Appendix 1

Correspondence

Senator the Hon Michaelia Cash

Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MB15-000242

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

Dear Chair

Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 [F2015L01462]; and
Fair Work (State Declarations – employer not to be national system employer) Endorsement 2015 (No.1) [F2015L01420]

I refer to the letter of 10 November 2015 from Mr Laurie Ferguson MP, Deputy Chair, Parliamentary Joint Committee on Human Rights, concerning the Building Code amendment and the Fair Work declaration.

The Committee sought my advice about the human rights compatibility of these instruments. I enclose a response to the questions posed by the Committee and I trust this addresses remaining issues raised by the Committee.

Should the Parliamentary Joint Committee on Human Rights require further information, please contact my office on (02) 6277 7320.

Yours sincerely

Senator the Hon Michaelia Cash
7 / 1 / 2015

Encl.

Response to the Committee's concerns regarding the Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015

The Committee is concerned that the statement of compatibility with human rights that accompanied the explanatory statement to the Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 (the Building Code instrument) does not sufficiently justify the limitation to the right to privacy, for the purposes of international human rights law of individuals who are subject to drug and alcohol testing in accordance with the policies required by the instrument.

The Committee questions whether the policy framework for drug and alcohol testing required under the Building Code instrument prescribes effective safeguards to protect the privacy of individuals being tested in that it does not detail how testing is to be conducted, or the procedures for the retention or destruction of testing samples. The Committee seeks my advice as to whether there are sufficient safeguards in place to protect the right to privacy.

The Government's requirement that some form of drug and alcohol testing occur on Commonwealth funded construction sites does not in any way impact upon a person's 'right to respect for individual sexuality' or 'right to respect for reproductive autonomy' nor does it concern the 'prohibition on unlawful or arbitrary state surveillance'.

Any impact the Government's requirements have on the right to privacy contained in article 17 is entirely reasonable, necessary and proportionate, especially when one considers more pressing interest a worker has in being able to attend Commonwealth funded construction sites confident in the knowledge that there is a system in place to ensure their colleagues are not affected by drugs or alcohol.

In response to the specific questions on implementation raised by the Committee, it appears there is a misunderstanding of the nature and operation of the legislative instrument. The Building Code requires that contractors on Commonwealth funded construction projects have a drug and alcohol testing policy. The legislative instrument does not prescribe the policy that is to apply nor does it outline an exhaustive list of matters the policy must address. How the requirements of the Building Code are implemented at a certain workplace is a matter to be determined at the workplaces level, subject to existing safety, privacy and industrial laws.

Response to the Committee's concerns regarding the Fair Work (State Declarations – employer not to be national system employer) Endorsement 2015 (No.1)

The Committee considered the legislative instrument—'Fair Work (State Declarations – employer not to be a national system employer) Endorsement 2015 (No.1)' and seeks further information on the 'existence of any differences between workplace relations arrangements under the *Fair Work Act 2009* and those under New South Wales (NSW) law and whether the instrument promotes or limits the right to just and favourable conditions for work'.

The instrument endorses a declaration made by the New South Wales Treasurer and Minister for Industrial Relations, the Hon Gladys Berejiklian MP—namely, the *Industrial Relations (National System Employers) Amendment (Insurance and Care NSW) Order 2015*, which provides that Insurance and Care NSW is not a national system employer for the purposes of the *Fair Work Act 2009* (the Fair Work Act).

Section 14 of the Fair Work Act provides that, if a declaration is made under a state law that a body established for a public or local government purpose is not a national system employer, and the Minister endorses that declaration, the body is not a national system employer.

It appears that this is the first time the Committee has sought to comment upon a section 14 endorsement, noting that dozens of such these instruments have been made since the commencement of the Fair Work Act in 2009, by both this Government and the former Labor Government, in each case, with the assistance of a state Government.

The making of a ministerial endorsement under section 14 of the Fair Work Act must be considered in the context of the national workplace relations system and state referrals of workplace relations matters. The national workplace relations system is supported by the states' agreements to refer certain matters to the Commonwealth. Those referrals had the effect of extending Fair Work Act coverage to private sector employers and employees otherwise outside Commonwealth power (for example, unincorporated employers). NSW, Queensland, South Australia and Tasmania did not refer power in relation to their public sector workforces, as reflected in their referral legislation. Consequently, employers and employees in the public sector in these states remain covered by the relevant state industrial relations system.

The capacity to exclude bodies established for public or local government purposes set out in section 14 of the Fair Work Act is an inherent component of the states' agreements to refer their relevant workplace relations powers to the Commonwealth. A refusal to make a ministerial endorsement under section 14 of the Fair Work Act where the criteria set out in that section have been met could be seen as contrary to the framework underpinning the state referrals. Further, in light of NSW and other states retaining public sector employees within the state workplace relations system, such a refusal to endorse could amount to an interference with the functioning of a state in an impermissible way.

Insurance and Care NSW was established as a NSW Government agency under the *State Insurance and Care Governance Act 2015* (NSW). Staff for the agency are being transferred from other state public sector bodies. Those employees continue to receive their existing employment arrangements in accordance with clause 9 of Schedule 4 of the *State Insurance and Care Governance Act 2015* (NSW). Those employees, when working for other state public sector bodies, were not covered by the national workplace relations system.

Accordingly, there has been no change in employment conditions relating to these employees. The Fair Work Act did not to apply to them and that will continue to be the case.

The human right to just and favourable conditions of work is not limited by this endorsement. Concerns to the contrary should be directed to the NSW Government.

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

Ref No: MC15-019559

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
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CANBERRA ACT 2600

Dear ~~Chair~~ Philip

Thank you for the letter of 10 November 2015 from the Deputy Chair, the Hon Laurie Ferguson MP, seeking my response to the Committee's view on the compatibility with human rights of the *Health Insurance Amendment (Safety Net) Bill 2015* (the Bill).

The Committee's *Thirtieth Report of the 44th Parliament: Human Rights Scrutiny Report* states that the measures contained in the Bill 'engage and limit the right to social security and the right to health' under international human rights law. Specifically, the Committee seeks my advice 'as to whether the limitation is a reasonable and proportionate measure for the achievement of the objective, in particular, whether financially vulnerable patients are likely to be unreasonably affected by the changes and, if so, what safeguards are in place to protect financially vulnerable patients.' I have considered these matters and provide the enclosed information in response.

I believe the measures contained in the Bill are not incompatible with Australia's human rights obligations and that they are reasonable and proportionate to the achievement of a legitimate objective. The changes to the safety net arrangements aim to redistribute safety net benefits to people with concession cards. Additionally, the Government provides incentives for health care providers to bulk-bill concession card holders, providing additional protection against out-of-pocket costs for these services. The Government is committed to protecting Medicare and to ensuring that it continues to provide access to high quality health care.

I trust this information will be of assistance to the Committee.

Yours sincerely

The Hon Sussan Ley MP

Encl.

01 DEC 2015

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7220

Response to the Parliamentary Joint Committee on Human Rights' *Thirtieth Report to the 44th Parliament*, concerning the *Health Insurance Amendment (Safety Net) Bill 2015.*

The Committee states that the measures contained in the Bill 'engage and limit the right to social security and the right to health' under international human rights law. Specifically, the Committee seeks my advice 'as to whether the limitation is a reasonable and proportionate measure for the achievement of the objective, in particular, whether financially vulnerable patients are likely to be unreasonably affected by the changes and, if so, what safeguards are in place to protect financially vulnerable patients.' These issues are considered below.

Improved access for concessional patients and non-concessional single patients

There have been two independent reviews of the Extended Medicare Safety Net (EMSN). The *Extended Medicare Safety Net Review Report 2009* was a review of the whole EMSN. The *Extended Medicare Safety Net Review of Capping Arrangements Report 2011* evaluated the introduction of caps on benefits payable through the EMSN. These reports were prepared by the Centre for Health Economics Research and Evaluation at the University of Technology, Sydney, following open tender processes.

