**The Hon Scott Morrison MP**
Minister for Immigration and Border Protection

Reference: 1402/00996

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

**Supplementary response to questions received from the Parliamentary Joint Committee on Human Rights**

Thank you for your letter of 11 February 2013 in which further information was requested on a number of bills and legislative instruments. In my initial response provided on 3 March 2014, I was unable to provide information on some of the questions that were asked about the *Migration Amendment Bill 2013*. My supplementary response in respect of those queries is attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
**Minister for Immigration and Border Protection**
24/3/2014

***Migration Amendment Bill 2013 – Schedule 3***

Do the 'arrangements for independent review' mentioned in the statement of compatibility include the following features:

- Meet the 'quality of law' test;
- Permit review of the substantive grounds on which the person is held in order to determine whether the detention is arbitrary within the meaning of the ICCPR and not merely lawful under Australian law;
- Result in binding outcomes, including the power to orer release if the detention is not justified;
- Include regular review of the continuing necessity of the detention, including the ability of the person to initiate a review, for example, in light of new information; and
- Provide sufficient opportunity for the person to effectively challenge the basis for the adverse security assessment.

Review of ASIO adverse security assessments (ASAs) falls within the portfolio responsibilities of the Attorney-General. The Attorney-General has provided me with the following information in response to the Committee's concerns.

Security assessments are an important part of ensuring the safety of Australians. It is essential that ASIO advice that an individual is a risk to security is afforded appropriate weight when considering the individual's suitability for a visa. To meet community expectations, the Government must have the ability to act decisively and effectively, wherever necessary, to protect the Australian community. The Government must also have the legislative basis to refuse a protection visa or to cancel a protection visa, for those non-citizens who are a security risk.

The Government respects the professional judgment of ASIO. At the same time, the Government supports appropriate oversight arrangements of our intelligence and security agencies. The Inspector-General of Intelligence and Security, an independent statutory office holder, plays a primary and comprehensive oversight role, complementing Parliamentary committees such as the Parliamentary Joint Committee on Intelligence and Security. There is also an Independent Reviewer of Adverse Security Assessments who examines all the materials relied on by ASIO, including classified material, and provides her opinion and any recommendation to the Director-General of Security. Copies of the Independent Reviewer's findings are provided to the Attorney-General, the Minister for Immigration and Border Protection and the Inspector-General of Intelligence and Security.

The Independent Reviewer provides independent periodic reviews of ASAs every 12 months. In addition, ASIO can and will issue a new security assessment in the event that new information of relevance comes to light.

Review applicants are provided with an unclassified written summary of reasons for the decision to issue an ASA, as well as an unclassified version of the Independent Reviewer's report. Information can only be provided that does not prejudice the interests of security. For national security reasons, information that would reveal confidential sources and methodologies must remain protected.

Is the bar on refugees accessing merits review by the AAT for their adverse security assessments consistent with the right to equality and non-discrimination in article 26 of the ICCPR.

Article 26 allows for differential treatment where it is for a legitimate aim under the ICCPR and is reasonable, necessary and proportionate in the circumstances. Accordingly, if a distinction on the basis of a prohibited ground has arisen, differential treatment of a particular group will not constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the ICCPR.

Review of ASAs in the Administrative Appeals Tribunal is unavailable for non-citizens who are not the holder of a valid permanent, special category or special purpose visa. In 1977, the Hope Royal Commission on Intelligence and Security specifically considered and recommended against extending review rights to non-Australian, non-resident visa applicants who receive prejudicial security assessments.

Whether steps have been put in place and what they are to ensure that the circumstances that were the subject of consideration by the HRC [UN Human Rights Committee] will not arise again.

The Attorney-General is the Minister responsible for responding to adverse views of the United Nations Human Rights Committee (HRC). However, I am advised that the Government is currently considering its response to the UN HRC's views in this matter. While the views of the UN HRC are not binding as a matter of law, they are considered in good faith by the Government, and taken into account in the interpretation of Australia's obligations under the ICCPR. The Government has notified the UN HRC that it will respond as soon as possible to the Committee's views. It is the general practice of the Government not to publicly comment in detail while considering such views.

