* (the Citizenship Act) as it attaches to a revocation decision under current section 34 (as set out currently in Chapter 18 of the Australian Citizenship Instructions (ACI)). The fact that a decision-maker may decide to revoke a child's citizenship after considering all the factors, including the best interests of the child, does not mean the obligation to consider the best interests of the child has been limited. This was stated in the statement of compatibility accompanying the Bill at page 3 when the former Minister for Immigration and Border Protection, the Hon Scott Morrison MP, stated:

> 'In exercising the discretion the Minister would give effect to Article 3 by considering the best interests of the child as a primary consideration.'

The government is of the view that section 34AA does not limit the obligation to treat the best interests of children as a primary consideration and therefore it is not necessary to respond to the committee's further questions.

1.35 The committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding limits the right of the child to nationality. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Currently under the Citizenship Act, a conviction for a specified offence is required before citizenship can be revoked. In addition, the power to revoke only arises if the offence was committed prior to the Minister giving approval for the citizenship application, or the offence was committed in relation to the person's application to become an Australian citizen.

In evidence before the Senate Legal and Constitutional Affairs Legislation Committee on 19 November 2014, my department noted that in 2013-14 its National Assessments and Allocations Team received over 26,000 allegations of fraud and other matters. Of those, just over 10,000 were recommended for further investigation for fraud specifically. 135 investigations conducted by the department resulted in 12 briefs of evidence to the Commonwealth DPP. There were 13 convictions for fraud in the same period. The low rate of prosecutions indicates that there is a low risk that individuals who acquired citizenship fraudulently will be called to account. This in turn may encourage further fraudulent applications while undermining public confidence in the citizenship and migration programmes.

This amendment is intended to improve the integrity of the Australian citizenship programme and create stronger disincentives for people to provide false and misleading information. Strengthening the ability to revoke citizenship would reinforce the principle that citizenship by application is a privilege and that there is a real prospect of that privilege being removed from those who have obtained citizenship consequent to fraud or misrepresentation in the visa or citizenship processes. The government is of the view that this is 'a pressing or substantial concern' and the proposed changes are aimed at achieving a legitimate objective. I note that other foreign governments are of a similar view with the proposed 34AA being comparable with Ministerial powers to revoke citizenship for fraud or false representation without conviction in Canada, New Zealand and the United Kingdom. I note that Canada has long allowed revocation of citizenship for fraud without conviction.

The government considers that there is a rational connection between the objective of the proposed revocation power and how it would operate in practice. While a child may not have been responsible for, or had no knowledge of the fraud or misrepresentation, the proposed power would provide a disincentive for a person acting on behalf of a child to engage in fraud or misrepresentation in relation to a migration or citizenship application by that child.

Appropriate safeguards have been built into the proposal through the discretionary nature of the decision to revoke and the requirement that any revocation be in the public interest. The decision-maker would consider international law obligations when making this discretionary decision, including the *1961 Convention on the Reduction of Statelessness* (Statelessness Convention) and the best interests of the child and this will be reflected through updates to the ACI. In addition, there is a time limit beyond which citizenship could not be revoked and the exercise of the power is subject to judicial review.

The committee also "considers that, in the absence of a definition of what constitutes 'fraud' or 'misrepresentation', the minister's power to revoke citizenship on the basis of, for example, minor or technical misrepresentations may not be proportionate to the stated objective of the measure". It is not proposed to provide a statutory definition of fraud or misrepresentation; rather those words will have their ordinary or common meaning. 'Fraud' is a well-known concept at common law with a plain and ordinary meaning. The Macquarie Dictionary gives the following common law definition of 'fraud': "advantage gained by unfair means, as by a false representation of fact made knowingly, or without belief in its truth, or recklessly, not knowing whether it is true or false". The Macquarie Dictionary defines 'misrepresent' as "to represent incorrectly, improperly, or falsely". The department considers that these meanings provide sufficient certainty as to the types of conduct that would be regarded as fraud or misrepresentation.

The proposed section 34AA discretionary revocation power, like the existing section 34 discretionary revocation power, could only be exercised if the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen. The 'public interest' test would include consideration of such matters as whether the nature or severity of the fraud or misrepresentation was such that it would be contrary to the public interest to allow the person to retain their Australian citizenship. The decision would also take into account the best interests of the child.

The government is of the view that the proposed section 34AA does not limit the right to acquire a nationality under Article 7 of the *Convention on the Rights of the Child* (CRC) and Article 24(3) of the *International Covenant on Civil and Political Rights* (ICCPR). It does, however, provide an appropriate mechanism to consider whether an individual who acquired citizenship consequent to fraud or misrepresentation should continue to hold that citizenship and the privileges and responsibilities associated with it.

Article 8 of the CRC states:

> States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

The government is of the view that the amendments are consistent with Article 8 because if the Bill is passed, any revocation would not constitute 'unlawful interference'. Further, any decision made under the proposed revocation power that impacted on a child would take into account, as a primary consideration, the best interests of that child.

The committee "observes that the proposed power would allow the removal of a child's citizenship even where the child concerned is not alleged to have engaged in or had knowledge of any fraud or misrepresentation themselves". The committee "also notes that children have different capacities and levels of maturity than adults to make judgements. Given this, the committee considers that the measure may not be proportionate to its stated objective". The measure is proportionate to its objective as the decision whether it would be contrary to the public interest for the person to remain an Australian citizen would be informed by the facts of the case, which would include who was responsible for the fraud or misrepresentation and the nature or severity of the fraud or misrepresentation. Further, the best interests of the child would be a primary consideration in that decision-making process.

1.41 The committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding may limit the right of the child to be heard. As set out above, the statement of compatibility does not sufficiently justify that potential limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

The government does not consider that the proposed section 34AA limits or may limit the right of the child to be heard in the administrative proceedings associated with consideration of revocation of citizenship.

The statement of compatibility acknowledges that the proposed measure engages the right of the child to be heard but argues that the measure does not limit the right because prior to reaching a decision on whether to revoke a child's citizenship the Minister would afford the person natural justice, which would require giving the child, the child's parent or the child's representative the opportunity to be heard, thereby satisfying Article 12 of the CRC.

The proposed revocation power requires the Minister to be satisfied, through an administrative process, of both the occurrence of relevant fraud or misrepresentation and that it would be contrary to the public interest for the person to remain an Australian citizen. The committee appears to consider the right to be heard in relation to the consideration of revocation requires a judicial process. However, it is common for significant findings of fact and decisions that affect individuals to be made administratively, with the right to be heard given effect through a natural justice process.