The 2009 and 2011 reviews found that most EMSN benefits have flowed to patients living in relatively higher income areas. Analysis of current Medicare data confirms that this distribution has persisted. This is a reflection of different patterns of service use, as well as the tendency of doctors working in higher socio-economic areas to charge high fees, particularly for people without concession cards. The 2009 review noted that the EMSN 'may be helping wealthier people to afford even more high-cost services'. The 2011 review found that after the capping of safety net benefits for selected MBS items, the reduction in EMSN expenditure was relatively greater in wealthier areas and major cities, compared to lower socioeconomic and regional areas.

The existing safety nets also provide relatively poor access for non-concessional single people on low incomes, particularly people below retirement age who do not have children. A much smaller proportion of single people without concession cards qualify for the EMSN than any other group. This is due to the ability of family members to pool out-of-pocket costs to qualify for EMSN benefits. Singles, on the other hand, can only count their own out-of-pocket costs towards the threshold. If the Bill is not passed, a non-concessional single in 2016 would need to accumulate $2,030 in out-of-pocket costs to access the EMSN.

The new Medicare safety net introduces lower thresholds for most patient groups, including a new lower threshold for singles. It places uniform caps on the amount of out-of-pocket costs which can accumulate to the eligibility threshold and the total benefits payable for all Medicare Benefits Schedule (MBS) services. The combined effect of the lower thresholds and capping arrangements will be to create a relative shift in safety net payments to concessional patients and single people without concession cards.

Threshold changes

The 2016 thresholds for the new Medicare safety net will be:

- $400 for concessional families and singles,
- $700 for FTB (A) families and singles who do not have a concession card, and
- $1,000 for all other families.

If the Bill is not passed, the 2016 thresholds for the Extended Medicare safety will be:

- $647.90 for concession cardholders and FTB (A) families, and
- $2,030 for all other families and singles.

I expect the proportion of benefits flowing to people charged more moderate fees to increase and consequently a greater share of safety net benefits for those in lower socioeconomic areas. The Department of Health estimates an additional 53,000 people will receive a safety net benefit under the new arrangements. The number of eligible concession card holders is expected to increase by 80,500. The number of non-concession card holders is expected to decrease by 27,500, however, there will be a net increase in non-concessional single people.

Capping arrangements

Although the EMSN was intended to assist patients who have high out-of-pocket costs, it has had an inflationary impact in some areas. While the Government pays 80 per cent of the increase in fees, the patient still pays the remaining 20 per cent. In some cases, the increase in fees has been so high that Medicare data indicate that patients now face higher out-of-pocket costs than they would have if the safety net had not existed. More generally, the 2009 review estimated that the EMSN was directly responsible for a 2.9 per cent increase in provider fees per year (excluding GPs and pathology). Clearly, this has implications for patients who need services, but do not qualify for the EMSN, and the health system as a whole.

Benefit cap

Caps were introduced on safety net benefits for selected items in 2010. These caps placed an upper limit on the Commonwealth contribution for the service. This led to some moderation in the fees charged in some areas for these services. The introduction of safety net benefit caps for all MBS items is therefore expected to have a moderating effect on fee inflation.

At present, around 570 MBS items have a maximum safety net benefit or 'cap' in order to limit the incentives for providers to charge high fees for these items. However, the 2011 review into capping arrangements concluded that numerous opportunities remain for providers to shift billing practices in order to avoid caps.

Cataract surgery provides an example of billing practice shifting around capped items. Caps were introduced for cataract surgery in 2010. The 2011 review found that the fees charged for uncapped MBS item 20142 (the initiation of management of anaesthesia for lens surgery) increased by 400 per cent at the 90th percentile provider fee, indicating the possibility of provider fee sharing between ophthalmologists and anaesthetists to avoid the cap on cataract surgery.

When EMSN benefit caps were expanded in 2012, a cap was placed on the item for the initiation of anaesthesia in association with cataract surgery. Since then, some providers have shifted fees to other items, including to a routine diagnostic test. Although most doctors charge around $40 for the test, some patients have been billed over $1,000. While safety net benefit caps could be introduced for the diagnostic test item, currently there is the possibility that the high fee would move to another uncapped item. The new Medicare safety net, by capping benefits for all MBS items, would protect patients against this type of fee inflation in the future.

Accumulation cap

The 2009 review also found that one of the main incentives for fee inflation was the ability for people to cross the threshold of the EMSN in a single high fee service. This is because when a practitioner knows a patient is likely to qualify for the EMSN, they can increase their fees with the knowledge the Government is paying the majority of the cost.

For example, the maximum fee for brain stem audiometry (a form of hearing test) - an item with an MBS Fee of around $192 - increased to more than $3,995 in 2014. The patient qualified for EMSN benefits in a single service and was rebated 80 per cent of all costs in excess of the relevant threshold. The accumulation cap will in many cases remove the incentive for providers to charge very high fees relative to the MBS Fee.

The new thresholds already take into account the effects of an accumulation cap. In addition, people who are charged up to 150 per cent of the MBS Fee will not experience more out-of-pocket costs before reaching the threshold.

The accumulation and safety net benefit caps for all MBS items will address the chief structural flaws of the EMSN. The threshold settings and capping arrangements will create a more level-playing field for patients to qualify for assistance. The accumulation cap weakens the link between the patient's ability to pay high fees and the likelihood of reaching the threshold. In combination with the lower threshold levels, the capping arrangements will facilitate access to the new Medicare safety net for an additional 80,500 concessional patients.

Removal of the Greatest Permissible Gap rule

At paragraph 1.89 of the Report, the Committee raises the potential impact of the removal of the Greatest Permissible Gap (GPG) rule on financially disadvantaged people, particularly for 'one-off' services. The removal of the GPG will have no effect on most services that are bulk billed. For those that are not bulk billed, the impact of the removal of the GPG will be largely offset by the reduced thresholds of the new Medicare safety net. The GPG does not apply to in-hospital services. A worked example, prepared by my Department, to demonstrate the interaction of the removal of the GPG rule and the new Medicare safety net for a high-priced MBS item is at Attachment A.

A significant proportion of the services to which the GPG rule is applied are bulk-billed, and many of these are diagnostic imaging MBS items. There is a bulk-billing incentive for diagnostic imaging services provided to concessional people and children under 16 years of age. Diagnostic imaging providers receive 95 per cent of the MBS Fee if they bulk-bill a patient in one of these categories. This is independent of the operation of the GPG rule. This means that there is no change to the rebate paid for these services when bulk-billed. The bulk-billing rate across all diagnostic imaging services for patients in these groups is around 90 per cent.

The MBS items subject to the GPG rule are for high priced services that are often embedded in a 'cycle of care', e.g. Assisted Reproductive Technology services. The nature of many of these high priced items means that at the time a patient receives such a service, he or she will have, at the least, already seen their GP for a referral and a specialist for an initial consultation. While there is a reduction in the standard MBS benefit available, there is an increase in the amount of out-of-pocket costs that accrue to the safety net thresholds, and the patient reaches the safety net sooner. This will be of particular benefit to concessional singles and families who under the new Medicare safety net have a threshold of $400. Registered families are able to pool out-of-pocket costs to reach the safety net threshold.

Once the patient has qualified for the safety net, there is a cap on the amount of safety net benefits that will be paid (as is currently the case with many high cost out-of-hospital services), meaning that the net impact on the financial position of the patient is usually unchanged.

For the reasons outlined above, I believe these measures are not incompatible with Australia's human rights obligations and that they are reasonable and proportionate to the achievement of a legitimate objective.

