Appendix 3

Correspondence

ATTORNEY-GENERAL

CANBERRA

27 NOV 2016

MC16-141053
MC16-141054
MC 16-142484

Mr Ian Goodenough MP
Chair, Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for the letters of 12 October 2016 from the Secretary of the Parliamentary Joint Committee on Human Rights (the Committee), Ms Toni Dawes, regarding the Committee's assessment of the *Counter-Terrorism Legislation Amendment Bill (No.1) 2016* and the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016.*

In relation to the *Counter-Terrorism Legislation Amendment Bill (No.1) 2016*, I note that the Committee does not require a response, and I thank the Committee for its detailed consideration of the Bill.

In relation to the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, I thank the Committee for its consideration of the compatibility of the Bill with Australia's human rights obligations and its request for additional information (first request).

I also thank you for your letter of 9 November 2016 advising that the Committee has made a second request for information in relation to the human rights compatibility of the legislation, as set out in the Committee's Report 8 of 2016.

My response below addresses both requests.

I note that the Bill was referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) for inquiry. The PJCIS tabled its report on 4 November 2016. The Government has accepted all 24 of the PJCIS recommendations.

I intend to move Government amendments to the Bill in the Senate in the week commencing 28 November 2016. These amendments amend the *Criminal Code* to implement the PJCIS recommendations. The Bill has also been amended to enhance safeguards and improve the efficacy of the continuing detention scheme. The amendments provide that:

- an application for a continuing detention order may be commenced up to 12 months (rather than 6 months) prior to the expiry of a terrorist offender's sentence

- the scope of the offences to which the scheme applies be limited by removing offences against Subdivision B of Division 80 (treason) and offences against subsections 119.7(2) and (3) of the *Criminal Code* (publishing recruitment advertisements)

- the Attorney-General must apply to the Supreme Court for a review of a continuing detention order (at the end of the period of 12 months after the order began to be in force, or 12 months after the most recent review ended) and that failure to do so will mean that the continuing detention order will cease to be in force

- the Attorney-General must undertake reasonable inquiries to ascertain any facts known to a Commonwealth law enforcement or intelligence or security officer that would reasonably be regarded as supporting a finding that a continuing detention order should not be made (or is no longer required)

- the application for a continuing detention order, or review of a continuing detention order, must include a copy of any material in the possession of the Attorney-General or any statements of facts that the Attorney-General is aware of that would reasonably be regarded as supporting a finding that an order should not be made

- on receiving an application for an interim detention order the Court must hold a hearing where the Court must be satisfied that there are reasonable grounds for considering that a continuing detention order will be made in relation to the terrorist offender

- each party to the proceeding may bring forward their own preferred relevant expert, or experts, and the Court will then determine the admissibility of each expert's evidence

- any responses to questions or information given by the terrorist offender to an expert during an assessment will not be admissible in evidence against the offender in criminal and other civil proceedings

- the criminal history of the offender that the Court must have regard to in making a continuing detention order is confined to convictions for those offences referred to in paragraph 105A.3(1)(a) of the Bill

- if the offender, due to circumstances beyond their control, is unable to obtain legal representation, the Court may stay the proceeding and/or require the Commonwealth to bear all or part of the reasonable cost of the offender's legal representation in the proceeding

- when sentencing an offender convicted under any of the provisions of the *Criminal Code* to which the continuing detention scheme applies, the sentencing court must warn the offender that an application for continuing detention could be considered

- the continuing detention scheme be subject to a sunset period of 10 years after the day the Bill receives Royal Assent, and

- a control order can be applied for and obtained while an individual is in prison, but the controls imposed by that order would not apply until the person is released.

To enhance oversight of the continuing detention scheme, the amendments also provide that:

- the *Independent National Security Legislation Monitor Act 2010* be amended to require the Independent National Security Legislation Monitor (INSLM) to complete a review of the continuing detention scheme five years after the day the Bill receives Royal Assent, and

- the *Intelligence Services Act 2001* be amended to require that the Committee review the continuing detention scheme six years after the day the Bill receives Royal Assent

Once again, I thank the Committee for its consideration of the Bill and trust this advice is of assistance.

Yours faithfully

(George Brandis)

Encl. Response to the Parliamentary Joint Committee on Human Rights' *Human Rights Scrutiny Report - Reports 7 and 8 of 2016,* concerning the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016.

Response to the Parliamentary Joint Committee on Human Rights' *Human Rights Scrutiny Reports - Reports 7 and 8 of 2016* concerning the *Criminal Code Amendment (High Risk Terrorist Offender) Bill 2016*

The Committee has requested advice as to the extent to which the proposed scheme addresses the specific concerns raised by the United Nations Human Rights Committee (UNHRC) in its determination concerning arbitrary detention in violation of Article 9 of the International Covenant on Civil and Political Rights (ICCPR) in respect of existing post-sentencing preventative detention regimes.

The right to be free from arbitrary detention

The scheme includes numerous features designed to ensure that detention is only authorised where it is non-arbitrary. I refer the Committee to paragraph 37 of the Explanatory Memorandum to the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* that provides the list of comprehensive safeguards included in the scheme.

Secondly, section 105A.4 of the Bill provides for the treatment of a terrorist offender in a prison under a continuing detention order, including a requirement at subsection 105A.4(2) to house the offender separately from persons who are in prison for the purposes of serving a sentence of imprisonment, except in certain circumstances such as where the offender's treatment or accommodation arrangements could compromise the management, security and good order of the prison, for rehabilitation purposes or for the safety and protection of the community. This recognises the terrorist offender's status as person not serving a sentence of imprisonment.

I also note that the Court is not restricted to what matters it may take into account when considering an application under the scheme. Given the nature of the order, the Court is likely to consider the offender's proposed treatment and accommodation arrangements when making its decision.

Thirdly, paragraph 105A.7(1)(c) provides that the Court may only make a continuing detention order if satisfied that there is 'no other less restrictive measure that would be effective in preventing the unacceptable risk'. I provide further information about this safeguard below in response to the Committee's specific questions about this measure.

Prohibition on the retrospective operation of criminal laws

The continued detention of a terrorist offender under the proposed scheme does not constitute additional punishment for their prior offending. The purpose of the proposed scheme is community protection.

When determining whether to make a continuing detention order the Court must be satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community. This is the risk the person presents to the community at the end of their custodial sentence. Preventative detention imposed on this basis does not constitute a violation of the prohibition on the retrospective operation of criminal laws.

In addition, the continued detention is protective rather than punitive or retributive. The protective purpose of the scheme is reflected in numerous features including the grounds on which a continuing detention order may be made or affirmed; the matters to which the Court must have regard when making or reviewing a continuing detention order; the requirement to

consider less restrictive measures; and the requirement that the period of detention authorised by a continuing detention order be limited to a period that is reasonably necessary to prevent the unacceptable risk.

The fact that the effect of a continuing detention order or interim detention order is to commit the terrorist offender to detention in a prison does not render the detention punitive.

The right to procedural guarantees

The continued detention of terrorist offenders does not constitute a prohibited form of retrospective or double punishment. As mentioned above, the intention of the proposed scheme is not to punish but rather detain an offender for the purpose of protecting the community.