SENATOR THE HON MITCH FIFIELD
ASSISTANT MINISTER FOR SOCIAL SERVICES

BR14-000228

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Dean

Thank you for your letters of 4 March 2014 in which you seek clarification on behalf of the Parliamentary Joint Committee on Human Rights on aspects of:

- the National Disability Insurance Scheme Rules;
- the National Disability Insurance Scheme Legislation Amendment Bill 2013; and
- the DisabilityCare Australia Fund Bill 2013 and eleven related Bills.

I am pleased to provide the attached responses to the issues the Committee has raised. Please note that on the matter relating to the exclusion of non-protected Special Category Visa holders, I am not able to provide the requested information. Although the Department of Social Services has access to data on the numbers of people who are on a Special Category Visa, it is not readily available without a customised query programme written to extract this data from the Department of Human Services data holdings. In addition, the Department does not hold data on Australian citizens receiving welfare and benefits administered by the New Zealand Government.

I trust that the information I have provided is helpful addressing the Committee's concerns.

Yours sincerely

**MITCH FIFIELD**

Encl.

19/3/14

PARLIAMENT HOUSE, CANBERRA ACT 2600 TELEPHONE: 02 6277 7280 EMAIL: MINISTER.FIFIELD@DSS.GOV.AU

***National Disability Insurance Scheme Legislation Amendment Bill 2013 and DisabilityCare Australia Fund Bill 2013 and eleven related bills***

***3.95 The committee is of the view that general exemptions to the provisions of the anti-discrimination statutes are in general to be avoided, unless there is a compelling case that such an exemption is needed. The committee recognises that partial or temporary exemptions may be necessary and accepts that this may be so in relation to the establishment of trial sites for the NDIS. However, the committee considers that there appear to be ways of achieving the legitimate goal of ensuring that the NDIS can be phased in without adopting the general exemption which the legislation contains.***

***3.96 The committee regrets the fact that the approach adopted has been use of a general exemption, unlimited as to time, to advance a goal which is said to be limited and temporary, without any substantive engagement with the committee on the issue of whether a more limited exemption or exclusion would serve those goals equally well.***

The Australian Government supports the protections provided by the federal anti-discrimination legislation and understands the concern of the Parliamentary Joint Committee in relation to the breadth of a general exemption from the *Age Discrimination Act 2004*. As the Government has previously advised the Committee, a number of alternatives, including limited exemptions, were considered but it was concluded that these alternatives were not able to adequately achieve the necessary policy objectives.

As the Government advised, without a general exemption from the *Age Discrimination Act*, any new temporary age-based restrictions in trial sites could constitute unlawful age discrimination. New trial sites have been negotiated since the commencement of the trials and the flexibility created by the legislation has allowed those negotiations to take place. The Government will continue to require this flexibility in the context of continuing negotiations with State and Territory governments about trials leading to transition and full implementation.

The decision to seek a general exemption was a decision of the previous Government. The operation of the *National Disability Insurance Scheme Act 2013* must be reviewed independently after two years of operation. Subject to the agreement of the Disability Reform Council, the exemption from the *Age Discrimination Act 2004* may form part of that review. This would provide further information that could assist the Government in reassessing whether a more restricted exemption could fulfil the necessary policy objectives outlined above.

As previously advised, the Australian Government does not envisage undertaking any additional acts which would fall within the exemption in the Age Discrimination Act, except those analogous to the existing exemptions in establishing trial sites. The Government notes that the general exemption from the Age Discrimination Act only applies to acts done in direct compliance with the NDIS Act. Any other acts of unlawful discrimination carried out through the course of administering the scheme and Act, and which are not in direct compliance with the Act itself, are still prohibited under the Age Discrimination Act 2004.

***3.99 The committee notes that the Assistant Minister's response did not respond to this recommendation. The committee intends to write again to the Assistant Minister to draw his attention to the committee's recommendation and to request a response.***

Subject to the agreement of the Disability Reform Council, the age restrictions on eligibility could be part of the review into the operation of the *National Disability Insurance Scheme Act 2013* that is required under section 208 of the Act.

