Appendix 1

Correspondence

RECEIVED
DATE 2/11/15 BY PJCHR

THE HON SUSSAN LEY MP
MINISTER FOR HEALTH
MINISTER FOR AGED CARE
MINISTER FOR SPORT

Ref No: MC15-017636

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

Dear ~~Chair~~ Philip

Thank you for your correspondence of 13 October 2015 in which you seek my advice in relation to the Australian Immunisation Register Bill 2015 and Australian Immunisation Register (Consequential and Transitional Provisions) Bill 2015, and the Health Legislation Amendment (eHealth) Bill 2015.

Australian Immunisation Register Bill 2015 and Australian Immunisation Register (Consequential and Transitional Provisions) Bill 2015

I note the Committee's enquiry regarding the ability for I, as the Minister for Health, to authorise (under subsection 22(3) of the Bill) a person to make a record of, disclose or otherwise use protected information for a specified purpose that I am satisfied is in the public interest.

The proposed subsection is consistent with existing powers I have to certify that disclosure of protected information is necessary in the public interest, as contained within paragraph 135A(3)(a) of the *National Health Act 1953* and paragraph 130(3)(a) of the *Health Insurance Act 1973*, which currently apply to the National Human Papillomavirus Vaccination Program Register and the Australian Childhood Immunisation Register (ACIR) respectively.

An example of the type of authorisations these are, and when this public interest power may be used, is where a child protection agency requests information when investigating the welfare of a child. In the 2014-15 financial year, more than 18,000 authorisations occurred for this purpose, authorised under paragraph 130(3)(a) of the *Health Insurance Act 1973*. In this circumstance, the Department of Human Services who operates the ACIR on behalf of my Department, releases information to child protection agencies along with the police to assist in the determination of a child's welfare. To assess the child's welfare, ACIR information including whether a child is protected against certain vaccine preventable diseases through their immunisation history can be determined by child protection agencies.

Another example could involve a request by a vaccine supplier or a vaccination provider to obtain the contact details of one or more vaccine recipients in order to contact the individuals to inform them if a manufacturing error or cold chain breach is identified in

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relation to a batch of vaccine stock. In this circumstance, the release of the protected information from the register would not fit within the purposes of the Australian Immunisation Register Bill 2015 as defined in section 10, and could only be released under a public interest disclosure.

Such a power is considered necessary to provide an ability to authorise use or disclosure where it does not fit within the purposes of the Australian Immunisation Register Bill 2015, but there is a public interest in the protected information being used or disclosed for that purpose. The purposes for which there might be a public interest in use or disclosure cannot be ascertained with certainty. Whether there is a public interest will depend on a case by case assessment of any requests, and therefore this general public interest power is required to create the ability to allow disclosure in situations like the examples above.

I can assure the Committee that the decision to authorise a person to make a record of, disclose or use protected information is not one which is taken lightly. In making such decisions consideration would be given to an individual's privacy and other interests, which would be balanced against the identified public interest outcome. This limitation is a reasonable and proportionate measure to achieve the intended objectives of the legislation and as previously provided for under existing legislation will be applied in the least restrictive manner protecting individual privacy.

I note your concern regarding the reference in the explanatory memorandum, to information being able to be disclosed to 'a specified person or to a specified class of persons'. You have expressed concern that this wording does not appear in the text of the provision itself. I draw the Committee's attention to subsection 22(3) which authorises me to *disclose* protected information if I am satisfied it is in the public interest. The use of the word 'disclose' inherently implies that information could be released by me to another person or persons (i.e. the recipient of the information), which I would specify when making my decision whether or not to release information.

Proposed section 23 creates an offence if a person obtains protected information, and makes a record of, discloses or otherwise uses the information, where it is not authorised by section 22 of the Bill. Exceptions to this offence are provided in sections 24 through to 27 to provide people with a defence in certain circumstances.

An evidential burden placed on the defendant is not uncommon. Similar notations to those used in the current Bill exist in many other Commonwealth legislation (for example, subsection 3.3 of the *Criminal Code Act 1995* - where a person has an evidential burden of proof if they wish to deny criminal responsibility by relying on a provision of Part 2.3 of the Criminal Code). The defences used in the Australian Immunisation Register Bill 2015 are modelled on those used in sections 586 to 589 of the *Biosecurity Act 2015*.