Given the above intention, the civil nature of the proceedings and the lack of a criminal charge in each case, the minimum guarantees outlined in article 14 of the ICCPR do not apply. Despite this, there are a number of important safeguards contained within the Bill to ensure fair treatment and consistency in the decision making process. It is important to highlight that the Court must be satisfied, subject to civil rules of evidence and procedure, that there is no other less restrictive measure that would be effective in preventing the unacceptable risk before making a continuing detention order.

Detention on the basis of future dangerousness

Any detention under the scheme must be adequately justified. The Bill provides that for a terrorist offender to be subject to a continuing detention order, the Court must be satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious terrorism offence if the offender was released into the community. Various forms of evidence may be admitted to assist the Court in making this assessment.

To assist the Court in making this decision, the Court may appoint a relevant expert to conduct an assessment of the risk of the offender committing a serious terrorism offence if they were released into the community. An example of an expert who may be appointed by the Court could be a person with expertise in forensic psychology or psychiatry (and in particular, recidivism) coupled with specific expertise on terrorism, radicalisation to violent extremism and countering violent extremism. The Court must have regard to the expert's report when making its decision.

Less restrictive measures

Generally

I refer the Committee to paragraph 125 of the Explanatory Memorandum for the Bill that explains that an example of a less restrictive measure is a control order under sections 104.4 and 104.14 of the *Criminal Code.*

The Court that hears an application for a continuing detention order will not be able to make a control order in the alternative. This is due to the fact that currently control orders are issued by federal courts, while applications for a continuing detention order as proposed by the Bill are made to the Supreme Court of a State or Territory. There are also different applicants under each regime, and there are also different threshold requirements which must be met under the respective regimes.

The Independent National Security Legislation Monitor and PJCIS will conduct reviews into

the control order regime by 7 September 2017 and 7 March 2018 respectively. Given the detailed and complex policy and practical issues that would need to be explored about the interaction between the proposed post-sentence preventative detention scheme and the control order regime, I suggested to the PJCIS during its inquiry into the Bill that it may be better to defer a detailed consideration of how the control order scheme and the proposed scheme under the Bill interact with each other until those reviews occur. The PJCIS agreed.

Rehabilitation as a less restrictive measure

As noted above, a less restrictive measure is a control order under the *Criminal Code*. A control order may impose obligations, prohibitions and restrictions on a person. A condition that the issuing court may impose includes a requirement that the person participate in specified counselling or education (paragraph 104.5(6)(l)), subject to their consent (see subsection 104.5(6)). Therefore it is open to the Court to consider whether this obligation under a control order would be effective in preventing the unacceptable risk.

Further, the Court must have regard to any treatment or rehabilitation programs in which the offender has had an opportunity to participate and the level of the offender's participation in such programs (paragraph 105A.8(e)). The Commonwealth will work with the States and Territories to ensure there are prison based programs to address the specific needs of this cohort to ensure their needs for rehabilitation and reintegration are met.

Attorney-General's consideration of less restrictive measures

Before the Attorney-General initiated an application for a continuing detention order in relation to a terrorist offender he or she would need to carefully consider all of the information before them. Consideration would also include whether there is a reasonable prospect of success, which would require the Attorney-General to consider whether the risk to the community could be appropriately managed through less restrictive measures such as a control order.

Civil standard of proof

The 'high degree of probability' standard is a statutory standard which indicates something beyond the traditional civil standard of proof of more probable than not. The existence of the risk of the offender committing a further serious offence must be proved to a higher degree than the normal civil standard of proof, though not to the criminal standard of beyond reasonable doubt. This standard is modelled on the standard used by most States and Territories that have post-sentence preventative detention schemes.

Risk Management Monitor

My Department has convened an Implementation Working Group with legal, corrections and law enforcement representatives from each jurisdiction to progress all outstanding issues relating to implementation of the proposed post sentence preventative detention scheme.

The implementation Working Group has developed an implementation plan in response to PJCIS Recommendation 22. The plan sets the process and timeframes for the development of the risk assessment tool and ongoing validation. It notes that work will be undertaken in consultation with correctional services, law enforcement and intelligence agencies, and international partners, and ongoing validation will need to be undertaken. The Working Group may consider whether a Risk Management Monitor or similar will undertake the functions set out at paragraph 1.77 of the Committee's Report 7 of 2016.

Availability of rehabilitation programs

Access to rehabilitation programs is an important part of the scheme. When making a continuing detention order, paragraph 105A.8(e) requires the Court to have regard to any treatment or rehabilitation programs in which the offender has had an opportunity to participate and the level of the offender's participation in any such programs.

At present, Corrections Victoria and Corrections New South Wales provide inmates with access to prison based programs which aim to disengage individuals from advocating or using violence to further their goals or beliefs. Jurisdictions other than Victoria and New South Wales have a range of general rehabilitation programs, which are not specifically tailored to violent extremist offenders.

The Commonwealth will continue to consider the availability of such programs with states and territories through the Implementation Working Group.

The Hon Christian Porter MP
Minister for Social Services

18 NOV 2016

MC16-010043

Chair
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Dear Chair

Thank you for your email of 9 November 2016 regarding Fairer Paid Parental Leave Bill 2016 and the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016. I appreciate the time you have taken to bring these matters to my attention.

The Parliamentary Joint Committee on Human Rights, in its 'Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011' report, has sought advice on whether certain components included in the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016 and the Fairer Paid Parental Leave Bill 2016 are compatible with human rights, as defined in the Act.

With regard to the Fairer Paid Parental Leave Bill 2016, the Committee has expressed concerns about the proposed period of time before the measures commence. I am aware of the concern of families in relation to this measure. The Australian Government first announced these changes in December 2015 as part of the 2015-16 Mid-Year Economic and Fiscal Outlook (MYEFO). The original commencement date for these measures was 1 July 2016, which has been delayed by six months.

The current Bill before Parliament contains changes that reflect concerns expressed about the 2015-16 Budget measure. The Government wants to better target the taxpayer-funded scheme to those who do not receive employer-provided paid parental leave, or whose employer-provided paid leave is for less than 18 weeks. The taxpayer-funded Paid Parental Leave for women without access to any employer paid parental leave remains unchanged; they receive 18 weeks at the National Minimum Wage, roughly $12,000.

All eligible parents will be guaranteed a safety net of financial support equivalent to 18 weeks of Parental Leave Pay at the rate of the National Minimum Wage. Those eligible parents with access to an employer scheme of less than 18 weeks paid leave will receive a mix of employer and taxpayer-funded paid parental leave, up to 18 weeks in total. Only those with a generous employer entitlement of 18 weeks or more will lose access to the taxpayer funded scheme (estimated to be less than 4 per cent of mothers).

With regard to the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016, the Committee has questioned the compatibility of some of the proposed changes with the right to equality and non-discrimination. The enclosed document provides responses to the Committee's request for advice on compatibility of the Bill identified with those rights, and other matters.

I trust this information is of assistance.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS16-004405

Mr Ian Goodenough MP
Chair
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Dear Mr Goodenough

Thank you for your correspondence of 23 November 2016 in which information was requested on the following bills:

- *Migration Amendment (Visa Revalidation and Other Measures) Bill 2016; and*
- *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016.*

My response to your request is attached.

Thank you for raising this matter.