***3.106 The committee intends to write again to the Assistant Minister to seek information on the question of whether the exclusion of non-protected SCV holders from the NDIS is differential treatment amounting to discrimination under the ICCPR, ICESCR and ICERD, or whether the exclusion is based on objective and reasonable justification in pursuit of a legitimate goal. In particular, the committee would appreciate the following specific information:***

- ***In relation to the claim that exclusion is a reasonable and proportionate measure to ensure the financial sustainability of the NDIS, details of the additional costs that would be involved if access to the NDIS were extended to non-protected SCV holders and the amount of revenue that their contributions by way of the NDIS levy would raise;***
- ***Whether there is a disparity in the numbers of Australian citizens receiving welfare and other benefits in New Zealand compared with the number of New Zealand citizens receiving such benefits in Australia; what the net cost to Australia is; and whether there is any transfer of funds between the two governments to reflect this; and***
- ***Whether all non-protected SCV holders are eligible to apply for Australian permanent residence or citizenship, or whether age requirements or other conditions may prevent some of those, in particular those affected adversely by the 2001 changes, from doing so, and whether the number of those who might be ineligible is known.***

New Zealanders on a special category visa (SCV) have a temporary visa which provides a mechanism for the free movement of New Zealanders and Australians between the two countries. It is difficult to quantify how many visa holders will be in Australia at any time. This capacity for fluctuation means that it is difficult to determine the additional costs that would be caused by extending coverage of the NDIS to New Zealanders on special category visas, or the amount of revenue that may be generated by these individuals through the NDIS levy.

The transfer of funds between the Australian and New Zealand government in relation to welfare benefits is largely the legacy of previous agreements and not a major part of the current arrangements. Prior to the revised Social Security Agreement that commenced in 2001, New Zealand would provide Australia funds in relation to payments made by the Australian Government to its citizens. After the revised Social Security Agreement was concluded individuals receive payments directly from the relevant governments. Under the Agreement, Australia and New Zealand share responsibility for paying certain benefits, broadly according to the period people have lived in both Australia and New Zealand (between 20 and 65 years of age). A person will generally be entitled to two pensions - one from New Zealand and one from Australia. Generally the two pensions, when added together, would equal the amount of pension an individual would have received had they lived all their life in one country. The revised Agreement does not cover working age payments such as Parenting Payment (single or partnered), Newstart allowance, sickness allowance or special benefit. Transfers between the governments are only in the form of legacy payments that account for the previous agreement.

Like the nationals of other countries, New Zealand citizens seeking an option to apply for a permanent visa are encouraged to explore the range of visa options available under the Family and Skill streams. Alternatively, people who spent time in Australia as a New Zealand citizen prior to 1 September 1994 may be considered former permanent residents and can be eligible for the Subclass 155 Resident Return visa.

While there is a diverse range of permanent visas available, the Australian Government does acknowledge that there will be some temporary visa holders, including Special Category Visa holders, who will not be able to meet the requirements for a permanent visa, despite having lived in Australia for many years. All permanent visas have a health requirement that takes into account the cost to the Australian community or the impact on the access to services of the person becoming a permanent visa holder. In some visa categories there is a health waiver available, where a person's individual circumstances can be considered, which in the case of New Zealand citizens includes their existing access to Medicare and existing support to disability benefits and services under the bi-lateral agreement.

Based on analysis of passenger card data, the Department of Immigration and Border Protection estimates that around 40 per cent of New Zealand citizens living in Australia would appear to have a permanent visa pathway available.

***3.111 The committee intends to write to the Assistant Minister to request information as to whether the Australian government has adopted a position in relation to the recommendations of the two Productivity Commissions addressed to the Australian government relating to SCV visa holders, and how the report of the two Productivity Commissions is to be taken forward in that regard as indicated in the joint statement of 7 February 2014 by the Prime Ministers of the two countries.***

The Australian Government is considering the recommendations of the joint report *Strengthening trans-Tasman economic relations.* As the Committee notes, both Prime Ministers are committed to review the progress on implementing the report's recommendations at the next Leaders' meeting in 2015.

The Hon. Barnaby Joyce MP

**Minister for Agriculture**
**Federal Member for New England**

Ref: MNMC2014-02918

Senator Dean Smith MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Senator Smith

Thank you for your letter of 18 March 2014 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Quarantine Charges Bills.

