

## **Appendix 3**

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### **Correspondence**





**THE HON PETER DUTTON MP  
MINISTER FOR IMMIGRATION  
AND BORDER PROTECTION**

Ref No: MS17-000673

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

*Ian,*

Dear Mr Goodenough

Thank you for your correspondence of 17 February 2017 in which further information was requested on the Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016.

My response to your request is attached.

Thank you for raising this matter.

Yours sincerely

PETER DUTTON

*09/03/17*

**Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016  
[F2016L01696]**

**Committee comment**

**1.64 The committee notes that the narrowing of the definition of 'member of the family unit' engages and limits the right to protection of the family. The statement of compatibility has not sufficiently justified this limitation for the purposes of international human rights law.**

**1.65 The committee notes that the preceding analysis raises questions as to whether the limitation on the right to protection of the family seeks to achieve a legitimate objective, whether it has a rational connection to that objective, and whether it is proportionate to that objective.**

**1.66 Accordingly, the committee requests the advice of the Minister for Immigration and Border Protection as to:**

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

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The Committee has sought comment regarding recent changes to the definition of 'member of the family unit' for Australian visas, other than refugee and humanitarian, and protection visas.

The Committee noted concern that the amendment to the definition has the effect of limiting the right to protection of the family.

Under the International Covenant on Civil and Political Rights (ICCPR), article 17(1) relevantly states that no one shall be subjected to arbitrary or unlawful interference with his family and that everyone has the right to the protection of the law against such interference. Article 23(1) states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Adult children of a primary applicant or of the primary applicant's spouse (or de facto partner) continue to be eligible to be included where they are aged under 23 years and are financially dependent. Adult children of any age also continue to be eligible where they are financially dependent due to incapacity to work.

### ***The ICCPR does not invoke a positive obligation***

In regard to the Committee's comments at 1.60, the proposed changes do not amount to an interference with family, as there is no right to family reunification under international law. The protection of the family unit under Articles 17(1) and 23(1) of the ICCPR does not amount to a right to enter and reside in Australia where there is no other right to do so. While the ICCPR requires the protection of the family, there is no positive obligation to take steps to facilitate family reunification.

Further, there has been no positive action on the part of Australia to separate the family. The visa holders become separated from their family when they choose to travel to Australia without their family members.

In addition, the amended definition applies to some permanent and temporary visas but not to refugee and humanitarian or protection visas. Therefore, it will be, as it always has been, a choice for prospective migrants if they wish to seek to travel or migrate to Australia and in so doing separate themselves from family members. Substantial information is provided including through visa application forms, to inform prospective applicants of which family members are eligible to be included in an application.

While Australia is not legally obliged to facilitate family reunion, it is also noted that there are visa products available which enable family members to travel or migrate to Australia to reunite with their family.

It is open to family members who are not members of the family unit of the primary visa applicant to apply for such other visa classes, where they meet the legislative and validity criteria in their own right.

### **Effective border control and appropriate targeting of Australia's Migration Programmes**

Australia has a right, under international law, to take reasonable steps to control the entry, residence and expulsion of aliens. This allows States to effectively manage the movement of people across and within their territory, which is a legitimate State objective.

In order to effectively achieve this objective, Australia has well managed and targeted immigration programmes that are designed to meet its social and economic needs. The programmes are directed toward supporting and enhancing Australia's national prosperity and social cohesion.

Australia's Skilled migration programmes are designed to meet Australia's economic and labour market needs to complement, and not replace, Australia's domestic labour force and our domestic training efforts. Skilled migrants help address demographic pressures of an ageing population because they are younger, they improve our participation rates and add to productivity because they are highly skilled and help grow our gross domestic product. In general, Skilled migrants have good labour market outcomes, higher than the national average.

The Family Stream of Australia's Migration Programme is primarily targeted at reuniting Australian citizens and permanent residents with their partners and family members who are minors.

Places in the programmes are directed to those who meet the primary visa criteria which are intended to achieve the above aims and deliver a benefit to Australia. These applicants continue to be able to bring with them their direct family members as secondary visa holders, noting that their eligibility is by reference to their relationship to the primary visa applicant. It is imperative to ensure that the limited places available in these targeted programmes are directed to those who are most likely to support and deliver on the intentions of the programmes.

For relatives who are no longer eligible to travel or migrate as secondary applicants, other migration and visa programmes remain open to them, where they meet the primary criteria and, in so doing, demonstrate their ability to make a positive contribution to Australia.

The new definition is consistent with the arrangements for relatives of Australian citizens and existing permanent residents.

As persons affected by this amendment continue to have available visa pathway options to travel or migrate to Australia that may facilitate the unity or reunification of families, this amendment is a reasonable and proportionate measure (see UN Human Rights Committee, *CCPR General Comment No. 19: Article 23 (The Family) - Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990).

### **Comparison with allied signatory countries**

The amended definition of 'member of the family unit', while limiting the family members eligible to be included as secondary visa applicants, continues to be more generous than that of other similar nations, who are also signatories to the ICCPR.

Canada permits a primary applicant for a permanent visa to be accompanied by their spouse or partner, and dependent children up to the age of 19. Children over that age are permitted only where they are dependent due to a medical condition and have been dependent since before they turned 19 years of age.

The United States of America limits eligible family to a person's spouse and unmarried children only up to age 21. Other family members may be eligible to be subsequently sponsored, but only after their migrating family member has become a citizen.

Dependent family members in the United Kingdom are restricted to a person's spouse or partner and a child under 18 years of age or an adult child over 18 only if they are already in the UK as a dependent.

Nearer to Australia, New Zealand only permits a person to seek to migrate with their partner and dependent children who are 24 years of age and under.