Attachment A

Worked example of the interaction between the removal of the Greatest Permissible Gap rule and the new Medicare safety net for MBS item 61425

MBS Item: 61425		
MBS Item Descriptor: BONE STUDY - whole body and single photon emission tomography, with, when undertaken, blood flow, blood pool and delayed imaging on a separate occasion		
MBS Fee: $600.70	2014-15 total services: 96,680	Bulk billing rate: 90.4 per cent

- In this example, let's assume the fee charged by the provider is $650 (average fee out-of-hospital when not bulk billed was $668 in 2014-15).
- For a patient that is not bulk-billed:
  - The table below illustrates, prior to reaching the threshold, the patient will pay $10.60 more in out-of-pocket costs with the removal of the GPG rule.
  - As the fee charged is within 150 per cent of the MBS Fee, the extra $10.60 in out-of-pocket costs accumulates towards the patient's threshold.
  - However, for patients who have reached the threshold, the difference in the patient's out-of-pocket costs is reduced to $2.15.

	With GPG	Without GPG	Difference
Medicare rebate	$521.20	$510.60	-$10.60
Patient contribution which accumulates towards the safety net threshold	$128.80	$139.40	+$10.60
Patient contribution after reaching the safety net threshold	$25.75	$27.90	+$2.15

- For the same item, let's assume the patient was bulk-billed out-of-hospital. The bulk-billing rate out-of-hospital for this item is 90.4 per cent.
- The table below shows that the rebate for MBS item 61425 is $570.70 when provided out-of-hospital and bulk-billed. This figure is the same regardless of whether the GPG rule applies to the item. That is, the removal of the GPG rule will not change the benefit payable for any service provided out-of-hospital that is bulk-billed.

	GPG out-of-hospital rebate	Rebate plus bulk-billing incentive	Difference
Medicare rebate	$522.30	$570.70	+$48.35

THE HON DR PETER HENDY MP
ASSISTANT MINISTER FOR PRODUCTIVITY

Reference: C15/123475

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

Dear Mr Ruddock

Thank you for your letter dated 24 November 2015 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Omnibus Repeal Day (Spring 2015) Bill 2015 (the Bill). I welcome this opportunity to respond to the issues raised by the Committee's in the *Thirty-First Report of the 44th Parliament*.

Removal of consultation requirements when changing disability standards.

The proposed repeal of subsections 382(1) and (5) of the *Telecommunications Act 1997* (the TC Act) forms part of a broader reform of statutory consultation requirements in the Communications and the Arts portfolio. Statutory consultation requirements have, over time, developed into a variety of inconsistent approaches with respect to the time and method of consultation. The legitimate objective of making consultation requirements consistent across portfolio legislation will reduce the complexity and inflexibility of current arrangements, providing stakeholders with certainty and consistency, and allowing rule-makers to undertake targeted, appropriate and satisfactory consultation using standardised consultation requirements already provided for in Section 17 of the *Legislative Instruments Act 2003* (the LI Act).

The consultation provisions in section 382 of the TC Act do not strictly require that consultation be undertaken before an instrument is made. Rather, the provisions require the Australian Communications and Media Authority (ACMA) to 'so far as is practicable, try to ensure' that an adequate opportunity is provided for representations to be made. The 60 day period referred to in subsection 382(5), for persons to make representations, applies in the context of the ACMA's obligations to try to consult so far as is practicable.

Subsection 17(1) of the LI Act on the other hand requires a rule-maker, before making a legislative instrument, to be satisfied that he or she has undertaken consultation that is

appropriate and reasonably practicable. Accordingly, both section 382 of the TC Act and section 17 of the LI Act are framed in terms of 'practicable' consultation. The LI Act provides for equivalent requirements for the ACMA to consult when any changes are made to disability standards.

The legislated consultation obligations in section 17 of the LI Act will ensure that persons with disabilities continue to be consulted by the ACMA in the making of disability standards, particularly as the ACMA ensures the effectiveness of any standard providing for the needs of persons with disabilities. Therefore the repeal of subsections 382(1) and (5) of the TC Act would not limit requirements for consultations with persons with disabilities, and there is no limitation on the right to equality and non-discrimination in relation to persons with disabilities.

It is worth noting that Part 5 of the LI Act sets out a tabling and disallowance regime which facilitates parliamentary scrutiny of legislative instruments. The consultation undertaken in relation to any legislative instrument is required to be detailed in the associated explanatory statement and, accordingly, if Parliament were dissatisfied with the level of consultation undertaken, the instrument may be disallowed.

In the present context of disability standards made by the ACMA, if the Parliament were dissatisfied with the ACMA's response to the requirement for appropriate and reasonably practicable consultation under section 17 of the LI Act, then Parliament could disallow the instrument.

The proposed repeal of subsections 382(1) and (5) of the TC Act therefore may engage but do not limit the right to equality and non-discrimination and the rights of persons with disabilities, due to the operation of comparable provisions in Section 17 of the LI Act.

Removal of requirement for independent reviews of Stronger Futures measures

I note the Committee considers that the removal of a legislated requirement for independent review of the *Stronger Futures in the Northern Territory Act 2012* (the SF Act), as set out in Schedule 11 of the Bill, may mean that any human rights impacts of measures in the SF Act may not be appropriately evaluated. I further note that the Committee is currently conducting a review of the SF Act and related legislation and intends to consider the effect of the proposed amendments in Schedule 11 of the Bill as part of that inquiry.

I hope the Committee finds the information contained herein to be of use.

Yours sincerely

DR PETER HENDY

15 / 12 / 2015

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-029746

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

I refer to the two letters from the Parliamentary Joint Committee on Human Rights (the committee) dated 10 November 2015 in relation to the committee's comments contained in its *Thirtieth Report of the 44th Parliament*. I apologise for the delay in responding.

The committee has sought comment in relation to the Migration Amendment (Complementary Protection and Other Measures) Bill 2015, the Migration and Maritime Powers Amendment Bill (No. 1) 2015, and the Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015 [F2015L01461]. My response addressing the committee's comments is attached.

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

Yours sincerely

PETER DUTTON 11/01/16

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Migration Amendment (Complementary Protection and Other Measures) Bill 2015

Changes to the statutory framework for complementary protection – real risk in the entire country

1.105 The committee's assessment of the proposed changes to the statutory framework for complementary protection against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and articles 6(1) and 7 of the International Covenant on Civil and Political Rights (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.106 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations, in light of the committee's concerns raised above.

I note the Committee's view that the Bill would result in a person being ineligible for protection even though it may not be reasonable for them to relocate internally, and that this would therefore leave individuals subject to refoulement, in breach of Australia's international obligations.

It is my intention that, in assessing whether a person may be personally at a real risk of significant harm, a consideration of whether the level of risk of harm is one that the person will face in all areas of the receiving country will no longer encompass the consideration of whether the relocation is 'reasonable' in light of the individual circumstances of the person.

In assessing whether it is reasonable for a person to relocate to another area of the receiving country in the refugee context, Australian case law indicates that some decision-makers (including merits review tribunal members) have considered broader issues such as the practical realities of relocation, which have included considering diminishment in the quality of life or potential financial hardship of a protection visa applicant. This goes beyond the intention that Australia's protection should only be available to persons who face the relevant harm in all parts of the receiving country and hence cannot access that country's protection. The *Migration Act 1958* (Migration Act) was amended by the *Migration Amendment (Resolving the Asylum Legacy Caseload) Act 2014* to reflect this intention in the refugee context, and the *Migration Amendment (Complementary Protection and Other Measures) Bill 2015* reflects this intention in the complementary protection context. This provides certainty to applicants and decision-makers by providing consistency on this issue.

I am committed to acting in accordance with Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and maintain that while an assessment of whether it is 'reasonable' for an applicant to relocate to another area within the receiving country is proposed to be removed by the Bill, what constitutes a real risk that a person will suffer significant harm under the Migration Act has not changed. When considering whether a person can relocate to another area, decision-makers will continue to be required to consider whether a there is a real risk that a person will suffer significant harm if:

- the person will be arbitrarily deprived of his or her life; or
- the death penalty will be carried out on the person; or
- the person will be subjected to torture; or

- the person will be subjected to cruel or inhuman treatment or punishment; or
- the person will be subjected to degrading treatment or punishment.