1.47 The committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding may limit the right to a fair trial and fair hearing. As noted above, the statement of compatibility does not provide an assessment of whether the right to a fair hearing is engaged and limited. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

The government considers that the right to a fair trial and fair hearing are not limited by the proposal as:

i. in the event that the person is charged with a criminal offence related to the fraud or misrepresentation, the person retains the rights that are applicable to a criminal trial;

ii. the consideration of whether to revoke the person's citizenship is a discrete administrative process that would be undertaken within the administrative law framework and in accordance with the principle of natural justice;

iii. the revocation decision is subject to the right of judicial review. In a judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been exercised according to law. This would include consideration of whether the power has been exercised in a reasonable manner. It would also include consideration of whether natural justice has been afforded and whether the reasons given provide an evident and intelligible justification for why the balancing of these factors led to the outcome which was reached.

1.53 The committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding may limit the right to take part in public affairs. As noted above, the statement of compatibility does not provide an assessment of whether the right to take part in public affairs is engaged and limited. The committee therefore requests the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

The government does not assess the proposed revocation power as limiting the right to take part in public affairs. Article 25 of the ICCPR states in full:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

Article 25 of the ICCPR is concerned with the right to take part in public life, not with the right of state parties to determine, subject to any other applicable treaties or conventions, the circumstances in which a person's citizenship may be revoked.

1.59 The committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding may limit the right to freedom of movement. As set out above, the statement of compatibility does not sufficiently justify that potential limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

The government does not consider that the proposed revocation power limits Article 12.

In particular the proposed revocation power does not limit the rights under paragraphs 1, 2 and 3 of Article 12 as a person whose citizenship has been revoked acquires an ex-citizen visa by operation of law and that visa does not restrict a person's movement within Australia; nor does it prevent a person leaving Australia.

Similarly, even if the proposed revocation power engages Article 12(4), any deprivation of a person's right to enter Australia is not arbitrary. As noted by the committee, an ex-citizen visa ceases on a person's departure from Australia. However, a person whose citizenship was revoked has the opportunity to apply in Australia for a visa that permits them to re-enter Australia, or, while outside Australia, to apply for a visa. Whether a visa is granted will depend on whether the person meets the visa requirements. Of the 16 people whose citizenship has been revoked, 5 have subsequently applied for a visa with a travel facility and have been granted. While it is possible that a former citizen may be refused a visa to enter Australia, that refusal would be undertaken in accordance with the legislative requirements and principle of natural justice. Consequently, the deprivation of the right to enter Australia would not be arbitrary and the right is not limited.

1.62 As a measure that may limit human rights, the committee considers that the proposed discretionary power may be insufficiently certain and overly broad to satisfy the 'quality of law' test. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed power to revoke citizenship is compatible with the 'quality of law' test.

As noted earlier in my response, it is not proposed to provide a statutory definition of fraud or misrepresentation; rather those words will have their ordinary or common meaning. The government considers that these ordinary meanings provide sufficient certainty as to the types of conduct that would be regarded as fraud or misrepresentation.

The government is of the view that that the proposed section 34AA is sufficiently certain and not overly broad The proposed section 34AA discretionary revocation power, like the existing section 34 discretionary revocation power, could only be exercised if the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen. The term 'public interest' is not defined in the Citizenship Act or in policy. The 'public interest' test would include consideration of such matters as whether the nature or severity of the fraud or misrepresentation was such that it would be contrary to the public interest to allow the person to retain their Australian citizenship. The decision would also take into account the best interests of the child.

Policy guidance regarding the above will be detailed in the ACI. The ACI is a publicly available document.

Extending the good character requirement to include applicants for Australian citizenship under 18 years of age

1.77 The committee considers that the proposed extension of the good character requirement limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the proposed extension of the good character requirement is a reasonable and proportionate measure for the achievement of that objective having regard to the different capacities of children.**

The 'good character' requirement currently applies to all citizenship streams (conferral, descent, adoption and resumption), but only to applicants aged 18 and over. However, the department is aware of a number of applicants less than 18 years of age who have had serious character concerns but whose applications were not covered by the bar on approval concerning criminal offences in subsection 24(6) of the Citizenship Act. These applicants'

criminal histories have included multiple convictions for common assault and stealing, robbery in company, reckless wounding in company and aggravated robbery.

The Bill proposes to extend the good character requirement to include applicants under 18 years of age. The department would only seek criminal history records for children if they are 16 or 17 years of age, and this would be done with the client's consent. The department would only seek information on the character of applicants under 16 years of age if serious concerns came to attention. The proposed amendments would allow the Minister to refuse citizenship to minors with known criminal histories and insufficient evidence of rehabilitation. Guidance on the character requirement for citizenship is in the ACI. In determining if a person is of good character at a particular point in time, decision makers take into account a wide range of factors, including the age of the offender, the circumstances of the offence, patterns of behaviour, remorse, rehabilitation and any other mitigating factors.

A legislative body is required to consider the best interests of the child as a primary consideration. The government is also required to determine if these interests are outweighed by other primary considerations such as the integrity of the citizenship programme and the effective and efficient use of government resources. The government is of the view that Australia should not negotiate on its good character requirements.

Although in practice it would be extremely rare for the department to become aware of information showing that a child under the age of 16 is not of good character, it is the government's view that the good character requirement should not have a lower age limit of 16. The government notes that all Australian jurisdictions recognise that children under the age of 18 may commit offences, setting the age of criminal intent at 10. The Bill seeks to provide a legislative framework that facilitates the identification of children who may not be of good character, requires an assessment of character and where the child is found not to be of good character, refusal of citizenship.

Guidance on the assessment of whether a person is of good character is provided in Chapter 10 of the ACI. One of the relevant factors set out in the ACI is the applicant's age at the time the offence was committed. If the applicant committed the offence at a young age, the commission of the offence may be given less weight, depending on the nature of the crime and any subsequent offences. The ACI recognises that the person may since have matured and gained greater respect for upholding the law, and as such, criminal offences committed as a juvenile may not be indicative of their current character.

A finding that an applicant is not of good character does not prevent them from making a subsequent application for citizenship, if they are able to show that they are of good character at the time of the decision on their later application.

1.81 The committee considers that the proposed extension of the good character requirement may limit the right to protection of the family. As noted above, the statement of compatibility does not provide an assessment of whether the right to protection of the family is engaged and limited. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether and on what basis there is a rational connection between the proposed extension of the good character requirement and that objective; and**
- **whether the proposed extension of the good character requirement is a reasonable and proportionate measure for the achievement of that objective.**

The government does not agree that the proposed amendment engages the right to protection of the family. The amendment is concerned with the requirements that must be met in order for a person to be approved for citizenship. Refusal of citizenship does not in itself affect a person's visa status or their right to enter or remain in Australia. The government does not restrict the right of its permanent residents or citizens to depart Australia to be with other family members.

Article 17 of the ICCPR carries with it an obligation to ensure family members are not involuntarily separated from each other. Rather, it provides that "No one shall be subjected to arbitrary or unlawful interference with his … family". Even if Article 17 is engaged, any limit on the right to protection of family would be neither arbitrary nor unlawful. A sovereign nation may determine the conditions under which a person may acquire that nation's citizenship, within any applicable principles in treaties or conventions to which it is a party. In the Australian context, each applicant for citizenship or a visa is assessed against the legislative requirements as an individual and in their own right. People do not acquire a right to citizenship simply because their family holds citizenship.