Yours sincerely

PETER DUTTON 19/01/17

Attachment

Migration Amendment (Visa Revalidation and Other Measures) Bill 2016

1.48 Why is there no limit on the face of the bill as to the type of visas that may be prescribed as being subject to the possibility of a revalidation check?

The classes of visas that may become subject to a revalidation check would be prescribed through a disallowable instrument. There would be Parliamentary scrutiny over which visas, or the types of visas, that were prescribed for the revalidation check framework through the disallowance process. If the Parliament considered it was inappropriate for a visa which has been prescribed to be subject to the revalidation check process, a motion could be moved to disallow that instrument.

Currently, only the new Frequent Traveller stream of the Subclass 600 (Visitor) visa (Frequent Traveller visa) will be prescribed for the purposes of requiring a revalidation check. This is to support the trial of a new longer validity visitor visa that will initially only be available to Chinese nationals.

The power to prescribe which visa can be subject to the revalidation check process introduced in the *Migration Amendment (Visa Revalidation and Other Measures) Bill 2016* (the Bill) has not been limited for several reasons.

Flexibility has been provided to enable other longer validity visa products to be implemented in the future. The revalidation framework may be an appropriate mechanism to manage identified risks in these products. Limiting the types of visas that can be prescribed would restrict the ability to use the revalidation framework to reduce red tape and manage risks associated with newly developed or reformed visa products.

As noted above, there would be Parliamentary scrutiny over which visas, or the types of visas, that were prescribed for the revalidation check framework through the disallowance process. The Bill therefore provides an appropriate and reasonable balance between reducing red tape for travellers and parliamentary scrutiny.

Whether, in light of the broad power to prescribe any kind of visa, is the measure compatible with Australia's non-refoulement obligations, the right to an effective remedy, the right to liberty and the right to protection of the family.

The revalidation framework is compatible with Australia's non-refoulement obligations, the right to an effective remedy, the right to liberty and the right to protection of the family.

The revalidation framework does not engage Australia’s non-refoulement obligations and has no impact on the Department of Immigration and Border Protection’s (the Department’s) existing protection, cancellation, detention or removal frameworks.

Prescribing a new visa for the revalidation check framework would include the requirement to separately address compatibility with Australia’s human rights obligations, because the classes of visas that may become subject to a revalidation check would be prescribed through a disallowable instrument. As such, this would also be subject to Parliamentary scrutiny through the disallowance process.

Australia's non-refoulement obligations

The revalidation framework does not engage Australia’s non-refoulement obligations for the following reasons:

- Where an onshore visa holder does not pass a revalidation check for the visa, this will be referred to a visa cancellation delegate who will consider whether a visa cancellation ground exists under the existing cancellation framework.

- An onshore visa holder will not become an unlawful non-citizen as a direct consequence of not passing a revalidation check, or failing to comply with a revalidation requirement. New subsections 96D(2) and 96H(2) of the Bill provide that where an onshore visa holder does not complete or pass a revalidation check, their visa will only cease to be in effect upon departure from Australia.
- An onshore visa holder will not be detained or removed from Australia as a direct consequence of not passing a revalidation check or failing to comply with a revalidation requirement.
- The revalidation check framework does not prevent a visa holder from applying for a protection visa if they wish to make protection claims while they are still in Australia – therefore the framework does not breach Australia's non-refoulement obligations by requiring a revalidation check, noting that the onus is on the individual to declare that they have protection claims.

The right to an effective remedy

A person will not become an unlawful non-citizen as a direct consequence of not passing a revalidation check, or failing to comply with a revalidation requirement. In this case, the visa would only cease to be in effect upon departure from Australia.

A decision that a person does not pass a revalidation check for the visa is a decision that can be reconsidered by the Minister for Immigration and Border Protection (the Minister) or delegate. An individual who does not pass a revalidation check may subsequently pass the check during the visa period, for example, after responding to a request for further information.

Where a person does not pass a revalidation check for the visa, this will be referred to a visa cancellation delegate who will consider whether a visa cancellation ground exists. If the delegate decides not to cancel the visa, this will result in the person passing the revalidation check for the visa. If the delegate decides to cancel the visa, this decision may be subject to merits review under the existing visa cancellation and review framework.

The right to liberty

As noted above, an onshore visa holder will not be detained or removed from Australia as a direct consequence of not passing a revalidation check or failing to comply with a revalidation requirement. This is because they will not become an unlawful non-citizen as a result of not passing a revalidation check, or failing to comply with a revalidation requirement.

The right to protection of the family

Currently, only the new Frequent Traveller visa will be prescribed for the purposes of requiring a revalidation check. The Frequent Traveller visa is a temporary visitor visa providing for a 3-month stay period and a cumulative stay period of no more than 12 months and in any 24-month period. It is designed to facilitate short visits to Australia for tourism or business visitor purposes.

As noted above, prescribing a new visa (including spousal or permanent resident visas) for the revalidation check framework would include the requirement to separately address compatibility with Australia's human rights obligations, because the classes of visas that may become subject to a revalidation check would be prescribed through a disallowable instrument. As such, this would also be subject to Parliamentary scrutiny through the disallowance process.

1.57 The committee […] seeks the advice of the Minister for Immigration and Border Protection as to whether safeguards could be included in the legislation, such as:

- **the minister's power to require a revalidation check be limited to long-term visitor visas;**

As noted above, the power to prescribe which visa can be subject to the revalidation check process has not been limited for several reasons. Flexibility has been provided to cater for visa products that may be developed or reformed in the future.

The revalidation framework may be an appropriate mechanism to manage identified risks in new or reformed products. Additionally, new classes of visas that may become subject to a revalidation check would be prescribed through a disallowable instrument

Limiting the types of visas that can be prescribed would restrict the ability to use the revalidation framework to reduce red tape and manage risks associated with those visa products.

- **the basis upon which a revalidation check may be required be made clear in the legislation, rather than being a matter of ministerial discretion;**

Flexibility has been provided in the legislation to reduce regulatory burden, whilst managing risks associated with newly developed or reformed visa products.

It is intended that a routine revalidation requirement under new subsection 96B(1) of the Bill will be issued by an IT program to all Frequent Traveller visa holders at pre-determined intervals, such as every two years, during the visa period of the visa. This approach is designed to replicate the management of risk currently available in assessing multiple shorter validity visas, with less red tape for frequent travellers. Specifying a particular interval for a routine revalidation requirement in the legislation would reduce the Department's ability to accommodate changes in government policy that reflect changing global circumstances and may result in an unintended increase in red tape for visa holders.

A routine revalidation check is intended to reduce red tape for frequent travellers by removing the requirement for the visa holder to complete multiple visa applications over a 10-year period, answering the same questions and providing the same level of supporting documentation, as the original visa application.

A revalidation check will generally assess whether a visa holder continues to meet the criteria for the visa that has been granted. But, this check is not intended to be a complete reassessment of the visa holder's ability to meet the original requirements for grant of the visa. In completing the check, in the absence of any adverse information, or where there is adverse information – and it is reasonable to disregard that information – the visa would be revalidated. There is no disadvantage to the visa holder of this approach.

As noted above, there would be Parliamentary scrutiny over which visas, or the types of visas, that were prescribed for the revalidation check framework through the disallowance process because the classes of visas that may become subject to a revalidation check would be prescribed through a disallowable instrument If the Parliament considered it was inappropriate for a visa which has been prescribed to be subject to the revalidation check process, a motion could be moved to disallow that regulation.