In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* the facts relating to each defence in sections 24 to 27 of the Bill are peculiarly within the knowledge of the defendant, and could be extremely difficult or expensive for the prosecution to disprove whereas proof of a defence could be readily provided by the defendant. The burden that sections 24 to 27 of the Bill impose on a defendant is an evidential burden only (not a legal burden), and does not completely displace the prosecutor's burden in proving the elements of the offence in section 23 of the Bill.

Section 24 simply requires a person to produce or point to evidence that suggests a reasonable possibility that the person made a record of, disclosed or otherwise used protected information in good faith and in purported compliance with section 22 of the Bill.

Section 25 requires that a person, who makes a record of, discloses or otherwise uses protected information that is commercial-in-confidence, produce or point to evidence to demonstrate that they did not know that the information was commercial-in-confidence.

Section 26 requires that a person, who discloses protected information, produce or point to evidence that the protected information was disclosed to the person to whom the information relates.

Section 27 requires that a person produce or point to evidence which indicates that the protected information that was disclosed to another person was originally obtained from that same person.

The evidential burden in each of these circumstances can easily be met by the defendant. In these circumstances, therefore, the imposition of an evidential burden on the defendant is reasonable.

Health Legislation Amendment (eHealth) Bill 2015

In its *Twenty-ninth report of the 44th Parliament* (**Human Rights Report**), the Committee questioned whether the opt-out arrangements for the My Health Record system proposed by the Health Legislation Amendment (eHealth) Bill 2015 (**eHealth Bill**) are a justifiable limitation on the right to privacy, and whether the automatic inclusion of health records in the My Health Record system is compatible with the rights of a child and the rights of persons with disabilities.

The Committee has also questioned whether the new civil penalties in the eHealth Bill might be considered criminal in nature under international human rights law and might not be consistent with criminal process guarantees.

Opt-out arrangements and their effect on healthcare recipients, including children and people with disabilities

A key theme of the Human Rights Report in relation to the eHealth Bill is whether the proposed opt-out arrangements are:
(i) necessary to achieve a legitimate objective; and
(ii) proportionate, necessary and reasonable to achieving that objective.

I am of the view that the opt-out arrangements in the Bill are a proportionate, necessary and reasonable way of achieving the policy objective of improved health outcomes for all Australians, including children and persons with disabilities. My reasons are set out below.

The *Personally Controlled Electronic Health Records Act 2012* (to be renamed the My Health Records Act) has, and will continue to have, the objective of ***improving health outcomes*** by establishing and operating a national system for accessing individual's health information to[1]:

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[1] Section 3 of the *Personally Controlled Electronic Health Records Act 2012*

(a) help overcome the fragmentation of health information;
(b) improve the availability and quality of health information;
(c) reduce the occurrence of adverse medical events and the duplication of treatment; and
(d) improve the coordination and quality of healthcare provided to individuals by different healthcare providers.

Having a My Health Record is likely to improve health outcomes, making getting the right treatment faster, safer, easier and more cost-effective:

- **faster** – because doctors and nurses and other healthcare providers will not have to spend time searching for past treatment information;
- **safer** – because authorised healthcare providers can view an individual's important healthcare information, including any allergies and vaccinations and the treatment the individual has received;
- **easier** – because individuals will not have to remember the results of tests they have had, or all the medications they have been prescribed; and
- **more cost effective** – because healthcare providers won't have to order duplicate tests – e.g. when an individual visits a different GP whilst on holidays. The time necessary to provide treatment may also be reduced as an individual's health information will be available in one place. As a result, the cost of treatment may be reduced, freeing up funds for improving health outcomes in other areas.

Health information is currently spread across a vast number of different locations and systems. In many current healthcare situations, quick access to key health information about an individual is not always possible. Limited access to health information at the point of care can result in:

- a greater risk to patient safety (e.g. as a result of an adverse drug event due to a complete medications history not being available);
- increased costs of care and time wasted in collecting or finding information (e.g. when a general practitioner has to call the local hospital to get information because the discharge summary is not available);
- unnecessary or duplicated investigations (e.g. when a person attends a new provider and their previous test results are not available);
- additional pressure on the health workforce (e.g. needing to make diagnosis and treatment decisions with incomplete information); and
- reduced participation by individuals in their own healthcare management.