Citizenship to a child found abandoned in Australia

1.89 The committee considers that introduction of a new factor that can disqualify an abandoned child from being an Australian citizen may be a limitation on the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether the proposed amendments to citizenship for an abandoned child are aimed at achieving a legitimate objective; and**
- **whether and on what basis the proposed amendments to citizenship for an abandoned child are rationally connected to achieving a legitimate objective; and**
- **whether the proposed amendments to citizenship for an abandoned child are a reasonable and proportionate measure for the achievement of that objective.**

As noted in the statement of compatibility, the objective of replacing current section 14 of the Citizenship Act is to clarify the meaning of the abandoned child provision.

Currently, section 14 of the Citizenship Act provides:

> "A person is an Australian citizen if the person is found abandoned in Australia as a child, unless and until the contrary is proved."

In practice, the department is only required to make a finding of fact under section 14 when a person makes a claim to the department that they are an Australian citizen under that provision. For example, when the person or another party acting on their behalf applies for evidence of citizenship. In order to find that a person is an Australian citizen under section 14, the Minister must consider several matters:

- whether there is evidence the person is an Australian citizen under any other provision of the Citizenship Act – if so, section 14 is not relevant to the person's situation;
- whether the person was found abandoned as a child – if not, the presumption of citizenship is not available;
- whether there is evidence that the person is not an Australian citizen, for example, evidence of their birth outside Australia and no record that they acquired Australian citizenship – if so, the presumption is disproved. A relevant consideration is whether the child is known to have been outside Australia prior to being found abandoned and the circumstances and the circumstances of their entry or re-entry. For example, if the child entered Australia lawfully, their identity and citizenship status will be known. If the child entered Australia unlawfully, the fact of that unlawful entry would give rise to strong inference that the child is not an Australian citizen in the absence of contrary information.

The amendment to the abandoned child provision to state that the presumption of citizenship does not apply if the child is known to have been physically outside Australia on or before the day on which it is claimed the child was found abandoned does not introduce a new factor that can disqualify an abandoned child from being an Australian citizen. Rather, it explicitly

states a current consideration. To the extent that the amendment removes the discretion of the Minister to determine that a person is a citizen under section 14 when that person is known to have been outside Australia prior to being found abandoned, the amendment may limit the obligation to consider the best interests of the child.

As noted in the statement of compatibility, Article 3 of the CRC sets out that the best interests of the child shall be a primary consideration in all actions concerning children. To that end, a legislative body is required to consider the best interests of the child as a primary consideration, and to determine whether these interests are outweighed by other primary considerations, such as the integrity of the citizenship programme. The proposed amendment to the abandoned child provision seeks to restore the original intent of the legislation and directly link the presumption of citizenship for abandoned children with the citizenship by birth provisions.

Any limitation on the obligation to consider the best interests of the child is both reasonable and proportionate, as a child who is known to have been outside Australia prior to being found abandoned:

- whose identity is known will have their visa or citizenship status assessed in accordance with the relevant provisions of the Migration and Citizenship Acts; or
- whose identity is unknown will not be presumed to be an Australian citizen and will have their status determined under the Migration Act, reducing the potential for the abandoned child provision to be incorrectly applied to unlawful non-citizens.

Limiting automatic citizenship at 10 years of age

1.96 The committee considers that the proposed amendment to the 10-year rule for citizenship limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

The proposed amendment seeks to ensure that citizenship by operation of law is only accorded to those persons who have maintained a lawful right to remain in Australia during the ten years from their birth. It also provides that citizenship under the ten year rule is not available to a child whose birth in Australia followed the presence in Australia of the child's parent as an unlawful non-citizen.

Article 3 of the CRC sets out that the best interests of the child shall be a primary consideration in all actions concerning children.

Any limitation on the obligation to consider the best interests of the child is both reasonable and proportionate as:

- Limiting application of the ten year rule to children who have maintained a lawful presence since birth sends a strong message that non-citizens are expected to comply with Australia's migration legislation and reduces the incentive to remain in Australia unlawfully.
- It is an inherent requirement of the migration legislation that a person on a temporary visa is responsible for maintaining their lawful status and is entitled to remain in Australia only for so long as the visa is in effect. An unlawful non-citizen is subject to removal if they do not voluntarily depart. Primary responsibility for a child's migration status and welfare rests with the child's parents or other responsible adult. It is incumbent on those adults to prepare a child who does not have permanent residence for life outside Australia, just as the parents or responsible adults must themselves prepare for life outside Australia when their temporary visa ceases to be in effect. This position is supported by Article 18(1) of the CRC, which states that "...Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."
- The Citizenship Act provides, and would continue to provide, that a person born in Australia who is stateless has access to citizenship through subsection 21(8) of the Citizenship Act. Eligibility under subsection 21(8) is not in any way dependent on the migration status of the applicant's parents.
- The ten year rule amendments do not prohibit children from applying under other pathways to Australian citizenship, such as citizenship by conferral, should they become eligible.
- The amendment does not affect the child of a person who had been an unlawful non-citizen but had regularised their status by obtaining a substantive visa prior to the child's birth.
- A child born to unlawful non-citizens and who does not acquire a visa to remain in Australia is subject to removal along with their parents. Children subject to removal undergo a best interest of the child assessment prior to the removal decision being made.

Personal decisions of the Minister not subject to merits review

1.104 The committee considers that the measure may limit the right to a fair hearing. As noted above, the statement of compatibility does not provide an assessment of whether the right to a fair hearing is engaged and limited. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

The Bill proposes that any personal decision of the Minister be protected from merits review if the decision is made in the public interest, and that a statement be tabled in both Houses of Parliament within 15 sitting days if such a personal decision is made. It is anticipated that such decisions will be rarely made, but if they are made on public interest grounds, such decisions would not be reviewable by the AAT. The proposal preserves the significance of an elected official making a decision in the public interest by not allowing that decision to be subject to merits review. A similar protection is available under the Migration Act.

Currently, the only powers which the Minister cannot delegate under the Citizenship Act are approval of a citizenship test and application of an "alternative residence requirement" to an application for citizenship. However, in practice, decisions about revocation of citizenship for fraud or serious offences have not been delegated to departmental officers and have been made personally by the Minister. These are serious powers and have been used sparingly. Some cases currently under consideration for revocation involve convictions for murder, paedophilia, incest and fraud.

Also, on occasion it is appropriate for the Minister to personally exercise the power in subsection 24(2) of the Citizenship Act to refuse an application for citizenship by conferral where the Minister decides that the circumstances are such that it would not be in the public interest for the applicant to become a citizen at that time, despite the applicant being otherwise eligible.