- **a requirement that the minister's power to require a person or classes of persons to complete a revalidation check be based on an objective assessment of an increased risk to the Australian community.**

The Ministerial power in new subsection 96E(1) of the Bill provides a mechanism to manage specific, serious, or time-critical risks in relation to an identified cohort of visa holders, where the Minister determines it is in the public interest to exercise this power.

It is intended that this power be exercised in circumstances necessitating an immediate response, for example, situations where there has been an assessment of increased risk to the Australian community resulting from a significant health or national security incident.

The tabling provisions in new subsections 96E(3), 96E(4) and 96E(5) of the Bill ensure that the Parliament can scrutinise the Minister's decision and provide comment on such a determination through a motion of disapproval or other mechanism. This provides additional scrutiny of the Minister's decision.

1.74 The proposed lifetime visa ban engages the right to equality and non-discrimination.
1.75 This visa ban would appear to have a disproportionate negative effect on individuals from particular national origins or nationalities. This human rights issue was not specifically addressed in the statement of compatibility.
1.76 The committee notes that the preceding legal analysis raises questions as to whether this disproportionate negative effect (which indicates *prima facie* indirect discrimination on the basis of national origins, nationality or race) amounts to unlawful discrimination.
1.77 The committee further notes that the proposed ban distinguishes the grant of visas between people who fall within the 'regional processing country cohort' and individuals who do not and the preceding legal analysis raises questions as to whether this may amount to direct discrimination on the basis of 'other status'.

1.78 Accordingly, in relation to the compatibility of the measure with the right to equality and non-discrimination, the committee requests the further advice of the Minister for Immigration and Border Protection as to whether:

- **there is a rational connection between the limitation and the stated objective (that, is evidence that the measure will be effective); and**
- **the measure is reasonable and proportionate for the achievement of that objective, including how it is based on reasonable and objective criteria; whether there are other less rights restrictive ways to achieve the stated objective; whether the visa ban could be more circumscribed; whether the measure provides sufficient flexibility to treat different cases differently; whether there are any additional safeguards; and whether affected groups are particularly vulnerable.**

The Bill prevents valid visa applications from a cohort of non-citizens who are defined as being unauthorised maritime arrivals (UMA) who were over 18 years old when transferred to a regional processing country after 19 July 2013. The measure is therefore based on reasonable and objective criteria for identifying people in the affected cohort. Personal characteristics such as race, ethnicity, nationality (other than not being an Australian citizen), religion, gender or sexual orientation are not criteria for identifying non-citizens in the affected cohort. Limiting the applicability of the measure has already been taken into account, namely that the measure will not apply to children who were under 18 at the time they were first transferred to a regional processing country, or were born to a member of the affected cohort.

While the continued differential treatment of a group of non-nationals (namely, the designated regional processing cohort) could amount to a distinction on a prohibited ground under international law on the basis of 'other status', the Government is of the view that this continued differential treatment is for a legitimate purpose and based on relevant objective criteria and that it is reasonable and proportionate in the circumstances. This measure is a proportionate response to prevent a cohort of non-citizens who have previously sought to circumvent Australia's managed migration program by entering or attempting to enter Australia as a UMA from applying for a visa to enter Australia.

This legislation sends a strong message to people smugglers and those considering travelling illegally to Australia by boat: Australia's borders are now stronger than ever. It is imperative that the bar apply to all visas, including tourist and business visas. Even a temporary visa can be used as a pathway to permanent residence in Australia.

The proposed amendments provide flexibility for the Minister to personally lift the application bar where the Minister considers it in the public interest to do so.
The measures are aimed at further discouraging persons from attempting hazardous boat journeys with the assistance of people smugglers in the future and encouraging them to pursue regular migration pathways instead. People smugglers are still active in attempting to encourage illegal migration to Australia and use changes in circumstances and the ongoing media discussion as a basis for proposing the current policy is softening or will soften in the future. The measures are intended to counter this to diminish the ability for people smugglers to attract potential clients.

1.88 The proposed lifetime visa ban engages and limits the right to protection of the family and rights of the child. The statement of compatibility has not sufficiently justified these limitations for the purposes of international human rights law.
1.89 The committee notes that the preceding legal analysis raises questions as to whether the measure is rationally connected to and a proportionate means of achieving its stated objective, so as to be compatible with the right to protection of the family and rights of the child.

1.90 Accordingly, in relation to the limitations on the right to protection of the family and rights of the child, the committee requests the further advice of the Minister for Immigration and Border Protection as to whether:

- **there is a rational connection between the limitation and the stated objective (that, is evidence that the measure will be effective); and**
- **the limitation is a reasonable and proportionate measure for the achievement of that objective (including whether there are other less rights restrictive ways to achieve the stated objective; whether the visa ban could be more circumscribed; whether the measure provides sufficient flexibility to treat different cases differently; whether there are any additional safeguards; and whether affected groups are particularly vulnerable).**

The proposed legislative amendments will include flexibility for the Minister to personally lift the bar where the Minister thinks it is in the public interest to do so. This could include allowing a valid application for a visa on a case by case basis and in consideration of the individual circumstances of the case, including the best interests of affected children. Family unity may be one of the issues that the Minister may consider in the context of lifting the bar to allow a person to make a valid visa application under the proposed legislation. Consideration of the individual circumstances of applicants and their relationships with family members allows the Government to ensure that it acts consistently with its obligations to families and children in Australia. Well-established mechanisms already exist to bring vulnerable cases to the Minister's attention for consideration of the exercise of non-compellable personal powers.

The measures are aimed at further discouraging persons from attempting hazardous boat journeys with the assistance of people smugglers in the future and encouraging them to pursue regular migration pathways instead. People smugglers are still active in attempting to encourage illegal migration to Australia and use changes in circumstances and the ongoing media discussion as a basis for proposing the current policy is softening or will soften in the future. The measures are intended to counter this to diminish the ability for people smugglers to attract potential clients.

ATTORNEY-GENERAL

MC16-143309

CANBERRA

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21 DEC 2016

Dear Mr Goodenough Ian

Thank you for the letter of 23 November 2016 in relation to Report 9 of 2016, in which the Parliamentary Joint Committee on Human Rights sought comment on the Privacy Amendment (Re-identification Offence) Bill 2016 andf the Sex Discrimination Amendment (Exemptions) Regulation 2016. My response to the issues raised by the committee is set out below.

Privacy Amendment (Re-identification Offence) Bill 2016

The committee notes that the proposed offence provisions in sections 16D and 16E of the Bill apply retrospectively to conduct occurring on or after 29 September 2016, which engages the prohibition of retrospective criminal laws. The committee requests advice as to whether consideration has been given to amending these provisions so that they operate prospectively.

The Privacy Amendment (Re-identification Offence) Bill 2016 amends the *Privacy Act 1988* to introduce provisions which prohibit conduct related to the re-identification of de-identified personal information published or released by Commonwealth agencies and disclosure of re-identified information. The Bill is intended to strengthen existing privacy protections and act as a deterrent against attempts to re-identify de-identified personal information in government datasets.