Currently about 1 in 10 individuals have a My Health Record. Since the vast majority of individuals don't have a My Health Record, healthcare providers generally lack any incentive to adopt and contribute to the system, thereby limiting the usefulness of the system. This means there are currently too few individuals and healthcare providers using the system for health outcomes to be significantly improved for the benefit of all Australians.

The *Review of the Personally Controlled Electronic Health Record*[2] (**PCEHR Review**) recommended moving to opt-out participation arrangements for individuals as the most effective way of achieving participation of both healthcare providers and individuals in the system and through this delivering the objective of improving health outcomes. Opt-out arrangements are supported by a wide range of peak bodies representing healthcare recipients, healthcare providers and other stakeholders[3]. Of the 137 responses to the *Electronic Health Records and Healthcare Identifiers: Legislation Discussion Paper* issued

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[2] http://health.gov.au/internet/main/publishing.nsf/Content/ehealth-record

[3] See, for example, the comments from the Consumers Health Forum supporting opt-out which are extracted on page 28 of the PCEHR Review.

in May 2015, around half of them commented on opt-out arrangements. Of those, about 85 per cent gave full or conditional support to national implementation of opt-out, while about 98 per cent supported opt-out trials. Supporters of opt-out were equally individuals (and organisations representing them) and healthcare providers.

Annual Commonwealth healthcare costs are forecast to increase by $27 billion to $86 billion by 2025, and will increase to over $250 billion by 2050[4].

Improved health outcomes and productivity improvements such as those that can be delivered by eHealth are needed to help counter the expected increases in the healthcare costs. Leveraging eHealth is one of the few strategies available to drive microeconomic reform to reduce Commonwealth health outlays and, at the same time, achieve the objective of improved health outcomes. Without implementation of the changes in the eHealth Bill, in particular implementation of opt-out, the quality of healthcare available to all Australians may reduce in the future as costs become prohibitive.

Without a move to opt-out participation arrangements, the required critical mass of registered individuals may not occur, or may be significantly delayed. As a result, the anticipated objective of improving health outcomes and reducing the pressure on Commonwealth health funding may not occur or may be significantly delayed. Under the current opt in registration arrangements, a net cumulative benefit of $11.5 billion is expected over 15 years to 2025. It is anticipated that the move to a national opt-out system would deliver these benefits in a shorter period.

National opt-out eHealth record systems have been implemented in a number of countries that are also subject to Human Rights Conventions including Denmark, Finland, Israel, England, Scotland and Wales. This supports the view that opt-out participation arrangements for electronic health record systems are not inherently an unjustified limitation on individuals' right to privacy.

While the PCEHR Review recommended moving to national opt-out arrangements, the Government has decided to trial opt-out arrangements first to ensure there is community acceptance and support of opt-out arrangements, that is, the community considers opt-out arrangements as proportionate and reasonable to achieve the objective of improving health outcomes.

Individuals in the opt-out trials will be made aware of how their personal information will be handled, and how to opt-out or adjust privacy control settings, so they can make an informed decision. Comprehensive information and communication activities are being planned for the opt-out trials to ensure all affected individuals, including parents, guardians and carers, are aware they are in an opt-out trial and what they need to do to participate, adjust privacy controls associated with their record, or to opt-out if they choose. This will include letters to affected individuals, targeted communication to carers and advocacy groups, extensive online information, and education and training for healthcare providers in opt-out trials.

The eHealth Bill ensures that strong and significant privacy protections will continue to exist under the current opt-in arrangements and will apply under the proposed new opt-out arrangements (whether as part of a trial or under national implementation).