In both revocation and discretionary refusals, the decisions involve consideration of the public interest and consideration of Australian community standards and values. In particular, the revocation provisions require the Minister to be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

The Bill provides that if a decision is made by the Minister personally, the notice of reasons for decision (under section 47) may include a statement that the Minister is satisfied that the decision was made in the public interest. It then provides that AAT review is not available when a notice under section 47 includes a statement that the Minister is satisfied that the decision was made in the public interest. Examples of personal decisions which could be made on public interest grounds are:

- refusing citizenship if the applicant is not of good character (whether conferral, descent, resumption or adoption);

- refusing citizenship on a discretionary basis despite the applicant being otherwise eligible;
- cancellation of approval of citizenship by conferral;
- revocation of citizenship for offences or fraud;
- overturning a decision of the AAT (see below).

To provide for transparency and accountability, the Bill proposes that the Minister report to Parliament if s/he makes a personal decision which is not subject to merits review, but that such a statement not disclose the name of the client. This is similar to sections 22A(9)-(10) and 22B(9)-(10) of the Citizenship Act, which require a report to be tabled if the personal discretion to apply the alternative residence requirements is applied, and for that report to not disclose the client's name.

The government notes that much of Article 14(1) of the ICCPR relates only to persons facing criminal charges or suits of law and may not be directly applicable to citizenship proceedings. Where appropriate, however, the government seeks to provide comparable arrangements for reviews involving administrative decisions that impact a person's rights, liberties or obligations.

The provision to protect personal decisions of the Minster from merits review may engage and limit the right to a fair hearing as the person will not enjoy the same right to merits review as a person who was subject of a decision by a delegate of the Minister. However, this limitation is a reasonable and proportionate measure as:

- The Minister's personal decision would be consequent to an administrative process that would be undertaken within the administrative law framework and in accordance with principles of natural justice.
- Judicial review is still available. In a judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been properly exercised. For a discretionary power such as personal decisions of the Minister under the Citizenship Act, this could include consideration of whether the power has been exercised in a reasonable manner. It could also include consideration of whether natural justice has been afforded and whether the reasons given provide an evident and intelligible justification for why the balancing of these factors led to the outcome which was reached.
- The department will enhance its current ACI and case escalation matrix to ensure that advice is consistent and that only appropriate cases are brought to the Minister's personal attention, so that merits review is not excluded as a matter of course.

Ministerial power to set aside decisions of the AAT if in the public interest

1.112 The committee considers that the proposed power to set aside AAT decisions may limit the right to a fair hearing. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and the stated objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

The Citizenship Bill provides the Minister with a power to personally set aside certain decisions of the AAT concerning character and identity if it is in the public interest to do so. It also provides that personal decisions made by the Minister in the public interest are not subject to merits review. Applicants affected by a personal decision would continue to have access to judicial review.

The government reiterates its view that the provision does not impact the enjoyment of the right to a fair hearing as applicants for citizenship who have been affected by the Minister's decision to set aside AAT decisions will still be entitled to seek judicial review of the Minister's decision under s 75(v) the Constitution and s 39B of the *Judiciary Act 1903* at the Federal and High Courts. In a judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been properly exercised. For a discretionary power such as personal decisions of the Minister under the Citizenship Act, this would include consideration of whether the power has been exercised in a reasonable manner. It would also include consideration of whether natural justice has been afforded and whether the reasons given provide an evident and intelligible justification for why the balancing of these factors led to the outcome which was reached.

Extension of bars to citizenship where a person is subject to a court order

1.126 The committee considers that the extension of bars to citizenship limits rights to equality and non-discrimination. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed extension of bars to citizenship where a person is subject to a court order is compatible with the right to equality and non-discrimination, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

The Citizenship Act includes various provisions that bar a person from being approved for citizenship at a time when they are affected by prescribed circumstances, such as when they are subject of an adverse or qualified security assessment, the Minister is not satisfied of the identity of the person and when the person falls under the *Offences* provision in subsection 24(6). A person who was refused citizenship because they were affected by one or more bars but who otherwise meets the requirements for citizenship will be eligible for citizenship once they are no longer affected by the bar/s on approval.

In summary, the Offences provision currently provides that a person must not be approved for citizenship at a time:

- when proceedings for an offence against an Australian law are pending in relation to the person;
- when the person is confined to a prison in Australia;
- during the period of 2 years after the end of a serious prison sentence, or the period of ten years after the end of any period of a serious prison sentence where the person is a serious repeat offender;
- when the person can be required to serve the whole or part of a sentence after having been released on parole or licence;
- when action can be taken against the person under an Australian law because of a breach of a condition of a security given to a court; or
- during any period where the person is confined in a psychiatric institution by order of a court made in connection with proceedings for an offence against an Australian law in relation to that person.

The existing offence provisions were largely carried over from the *Australian Citizenship Act 1948* (the 1948 Act) and were not updated to reflect modern sentencing practices in 2007.

The Bill:

- updates paragraph 24(6)(f) to recognise that a court can release a person from serving the whole or part of a sentence of imprisonment subject to conditions relating to their behaviour;

- updates paragraph 24(6)(g) to recognise that in respect of proceedings for an offence against an Australian law, a court can release a person subject to conditions relating to their behaviour, including when a term of imprisonment may not be available; and
- inserts paragraphs 24(6)(i) and (j) to provide bars on approval when the person is subject to an order of a court for home detention or participation in residential schemes or programmes. Although sentencing practices such as home detention are a deliberate decision of the courts as an alternative to imprisonment, they are only used if a person has been convicted of a criminal offence and needs to remain under some form of obligation to the court. From a citizenship programme perspective, it is not appropriate to confer citizenship upon applicants while the obligation remains.

These amendments help maintain the integrity of the citizenship programme by preventing citizenship being conferred on people while they are subject of an ongoing matter before the courts or they are still under an obligation to a court in relation to a criminal offence.

The government's view is that the limitation is reasonable and proportionate as it upholds the value of citizenship by barring a person from becoming a citizen while they are before the courts or subject to an order of the courts, but does not prevent the person from acquiring citizenship once they are no longer subject to that bar.

Tabling statement

1.133 The committee considers that the measure limits the right to privacy. As noted above, the statement of compatibility does not provide an assessment of whether the right to privacy is engaged and limited. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the tabling statement in Parliament could lead to an individual being identified either directly or indirectly and how this is compatible with the right to privacy, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

As noted by the committee, the Bill proposes inserting a new section into the Citizenship Act to require the Minister to cause a statement to be tabled in each House of Parliament when the Minister makes a decision that is not reviewable by the AAT, or decides to set aside a decision of the AAT. Proposed section 52B of the Bill provides that such a statement must not disclose the name of the applicant. It does not require the Minister to provide specific personal information about an applicant when tabling the statement of the Minister's personal decision in Parliament.

The objective of this proposal is to provide for transparency and accountability in the decision-making process, while protecting the privacy of the applicant.