Retrospective offences challenge a key element of the rule of law—that laws are capable of being known in advance so that people subject to those laws can exercise choice and order their affairs accordingly. The Government gave careful consideration as to whether the offences in sections 16D and 16E could operate prospectively from the date of Royal Assent. However, in the circumstances the Government considers that these narrowly prescribed offences should have a limited retrospective effect.

The recently identified vulnerability in the Department of Health's Medicare and Pharmaceutical Benefits Scheme dataset brought to the Government's attention the existence of a gap in privacy legislation regarding the re-identification of de-identified data. Once aware of this gap, the Government acted immediately to strengthen protections for personal information against re-identification by introducing these offences. The offences will only take effect in relation to conduct occurring on or after 29 September 2016, which is the day after I announced the proposed amendments to the Privacy Act. This retrospective application

was made very clear in my statement of 28 September 2016. As a result of my statement, entities were clearly given notice that this particular conduct will be made subject to offences from that time.

The release of personal information can have significant consequences for individuals which cannot be easily remedied. In particular, once personal information is made available online it is very difficult—in many cases impossible—to fully retract that information or prevent further access. Applying the offences to conduct occurring from the day after I announced the Government's intention to introduce this Bill provides a strong disincentive to entities who, upon hearing of this intention, may have been tempted to attempt re-identification of any published datasets while the Parliament considers the Bill. The Government has also taken swift action to introduce the Bill in the Parliament at the earliest available opportunity to ensure the retrospective application is for a short time period only.

Sex Discrimination Amendment (Exemptions) Regulation 2016

The committee notes that the exemption from protections against discrimination on the basis of a person's sexual orientation, gender identity and intersex status engages and limits the right to equality and non-discrimination. The committee requests advice on whether extending the exemption for two Western Australian laws for a further 12 month period is effective and proportionate in achieving the stated objective of allowing states and territories adequate time to review their legislation and assess compliance with the new protections, particularly in light of the fact that an exemption has already been in place for a previous three-year period.

Western Australia indicated that a further extension of time was required to facilitate the amendment of the *Human Reproductive Technology Act* (WA) and *Surrogacy Act* (WA). Section 23 of the Human Reproductive Technology Act has the effect of prohibiting male same-sex couples, and potentially transgender persons or persons of intersex status, from accessing IVF procedures—including for the purpose of a surrogacy arrangement. Section 19 of the Surrogacy Act has the effect of prohibiting male same-sex couples, and potentially transgender persons or persons of intersex status, from seeking a parentage order for a child born under a surrogacy arrangement.

The Government does not consider that a state should continue to discriminate against people on the basis of their sexual orientation, gender identity and/or intersex status. However, the Government acknowledges that the regulation of assisted reproductive technology and surrogacy is a sensitive issue that is primarily a matter for states and territories and that the Western Australian government should be granted additional time to properly consult the Western Australian community about options for reform in this area.

The limitation is proportionate, allowing a sufficient yet not overly lengthy time for Western Australia to properly consult on options for reform to its legislation The Government has advised the Western Australia government that it does not propose any further extensions of this exemption after 31 July 2017.

I trust this information will assist you in concluding your consideration of this legislation.

Yours faithfully

(George Brandis)

Cc: <human.rights@aph.gov.au>

Minister for Revenue and Financial Services

The Hon Kelly O'Dwyer MP

Ref: MC17-001630

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

Dear Mr Goodenough Ian

Thank you for your correspondence of 17 February 2017, concerning Schedule 5 of the Treasury Laws Amendment (2016 Measures No. 1) Bill 2016 (the Bill).

Schedule 5 of the Bill authorises the Australian Securities and Investments Commission (ASIC) to make client money rules, a contravention of which may attract a civil penalty of up to $1 million. The Committee commented in its *Human rights scrutiny report 1 of 2017* that as the maximum penalty could apply to a natural person, it may be considered 'criminal' for the purposes of international human rights law and could engage the right to a fair trial.

The Explanatory Memorandum to the Bill explains that misuse of retail client money by Australian Financial Services Licensees (licensees) can result in significant losses for retail investors and undermine confidence in Australian financial markets. For this reason, it is important that penalties in this area are sufficiently severe to have a genuine deterrent effect.

The Government considers that a maximum penalty of $1 million is appropriate given the scale of potential loss that may result from a contravention. The market integrity rules have an equivalent penalty regime for the same reason. This is further justified by the fact that problems in this area have previously occurred in relation to corporate licensees managing large amounts of client monies.

In relation to the Committee's concerns, and taking into account the Committee's Guidance Note 2 on offence provisions, civil penalties and human rights, the following factors support the view that the client money penalty regime is not criminal in nature:

- the $1 million penalty is not a criminal penalty under Australian law;
- it applies exclusively to licensees and not to the general public;

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- there is no criminal sanction if there was a failure to pay the penalty; and
- the proportionate size of the maximum penalty, given the corporate nature of the financial services industry and the amounts of client money that may be handled by licensees subject to the rules.

For these reasons, the Government considers its assessment that Schedule 5 of the Bill does not engage any of the applicable human rights or freedoms is appropriate.

The Committee has also commented on the risk of double jeopardy arising due to the operation of section 1317P of the *Corporations Act 2001* (Corporations Act), which allows criminal proceedings to be started against a person for conduct that has already resulted in a civil penalty being imposed.

I note that similar provisions are relatively common and can be found in other Commonwealth legislation, as stated in Chapter 11 of the Australian Law Reform Commission's *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC Report 95).

Substantial protection is afforded by the statutory bar in provisions such as section 1317Q of the Corporations Act which prevents evidence that has been used in civil proceedings from being used in subsequent criminal proceedings. This makes it clear that these provisions only allow criminal proceedings to be brought where new evidence comes to light following civil proceedings being started or completed. In any case, I note that section 1317P would not operate in this instance since a breach of ASIC's client money rules is not a criminal offence under Schedule 5 of the Bill.

I trust this information will be of assistance to you.

Yours sincerely

Kelly O'Dwyer

Senator the Hon Fiona Nash
Minister for Regional Development
Minister for Local Government and Territories
Minister for Regional Communications
Deputy Leader of The Nationals

PDR ID: MB17-000109

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

- 3 MAR 2017

Dear Mr Goodenough

Thank you for your letter of 17 February 2017 seeking my advice on the human rights compatibility of the *Jervis Bay Territory Marine Safety Ordinance 2016* (the Marine Ordinance), as set out in *Report 1 of 2017* of the Parliamentary Joint Committee on Human Rights (the Committee).

Ordinances made for the Jervis Bay Territory (JBT), and the external territories, are different to other types of delegated legislation at the Commonwealth level. These Ordinances generally deal with state-type matters, including matters relating to the protection of life, which are not normally dealt with in other types of Commonwealth delegated legislation.

The objective of the Marine Ordinance is to establish a comprehensive legal framework for marine safety in the JBT, and in so doing protect the fundamental right to life of all users of the JBT marine environment. To achieve this goal, the Marine Ordinance imposes legal obligations on such users, and provides enforcement powers, similar to those applying in NSW and ACT. The Marine Ordinance also engages human rights, including the right to be presumed innocent, the right to privacy and the right to liberty.

I would like to take this opportunity to thank the Committee for closely examining the compatibility of the Marine Ordinance to ensure it meets Australia's human rights obligations. I provide the enclosed response to the Committee's request of information on the human rights capability of the legislation.