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[4] Australian Government's 2010 Intergenerational Report

These protections include the ability to do the following for all people registered with the My Health Record system, including children and persons with disabilities:

- set access controls restricting access to their My Health Record entirely or restricting access to certain information in their My Health Record;
- request that their healthcare provider not upload certain information or documents to their My Health Record, in which case the healthcare provider will be required not to upload that information or those documents;
- request that their Medicare data not be included in their My Health Record, in which case the Chief Executive Medicare will be required to not make the data available to the System Operator;
- monitor activity in relation to their My Health Record using the audit log or via electronic messages alerting them that someone has accessed their My Health Record;
- effectively remove documents from their My Health Record;
- make a complaint if they consider there has been a breach of privacy; and
- cancel their registration (that is, cancel their My Health Record).

The *Personally Controlled Electronic Health Records Act 2012* (PCEHR Act) and the system currently provide special arrangements to support children and vulnerable people to participate in the system by allowing authorised representatives to act on their behalf and protect the rights of children and people with a disability. Authorised representatives generally have parental responsibility for a child, or some other formal authority to act on behalf of the individual. Nominated representatives can also be appointed by an individual (or by their authorised representative) to help the individual manage their electronic health record. The concept of nominated representatives allows for a less formal appointment of another person to help an individual manage their electronic health record. Nominated representatives could be, for example, a family member, neighbour or friend who will generally not have any formal authority to act on behalf of the individual, but whom the individual appoints to assist them in managing their record.

Representatives are currently required to act in the best interests of the person they are representing, and have regard to any directions given by that person. In light of international changes in the treatment of individuals who require supported decision-making, recognising that one person cannot necessarily determine what is in the best interests of another person, the eHealth Bill provides that people providing decision-making support will instead need to give effect to the will and preference of the person to whom they provide decision-making support. Ensuring that representatives can continue to act on behalf of individuals (including children and persons with a disability) to help them to manage their record as part of opt-out is a privacy positive under the eHealth Bill. Authorised representatives will be able, for example, to opt-out the individual for whom they have responsibility from having an electronic health record.

Finally in relation to privacy, a move to opt-out is likely to improve privacy for individuals, including children and persons with a disability, in a number of ways. As noted in the Commonwealth's *Concept of Operations: Relating to the introduction of a personally controlled electronic health record system* (2011):

> *According to the Australian Medical Association (AMA), over 95% of GPs have computerised practice management systems. The majority of GPs with a computer at work used it for printing prescriptions recording consultation notes, printing test requests and Referral letters and receiving results for pathology tests electronically. Roughly one third of GPs keep 100% of patient information in an electronic format and the remainder of general practices use a combination of paper and electronic records.* (pages 126-7)

Implementing opt-out participation arrangements is likely to increase the number of individuals with a My Health Record, and it is anticipated that this will result in the majority of healthcare provider organisations viewing records for their patients in the system and contributing clinical content to those records as part of the process of providing healthcare. Increased participation by healthcare providers, planned improvements in system functionality and ease of use, together with planned incentives to use the system, will lead to much greater use of the system in providing healthcare to individuals.

Increased use of the system is a privacy positive as it will reduce the use of paper records, which pose significant privacy risks. For example, where a patient is receiving treatment in a hospital's emergency department for a chronic illness, the hospital may request from the patient's regular doctor information about the patient's clinical history which is likely to be faxed to the hospital. The fax might remain unattended on the fax machine for an extended period of time before being placed into the patient's file, or the information may be sent to the wrong fax number. Either of these things could lead to an interference with the patient's privacy should a third party read the unattended fax or incorrectly receive the fax. In contrast, under the My Health Record system, the patient's Shared Health Summary would be securely available only to those people authorised to see it. There are other similar scenarios where an increase in the level of use of the My Health Record system is likely to lead to a reduction in privacy breaches associated with paper based records.

In summary, the combination of opt-out trials, extensive information and strong personal controls mean that moving to opt-out participation arrangements for individuals is proportionate, necessary and reasonable for achieving the objective of improving health outcomes. Furthermore, increased registration with, and use of, the PCEHR system is likely to increase individuals' privacy, especially compared to existing paper based records that are still used to some degree by around two-thirds of healthcare providers.

Civil penalties

The eHealth Bill introduces further protection of an individual's health information contained in a My Health Record with the proposed introduction of further enforcement and penalty options if someone deliberately misuses the information or commits an act that may compromise the security or integrity of the system.