While the proposal may engage a person's right to privacy, it does not impose a new limit on that right to privacy as it does not require the publication of any greater detail than may otherwise be published if the person's decision was subject to review at the AAT. Under section 35 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) and the AAT's privacy policy the AAT has the power to decide whether or not to publish personal information, including names. Decisions are required to be published under section 43 of the AAT Act, but the publication of evidence given before the Tribunal can be restricted or prohibited under section 35. However, the type of details published in an AAT decision record (such as birth date, place of birth, occupation, date of arrival in Australia) may be enough to identify a person even if the name of that person were withheld.

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

MC15-000285

15 JUN 2015

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Ruddock Philip

Thank you for your letter of 13 May 2015 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (the Bill). I welcome this opportunity to address the Committee's questions on the Bill as presented in the *Twenty-Second Report of the 44th Parliament*.

Your Committee has sought my advice in relation to the compatibility of certain amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* with human rights, and recommended amendments to the provisions of Schedule 6 of the Bill (mandatory minimum sentencing for trafficking in firearms).

My responses to these matters are enclosed.

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

Thank you again for writing on this matter.

Yours sincerely

Michael Keenan

Encl: Responses to matters raised in the 22nd Report of the 44th Parliament, 13 May 2015.

Parliament House Canberra ACT 2600 • Telephone: (02) 6277 7290 Facsimile: (02) 6273 7098

Enclosure

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

Responses to the Parliamentary Joint Committee on Human Rights

Twenty-Second Report of the 44th Parliament (tabled 13 May 2015)

Compatibility of measures in Schedule 10

Committee comment (p. 41)

The committee considers that the amendments which require an individual to give information that may be self-incriminating engages and limit the fair trial rights. The committee considers that the statement of compatibility has not explained the legitimate objective for the measure. The committee therefore seeks the advice of the Minister for Justice as to whether the amendments to the AML/CFT Act are compatible with the right to a fair trial, and particularly:

- *whether the proposed changes are aimed at achieving a legitimate objective;*
- *whether there is a rational connection between the limitation and that objective; and*
- *whether the limitation is a reasonable and proportionate measure for the achievement of that objective.*

Minister for Justice's response

The proposed amendment to section 169 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) allows for self-incriminating information gathered by the Australian Transaction Reports and Analysis Centre (AUSTRAC) under section 167 of the Act to be adduced in a broader range of civil and criminal proceedings.

The Committee has focused on the effect of these proposed amendments on the right to a fair trial and fair hearing contained in Article 14 of the International Covenant on Civil and Political Rights (ICCPR). I consider the proposed amendments to be a reasonable and proportionate response to address significant limitations that inhibit AUSTRAC's ability to perform its statutory functions and, more generally, the prosecution of money laundering and terrorism financing offences under the *Criminal Code Act 1995* (the Criminal Code).

Current Provisions

AUSTRAC has two powers, under sections 167 and 202 of the AML/CTF Act, to compel the production of information. Section 167 has a broad application and purpose, but is only available to AUSTRAC. Section 202 has a narrow application and purpose, but is available to a broader range of issuers.

	Section 167	Section 202
Issuer	AUSTRAC – CEO/authorised officer	• AUSTRAC – CEO/authorised officer • AFP – Commissioner/Deputy Commissioner/authorised senior executive • ACC – CEO/examiner • approved examiner under the *Proceeds of Crime Act 2002* (POC Act)

	Section 167	Section 202
Application	a person believed on reasonable grounds to be or have been: • a reporting entity • an officer, employee or agent of a reporting entity, or • entered on the Remittance Sector Register	a person, believed on reasonable grounds to be a reporting entity
Purpose	• belief on reasonable grounds that the person has information or documents that are relevant to the operation of the AML/CTF Act, the regulations or the AML/CTF Rules	• determining whether a person is providing a designated service at or through a permanent establishment in Australia • ascertaining details relating to any permanent establishment in Australia at or through which that person provides a designated service, or • ascertaining details relating to the designated services provided by the person at or through the permanent establishment in Australia

Sections 169 and 205 provide that self-incrimination is precluded as a reason for refusing to provide information under sections 167 and 202 respectively. However, sections 169 and 205 limit the use of that information, although section 205 allows for information to be used in a broader range of proceedings than section 169.

Admissibility	Section 169	Section 205
Civil	proceedings under the POC Act that relate to the AML/CTF Act	• proceedings under the AML/CTF Act • proceedings under the POC Act that relate to the AML/CTF Act
Criminal	proceedings for an offence against: • AML/CTF Act – Complying with the notice to produce / providing false or misleading information or documents • Criminal Code – Providing false or misleading information or documents	proceedings for an offence against: • the AML/CTF Act • the Criminal Code that relate to the AML/CTF Act

Objective of the proposed amendments

The proposed amendments to section 169 enhance AUSTRAC's ability to fulfill its statutory role as Australia's AML/CTF regulator and financial intelligence unit. In particular, the amendments allow AUSTRAC to use relevant information to sanction breaches of the AML/CTF Act and bring money laundering and terrorism financing charges under the Criminal Code.

The current inconsistency between the scope of sections 169 and 205 creates significant constraints for prosecuting serious offences under the Criminal Code and AML/CTF Act. As noted in the table above, section 167 notices can be issued to a broad range of persons or entities, but the information or documents obtained can only later be used in a narrow range of proceedings. Therefore, should AUSTRAC uncover pertinent material relating to criminal conduct through the ordinary exercise of its section 167 notice power, that evidence could not be adduced in later proceedings to prosecute money laundering or terrorism offences under the Criminal Code.

Section 202, which allows self-incriminating material to be used in a broader range of proceedings is not a substitute for section 167. It can only be issued to a person believed on reasonable grounds to be a reporting entity, which limits its utility. For example, AUSTRAC cannot use a section 202 notice to obtain information and documents from an entity that has had its registration suspended as they are no longer deemed to be a reporting entity once suspended – such a notice would need to be issued under section 167.

Given the significant threat posed to the Australian community by money laundering and terrorism financing, I consider that the proposed amendments fulfil a legitimate objective by closing an operational gap. The Australian Crime Commission's most recent public report on organised crime in Australia noted that money laundering is one of six 'intrinsic enablers' of serious and organised crime, with money laundering being carried out by 'most, if not all, organised crime groups'.[1] Money laundering is considered a 'critical risk because it enables serious and organised crime, it can undermine [Australia's] financial system and economy and it can corrupt individuals and businesses'.[2] AUSTRAC have noted that terrorism financing is a 'national security risk as it can directly enable terrorist acts both in Australia and overseas'.[3] To effectively combat these inherent risks, AUSTRAC must be able to efficiently and effectively exercise its enforcement powers. The proposed amendments achieve this objective.