As a matter of policy, decision-makers are also required to determine whether a real risk of significant harm exists for a person when considering whether they can safely or legally access the relocation area from their point of return to the receiving country, such that it would mitigate a 'real risk' of 'significant harm' to the person. Notwithstanding that this is not expressed in the Bill, this policy is consistent with the domestic legal interpretation and has been applied in the refugee context since the relevant Migration Act provisions were amended. It will likewise be applied appropriately in the complementary protection context proposed by the Bill.

Changes to the statutory framework for complementary protection – behaviour modification

1.114 The committee's assessment of the proposed changes to the statutory framework for complementary protection (behaviour modification) against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and articles 6(1) and 7 of the International Covenant on Civil and Political Rights (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.115 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.

I note the Committee's concerns regarding proposed new subsection 5LAA(5) of the Bill, which provides that there is not a real risk of significant harm if a person could take reasonable steps to modify their behaviour so as to avoid a real risk of significant harm, other than a modification that includes a modification that would conflict with a characteristic that is fundamental to the person's identity or conscience, or conceal an innate or immutable characteristic.

While I acknowledge the Committee's views, at paragraph 1.111, that *the obligation to protect against non-refoulement is not contingent on the oppressed avoiding conduct that might upset their oppressors*, in introducing this provision into the statutory complementary protection context, my intent is to reflect that some harm can be brought about by a person's own voluntary actions, and that in some circumstances, it is reasonable to expect a person not to engage in such action, so as to avoid a real risk of significant harm. If a person is able to modify their behaviour in a manner that does not conflict with their core identity or belief system, as mentioned in proposed subsection 5LAA(5), and in doing so, could avoid a real risk of significant harm, then they should not necessarily be provided with protection, as their return would not itself engage non-refoulement obligations. The risk of harm would only arise if they chose to undertake certain actions. This amendment is therefore consistent with non-refoulement obligations.

To support the position that this provision is concerned with reasonable modification only, the Bill includes an express list of modifications, at new paragraph 5LAA(5)(c), that a person cannot be required to do. These are:

- alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
- conceal his or her true race, ethnicity, nationality or country of origin;

- alter his or her political beliefs or conceal his or her true political beliefs;
- conceal a physical, psychological or intellectual disability;
- enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
- alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.

I respectfully submit my view that the Committee is inaccurate in its assertion, at paragraph 1.113, that a person could be required to not attend or participate in any political activity, such as attending a rally, if such conduct is not considered to be of fundamental importance to the person's conscience. In accordance with new subparagraph 5LAA(5)(c)(iii), the Bill does not require modification that would alter or conceal a person's political beliefs.

Furthermore, I also respectfully submit that the Committee's claim that a person who has previously worked as a journalist in their home country could be required to cease work as a journalist if the content of their published work risked attracting persecution, is inaccurate. Proposed subsection 5LAA(5) is concerned with reasonable modification of future behaviour and takes into account what reasonable steps a person *could* objectively take to avoid a risk upon returning to their receiving country, not just what they *would* do on their return (for example, a person refraining from engaging in an occupation that carries risk where it is reasonable for the person to find another occupation). If a person were to claim protection on the basis that their published work as a journalist would attract persecution, such claims would be assessed against both the refugee and complementary protection provisions in the Migration Act in order to determine whether Australia's non-refoulement obligations under the Refugees Convention, or the ICCPR or the CAT are engaged. Similarly, a person would not be required to cease work as a journalist, if to do so would require the altering or concealment of their political beliefs.

While I acknowledge that this provision engages human rights that relate to Australia's non-refoulement obligations under the ICCPR and the CAT (including articles 18(1) and 19 of the ICCPR), I maintain that it is possible to limit certain rights, as long as the limitation is reasonable, proportionate and adapted to achieve a legitimate objective. In relation to these amendments, my objective is to ensure that only those who face a real risk of significant harm, as a necessary and foreseeable consequence of their removal from Australia to a receiving country, are granted a protection visa on complementary protection grounds. In this context, I believe that it is reasonable to expect, in some circumstances, for a person not to engage in particular actions so as to avoid a real risk of significant harm, noting that this does not apply to a modification of behaviour that conflicts with their identity or core belief system. If a person is able to reasonably modify their behaviour in this way, they do not require Australia's protection as their return would not place them at risk of harm and therefore not engage Australia's non-refoulement obligations – a risk of harm would only arise if they chose to undertake certain actions. I confirm that Australia does not intend to resile from its non-refoulement obligations.

This provision will require decision-makers to objectively consider whether a person could take reasonable steps to modify their behaviour, so as to avoid a real risk of significant harm, which will be assessed on a case-by-case basis. Any modification would also be limited to what is reasonable in the person's individual circumstances.

The reasons supporting this view have been set out in the Statement of Compatibility with Human Rights, attached to the Explanatory Memorandum to the Bill, and I reiterate those reasons here.

Excluded persons

1.131 The committee's assessment of the proposed extension of the Minister's power to exclude a person from merits review against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.132 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.

I note the Committee's view that the proposed amendment to subsection 502(1) in the Bill, in removing a person's ability to seek merits review of a decision to refuse a visa on character-related grounds, engages the protection against refoulement, including the right to an effective remedy.

Section 502 of the Migration Act provides me with the power, in certain circumstances, to declare a person to be an 'excluded person' and therefore, in this context, a person is not able to seek merits review of a decision at the Administrative Appeals Tribunal. These circumstances apply where I intend to make a personal decision to refuse to grant or cancel a protection visa on character-related grounds and require me to decide that, because of the seriousness of the circumstances giving rise to the making of that decision, it is in the national interest that the person be declared an excluded person.

Currently section 502 applies in respect of persons who have been refused the grant of a protection visa on refugee grounds for reasons relating to the character of the person. I now consider it appropriate to extend the scope of section 502 to also apply to persons who have been refused the grant of a protection visa on complementary protection grounds for reasons relating to the character of the person.

This provision provides that any personal decision of mine is protected from merits review if the decision is made in the national interest, and it also requires me to cause notice of the making of the decision to be tabled in both Houses of Parliament within 15 sittings days after the day of my decision. It is anticipated that such decisions will be rarely made, but if they are made on national interest grounds, such decisions will not be reviewable by the AAT. Decisions to refuse to grant or cancel a protection visa will involve my consideration of the national interest.

I note the Committee's concerns that the provision to protect my personal decisions from merits review may engage and limit the right to an effective remedy, as the person will not enjoy the same rights to merits review as a person who was the subject of a decision by a delegate of the Minister. These amendments present a reasonable response to achieving a legitimate objective, which is the safety of the Australian community, noting that the amendments only apply in respect of persons who are refused the grant of a complementary protection visa on character related grounds. In addition:

- my personal decision will be consequent to an administrative process that is undertaken within the administrative law framework and in accordance with principles of natural justice; and
- judicial review is still available. In a judicial review action, the Court would consider whether or not the power given by the Migration Act has been properly exercised. For a discretionary power such as personal decisions of mine under the Migration 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.

I respectfully disagree with the Committee's view, at paragraph 1.128, that 'judicial review is not sufficient to fulfil the international standard required of "effective review", because it is only available on a number of restricted grounds of review that do not relate to whether that decision was the correct or preferable decision'. The entire purpose of judicial review is to assess whether the primary decision was legally correct, and to determine any error or unfairness in the decision-making process. Judicial review remains an effective mechanism by which administrative decisions, which includes decisions in relation to protection visa applications, are assessed by a higher authority. Although I agree that the intent of judicial review may not be to avoid harm to the individual concerned, it does not mean that it is not an appropriate means by which this is assessed.

In introducing this proposed amendment, I am not seeking to resile from or limit Australia's non-refoulement obligations, nor will it affect the substance of Australia's adherence to these obligations. Anyone who is found through visa or Ministerial intervention processes to engage Australia's non refoulement obligations will not be removed in breach of those obligations. All persons impacted by the personal decisions made by me will remain able to access judicial review which satisfies Australia's obligation under Article 13 of the ICCPR to have review by a competent authority.