In your letter you asked for clarification on a number of matters in relation to the Quarantine Charges (Imposition-General) Bill 2014, Quarantine Charges (Imposition-Customs) Bill 2014, Quarantine Charges (Imposition-Excise) Bill 2014 and the Quarantine Charges (Collection) Bill 2014. These matters are identified in the *Fourth Report of the 44th Parliament* (the Report) which accompanied your letter to me. My response to the matters raised by the Committee is set out below.

I would also like to thank the Committee for their comments in the Report relating to the Farm Household Support Bill 2014 and the Farm Household (Consequential and Transitional Provisions) Bill 2014. I will note these comments for human rights impact statements that are prepared for future legislative proposals.

**Quarantine Charges Bills 2014**

Right to privacy

Paragraph 1.70 of the Report seeks further information on the compatibility of Part VIA of the *Quarantine Act 1908* (the Quarantine Act) in relation to the right to privacy as applied in the context of the Quarantine Charges (Collection) Bill 2014 (the Bill). Because the Quarantine Act was drafted some time ago, it may not reflect modern human rights principles; however, a range of safeguards on the application of this Part to the Bill means that these enforcement provisions can only be used when it would be appropriate to do so.

Part VIA of the Quarantine Act has been incorporated into the Bill to ensure that there are consistent enforcement powers available to quarantine offices to enforce the collection of fees under the Quarantine Act and quarantine charges under this Bill. As noted in the Report, the

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application of Part VIA to the Bill is intended to protect the ability of the Commonwealth to collect quarantine charges when they are due and payable. The application of Part VIA to the Bill is limited by the extent that matters under this Part apply to the collection of charges and not for the general management of quarantine under the Quarantine Act. For example, section 66AO of the Quarantine Act relates to the use of equipment to examine and process things found at a premises for the purpose of quarantine. Powers under this section would not be applicable to the Quarantine Charges (Collection) Bill 2014. The limited application of Part VIA to the Bill ensures the extent that the right to privacy may be engaged is limited and will only occur in circumstances where it is necessary for the proper operation of the Bill.

In addition to the limited application of Part VIA of the Quarantine Act to the Bill, those sections which do apply have safeguards and restrictions built into them to ensure that the right to privacy and other human rights considerations are protected. For example, section 66AC of the Quarantine Act (which relates to monitoring warrants) prescribes a test of reasonableness so that a warrant to monitor premises can only be issued when it is reasonable to do so. Similarly, a quarantine officer may only search a vessel or vehicle without a warrant in an emergency situation and where the quarantine officer reasonably suspects that it is necessary to do so (see Division 5 of Part VIA of the Quarantine Act).

The tests of reasonableness built in to many of the enforcement provisions under Part VIA of the Quarantine Act, and which may in turn apply to the Bill, ensure that these enforcement powers are not used arbitrarily. In addition to these tests of reasonableness, many of the powers under this Part only apply to quarantine officers with appropriate training (see for example sections 66AA, 66AB and 66AH) or authorisation (see for example sections 66AG, 66AK and 66AS). More generally, and as noted by the Report, the operation of the enforcement provisions under the Bill would be required to be exercised in compliance with the *Privacy Act 1988*.

Right to freedom of movement

Paragraph 1.75 of the Report seeks further information on the compatibility of Part VIA of the Quarantine Act as applied in the context of the Bill, in relation to the right to the freedom of movement. As mentioned previously, because the Quarantine Act was drafted some time ago it may not reflect modern human rights principles. Despite this, similar to the Bill's treatment of the right to privacy, there are a range of safeguards on the application of the enforcement provisions under the Quarantine Act to the Bill. This means that any limitations on the right to freedom of movement may only occur when it is reasonable or necessary to achieve the legitimate objectives of the Bill.

Part VIA of the Quarantine Act will only apply to the Bill to the extent that it applies to the collection of quarantine charges. The department anticipates using these provisions in very limited circumstances. As noted in the Report, Clause 24 of the Bill provides a Director of Quarantine with power to detain a vessel that is the subject of a charge. Given the relative value of a potential charge or late payment fee under the Bill and the potential value of a detained vessel it will only be in extremely rare circumstances that these enforcement powers would be used in a manner that may limit the right to freedom of movement.