Thank you again for taking the time to write to me on this matter.

Yours sincerely

FIONA NASH

Encl

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7495

Jervis Bay Territory Marine Safety Ordinance 2016

The Parliamentary Joint Committee on Human Rights (the Committee), in *Report 1 of 2017*, has sought advice from the Minister for Local Government and Territories on the human rights compatibility of provisions of the *Jervis Bay Territory Marine Safety Ordinance 2016* (the Marine Ordinance).

Specifically, the Committee is seeking advice from the Minister in relation to the following:

- the rationale and proportionality of reversing the legal burden of proof in s.63 of the Marine Ordinance;
- the extent to which provisions of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) (the ACT Act), as incorporated by s.64 of the Marine Ordinance, comply with international human rights law; and
- the proportionality of search and entry powers in s.83 of the Marine Ordinance.

This document provides responses to the Committee's comments on the compatibility of the identified Marine Ordinance provisions with those rights, and other matters.

Paragraph 1.27: The Committee considers that the measure in section 63, which reverses the legal burden of proof, engages and limits the right to be presumed innocent, as it requires the defendant to prove elements of the offence. As set out above, the statement of compatibility does not justify that limitation for the purpose of international human rights law. The Committee therefore seek the advice of the Minister for Local Government and Territories as to whether the limitations on the presumption of innocence is rationally connected to, and a proportionate approach to achieving, the stated objective.

The objective of the Marine Ordinance is to provide a comprehensive regime for marine safety in the JBT, and in so doing protect the fundamental right to life (Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR)) of users of the JBT marine environment. It achieves this by imposing legal obligations on such persons; such obligations engage human rights and in some circumstances limit them.

The Marine Ordinance ensures public safety by imposing limits on the level of alcohol present in the breath or blood of persons operating, or supervising the operation of, a vessel. Under s.56 of the Marine Ordinance, people under the age of 18 are not allowed to operate a vessel or supervise a juvenile operator while having a prescribed concentration of alcohol in the person's breath or blood (in effect, no alcohol is permitted). The prosecution is required to prove the elements of this offence beyond reasonable doubt.

However, the Marine Ordinance recognises that there are certain circumstances where such persons may inadvertently or unavoidably have alcohol in their breath or blood. The defence in s.63 of the Marine Ordinance, based on s.24(9) of the *Marine Safety Act 1998* (NSW) (the NSW Act), exists to allow for such circumstances, and requires the defendant to prove that the presence of the prescribed concentration of alcohol, in the defendant's breath or blood, was not caused (in whole or in part) by consumption of an alcoholic beverage (otherwise than for the purposes of religious observance) or the consumption or use of any other substance (e.g. food or medicine) for the purpose of consuming alcohol.

Section 63 reverses the onus of proof by requiring the defendant to bear the burden of establishing the existence of the relevant circumstances set out in that provision. This is appropriate because the circumstances set out in s.63 are matters that are specifically within the knowledge of the defendant, and the defendant should bear the burden of establishing the existence of these matters.

In addition, s.63 imposes a legal burden of proof in relation to these matters on the defendant. This is appropriate because the matters set out in s 63 relate to the purpose of the defendant's consumption of a substance, and would be difficult for the prosecution to prove in the negative if a lower evidential burden applied and was discharged by the defence.

The use of alcohol and drugs are known to affect judgement and response times and inappropriate use of such substances in a marine environment could cause injury or loss of life. The severe consequences of a breach of s.56 of the Marine Ordinance justify imposing a legal burden of proof on a defendant seeking to rely on the defence in s.63.

Finally, as JBT and NSW share a maritime boundary, most persons to which the Ordinance will apply also need to comply with the NSW Act, and ss.56 and 63 of the Marine Ordinance impose identical requirements as s.24(1) and (9) of the NSW Act. The application of similar provisions across jurisdictions promotes the right to equality (by reducing potential discrimination because of place of residence) and the right to freedom of movement (by reducing the regulatory cost of free movement between JBT and NSW).

As outlined above, the limitation on the presumption of innocence in this circumstance is reasonable and proportionate to achieving the stated objective of the Marine Ordinance.

Paragraph 1.42: The Committee notes that the right to liberty is engaged and limited by the measure through the reference in the Ordinance to the ACT Act but notes that the statement of compatibility does not provide an analysis of how the limitation is rationally connected to or proportionate to the achievement of the stated objective.

As stated in the statement of compatibility with human rights for the Marine Ordinance, s.64 engages the right to liberty by incorporating provisions from the ACT Act as it applies in the JBT.

Provisions incorporated from the ACT Act that limit the right to liberty include: measures enabling police officers to take persons into custody if they have a positive test result or refuse a screening test for alcohol or drugs (ss.11 and 13D of the ACT Act); and the offence of failing to remain at the place where an alcohol or drug screening test is being carried out until the test is complete (s.22B of the ACT Act).

The objective of the Marine Ordinance is to provide a comprehensive regime for marine safety in the JBT, and in so doing protect the fundamental right to life (Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR)) of users of the JBT marine environment. It achieves this by imposing legal obligations on such persons and providing for the enforcement of these obligations; such provisions engage the right to liberty.

The incorporated measures from the ACT Act referred to above enable police officers to take persons into custody in circumstances where they are, or are reasonably suspected of being, under the influence of alcohol or drugs, and pose a danger to themselves and other users of the JBT marine environment.

Limiting the right to liberty by measures incorporated from the ACT Act by s.64 is assessed as a rational and proportionate response to reduce the likelihood of persons injuring themselves and others, and is a proportionate response to protect the right to life.

Paragraph 1.43: The Committee also notes that the right to privacy is engaged through the reference in the Ordinance to the ACT Act and the ACT Human Rights Commission has raised concerns with the ACT Act, in relation to the right to privacy and other rights that may be engaged and limited by the ACT Act.

The relevant provisions of the ACT Act are incorporated by the Marine Ordinance in provisions that allow police officers to conduct alcohol and drug testing on persons operating vessels in JBT waters. As noted in the explanatory statement (incorporating the Statement of Human Rights Compatibility), such testing can limit a person's right to privacy.

Under the Marine Ordinance, such testing can take place when an accident has occurred (in which case the limitation is justified on the basis that the testing is needed to ensure public safety by establishing whether alcohol or drug intake has been a factor in the accident). It can also take place randomly (in which case the limitation to the individual is justified because random testing for alcohol and drugs has a deterrent effect on individuals unlawfully using such substances, resulting in safety benefits accruing to the general public, as referred to in the explanatory statement). Similar justifications apply to provisions that make it an offence to refuse to undergo an alcohol or drug test.

In practice, the Australian Federal Police (AFP) do not have a permanent JBT marine presence and they adopt a risk management approach to the exercise of their powers under the Marine Ordinance i.e. to intervene to investigate incidents or in response to erratic or dangerous behaviour. Consequently, these powers are exercised (and human rights are limited) only in circumstances where there are reasonable grounds to limit rights to protect the public.

Measures such as random alcohol and drug testing are carried out for deterrence purposes, and the consequential behavioural changes brought about by these provisions indicate that they are the least rights restrictive way to protect the public.

Paragraph 1.44: Accordingly, the Committee seeks the advice of the Minister for Local Government and Territories as to the extent to which the ACT Act complies with international human rights law.