At present, the PCEHR Act contains a civil penalty regime for misuse of information, and the *Healthcare Identifiers Act 2010* (HI Act) contains a criminal regime. The eHealth Bill aligns the enforcement and sanction regimes under the two Acts to provide a more graduated and consistent framework for responding to inappropriate behaviour that is proportional to the severity of a breach.

Civil and criminal penalties are proposed for both Acts (up to a maximum of $108,000 for individuals and $540,000 for corporations for deliberate misuse of health information). Enforceable undertakings and injunctions will also be available.

The Committee has questioned whether the civil penalty provisions proposed by the eHealth Bill are criminal for the purposes of international human rights law and, if so, whether any limitation on the right to a fair hearing is justified.

The maximum civil penalty that can be imposed under the eHealth Bill is 600 penalty units. This penalty is justified because the My Health Record system stores the sensitive health information of many individuals. The amount of health information stored and the number of individuals whose records are stored would increase significantly under opt-out.

Penalty levels must provide an appropriate deterrent to misuse of sensitive health information. In addition, penalties need to be proportionate to the potential damage that might be suffered by individuals if the health information in their My Health Record is misused.

The civil penalty levels imposed under the eHealth Bill can be contrasted to the existing *Privacy Act 1988*:

- Under the eHealth Bill the maximum civil penalty is 600 penalty units for a misuse of sensitive health information;
- Under the Privacy Act there are significantly higher civil penalties of up to 2,000 penalty units for serious or repeated misuse of personal information. This is despite the fact that the information in question might not be sensitive health information and may only be less sensitive personal information.

Given that the civil penalties available under the Privacy Act are considered appropriate, it is most unlikely that lower penalties under the eHealth Bill would be considered criminal in nature or would limit the right to a fair trial, especially where the penalty regime imposed by the eHealth Bill is designed to protect significantly more sensitive health information than is generally the case under the Privacy Act.

In response to the Committee comments on the differential between the maximum civil penalty amount and the maximum criminal penalty amount, the eHealth Bill provides for a higher level of civil penalty (600 penalty units) compared to the maximum criminal penalty (120 penalty units) as it is not necessary to have the same levels for each. Imposition of a criminal conviction by a court has other implications that mean that higher penalty levels are not necessary to achieve the desired deterrent. For example, a criminal conviction may result in imprisonment (up to two years) or restrictions on an individual's ability to travel.

The Committee also commented on the reversal of the burden of proof in proposed new section 26 of the HI Act.

Proposed new subsections 26(3) and (4) provide exceptions to the prohibition against misusing healthcare identifiers and identifying information in subsection 26(1) of the HI Act. In doing so, subsections 26(3) and (4) reverse the burden of proof by providing that the defendant bears an evidential burden when asserting an exception applies. An evidential burden placed on the defendant is not uncommon. Similar notations to those used in the eHealth Bill exist in many other pieces of Commonwealth legislation (for example, subsection 3.3 of the *Criminal Code Act 1995* – where a person has an evidential burden of proof if they wish to deny criminal responsibility by relying on a provision of Part 2.3 of the Criminal Code).

In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the facts relating to each defence in proposed new subsections 26(3) and (4) of the HI Act are peculiarly within the knowledge of the defendant and could be extremely difficult or expensive for the prosecution to disprove whereas proof of a defence could be readily provided by the defendant.

A burden of proof that a law imposes on a defendant is an evidential burden only (not a legal burden), and does not completely displace the prosecutor's burden. Proposed subsections 26(3) and (4) simply require a person to produce or point to evidence that suggests a reasonable possibility that exceptions in those provisions apply to the person.

I trust that this additional information will be sufficient to address the Committee's concerns.

Yours sincerely

The Hon Sussan Ley MP

28 OCT 2015

Senator the Hon Marise Payne
Minister for Defence

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MC15-002778

The Hon Philip Ruddock MP
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Dear Mr ~~Ruddock~~ Philip

Thank you for your letter of 18 August 2015 requesting further clarification of a matter in relation to the *Defence Legislation (Enhancement of Military Justice) Act 2015* (the Principal Act), which recently made various amendments to Defence legislation. I apologise for the delay in responding.