The exercise of enforcement powers under clause 24 of the Bill are only available to the Director of Quarantine (as opposed to a quarantine officer) and therefore any potential limitation on the right to movement as a result of the use of these powers would be at the

discretion of a senior officer. In addition to this high level of assessment, the department will ensure that the application of the powers under Part VIA of the Quarantine Act, in the context of this Bill, will be exercised in consideration of the right to the freedom of movement.

Right to a fair hearing

Paragraph 1.80 of the Report seeks further information on the compatibility of the Bill with the right to a fair hearing, and particularly the justification for the non-availability of merits review for a decision under clause 14 of the Bill. In particular, the Report seeks further information as to why it is necessary to preclude merits review for decisions made under clause 14 and how the preclusion of merits review in relation to decisions made under this clause is proportionate to achieving the legitimate objective of the Bill.

Clause 14 of the Bill provides for the power to suspend or revoke a number of approvals or authorisations made under the Quarantine Act where a person has not paid a quarantine charge or late payment fee which is due and payable. To ensure consistency with the Quarantine Act and to ensure that those subject to the Quarantine Act are afforded the same rights under this Bill, decisions made under clause 14 of the Bill are not subject to merits review. It would not be appropriate for fees charged under the Quarantine Act and quarantine charges under this Bill to have different review mechanisms.

Where required, mechanisms exist under the Bill to allow for decisions to be reviewed. For example, judicial review is available to challenge any decision made under clause 14 of the Bill. The availability of judicial review for decisions made under clause 14 is consistent with existing arrangements under the Quarantine Act and is an appropriate safeguard. The availability of judicial review under clause 14 achieves the legitimate objective of providing persons who are affected by decisions under the bill with the opportunity to have those decisions reviewed.

Right to a fair trial – presumption of innocence

Paragraph 1.84 of the Report notes that the use of reverse burdens as proposed by the Bill is unlikely to raise issues of incompatibility with the presumption of innocence. Paragraph 1.85 of the Report highlights the expectation of the committee that statements of compatibility should include sufficient detail of relevant provisions in a bill which impact on human rights to enable it to assess their compatibility. These comments made by the committee have been noted and will be considered in the preparation of future statements of capability by my department.

Thank you for bringing the Committee's concerns to my attention. I trust this information is of assistance.

Yours sincerely

Barnaby Joyce MP

12 APR 2014

**The Hon Scott Morrison MP**
Minister for Immigration and Border Protection

Reference: 1403/02038, 1403/02036, 1403/02041, 1403/02042.

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
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CANBERRA ACT 2600

Dear Senator

**Response to questions received from Parliamentary Joint Committee on Human Rights**

Thank you for your letters of 5 March 2014, 18 March 2014 and 25 March 2014 in which further information was requested on the following bills and legislative instruments:

- *Migration Amendment Regulation 2013 (No. 4)* [F2013L01014];
- *Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern* [F2013L01185];
- *Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013* [F2013L01218];
- *Migration Amendment (Disclosure of Information) Regulation 2013* [F2013L02101];
- *Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013* [F2013L02102];
- *Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155* [F2013L02105];
- *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* [F2013L02104]; and
- *Migration Act 1958 – Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year – IMMI 14/026* [F2014L00224].

My responses in respect of the above-named bills and legislative instruments are attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
**Minister for Immigration and Border Protection**
15/9/2014

***Migration Amendment Regulation 2013 (No. 4)* [F2013L01014]**

***Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2)* [F2013L01185]**

'It remains unclear to whom the amendments will apply.'

The amendments can be used to facilitate the grant of a visa to detainees who are currently in immigration detention and in the event that a detainee's current immigration detention is found to be unlawful by a court.

It is government policy that the amendments will only apply to enable the grant of a visa, without the requirement of an application being made, to persons in immigration detention who have been assessed to be a security risk in the event that their current immigration detention is found to be unlawful by a court.

'In particular, it is unclear:

- 'On what basis the detention of this cohort has been (or will be) found to be unlawful by a court.'

While it is not appropriate to speculate on possible future court cases, the question of whether or not indefinite immigration detention is lawful has been raised as an issue in cases where the Plaintiff has been the subject of an adverse security assessment.

The current immigration detention of persons who have been assessed to be a security risk has not been found to be unlawful by a court.