The JBT is a Commonwealth administered territory that has no state legislature. Section 4A of the *Jervis Bay Territory Acceptance Act 1915* (the Acceptance Act) provides that the laws (including the principles and rules of common law and equity) inforce in the ACT are in force in the JBT, so far as the laws are applicable to the JBT and are not inconsistent with an

Ordinance made under the Acceptance Act. Such laws consist of state and local government-type laws made by the ACT Legislative Assembly, which are subject to the scrutiny of the ACT legislature (and apply to the JBT without Commonwealth parliamentary scrutiny).

The ACT Act is currently in force in the JBT under s. 4A of the Acceptance Act. As the Committee notes, the ACT Act was previously subject to human rights scrutiny by the ACT Human Rights Commission. Under the JBT applied law regime, it is not established practice for applied ACT laws to also be scrutinised for human rights compatibility at the Commonwealth level.

Section 8 of the *Australian Federal Police Act 1979* requires the AFP to provide police services to the JBT. The ACT Act applies in the JBT in relation to road transport. The rationale for incorporating ACT Act provisions (via s.64 of the Marine Ordinance) in provisions that relate to the marine environment is that AFP officers are familiar with these provisions as they apply to road transport, and it is desirable for similar procedures to be adopted in the marine environment for consistency.

Section 64 of the Marine Ordinance incorporates legislation that is currently in force in the JBT that is framed for roads drug and alcohol enforcement, and applies it in a relevantly identical manner to the marine environment. Although s.64 imposes the obligations contained in the ACT Act on a different set of people (i.e. users of the marine environment), it does not affect the manner (including in a human-rights-relevant way) in which the various power and obligations in those provisions apply to those persons.

The Marine Ordinance explanatory statement (incorporating the Statement of Human Rights Compatibility), addresses how the Marine Ordinance engages the rights of liberty and privacy with respect to the measures incorporated from the ACT Act. I have provided the information above in respect of paragraphs 1.42, 1.43 and 1.44 of *Report 1 of 2017* to inform the Committee's considerations.

The measures incorporated in the Marine Ordinance from the ACT Act are appropriate and proportional to protect the right to life, and comply with international human rights law.

Paragraph 1.52: The Committee notes that the right to privacy is engaged and limited by the search and entry power contained in the Ordinance and the above analysis raises questions as to whether the measure is the least rights restrictive way to achieve the stated aim.

and

Paragraph 1.53: Accordingly, the Committee requests the advice of the Minister for Local Government and Territories as to whether the limitation is proportionate to achieving its objective, including whether there are less rights restrictive ways to achieve the stated objective, such as:

- **Limiting the exercise of the powers to police officers (and not 'persons assisting' as under section 92)**
- **Requiring a police officer to seek the consent of the occupier of the vessel before exercising the search and entry power**
- **If consent is not granted, ensuring the search and entry powers can only be exercised when the police officer holds a reasonable suspicion that the Ordinance and rules may not be complied with and to investigate accidents or conduct investigations**
- **That the default position is that a warrant be obtained to exercise these powers if consent is not granted, unless it is not reasonably practical to obtain a search warrant**

Section 83 of the Marine Ordinance limits the right to privacy of users of the JBT marine environment for the purpose of promoting their fundamental right to life. It does this by empowering police officers (members and special members of the AFP) to board vessels (without a warrant) for the following purposes:

- finding out if the Ordinance and rules are being, or have been, complied with;
- investigating a marine accident;
- conducting a marine safety operation; or
- asking about the nature and operation of the vessel.

Section 92 of the Marine Ordinance is a measure enabling police officers to receive assistance from other persons, if 'necessary and reasonable', to support their functions and duties. Powers exercised or functions or duties performed by persons assisting in accordance with the direction of a police officer are taken to have been exercised by the police officer.

In practice, the exercise of such a power would be extremely rare, the provision creating a contingency to, for example, enable a police officer to request assistance of the public to assist in a marine rescue to protect the life of users of the JBT marine environment. Critically, persons assisting a police officer at no time act at their own volition and must at all times act at the direction of the police officer they are assisting. The police officer is also accountable for the actions of people they have requested assistance from at all times. On this basis, I consider that there is no reason to limit powers under s.64 to police officers.

Section 83 provides that a police officer may board a domestic vessel without warrant or consent to monitor compliance, or to issue an improvement, infringement or other notice. If requested by the vessel master the officer must produce appropriate identification. While on duty in the JBT, AFP officers must wear uniforms. Section 83(4) provides caveat to producing police identification, if there is reasonable grounds that to do so would endanger a person (defence of the right to life). In such circumstances the police officer must as soon as practical after the request is made, show appropriate identification to the vessel master

The Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) at 8.6 (exception for licensed premises) sets out that 'a person who obtains a licence or registration for non-residential premises can be taken to accept entry to those premises by an inspector for the purpose of ensuring compliance with the licensing or registration conditions.' Similarly, where a vessel is permitted to be used in the JBT marine environment, such as upon registration under State/Territory law, it is reasonable to require the operator of such a vessel to permit entrance onto the vessel by police officers for marine safety purposes.

The regulation of domestic vessel activity to ensure the safety of users in Australian marine environments is not new and regulation has occurred under state and self-governing territory legislation across Australia for some time. Owners and operators of domestic vessels are aware that the safety requirements pertaining to domestic vessels are subject to regulatory oversight, and where their vessel is registered under State/Territory law, they are implicitly accepting that their compliance with the regulatory requirements will be monitored. Consequently, I do not consider it necessary to require a police officer to seek consent to enter a vessel under the Marine Ordinance each time the search and entry power is exercised.

The AFP do not have a permanent marine presence in JBT, and their risk management approach is to intervene to investigate incidents or respond to suspicious or dangerous behaviour where there are reasonable grounds to suspect that the Ordinance and the Rule are not being complied with. In practice, the relevant powers will normally be exercised where a police officer has established that reasonable suspicion exists. However, in exceptional rare circumstances police officers should be able to intervene without first determining whether reasonable suspicion exists to ensure users of the JBT marine environment are safe and to protect their fundamental human right to life.

Consequently, on balance, I do not consider it necessary for the legislation to specifically require that a police officer must hold a reasonable suspicion before entering and searching a vessel as to do so may impact on the capacity of a police officer to protect the fundamental human right of life.

Vessels operating in the JBT marine environment are inherently mobile. The nature of the activities undertaken by these vessels often means that they do not follow any predictable pattern or timetable. This means that AFP monitoring and compliance activities need to be undertaken as and when an opportunity presents. The JBT marine area (about 875 hectares) is relatively small and enclosed by NSW waters, however, vessels are able to leave the jurisdiction and move into NSW in a short timeframe.

In these circumstances, itis generally impractical for a police officer to obtain a warrant and to require a police officer to do so before taking necessary action would severely limit their capacity to undertake their safety regulatory role in a responsive manner. For these reasons, on balance, I consider the enforcement powers outlined in the Marine Ordinance to be appropriate and proportionate for the task. I also consider the limitations on the right to privacy imposed by ss.83 and 92 to be the least restrictive way to protect the right to life of users of the JBT marine environment.

In summary, having carefully considered the human rights matters raised by the Committee, I am satisfied that to the extent that the Marine Ordinance may limit human rights, those limitations are reasonable and proportionate and that these limitations are required to ensure a comprehensive legal framework is in place for the safety of all persons using the JBT marine environment.