AUSTRAC also considers that there is some uncertainty regarding its ability to use information and documents obtained under a section 167 notice in making administrative decisions. This is because those materials may later need to be adduced on administrative or judicial review, thereby engaging the privilege against self-incrimination contained in section 169. By rectifying the inconsistency between sections 169 and 205, this uncertainty will also be clarified.

Connection between the proposed amendments and the objective

There is a rational connection between the amendments and the objective outlined above. Currently, valuable information that potentially relates to serious criminal misconduct can only be used in very limited proceedings, being proceedings related to providing false or misleading information or failing to be supply information in accordance with the AML/CTF Act.

Consistency between sections 167 and 205 will allow AUSTRAC to more effectively utilise section 167 information and fulfil its role in enforcing compliance with the AML/CTF Act and combating money laundering and terror financing. AUSTRAC has indicated that it uses its powers under section 167 and 202 interchangeably, with the chief considerations being the type of person to whom the notice is to be issued, the nature of the information or documents

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[1] Australian Crime Commission, *Organised Crime in Australia 2015*, (ACC, 2015) 12.
[2] AUSTRAC, *Money Laundering in Australia*, (AUSTRAC, 2011) 5.
[3] AUSTRAC, *Terrorism financing in Australia 2014*, (AUSTRAC, 2014) 5.

sought and the admissibility of the materials received. Given that both powers can be issued to individuals and entities there is no apparent reason why these powers, which fulfil the same investigatory function, should be subject to two different regimes for determining privilege against self-incrimination.

Reasonableness and proportionality of the proposed amendments

I consider the proposed amendments to be a reasonable and proportionate response to the current limitations. As noted above, the amendments to section 169 maintain a use immunity for affected persons and only extend the range of proceedings from which the privilege is excluded to proceedings for offences that are directly related to AUSTRAC's functions. The power remains limited to use by the AUSTRAC CEO or an authorised officer, and can only be used where there is reasonable grounds to believe that the subject has information relevant to the operation of the AML/CTF Act.

The High Court has recognised the validity of abrogating the right against self-incrimination in some circumstances, noting that '[t]he legislatures have taken this course when confronted with the need, based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained'.[4] The Queensland Law Reform Commission (QLRC) considers that an abrogation of the privilege 'may be justified if the information to be compelled as a result of the abrogation concerns an issue of major public importance that has a significant impact on the community in general or on a section of the community'.[5] The QLRC also concluded that '...if it is clear that the abrogation is likely to substantially promote the public interest, it is more likely that the abrogation can be justified'.[6]

A further point to note is that the majority of notices to produce issued by AUSTRAC are to reporting entities (through bodies corporate). From 1 July 2012 to 26 May 2015, AUSTRAC has issued three section 167 notices and 31 section 202 notices. All notices were issued to reporting entities. The ICCPR is focused on protecting the rights of the individual.
At common law, the High Court has concluded that corporations do not enjoy the protection of the privilege against self-incrimination. In particular, the Court has recognised the impracticality of extending the privilege given it would have a '...disproportionate and adverse impact in restricting the documentary evidence which may be produced to the court in a prosecution of a corporation for a criminal offence'.[7]

Offences against the AML/CTF Act and the Criminal Code as it relates to the AML/CTF Act (money laundering and terrorism financing) are serious crimes that pose a threat to the Australian community. Given the limited offences to which the extension applies, the serious nature of those offences and the safeguards that remain in place I consider the proposed additional restrictions on the privilege against self-incrimination in section 169 of the AML/CTF Act to be a justifiable limit on the right to a fair trial contained in Article 14 of the ICCPR.

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[4] Ibid 503.
[5] Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-Incrimination*, Report No 59, (2004) 54.
[6] Ibid.
[7] *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 504 (Mason CJ and Toohey J).

Mandatory minimum sentencing for trafficking in firearms

Committee comment (p. 38)

In light of these considerations, the committee reiterates its recommendation that the provisions be amended to clarify that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost' and that there may be a significant difference between the non-parole period and the head sentences. This would ensure that the scope of the discretion available to judges would be clear on the face of the provision itself, and thereby minimise the potential for disproportionate sentences that may be incompatible with the right not to be arbitrarily detained and the right to a fair trial.

Minister for Justice's response

I note the recommendation of the Committee that Schedule 6 of the Bill be amended to confirm that the mandatory minimum sentence is not intended to be used as a sentencing guidepost, and that there may be significant difference between the non-parole period and the head sentence. Advice of this nature, designed to clarify to the judiciary the intent of the provision, is best suited to the Explanatory Memorandum, which I note already includes wording to this effect.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-001280

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Philip Ruddock

I refer to your letter of 18 March 2015 concerning the comments of the Parliamentary Joint Committee on Human Rights (the committee), in relation to the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015.

The committee's comments are contained in its *Twentieth Report of the 44th Parliament*. My response addressing the remarks is attached.

Thank you for bringing the committee's views to my attention.

Yours sincerely

PETER DUTTON 21/4/15

Right to life

1.78 The committee considers that the conferral of power on [Immigration Detention Services Provider] IDSP officers to use force in immigration detention facilities on the basis of their reasonable belief engages and limits the right to life... the statement of compatibility has not, for the purposes of international human rights law, established that the measure is aimed at achieving a legitimate objective and, if so, whether it may be regarded as a proportionate means of achieving that objective. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

The legitimate objectives of the proposed amendment are to protect the life, health or safety of any person in an immigration detention facility, or to maintain the good order, peace or security of an immigration detention facility. The Department of Immigration and Border Protection (the Department) and IDSP officers are responsible for people within immigration detention facilities, and the responsibility for providing public order management during critical incidents is a significant issue for the Department and IDSP officers. It is vital that officers have the clear power and authority to take necessary and proportionate measures to restore public order in detention centres. The amendment provides a certainty to officers that the common law and State and Territory legislation may be unable to provide in situations of urgency.

The threat of a large scale riot or other disturbance escalating out of control is a real possibility in some immigration detention facilities. The availability of the local police service to respond in a timely fashion cannot be guaranteed, placing detainees and others within the facility at real risk of harm should the response to the situation be delayed. The proposed amendment also, therefore, intends to protect the right to life of all people within immigration detention facilities, not just the person(s) against whom force may be used.

Strict safeguards will apply to the use of force in immigration detention facilities and will be spelled out in official Departmental instructions, policies and procedures.

Consistent with international human rights law, the Department requires that any use of force be necessary, reasonable and proportionate in the circumstances. All authorised officers will be trained accordingly to only apply force that is necessary, reasonable and proportionate to the threat being faced, and that is always at the minimum level required.

The Bill notes that an authorised officer may use such reasonable force against a person or thing as the authorised officer reasonably believes is necessary in the circumstances specified in the Bill. So both the use of force must be reasonable and the authorised officer's belief (that it is necessary to use such force) must be reasonable.

Official departmental instructions, policies and procedures will provide additional guidance and examples of what is considered reasonable. Similarly, the training that all authorised

officers must have completed prior to becoming authorised officers, will address what is reasonably necessary.