In paragraph 1.141 of its Human Rights Scrutiny Report of 18 August 2015, the Committee expressed the view that 'enabling the executive to terminate the appointments of the Chief Judge Advocate and judge advocates at any time gives rise to a perception that the system of military justice is not objectively independent'. Accordingly, the Committee seeks my advice as to whether:

- 'extending the appointments of the Chief Judge Advocate and judge advocates, and thereby extending the current system of military justice, limits the right to a fair hearing'; and
- the *Military Justice (Interim Measures) Act (No 1) 2009* 'should be amended to remove the power of the minister to unilaterally revoke the appointments of the Chief Judge Advocate and judge advocates'.

I note for the Committee's benefit that the previous minister recently appointed the full-time Judge Advocate to be the new Director of Military Prosecutions, so the Committee's concerns now only relate to the Chief Judge Advocate's (CJA) appointment.

While from one point of view the *Military Justice (Interim Measures) Act (No 1) 2009* (the Interim Measures Act) gives me the exercise of a broad power, which has the effect of terminating the CJA's appointment, I do not share the Committee's concern that I can terminate CJA's appointment for any reason, or that the existence of the power limits an accused person's right to a fair military trial. The power to prescribe a termination day under the Interim Measures Act is not unfettered, and could not legitimately be exercised for the purpose of attempting to influence the CJA in the performance of their official duties. Rather, the primary purpose of the termination power is merely to provide a mechanism to make changes which might be required if the current 'interim' system of military discipline was replaced with a new system, not to terminate the CJA's appointment per se.

The Interim Measures Act was enacted following the 2009 High Court decision in *Lane v Morrison* [2009] HCA 29, which declared the military court system to be unconstitutional. The Interim Measures Act reinstated the military tribunal system, which the High Court had declared in a series of cases before *Lane v Morrison* to be constitutional. This was done in order to sustain the military discipline system until such time as the Parliament decided how to address the issue of the trials of serious service offences. It was originally envisaged that the Interim Measures Act would operate for a period of no more than two years.

The Interim Measures Act was amended by the *Military Justice (Interim Measures) Amendment Act 2011* (the first Amending Act) by the then Labor Government when it became clear, as the then Minister for Defence indicated in his Second Reading Speech, that a permanent solution to the issue may not be enacted before the expiration of the Interim Measures Act. The Government extended the operation of the Interim Measures Act by amending Schedule 3 to it, so as to provide that the appointment, remuneration and entitlement arrangements for the CJA and other Judge Advocates continued unchanged for another two years. Additionally, the Interim Measures Act was amended to provide that the Minister may declare in writing a specified day to be the 'termination day' for the purposes of the Schedule to cease the operation of the Act (the termination power).

Further two-year extensions to the Interim Measures Act were enacted by the *Military Justice (Interim Measures) Amendment Act 2013* (the second Amending Act), by the then Labor Government, and, again more recently, by the Principal Act, by the current Government. As the previous minister indicated in his Second Reading Speech to the Principal Act, it was necessary to extend the CJA's and then the full-time Judge Advocate's appointments so that the superior tribunal system could continue while the Government considered further reforms to the military discipline system. I note that each extension has retained the termination power.

The Explanatory Memorandum to the first Amending Act indicated that the termination power was inserted to provide the Government of the day with an expedient mechanism to end the interim superior service tribunal system on commencement of the replacement system. In particular, paragraph 17 of the Explanatory Memorandum explained that the 'termination day is likely to be the day upon which a permanent solution to the trial of serious service offences is implemented'.

The exercise of the termination power would not simply terminate the CJA's appointment. Rather, as the Explanatory Memoranda to the first Amending Act and the Principal Act explain, the exercise of the power would symbolically and practically bring an end to the interim disciplinary arrangements. Accordingly, the primary purpose of the termination power is to allow a single deemed statutory appointment to be brought to an end as a necessary and incidental consequence of Parliament replacing the interim arrangements with an enduring military discipline system. Considered in this way, the termination power is designed to terminate the interim arrangements, not the CJA's appointment per se.