Migration and Maritime Powers Amendment Bill (No. 1) 2015

1.149 The committee's assessment of the proposed extension of the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia, in the context of Australia's mandatory immigration detention policy, against article 9 of the International Covenant on Civil and Political Rights (right to liberty) raises questions as to whether the measure is justifiable under international human rights law.

1.150 As set out above, extending the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia, in the context of Australia's mandatory immigration detention policy, limits the right to liberty. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **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, in particular, is it the least rights restrictive**
- **approach that could be taken in order to achieve the stated objective.**

Under existing law, a person who has been removed to another country, and is then refused entry by the destination country, does not need a visa to return to Australia. When this happens, any bars imposed before they left that prevent them from making a further visa application will continue to apply when they are returned to Australia.

This is not the case, however, if the person is turned around in transit. The legislative changes will ensure that a consistent approach is taken for a person whose removal is aborted in transit prior to reaching the destination country.

Under the changes, sections 42, 48 and 48A will operate consistently for the range of situations that might prevent the department from completing a removal once it is underway.

- The changes ensure that, for the very small number of cases where a person is turned around in transit, the person can return to Australia under the same visa conditions they had before being removed and that those conditions will remain in force while alternative removal arrangements are undertaken.
- This will enable new removal arrangements to be made without being delayed by further visa applications – thereby facilitating the least restrictive approach to detention by removing access to unintended mechanisms that could delay removal.

The application of the same measures to persons that currently apply to a person returned from a destination country to those returned from a transit country could not, in itself, lead to arbitrary detention. Their detention in Australia is not unlawful (by virtue of compliance with section 189 of the Migration Act), and would not be arbitrary as it would be for the purpose of either removing the person from Australia or granting them a visa.

To ensure a person in immigration detention is held lawfully under section 189 of the Migration Act, as an unlawful non-citizen (UNC), and to avoid the possibility of the person being unlawfully or arbitrarily detained, my department undertakes regular reviews of immigration detainees. These reviews include:

- confirming an UNC's identity and unlawful immigration status;
- ensuring any outstanding matters relating to the person's immigration status are resolved as soon as possible; and
- ensuring that voluntary requests for removal from Australia are facilitated as soon as reasonably practicable, as required under section 198 of the Migration Act.

1.163 The committee's assessment of the proposed extension of the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.164 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.

A person in Australia who is not able to apply for a protection visa will not be removed in breach of Australia's non-refoulement obligations. Any new claims for protection that were not previously assessed will be appropriately considered, and my department has administrative processes in place, such as an International Treaties Obligation Assessment or my ability to exercise my powers under the Migration Act and grant a person a visa, which are designed to assess such claims and safeguard Australia's non-refoulement obligations. Removals do not take place where outstanding obligations require assessment. For cases affected by this change that raise new claims upon return to Australia, those claims will be considered through existing mechanisms within the (new) removal planning framework whereby application bars can be lifted where appropriate.

1.169 The committee's assessment of the proposed extension of the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia against article 3(1) of the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the changes are compatible with the rights of the child.

1.170 As set out above, extending the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia, 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 purposes of international human rights law. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the obligation to consider the best interests of the child 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 changes maintain Australia's obligations and responsibilities under the Convention on the Rights of the Child (CRC) that were in place prior to departure on the aborted removal. For the removal to have been initiated, an assessment against the CRC will have been undertaken where necessary. The fact of the removal being aborted at a transit destination does not of itself change that assessment nor the requirement for removal from Australia.

The proposed changes are aimed at ensuring the legitimate objective of ensuring the removal of persons (including children where appropriate) who have no legal right to remain in Australia as required by the Migration Act.

The limitation provides the opportunity for new removal arrangements to be made (likely through a different transit point) without the delay that currently exists, by preventing persons from making a further visa application unless protection circumstances have changed since departure on the aborted removal.

It is reasonable that any bars imposed before a person left that prevented them from making a further visa application would continue to apply when they are returned to Australia following travel that is aborted during transit.

1.185 The committee's assessment of the proposed expansion of visa cancellation powers against article 9 of the International Covenant on Civil and Political Rights (right to liberty) raises questions as to whether the measures are justifiable under international human rights law.

1.186 As set out above, the expansion of visa cancellation powers limits the right to liberty. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **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 the stated objective.**

The amendments proposed in Schedule 2 to the Bill do not expand visa cancellation powers or the grounds upon which a person may have their visa cancelled; they also do not alter the detention powers or framework already established in the Migration Act. Nor does this Bill propose any changes to the mandatory cancellation and revocation framework. This Bill seeks to ensure that legislative provisions which apply to other Ministerial powers within the character provisions apply equally to section 501BA.

Section 501BA, which gives me the power to overturn the decision of a delegate or AAT member to revoke the mandatory cancellation of a non-citizen's visa, was introduced by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* and came into effect on 11 December 2014. This power is non-delegable and can only be exercised when I am satisfied that the cancellation of the visa is in the national interest and the person does not pass certain limbs of the character test.

The Statement of Compatibly in the Explanatory Memorandum to the Bill outlines the Government's position that the detention of unlawful non-citizens as the result of visa cancellation is neither unlawful nor arbitrary *per se* under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. These amendments will put those whose visas are cancelled on the basis of section 501BA on the same footing as non-citizens who have had their visa/s cancelled under any other character provision (sections 501, 501A and 501B). These amendments present a reasonable response to achieving a legitimate purpose under the Covenant, which is the safety of the Australian community.

I note that such persons will be required to be detained under section 189 of the Migration Act as unlawful non-citizens, and will be liable to be removed from Australia under section 198 of the Migration Act. However, the cancellation of a non-citizen's visa in circumstances where they present a risk to the Australian community, and their subsequent detention prior to removal, follows a well-established process within the legislative framework of the Migration Act. The safety of the Australian community, particularly in the current security environment, is considered to be both a pressing and substantial concern and a legitimate objective to this proposal. Further, people who

are affected by these measures can seek judicial review of my cancellation decision, and I repeat what I have said above in relation to the effectiveness of this review mechanism.

1.192 The committee's assessment of the proposed expansion of visa cancellation powers against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.193 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.

I respectfully disagree with the Committee's view that Schedule 2 of this Bill expands visa cancellation powers. This Bill does not propose any new cancellation grounds. This Bill seeks to ensure that legislative provisions which apply to other Ministerial powers within the character provisions apply equally to section 501BA, which was introduced by the Migration Amendment (Character and General Visa Cancellation) Act 2014.

Australia does not seek to resile from or limit its non-refoulement obligations. Nor do the amendments affect the substance of Australia's adherence to these obligations. As with other character cancellation powers, a person cancelled under section 501BA will be unable to apply for any visa other than a protection visa.

However, I routinely consider non-refoulement obligations as part of my decision to cancel a visa on character grounds, and anyone who is found to engage Australia's non-refoulement obligations will not be removed in breach of those obligations.

1.206 The committee's assessment of the proposed expansion of visa cancellation powers, including barring a person from applying for other visas, against article 12(4) of the International Covenant on Civil and Political Rights (freedom of movement—right to enter one's own country) raises questions as to whether the measures are justifiable under international human rights law.

1.207 As set out above, the expansion of visa cancellation powers limits the right to freedom of movement. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. 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.**

I respectfully disagree with the committee's view that a person's right to freedom of movement extends to countries to which that person is not a citizen nor has a lawful right to enter and/or reside there. It is my position that a person who enters a State under that State's immigration laws cannot regard the State as his or her own country when he or she has not acquired nationality in that country. In any event, the Bill does not seek to enhance cancellation and refusal powers, but to ensure that legislative provisions which apply to other of my personal powers within the character

provisions apply equally to section 501BA. Further, the non-citizen's ties to the Australian community, including their length of residence is taken into account by delegates when considering whether to exercise the discretion to revoke the cancellation of the visa. The proposed amendments are therefore compatible with human rights because insofar as they engage Australia's human rights obligations, the safety of the Australian community, particularly in the current security environment is considered to be both a pressing and substantial concern and a legitimate objective to this proposal.