For these reasons, it is the Government's view that the proposed amendment is reasonable and proportionate and is compatible with the obligation to protecting a person's right to life.

Prohibition against torture, cruel, inhuman or degrading treatment

1.92 The committee considers that the use of force provisions in the bill as currently drafted are insufficiently circumscribed and risk empowering an authorised officer to use force against detainees in a way that may be incompatible with the prohibition on degrading treatment. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the use of force provisions in the bill are sufficiently circumscribed to ensure that they are compatible with the prohibition on degrading treatment.

1.93 The committee considers that the basis for monitoring the use of force provisions and the bar on criminal proceedings in proposed section 197BF may limit the obligation to investigate and prosecute acts of torture, cruel, inhuman or degrading treatment. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the arrangements for monitoring the use of force and the bar on proceedings in proposed section 197BF are compatible with the obligation to investigate and prosecute acts of torture, cruel, inhuman or degrading treatment.

Safeguards for the treatment of detainees

The Department will have in place policies and procedures, reflected in the IDSP contract, regarding the use of reasonable force in an immigration detention facility. These safeguards will ensure that the use of force:

- Will be used only as a measure of last resort;
- Must only be used for the shortest amount of time possible;
- Must not include cruel, inhuman or degrading treatment; and
- Must not be used for the purposes of punishment.

Conflict resolution (negotiation and de-escalation) must be considered and used before the use of force, wherever practicable. In practice, and wherever possible, de-escalating through engagement and negotiation will be the first response to maintain operational safety. Extensive guidance for authorised officers will be contained in policy and procedural documentation to ensure that a broad range of details and scenarios are canvassed in a format that is easily understood and accessed by operational staff. This guidance is also referenced in the IDSP contract.

All policy and procedural guidelines will be contained in the Department's Detention Services Manual and the Detention Operational Procedures. These documents are stored electronically in the Department's centralised departmental instructions system (CDIS) and in the Department's publicly available online subscription database (LEGEND). The IDSP incorporates these policies in their Policy and Procedure Manuals that are also approved by the Department.

Monitoring mechanisms

The Department has staff on duty or on call in all immigration detention facilities at all times. While this does not give the Department's staff the ability to monitor all activity at an immigration detention facility, it does give the Department general oversight of the activities of the IDSP and of the immigration detention facility.

In addition, the contract for the provision of immigration detention services requires IDSPs to report all incidents of the use of force in an immigration detention facility, from very minor incidents to critical incidents. Current contractual obligations require the IDSP to:

- Gain prior approval from the departmental regional manager for planned use of reasonable force;
- Video record the entire event when planned use of reasonable force is applied, retain these recordings in accordance with the *Archives Act 1983* and make them available to the Department within 24 hours of request;
- Verbally inform the Department immediately (no later than 60 minutes) on becoming aware of an instance of the unplanned use of reasonable force;
- Provide a written incident report for review by the Department within six hours of the Department being informed verbally;
- Internally audit one hundred percent of such incidents to continuously improve the IDSP's response to incidents; and
- Record the incident report in the Department's IT portal.

The Department will use this information to monitor and review the IDSP's compliance with the conditions of the contract and with its obligations under relevant legislation, policies and procedures.

On 10 November 2014, the Department established the Detention Assurance Team (DAT) to strengthen assurance in the integrity and management of immigration detention services. Operating independently of IDSPs and current contract management arrangements within the Department, the DAT is designed to:

- Provide advice to the Secretary of the Department and, from 1 July 2015, the Australian Border Force Commissioner on assurance in the management and performance of detention service providers;
- Undertake investigations and support commissioned inquiries into allegations of incidents in the onshore and offshore detention network, including investigation of inappropriate behaviour by staff of the IDSP;
- Monitor recommendations for improvement in detention contractor management processes and provide assurance that they are implemented and their effectiveness reviewed;
- Audit the effectiveness of contractual and other detention service performance measures;
- Ensure the effectiveness of integrity and other risk controls;
- Review detention practices for compliance against international conventions; and
- Identify trends and emerging issues in detention contract management and recommend strategies for improvement.

The DAT will be involved in the review of incidents of the use of force to identify operational, procedural and policy improvements applicable to the Departmental and IDSPs.

The Bill directly provides for a complaints mechanism. The complaints mechanism will allow a person to make a complaint to the Secretary of the Department about the exercise of the powers under new section 197BA to use reasonable force. Outside this internal process, if detainees would prefer to bring issues to the attention of external authorities and/or they believe that an issue that has been reported is not being dealt with effectively, there is capacity for detainees to bring any problems or complaints to the attention of external authorities, including police forces, the Commonwealth Ombudsman, the Australian Human Rights Commission, the Australian Red Cross or other advocacy groups. Within immigration detention facilities there is a comprehensive system in place to provide detainees with a variety of assistance and options to raise problems or make complaints regarding their immigration detention. On entering an immigration detention facility detainees are also provided with information about their rights to make a complaint and the avenues available to them to make such a complaint. This information is reinforced during induction sessions detainees undertake.

Detainees have access to telephone, facsimile, mail and photocopying services. Detainees are given reasonable access to communication services unless it presents a serious safety or security concern. Detainees are afforded the same level of privacy when communicating externally as they would have in the community. Neither the IDSP nor the Department may record, intercept, read, copy or otherwise listen to a person's communication without their explicit invitation.

Detainees can also contact Ministers of Parliament, State or Territory police, State or Territory welfare agencies and community groups to make a complaint about their immigration detention. This access to external bodies provides assurance that any issues from the perspective of a detainee will be open to scrutiny.

Finally, the public interest disclosure scheme (under the *Public Interest Disclosure Act 2013*) applies to immigration detention facilities. The public interest disclosure scheme operates to encourage public officials (which will include authorised officers in the immigration detention facility) to report suspected wrongdoing in the Australian public sector.
The public interest disclosure scheme allows public officials (which includes Commonwealth contracted service providers and authorised officers) who make a disclosure of suspected wrongdoing to be supported and protected from adverse consequences, and ensures that a disclosure is properly investigated and dealt with. The public interest disclosure scheme is an additional means by which any wrongdoing or other issue in an immigration detention facility regarding the use of force could come to light.

Section 197BF – bar on proceedings relating to immigration detention facilities

Proposed new section 197BF is intended to place a partial bar on the institution or continuation of proceedings in any Australian court against the Commonwealth in relation to the exercise of power under proposed section 197BA, where the power was exercised in good faith.

This does not, and is not intended to, bar all possible proceedings against the Commonwealth. Legal proceedings by way of judicial review are available in the High Court under section 75(v) of the Constitution. Further, it is always the case that Federal, State or Territory police may institute criminal prosecution against an individual, for example for assault or other criminal conduct, notwithstanding this provision – it would be up to the court to determine whether this provision had any application in the particular circumstances.