Moreover, the exercise of the termination power is not unfettered and cannot be arbitrarily used to terminate the CJA's appointment. Like most statutory powers, the termination power cannot be exercised for an improper purpose. The termination power cannot be used by me to influence the CJA in the performance of their duties. Any attempt to use the termination power in this way could of course be impugned on the basis of having been used for an improper purpose. For example, in such circumstances, the CJA could seek judicial review of the exercise of the termination power under section 75(v) of the *Constitution* or section 39B of the *Judiciary Act 1903*.

I advise the Committee that for these reasons the extension of the CJA's appointment through the Principal Act does not affect or limit an accused person's right to a fair military trial and, accordingly, there is no need to amend the Interim Measures Act.

I reiterate the previous minister's concluding remark in his Second Reading Speech on the Principal Act that the Government is committed to modernising the military discipline system. I expect to inform the Parliament of our policy in relation to the future of the superior service tribunal system at an appropriate time during the term of this Government.

Yours sincerely

MARISE PAYNE

The Hon Jamie Briggs MP
Assistant Minister for Infrastructure
and Regional Development
Member for Mayo

RECEIVED
DATE 25/11/2015 BY PJCHR

PDR ID: MC15-004125

The Hon Philip Ruddock MP
Chair
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Dear Mr ~~Ruddock~~ Philip

Thank you for your letter about the Norfolk Island Legislation Amendment Bill 2015 (the Bill).

The Bill was passed by both Houses of Parliament on 14 May 2015 and the *Norfolk Island Legislation Amendment Act 2015* (the Act) received the Royal Assent on 26 May 2015. The purpose of the Act is to extend the mainland social security, immigration and health arrangements to Norfolk Island from 1 July 2016.

I note the Parliamentary Joint Committee on Human Rights' comments in relation to Australian permanent resident New Zealand citizens living on Norfolk Island being ineligible for social security benefits.

The exclusion of this category of permanent residents from social security benefits is not consistent with the Australian Government's policy. The Department of Infrastructure and Regional Development is working with the Department of Social Services to develop an amendment to the Act to ensure New Zealand citizens living on Norfolk Island enjoy the same access to social security benefits as New Zealand citizens living on the Australian mainland.

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I will bring forward to the Parliament during its Autumn 2016 Sittings a Bill that will, amongst other Norfolk Island reforms, amend the social service arrangements.

I trust this information will be of assistance

Yours ~~sincerely~~ All my best,

Jamie Briggs

18 SEP 2015

RECEIVED
DATE 2/11/15 BY PJCHR

Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MB15-000212

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
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Dear ~~Chair~~ Philip

Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015

Thank you for your letter of 13 October 2015 concerning the Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015 (the Bill). I trust that the following advice will provide assurance to the Committee on the compatibility of the Bill with international human rights law.

Suspension of benefits for inappropriate behaviour

The Bill will introduce measures to ensure that job seekers who behave inappropriately at appointments may be subject to the same penalties as job seekers who fail to attend those appointments. This is not a unique proposal. Rules allowing penalties to be applied to job seekers who commit misconduct at activities and job interviews were introduced into the compliance framework in 2009. Administrative data indicates that misconduct at activities amounts to around 1 per cent of all failures related to activities.

This measure aims to apply similar rules for appointments that job seekers are required to undertake with their employment service providers or other organisations. Qualitative analysis of feedback from providers has indicated that inappropriate behaviour is a recurring issue and providers have requested increased scope to manage this behaviour. As providers are not currently required to report on the issue, precise data on the number of instances is not available.

This measure is aimed at achieving the legitimate objective of assisting job seekers into employment. Job seekers who prevent the purpose of provider appointments from being achieved by behaving inappropriately impede this objective by purposefully refusing support from providers intended to assist them to move off welfare payments and increase their chances of becoming productive participants in the workforce. Misconduct at appointments is also problematic due to the wasted tax payer resources involved in preparing for and conducting provider appointments that cannot be carried out.

The Bill clearly states that the inappropriate behaviour must be of a nature that prevents the purpose of the appointment being achieved. Further details of what constitutes inappropriate behaviour are not defined in primary legislation, but will be included in a legislative instrument that will be subject to parliamentary scrutiny. This will provide statutory guidance to decision makers and ensure that decisions related to inappropriate behaviour are not left entirely to the discretion of the provider.