1.213 The committee's assessment of the proposed expansion of visa cancellation powers against article 3(1) of the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.214 As set out above, the expansion of visa cancellation powers limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 2 of the bill with the obligation to consider the best interests of the child 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 Government is committed to acting in accordance with Article 3 of the CRC. The concerns raised by the Committee in relation to the best interests of the child relate to amendments that were made by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* and came into effect on 11 December 2014. To clarify, while section 501 is applicable to minors, it is generally not used to cancel the visas of minors who have a criminal record, nor does it allow the cancellation of the visas of dependent family members. Secondly, the Bill does not propose any changes to the discretionary revocation process or my (Ministerial) decision making process. In both circumstances the best interests of any child(ren) affected by the decision is a primary consideration, which is weighed against factors such as the risk the person presents to the Australian community.

As stated in the Statement of Compatibility to the Bill, delegates making a decision on character grounds are bound by a relevant Ministerial Direction which requires a balancing exercise of these countervailing considerations and while rights relating to family and children generally weigh heavily against cancellation, there will be circumstances where this will be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record. The safety of the Australian community, particularly in the current security environment is considered to be both a pressing and substantial concern and a legitimate objective to this proposal.

1.224 The committee's assessment of the proposed expansion of visa cancellation powers against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights, and article 5 of the Convention on the Rights of Persons with Disabilities (right to equality and non-discrimination)

raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.225 As set out above, the expansion of visa cancellation powers may limit the right to equality and non-discrimination on the basis of disability. As set out above, the statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 2 of the bill with the obligation to consider 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.**

Whilst noting the concerns of the Committee in relation to individuals in prison with mental health disorders, I respectfully disagree that this Bill proposes any changes that limit the right to equality and non-discrimination on the basis of disability. These amendments ensure that the powers under section 501CA and section 501BA are consistent in their application with other section 501 cancellation powers.

In the Statement of Compatibility to the Explanatory Memorandum for the *Migration Amendment (Character and General Visa Cancellation) Act* 2014, which relevantly amended section 501 of the Migration Act to capture persons found not fit to plead on mental health grounds, former Minister Morrison explained that the amendments in that Bill were not intended to distinguish people with a mental illness for the purpose of limiting, restricting or not recognising their equal rights with other members of the community, or for the purpose of treating them differently. Former Minister Morrison also stated that the amendment was a reasonable and proportionate response as it enlivened visa cancellation or refusal consideration only, with the full circumstances of the case being assessed during the consideration process, which takes into account the person's rights under Article 26 of the ICCPR. It was stated that the amendment did not enliven Article 26 of the ICCPR as the right can be limited if it is for maintaining public order and safety of the Australian community.

Likewise, the proposed amendments at section 501(7)(f) are aimed at providing a mechanism for my department to mitigate any risk of a person who has been found by a court to not be fit to plead but also found on the evidence to have committed the offence, being released from care or prison into the Australian community without first being considered under the character provisions. The seriousness of the offence and any indicative sentence of imprisonment where available are taken into account when deciding whether to cancel or refuse the visa under this ground. I maintain the position that the amendments do not enliven Article 26 of the ICCPR as this right can be limited if it is for maintaining public order and safety of the Australian community, which is the case here.

1.236 The committee's assessment of the proposed bar on further applications by children and persons with a mental impairment against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises

questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.237 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.

A person in Australia who is not able to apply for a protection visa will not be removed in breach of Australia's non-refoulement obligations. This is the case regardless of whether a person is a child or has a mental impairment. All individuals' circumstances are assessed on a case-by-case basis, and any new claims for protection that were not previously assessed will be appropriately considered, and consideration given to circumstances including the person's age and mental health. My department has administrative processes in place, such as an International Treaties Obligation Assessment and my ability to exercise my powers under the Migration Act and grant a person a visa, which are designed to further assess protection claims and, moreover, safeguard Australia's non-refoulement obligations.

The changes do not affect the assessment of legitimate claims that would give rise to non-refoulement obligations. All claims made prior to removal will have been assessed and non-refoulement obligations complied with before departure. For cases affected by this change that raise new claims upon return to Australia, those claims will be considered through existing mechanisms within the (new) removal planning framework whereby application bars can be lifted where appropriate and assessment of obligations undertaken in line with existing provisions.

1.242 The committee's assessment of the proposed bar on further applications by children and persons with a disability against article 3(1) of the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.243 As set out above, extending the bar on further applications by children limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not justify that limitation. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the obligation to consider the best interests of the child 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 best interests of the child are a primary consideration in administrative decisions made under the Migration Act, and an assessment in relation to a child's best interests of either the child's removal or a person's removal which would particularly affect a child will have been undertaken during the administrative processes which took place prior to attempting removal of the child or the other person. For example, the best interests of the child are a primary consideration in a delegate's visa cancellation decision, in a visa refusal decision, and if a visa has ceased naturally, a child's best interests will also be considered prior to the initiation of the removal operation.

Consequently, in barring persons from making a further application, it is recognised that these persons will have already had an opportunity to make a visa application which has already been considered and, where appropriate, taken into account a child's best interests in accordance with the CRC.

1.248 The committee's assessment of the proposed bar on further applications by children against article 12 of the Convention on the Rights of the Child (right of the child to be heard in judicial and administrative proceedings) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.249 As set out above, extending the bar on further applications by children and persons with a disability, limits the right of the child to be heard in judicial and administrative proceedings. As set out above, the statement of compatibility does not justify that limitation. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the right of the child to be heard in judicial and administrative proceedings 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.**

I agree that the proposed amendment engages article 12 of the CRC, and that an assessment of a child's best interests includes respect for the child's right to express his or her views freely, and for due weight to be given to those views, depending on the child's age and maturity. However, I also note - as stated above - that an assessment in relation to a child's best interests of either the child's removal or a person's removal which would particularly affect a child will have been undertaken during the administrative processes which took place prior to attempting removal of the child or the other person. For example, the best interests of the child are a primary consideration in a delegate's visa cancellation decision, in a visa refusal decision, and if a visa has ceased naturally, a child's best interests will also be considered prior to the initiation of the removal operation.

Consequently, in barring persons from making a further application, it is recognised that these persons will have already had an opportunity to make a visa application which has already been considered and, where appropriate, taken into account a child's best interests.

The changes do not affect the assessment of legitimate claims that would give rise to convention obligations. All claims made prior to removal will have been assessed and obligations satisfied before departure.

For cases affected by this change that raise new claims upon return to Australia those claims will be considered through existing mechanisms within the (new) removal planning framework whereby application bars can be lifted where appropriate and assessment of obligations undertaken in line with existing provisions.

1.254 The committee's assessment of the proposed bar on further applications by persons with a mental impairment against article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) (right of persons with disabilities to be recognised as persons before the law and to the

equal enjoyment of legal capacity) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.255 As set out above, extending the bar on further applications by persons with a mental impairment limits the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity. As set out above, the statement of compatibility does not justify that limitation. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity 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 with the discussion above concerning the best interests of the child, the proposed amendments apply to persons who have already made a visa application which has been finally determined. An assessment of the person's claims will have taken their particular disability and personal circumstances into account.

The proposed changes are aimed at ensuring the legitimate objective of ensuring the removal of person (including persons with disabilities, where appropriate) who have no legal right to remain in Australia as required by the Migration Act.

The limitation provides the opportunity for new removal arrangements to be made (likely through a different transit point) without the delay of the non-application of the limitation, by preventing them from making a further visa applications unless circumstances have changed since departure on the aborted removal.

It is reasonable that any bars imposed before they left that prevent them from making a further visa application would continue to apply when they are returned to Australia following travel that is aborted during transit. This applies equally to all persons including those with disabilities.

Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015

1.349 The committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.350 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how, in light of the committee's concerns raised above, the changes are compatible with Australia's absolute non-refoulement obligations.

The amendments to regulation 2.08F will not result in the return or removal of a person found to engage Australia's protection obligations in contravention of its non-refoulement obligations under the CAT and ICCPR. The grant of a permanent visa is not the only way of compliance with Australia's non-refoulement obligations. Temporary protection visa (TPV) holders who continue to claim Australia's protection are able to seek a further TPV or Safe Haven Enterprise Visa (SHEV) when their initial visa will expire. The Government does not regard its protection obligations as automatically ceasing when a visa expires. Where protection continues to be sought, cessation of the visa triggers a new assessment of these obligations in the context of current individual and country circumstances. Applicants who continue to engage Australia's protection obligations and satisfy other visa criteria will be granted a further TPV or a SHEV. An applicant who engages Australia's non-refoulement obligations will not be returned or removed in contravention of these obligations.

1.358 The Committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against article 12(1) of the International Covenant on Economic, Social and Cultural Rights raises questions as to whether the changes are compatible with the right to health.

1.359 As set out above, converting permanent protection visa applications into temporary protection visa applications into temporary protection visa applications, limits the right to health. The statement of compatibility does not justify that limitation for the purposes of international human rights law. 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 legislation converting permanent protection visa applications to temporary protection visa applications is aimed at achieving the legitimate objectives of dissuading people from taking potentially life threatening journeys to Australia, as well as the need to maintain the integrity of Australia's migration system and protect the national interest. Permanent protection visas may be marketed by people smugglers as motivators for unauthorised maritime entry to Australia.

I note the committee's concerns regarding possible mental health problems for TPV and SHEV holders, but consider that there is a rational connection between any limitations this policy may place on the right to health and achieving these objectives, and that these are reasonable and proportionate measures. As outlined in the Statement of Compatibility with human rights as set out in the Explanatory Statement to the Regulation, all TPV and SHEV holders have access to Medicare and mainstream medical services. In addition, they are able to access:

- The Government's Programme of Assistance for Survivors of Torture and Trauma (PASTT). PASTT provides direct counselling and related support services, including advocacy and referrals to mainstream health and related services;
    - PASTT has established rural, regional and remote outreach services to enable survivors of torture and trauma to access services outside metropolitan areas;

- The Government's Better Access initiative to receive rebates through Medicare should they wish to access selected mental health services provided by general practitioners, psychiatrists, psychologists and eligible social workers and occupational therapists; and
- The Mental Health Service in Rural and Remote areas (MHSRRA), which provides rural and remote areas with more allied and nursing mental health services. The MHSRAA enables survivors of torture and trauma to access these services in areas with lower levels of mental health services.

Given that TPV and SHEV holders have access to Medicare and mainstream health services, as well as the additional services identified above, any limitation on a temporary visa holder's right to health is mitigated by the availability of these services, and is reasonable and proportionate to the objective of deterring people form making dangerous boat journeys to Australia.

1.369 The committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights (right to protection of the family) and the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the measures are justifiable under international human rights law.

1.370 As set out above, converting permanent protection visa applications into temporary protection visa applications, limits the right to protection of the family and the obligation to consider the best interests of the child. The statement of compatibility does not justify that limitation for the purposes of international human rights law. 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 Government is committed to acting in accordance with Article 3 of the CRC. In developing this regulation, the best interests of the child have been treated as a primary consideration. However, other considerations may also be primary considerations, including:

- seeking to prevent anyone, including children, from taking potentially life threatening journeys to Australia;
- maintaining the integrity of Australia's borders and national security;
- maintaining the integrity of Australia's migration system;
- protection of the national interest; and
- encouraging regular migration.

Part of the Government's intention in re-introducing TPVs was to deter children from taking potentially life threatening journeys to achieve resettlement in Australia.

This goal, as well as the need to maintain the integrity of Australia's migration system and protect the national interests, were also primary considerations. I consider that these primary considerations outweigh the best interests of the child in seeking family re-unification.

There is no right to family reunification under international law. The protection of the family unit under articles 17 and 23 of the ICCPR does not amount to a right to enter Australia where there is no other right to do so. Likewise, Article 10 of the CRC does not amount to a right to family reunification. These rights can be subject to proportionate and reasonable limitations which are aimed at legitimate objectives. The objectives for re-introducing TPVs are set out above.

I consider that these objectives are legitimate and that the re-introduction of TPVs, in conjunction with other aspects of border protection policy, is a proportionate measure for achieving these objectives. I further consider that the measures have been effective in achieving these objectives. This has allowed the Government to provide increased opportunities for people to arrive in Australia via regular means, including obtaining a permanent visa for resettlement under Australia's Refugee and Humanitarian Programme, which allows family groups to migrate together.

1.378 The committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against article 12 of the International Covenant on Civil and Political Rights raises questions as to whether the measures are justifiable under international human rights law.

1.379 As set out above, converting permanent protection visa applications into temporary protection visa applications, limits the right to freedom of movement. The statement of compatibility does not justify that limitation for the purposes of international human rights law. 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.**

With respect, I do not accept that the Committee's assessment that the right to freedom of movement is limited by the amendment. The Committee notes that:

> "The right to freedom of movement includes the right to move freely within a country for those who are lawfully within a country, the right to leave any country and the right to enter a country of which you are a citizen."

TPV and SHEV holders are able to move freely within Australia and to choose their place of residence. They are also able to leave Australia at any time – there are no legal barriers to their departure and they are able to obtain Australian travel documents to facilitate their travel. Anyone who is found to be a refugee for the purpose of the Refugees Convention is able to apply for a Convention Travel Document (also known as a Titre de Voyage). Those who engage Australia's protection obligations on complementary protection grounds are able to seek a Certificate of Identity. These travel documents are available to both permanent and temporary protection visa holders.

Condition 8570 is imposed on temporary protection visas and requires visas holders to seek the Department's permission before travelling overseas if they do not want to risk being found to have breached their visa condition. The condition does not prevent a person from departing Australia.

Permission to travel, other than to the country against which protection was sought, is granted in compassionate and compelling circumstances (which may include visiting close family members). Where this condition is breached, consideration may be given to cancelling the visa. This would affect a person's right to re-enter Australia if they are overseas at the time of visa cancellation. A person in Australia at the time their visa is cancelled would not be removed from Australia where that would be inconsistent with Australia's non-refoulement obligations.

Condition 8570 is intended to protect the integrity of the protection visa program by ensuring that visa holders do not travel to the country in relation to which they were found to engage Australia's protection obligations.

The Hon Warren Truss MP
Deputy Prime Minister
Minister for Infrastructure and Regional Development
Leader of The Nationals
Member for Wide Bay

22 OCT 2015

PDR ID: MC15-004562

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

Dear ~~Chair~~ Philip,

Thank you for your letter dated 8 September 2015 regarding the *Shipping Legislation Amendment Bill 2015* (the Bill).

The Bill is seeking to strike a sensible balance between reduced barriers to access of foreign vessels and the long-term availability of personnel with maritime backgrounds and skills to fill critical jobs in the industry.

The Parliamentary Joint Committee on Human Rights' assessment, as outlined in paragraphs 1.82 and 1.83 of the Human rights scrutiny report dated 8 September 2015, is noted. Whilst Australia has sovereignty over its ports, as stated in the Statement of Compatibility with Human Rights the Australian Government is of the view that it does not have obligations under Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to set wages and conditions on foreign flagged vessels. In that regard the Government respectfully disagrees with the Committee's comments contained in paragraph 1.79 of its report.

In any case, the Government considers the amendments are reasonable, necessary and proportionate to achieving the legitimate objective of ensuring efficient and reliable coastal shipping services as part of the national transport system. The Government considers that a foreign flagged vessel and its seafarers should be covered by Australian workplace relations laws if the vessel is engaged predominantly in domestic trade. If not, that vessel can continue its existing international arrangements. This compromise seeks to balance the rights and responsibilities of relevant parties.