- 'If, as the response states, the amendments apply to persons currently in immigration detention and to persons whose current immigration detention has been found to be unlawful, why section 195A of the Migration Act is not available to the Minister.'

While a person is in immigration detention under section 189 of the *Migration Act 1958* (the Act), the power in section 195A of the Act is available to me. If a court finds a person's detention unlawful, they must be released from detention. The power in section 195A is only available in relation to persons in detention. Where a court has found detention to be unlawful the power in section 195A is not available.

Without this Regulation, there is no visa that could be granted without an application being made, meaning that a person ordered to be released by a court would need to be released from detention without a visa. Release without a visa is contrary to the legislation and government policy. The Regulation allows for a person to be quickly granted a Subclass 070 (Bridging (Removal Pending)) visa (RPBV) with appropriate conditions if the court orders their release from immigration detention, allowing for them to be lawfully in the community.

The conditions that must be imposed on the person reflect the necessity to manage, in the most effective way, the risk to security and the Australian community posed by detainees who are the subject of adverse security assessments.

- 'If, as the response states, it is government policy that the amendments will only be applied to persons whose current immigration detention has been found to be unlawful by a court, why the amendments also apply to persons who are currently in immigration detention (and whose detention has presumably not been found to be unlawful).'

Under the Regulation, I have the discretion to impose one or more of the conditions introduced by the amendments on a RPBV if, exercising my non compellable power under section 195A of the Act, I decide to grant this visa to a person currently in immigration detention, whose detention has not been found unlawful by a court.

I consider that the discretion to impose on a RPBV one or more of the conditions introduced by the amendments is a necessary part of the Government's strategy to manage the risk to the safety of the Australian community if detainees who pose a risk to the Australian community are released from immigration detention.

- 'On what basis and by what process a person will be 'assessed to be a security risk' and made subject to the conditions imposed by the amendments.'

The assessment that an individual is a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act* 1979 – ASIO Act) is made by the Australian Security Intelligence Organisation (ASIO). Security assessments fall within the portfolio responsibilities of the Attorney-General.

In the event that a court finds that the current immigration detention of a person who has been assessed to be a security risk is unlawful under section 189 of the Act, and orders their release from immigration detention, my delegate must impose these conditions on the RPBV. If a person assessed to be a risk to security by ASIO is lawfully detained the imposition of conditions on an RPBV granted pursuant to s195A will be at my discretion.

- 'Why persons who fall within the new class of persons must have such conditions imposed and why other detainees may have such conditions imposed.'

It is Government policy that the amendments will apply only to persons who have been assessed by ASIO to be a risk to security within the meaning of section 4 of the ASIO Act.

In the event that the RPBV is granted by a departmental delegate, the mandatory imposition of the conditions introduced by the amendments will enable the government to manage risks to security and to the Australian community posed by the release from immigration detention of a person who has been assessed to be a risk to security.

Under section 195A, I can grant any visa to a person who is in immigration detention. In the exercise of this power, I am not bound by the Regulations, and can choose to exercise the power if I consider it to be in the public interest. If I grant the RPBV under section 195A, the discretionary imposition of the conditions introduced by the amendments will allow me to manage risks to the Australian community, in line with my consideration of what is in the public interest.

***Migration Amendment (Subclass 050 and Subclass 051) Regulation 2013*** **[F2013L01218]**

Under what circumstances may a court issue an injunction to prevent removal or transfer to a regional processing centre

The Federal Circuit Court, the Federal Court and the High Court all have power to issue an injunction to prevent the removal of a person from Australia or the transfer of a person to a regional processing country in certain circumstances. If they were to do so, the Department would be obliged to comply with the terms of that injunction.

The grounds on which a court may grant an injunction are many and varied. The circumstances in which a court may issue an injunction will vary from case to case. However, the legal principles behind the courts' power to issue injunctions are well established. Usually, a court will have to be satisfied that the person has raised a substantive issue to be determined (that is, that the person has raised an arguable case about his or her circumstances that should be resolved by the court). The court will also weigh this issue against the 'balance of convenience'. Occasionally, the courts do not have time to resolve these issues and may simply issue a short injunction to preserve the status quo, while it considers these issues.

A person may seek an injunction by making an application to the court and if necessary the court can convene an urgent hearing.