As is currently the case with all compliance penalties, employment service providers will have full discretion not to report a job seeker's non-compliance to the Department of Human Services, if the provider believes it will not assist in ensuring the job seeker's future engagement.

Where a provider does recommend a payment suspension, a job seeker will be able to have this lifted and receive full-back pay by attending a further appointment and behaving appropriately. Alternatively, if the job seeker feels the suspension was unjustified, he or she may request that the Department of Human Services review the decision.

If the provider recommends a financial penalty, the penalty will not be applied until a review has been conducted by the Department of Human Services. The review process includes contacting the job seeker and discussing the circumstances of the failure with them. Under subsection 42SC(2) of the *Social Security Administration Act 1991* (the Act), no financial penalty may be applied where the job seeker had a reasonable excuse for the inappropriate behaviour. Details of what constitutes a reasonable excuse are included in the Social Security (Reasonable Excuse – Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1).

The application of the reasonable excuse provisions in this measure will ensure that vulnerable job seekers are not penalised for actions that are beyond their control or are a direct consequence of their vulnerability. For example, if a job seeker's behaviour was due to a psychological or psychiatric condition, or because he or she was unable to understand a provider's instructions, no penalty will apply. This process is consistent with all financial penalties that job seekers may incur under the current compliance framework.

Job seekers who do incur financial penalties can limit the extent of the penalty by prompt reengagement with their providers. The ability of job seekers to minimise the impact of suspensions or financial penalties simply by attending a further appointment and behaving appropriately ensures that penalties are applied proportionately to job seekers who decide to meet their requirements.

Statutory protections will ensure this measure is applied fairly. If a further appointment cannot be undertaken within two business days of the job seeker attempting to reengage, the payment suspension and financial penalty period is ended immediately under subsection 42SA(2AA) of the Act.
Job seekers who have a reasonable excuse for not being able attend the further appointment will also have their payment suspension and financial penalty period ended immediately.

Removal of waivers for failing to accept a suitable job

As noted in the explanatory memorandum, a range of protections exist to ensure job seekers who refuse offers of work for legitimate reasons are not subject to penalties, including through the definitions of 'suitable work' and 'reasonable excuse' set out in subordinate legislation.
These safeguards take effect before waivers are considered; that is, only job seekers who have refused work without good reason may be granted waivers.

Waivers may currently be granted if job seekers agree to undertake an additional compliance activity or if the job seeker may face financial hardship. Waivers that are granted to job seekers who agree to undertake an additional compliance activity are not based on an assessment of the job seeker's circumstances, as job seekers who had a genuine reason for refusing an offer of work will not be subject to a penalty in the first instance.

In 2014–15, 96 per cent of waivers for penalties incurred for refusing an offer of suitable work were granted because the job seekers agreed to undertake an additional compliance activity. This strongly suggests that the high rate of waivers is a result of the legislation requiring the waiver to be granted, rather than the waivers being granted for a legitimate reason related to the circumstances of the job seeker.

In practice, the additional compliance activities job seekers agree to undertake are substantially similar to a job seeker's existing requirements. In many cases, the additional activities do not substantially alter a job seeker's requirements as job seekers can satisfy the requirements by undertaking a few extra hours of activity. Consequently, by securing a waiver for a serious failure through a compliance activity, job seekers are able to refuse employment without any major changes to their activity requirements to reflect the gravity of their serious failure. This has encouraged abuse of the system.

In 2008–09, the year before waiver provisions were introduced to the legislation, there were 644 serious failures for refusing or failing to accept suitable work. In 2014–15, there were 1,412 such failures (although 73 per cent were granted waivers). This increase of 119 per cent in job seekers refusing work without good reason cannot be attributed to any comparable change in the size of the activity-tested job seeker population or increase in the number of jobs being offered—it appears to be a direct result of the leniency of the waiver provisions. The waivers have essentially enabled some job seekers to reject suitable work with impunity as the resulting serious failure they will incur can be waived. Removing the waivers, therefore, can reasonably be expected to reduce the instances of job seekers refusing suitable work, allowing more job seekers to gain employment and reduce their reliance on income support.

I trust this information addresses the committee's concerns.

Yours sincerely

Senator the Hon Michaelia Cash

2 November 2015