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For completeness, the Government draws to the attention of the Committee, Marine Order 11 (Living and Working Conditions on Vessels) 2015 (Marine Order 11) made under the *Navigation Act 2012* (Navigation Act). Marine Order 11 would continue to apply to foreign flagged vessels engaged in coastal trading in addition to the terms and conditions agreed to in an individual seafarer's contract of employment.

The Navigation Act and Marine Order 11 implement relevant terms of the International Labour Organization Maritime Labour Convention 2006 (MLC). The MLC establishes minimum working and living conditions standards for seafarers, including in relation to the minimum age of seafarers, the content of employment agreements, hours of work and rest, sleeping arrangements, paid annual leave, medical care, accommodation, ship provisions, health and safety protections and seafarers' complaint handling.

The attachment provides historical context for the amendments. I trust this response has addressed the Committee's concerns on these issues.

Yours sincerely

WARREN TRUSS

Enc

Historical context

Foreign flagged vessels operating domestically under permits issued under the now replaced *Navigation Act 1912* were generally not covered by Australian labour laws. The issue of coverage of foreign flagged vessels operating in the coastal trade became a particular issue following the break-up of the *Australian National Line* in 1999. A case regarding the coverage of the *Maritime Industry Seagoing Award 1999* between the Maritime Union of Australia and CSL Pacific in the early 2000s was heard by the Australian Industrial Relations Commission (AIRC) and the High Court.

In 2003, the High Court found that there was a proper connection between the *Workplace Relations Act 1996* and the regulation of the terms and conditions of employment of foreign resident crews employed by foreign vessel owners. However, the High Court noted that the AIRC could refrain from binding CSL Pacific to the award on the grounds that it was undesirable in the public interest.

In 2006, non-Australian workers on foreign flagged vessels were explicitly excluded from Australian labour laws. In 2010, the *Fair Work Regulations 2009* extended Australian labour law coverage in the maritime industry to licencing and permit arrangements under the *Navigation Act 1912*. These changes effectively remained in place following the commencement of the *Coastal Trading (Revitalising Australian Shipping) Act 2012*.

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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

Thank you for your letter of 24 November 2015 regarding the Parliamentary Joint Committee on Human Rights (the Committee) which sought my advice in relation to various matters arising from the *Charter of the United Nations (Sanctions-Syria) Regulation 2015*, the *Charter of the United Nations (Sanctions-Iraq) Amendment Regulation 2015*, and the *Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015*.

Charter of the United Nations (Sanctions-Syria) Regulation 2015

The Committee sought my views on offences dealing with illegally removed cultural property from Syria, and whether they were sufficiently prescribed and justifiable to engage and limit the prohibition on arbitrary detention (article 9 of the International Covenant on Civil and Political Rights). The Committee noted that the offence related to the failure to comply with the direction in relation to illegally removed cultural property in Syria (under Regulation 5 of the Syria Regulation) is also designated as a UN Sanction Enforcement Law.
The Department of Foreign Affairs and Trade acknowledges that this was a drafting error and will therefore make a revised UN Sanction Enforcement Law Declaration, which will remove Regulation 5 of the Syria Regulation as a UN Sanction Enforcement Law. Accordingly, the penalty for this Regulation will be the same as for the Iraq Regulation.

Charter of the United Nations (Sanctions-Syria) Regulation 2015
Charter of the United Nations (Sanctions-Iraq) Amendment Regulation 2015

The Committee also sought my views on the justification for the imposition of a strict liability offence in Regulation 5 of the Syria Regulation and Regulation 9 of the Iraq Regulation, for the failure to comply with a direction in relation to illegally removed cultural property of Syria and Iraq.

A strict liability offence is appropriate for the Regulations due to the fact that a person who has been correctly issued with a direction to return the illegally removed cultural property is effectively put 'on notice' by the issuing of that direction to return the item. As a result, they have received sufficient notice of their obligations under the Regulations and have had the opportunity to avoid an unintentional contravention. It would therefore be unnecessary to impose a requirement to prove the individual's intention not to comply with the notice.

Strict liability is also appropriate as the offences are not punishable by imprisonment: the offences are only punishable by a fine of less than 60 penalty units. The requirement to prove fault under the Regulations would reduce the effectiveness of the enforcement regime in deterring the trade of illegally removed Syrian and Iraqi cultural property. I also note that honest and reasonable mistake of fact is available as a defence to strict liability offences under Section 9.2 of the Criminal Code.

The Committee also noted that the Regulations fail to outline the procedure for the storage and return of cultural items of Iraq and Syria. This process is outside the purview of the Regulations which is solely to implement UN Security Council Resolution 2199, and would be decided through administrative processes between relevant government agencies.

I trust this information is of assistance.

Yours sincerely

Julie Bishop

21 DEC 2015

TREASURER

Chair
Parliamentary Joint Committee on Human Rights
S1.111
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Dear Mr Ruddock

On 11 November 2015, Mr Laurie Ferguson MP wrote to me in his role as Deputy Chair of the Parliamentary Joint Committee on Human Rights, seeking additional information regarding the human rights compatibility of two instruments made by my predecessor.

This followed the advice that I provided to the Committee in my letter of 14 October 2015 that the determination and payment of National Specific Purpose Payments (NSPPs) to the States and Territories for 2013-14 (F2015L00877 and F2015L00878) assisted in the realisation of a number of human rights, and that neither the determination nor payment of the NSPPs had a detrimental impact on any human rights.

In its Thirtieth Report of the 44th Parliament, the Committee requested further information about how funding for the determinations has changed over time; specifically, whether there has been any reduction in funding.

Funding for the NSPPs, including the growth from year to year, is in line with Schedule D of the Intergovernmental Agreement on Federal Financial Relations. The funding amounts for the Schools, Skills and Workforce Development, Affordable Housing, and Disability NSPPs between 2011-12 and 2013-14 are attached.

The Skills and Workforce Development, Affordable Housing, and Disability Services NSPPs have not experienced a reduction in funding over this period. In fact, the funding amounts for each have increased.

The determination of the National Schools NSPP for 2013-14 provided funding for government schools of $2,080.3 million. This is a reduction relative to previous years. The reduction is because Students First funding replaced the National Schools NSPP (and various National Partnership payments) on 1 January 2014. Thus the NSPP funding was only for half of the 2013-14 financial year.

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Once Students First funding for government schools is taken into account, the total funding provided to government schools in 2013-14 was $4,475.4 million. This constitutes a year-on-year increase in funding over this period.

On this basis, I confirm my previous assessment that the determination and payment of NSPPs assists in the realisation of a number of human rights, and neither the determination nor payment of these particular NSPPs has a detrimental impact on any human rights.

Yours sincerely

The Hon Scott Morrison MP

20 / 1 / 2016

Table 1: Funding for the Schools, Skills and Workforce Development, Affordable Housing and Disability NSPPs, 2011-12 to 2013-14

Year	Legislative Instrument	Amount ($m)
Schools NSPP (government schools)		
2011-12	F2012L02205	3,755.8
2012-13	F2014L00323	3,945.0
2013-14*	F2015L00877	2,080.3**
Skills and Workforce Development NSPP		
2011-12	F2012L02205	1,363.1
2012-13	F2014L00323	1,387.5
2013-14	F2015L00877	1,409.0
Affordable Housing NSPP		
2011-12	F2012L02205	1,242.6
2012-13	F2014L00323	1,263.7
2013-14	F2015L00877	1,282.7
Disability NSPP		
2011-12	F2012L02205	1,205.0
2012-13	F2014L00323	1,276.1
2013-14	F2015L00878	1,301.9

*The Schools NSPP ceased on 31 December 2013, and was replaced by Students First funding.
**Once Students First funding is taken into account, total government schools funding in 2013-14 equals $4,475.4 million.