As noted previously, proposed section 197BF contemplates that the Commonwealth will only have protection from criminal and civil action in all courts except the High Court if the power under proposed section 197BA is exercised in good faith. As a threshold question, the court would need to consider the following matters to decide if it has jurisdiction:

- Was the action complained about an exercise of power under proposed section 197BA?
- Did the authorised officer act in good faith in the use of reasonable force under proposed section 197BA?

If the use of reasonable force was not an exercise of the power under proposed section 197BA then it is not captured by the partial bar in proposed section 197BF, and court proceedings could be instituted or continued.

Similarly, if a court decides that the use of reasonable force was not to:

- Protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility; or
- Maintain the good order, peace or security of an immigration detention facility

then it is not captured by the partial bar in proposed section 197BF.

Further, if a court decides that the authorised officer did not act in good faith, the court would have jurisdiction to consider the action brought against the authorised officer (for example).

As described above, there are a number of ways by which a misuse of the power to use reasonable force in proposed section 197BA may come to the attention of the Department or to a police force or other authority. This, in addition to the fact that the partial bar on proceedings is limited in its application, means that the Bill does not place a restriction on the police's capacity to investigate and prosecute acts of torture, cruel, inhuman or degrading treatment.

For these reasons, it is the Government's view that this proposed amendment is compatible with the obligation to investigate and prosecute acts of torture, cruel, inhuman or degrading treatment.

Right to humane treatment in detention

1.102 The committee considers that the use of force provisions limit the right to humane treatment in detention. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, and particularly, whether there are any less restrictive ways to achieve the objective, whether the training provided to authorised officers will be sufficient to minimise the risk of violation and**

whether there is adequate monitoring and supervision of the exercise of the use of force.

The Department considers that reasonable use of force is the least amount of force necessary to achieve the required outcomes, which are the legitimate objectives of protecting the life, health or safety of any person in an immigration detention facility, or of maintaining the good order, peace or security of an immigration detention facility. It is acknowledged that the use of force is a last resort, and this will be reflected appropriately in Departmental policy documents. Safeguards for the treatment of detainees require that force will not be used where there are less restrictive ways to achieve the legitimate objectives set out in proposed section 197BA, such as discussion, de-escalation or negotiation with possible subjects of the use of reasonable force. In the few cases where the reasonable use of force is required in accordance with proposed section 197BA, the authorised officer may be able to plan for its use, including contingency planning for a greater or lesser degree of reasonable force to be used if circumstances change. For example, the transfer of an uncooperative detainee from one precinct to another within an immigration detention facility should include a plan to use reasonable force if it becomes necessary; it is not a plan to use force as part of the transfer.

It will be the decision of the Minister to determine the training and qualification requirements for authorised officers. It is expected that the Minister, at a minimum, will require authorised officers to maintain current qualifications to enable them to use reasonable force.

Note that Tier 1 and Tier 2 IDSP officers are currently trained in the national unit of competency CPPSEC2017A 'Protect Self and Others using Basic Defensive Techniques'. This is also part of the required refresher training for these officers. This training is identified as providing the outcomes required to apply basic defensive techniques in a security risk situation and gives the ability to use basic lawful defensive techniques to protect the safety of self and others. The IDSP is expected to engage the assistance of the relevant police service to assist in managing escalated or high risk situations.

Any instance of any use of reasonable force and/or restraint must be reported pursuant to section 28 of the *Work Health and Safety Act 2011*. Under this provision every worker is required to:

- Take reasonable care for his or her own health and safety; and
- Take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and
- Comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this act; and
- Co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.

In addition, current contractual obligations require the IDSP to comply with a number of items intended to safeguard the use of reasonable force, as set out above under the discussion relating to the prohibition against torture, cruel, inhuman or degrading treatment on page 4.

The Department considers that disproportionate, excessive or inappropriate use of force is not authorised by this Bill. A person is not protected from legal action by the proposed section 197BF in relation to the use of such force. Any excessive or inappropriate use of force will incur the appropriate disciplinary action and expose the person to possible criminal prosecution.

Right to freedom of assembly

1.109 The committee considers that the use of force provisions limit the right to freedom of association. The statement of compatibility does not justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

The Government supports the right of an individual to engage in peaceful protest but does not condone participation in violent protests, particularly where the violent protest might impact on public order or the protection of the rights or freedoms of others.

At common law, those responsible for managing an immigration detention facility have a duty of care towards people within and in the vicinity of those premises. Those responsible for managing an immigration detention facility must have the legal authority to lawfully take appropriate action to ensure the safety and well-being of those people.

The Department considers that the prosed powers to be granted to authorised officers to enable them to use reasonable force to protect the life, health or safety of any person in an immigration detention facility, or to maintain the good order, peace and security of an immigration detention facility are reasonable and proportionate.

Bar on proceedings

1.122 The committee...considers that the bar on proceedings relating to the use of force in immigration detention facilities limits the right to an effective remedy. As set out above, the statement of compatibility does not address the limitation on the right to an effective remedy. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the measure is compatible with the right to an effective remedy. In particular, the committee wishes to understand why it is necessary to provide immunity for the Commonwealth as a whole rather than personal immunity for the authorised officer, and what remedies (including compensation) are available to a person whose complaint about the use of force is substantiated.

The bar on proceedings in proposed section 197BF of the Bill is modelled on existing subsection 245F(9B) of the *Migration Act 1958* (the Migration Act). The definition of 'Commonwealth' is modelled on existing sections 494AA and 494AB of the Migration Act which concern a bar on certain legal proceeding relating to unauthorised maritime arrivals and transitory persons respectively.

The bar on proceedings will not result in aggrieved persons being unable to obtain an effective remedy.

Proceedings are always available through judicial review by the High Court under section 75(v) of the Constitution. Further, it is always the case that Federal, State or Territory police

may institute a criminal prosecution against an individual, for example for assault or other criminal conduct, notwithstanding this provision – it would be up to the court to determine whether this provision has any application in the particular circumstances. Police have access to immigration detention facilities and may be called to an incident by the IDSP, a detainee or a witness. This gives the police capacity to decide if a prosecution is warranted in the circumstances.

It is worth noting that the court will have the jurisdiction to consider the threshold issues of:

- If the use of reasonable force was an exercise of power under section 197BA; and
- If the power was exercised in good faith.

In circumstances where the use of reasonable force has been used in a manner that is not an exercise of the power under proposed section 197BA then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued. Similarly, in circumstances where the use of reasonable force has been found not to have been exercised in good faith, then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued.

In less serious circumstances, where the use of reasonable force has been found to be exercised in good faith and the person has not suffered an injury but there is some other failing, there may be circumstances in which it is appropriate for the Department to provide details to the aggrieved person of any proposed changes to policy or procedure that may result from the incident, as part of the follow up to that incident to demonstrate that a situation or circumstance has been addressed.