The Hon Greg Hunt MP
Minister for Health
Minister for Sport

Ref No: MC17-003101

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

01 MAR 2017

Dear Chair Ian

I refer to your letter of 17 February 2017 concerning the Narcotic Drugs Regulation.

The Parliamentary Joint Committee on Human Rights (the Committee) noted that the right to work and right to equality and non-discrimination are engaged and limited by the requirement set out in the Regulation not to employ or engage prescribed 'unsuitable persons' and the prevention of persons, who in the five years prior to employment or engagement have been subject to prescribed circumstances, from carrying activities authorised by a cannabis licence.

- **Compatibility with the human right to work**

The current medicinal cannabis framework was implemented by the *Narcotic Drugs Amendment Act 2016*. The Statement of Compatibility with Human Rights (the Statement) included in the Explanatory Statement to the Bill, provided a comprehensive discussion of the human rights implication and the human rights engaged in implementing the medicinal cannabis framework. The Statement addressed the human right to work implication in relation the statutory condition under section 10F in Chapter 2 of the *Narcotic Drugs Act 1967* (the Act) and section 12H in Chapter 3 of the Act that a licence holder only employ suitable persons. According to the Statement:

> *This provision is designed to address the risk of infiltration by organised crime below management level. Employees will have access to highly divertible cannabis material with a high 'street value' and so ensuring persons that are not going to engage in illicit activities is essential to the protection of public health and to help meet Australia's international obligation to control diversion.*
>
> *Decisions on the granting or revoking a person's licence (including on the basis of a breach of the condition relating to employment of staff) are subject to review by the Minister, the Administrative Appeals Tribunal and the Federal Court. The ability to seek review of these decisions helps ensure that only those persons who do not fulfil the fit and proper persons test, or comply with licence conditions around 'suitable persons' will be prevented from holding a licence. The limits imposed by the Bill are both reasonable and proportionate to achieve a legitimate outcome.*
>
> *The right to work in Article 6(1) of the ICESCR is limited by these provisions only in so far as is necessary to reduce the risk that cannabis grown under licence will enter the black market, and are reasonable and proportionate to achieving the objective.*

For the same reason, I reiterate that the requirements set out in the Regulation for the purposes of section 10F and 12H of the Act (not to employ or engage prescribed unsuitable persons and the prevention of persons, who in the five years prior to employment or engagement have been subjected to prescribed circumstances from carrying activities authorised by a cannabis licence), are both reasonable and proportionate to achieve the legitimate outcome of ensuring that cannabis plants, cannabis, cannabis resins and other products derived from them are prevented from enter the illicit drug market, meet Australian patients demand for access to medicinal cannabis products and meet Australia's international obligations to control diversion.

- **Compatibility with the right to equality and non-discrimination**

As discussed previously sections 10F and 12H of the Act, which are the authority for the making of regulations in relation to 'unsuitable persons', are implemented to address the risk of infiltration by organised crime below management level. These persons will be physically handling, and will have direct access to, highly divertible cannabis material with high 'street value'. A person who has a drug addiction, is undertaking or has undertaken treatment for drug addiction, undischarged bankrupts, has used illicit drugs, been convicted for a drug related offence or been convicted of an offence that involved theft, would be unsuitable to engage in activities such as cultivation, production and manufacture of drugs.

However, as provided for under subsections 18(2) and 39(2) of the Regulation, the prescribed circumstances in which a person is not taken to be suitable are limited to a period of 5 years (the exclusion period) and not indefinitely. The discrimination and prevention of these types of persons from being employed are necessary to address the high risk of diversion of cannabis and other drugs to the illicit drug market, ensure that the medicinal cannabis products made available to the Australian patients are from licit activities and licit sources and comply with Australia's obligations under the Single Convention on Narcotic Drugs as they relate to limiting the risk of diversion of drugs.

In addition, decisions on the granting or revoking a person's licence are subject to internal review as well as, by the Administrative Appeals Tribunal and the Federal Court. The ability to seek review of these decisions helps ensure that only those persons who do comply with licence conditions around 'suitable persons' will be prevented from holding a licence.

The limits imposed by the Regulations are in my view both reasonable and proportionate to achieve a legitimate outcome.

I trust this information will assist the Committee in concluding your consideration of the human rights implication of the Regulation.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

PARLIAMENT OF AUSTRALIA

President of the Senate

Speaker of the House of Representatives

01 March 2017

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House S 1 110

Dear ~~Mr Goodenough~~, Ian,

Thank you for your letter of 17 February 2017 conveying the committee's request for advice as to whether we intend to review the Parliamentary Service Amendment Determination 2016 in line with the 2016 APS Directions.

The Australian Public Service Commission is conducting a review of the necessity to gazette information in relation to termination decisions made on the grounds of breach of the Code of Conduct. We will further examine the 2016 Determination in light of this review

Yours sincerely,

SENATOR THE HON STEPHEN PARRY

THE HON TONY SMITH MP

The Hon Darren Chester MP
Minister for Infrastructure and Transport
Deputy Leader of the House
Member for Gippsland

02 MAR 2017

PDR ID: MC17-000683

Chair
Parliamentary Joint Committee on Human Rights
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 17 February 2017 regarding the Parliamentary Joint Committee on Human Rights (the Committee) *Report 1 of 2017.* I note that the Committee has requested a response in relation to issues identified with the Transport Security Legislation Amendment (Identity Security) Regulation 2016 (the new Regulation).

The new Regulation introduced the requirement for an issuing body to report any change in contact (or company) details to the Secretary of the Department of Infrastructure and Regional Development (my Department). It is crucial for my Department, as the transport security regulator, to have the most up-to-date information. The aviation and maritime regulations prescribe multiple circumstances when the Secretary of my Department must contact an issuing body, including for security-sensitive purposes.

For example, the Australian Security Intelligence Organisation may furnish an aviation or maritime security identification card (ASIC or MSIC) applicant with a qualified security assessment. If the Secretary is satisfied that the ASIC or MSIC applicant would constitute a threat to aviation or maritime security (respectively), the Secretary must give the issuing body a written direction not to issue an ASIC or an MSIC to the person.

The requirement for issuing bodies to update their contact (or company) details is intrinsically linked to protecting aviation and maritime infrastructure from unlawful interference (including terrorism). For this reason, failure to provide up to date information is prescribed as an offence of strict liability. I consider the new measure to be effective, reasonable, necessary and proportionate for the purposes of human rights law.

Since 2012, my Department has consulted industry on proposed regulatory changes to enhance issuing body practices. A range of regular consultations has occurred through industry-government forums including the Aviation Security Advisory Forum; the Regional Industry Consultative Meeting; the Maritime Industry Security Consultative Forum; Airport Security Committees; Cargo Working Groups and Issuing Body Forums.

Throughout 2016, the Department conducted a significant number of face-to-face meetings to discuss the new Regulation with issuing bodies, including introduction of the above-mentioned offence. In addition, the draft Regulation was released to all issuing bodies twice (in 2014 and 2016) for consultation. No issuing body expressed concern about the inclusion of the offence in the new Regulation.

I hope this information is of assistance to the Committee.

Yours sincerely

DARREN CHESTER