Clarification of the cancellation of a Bridging Visa E (BVE) where the breach occurred in circumstances beyond the visa holder's control

The Committee requested clarification regarding the following statement: 'As a general rule, a visa should not be cancelled where the breach of [a visa] condition occurred in circumstances beyond the visa holder's control'. The Committee expressed concern that BVEs should not be cancelled where the person is not at fault for the breach.

Decisions to cancel under section 116(1)g of the Act and regulation 2.43(1)(p) of the *Migration Regulations 1994* (the Regulations) or to cancel under section 116(1)(b) of the Act for a breach of visa condition 8564 (the holder must not engage in criminal conduct) are discretionary decisions. That is, decisions under these provisions allow the decision maker to weigh the grounds for cancellation against reasons not to cancel. Under policy, the decision maker may consider a wide range of matters when deciding whether or not to cancel a visa. These matters include, but are not limited to, the circumstances in which the grounds for cancellation arose. The policy advice available for decision makers is as follows:

*Cancellation under section 116(1)(g) and regulation 2.43(1)(p)*

Where a BVE holder has been charged with, or convicted of, a crime in Australia or overseas, then their visa may be considered for cancellation using the new grounds at section 116(1)(g) and regulation 2.43(1)(p). These grounds are objective, that is, the visa holder has either been charged or convicted, or they have not. However, even where grounds objectively exist, the discretionary cancellation framework still allows the decision maker to consider 'reasons not to cancel', and the decision maker may consider the circumstances in which the grounds for

cancellation arose. This consideration includes whether or not there are extenuating circumstances that outweigh the grounds for cancellation.

*Cancellation under section 116(1)(b) for breach of condition 8564*

Cancellation is also discretionary where a person's visa is being considered for cancellation in relation to a breach of condition 8564 (the holder must not engage in criminal conduct). In this situation, the decision maker may not only consider the circumstances in which the ground for cancellation arose, but also the reason for, and the extent of the breach. Under policy, the visa should generally not be cancelled where the breach of visa condition occurred in circumstances beyond the person's control.

On the basis of the above policy guidance, a decision-maker considering the cancellation of a BVE pursuant to the above provisions should consider all matters relevant to the cancellation, including the liability of the visa holder for the breach of the relevant visa condition.

***Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013*** **[F2013L02102]**

***Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155*** **[F2013L02105]**

3.120 The committee, however, notes that the government must show that there are objective and reasonable grounds for adopting a specific behaviour regime applicable only to BVE holders and that any asserted factual basis for the differential treatment is supported by evidence.

3.121 While the committee accepts that the measures are primarily aimed at public safety objectives, the committee remains concerned that the necessity for these measures has not been adequately demonstrated.

I note the Committee's views in this regard. I would also reiterate that the introduction of the Code of Behaviour provides the appropriate tools to support the education of BVE holders about community expectations and acceptable behaviour and supports the taking of compliance action, including consideration of visa cancellation, where BVE holders do not behave appropriately or represent a risk to the public. If not for my decision or the decision of previous Ministers to temporarily release these non-citizens from detention on a BVE granted in the public interest, these individuals would continue to be unlawful non-citizens subject to mandatory detention under the Act.

3.132 For these measures to be proportionate, the committee considers that the power to cancel a BVE holder's visa for breach of the code should only be possible when the decision-maker is satisfied:

- that the circumstances involve a threat to public safety which is sufficiently serious to justify the exercise of the power; and
- that the exercise of the power is no more restrictive than is required in the circumstances.

3.133 The committee intends to write to the Minister for Immigration and Border Protection to recommend that appropriate legislative amendments be made to give effect to the requirements set out above.

I note the Committee's recommendation. As stated in my previous response, the decision to cancel a visa based on a breach of the Code of Behaviour is discretionary. Existing legislation requires that the person must be provided with notification and an opportunity to demonstrate that cancellation grounds either do not exist, or that their visa should not be cancelled. The combination of this discretionary cancellation framework and the sanctions framework supporting the Code of Behaviour enable decision makers to make proportionate responses based on the individual merits of each case where the Code of Behaviour is found to have been breached.

3.134 The committee notes that merits review of a decision to cancel a BVE for a breach of the code will not be available if the Minister issues a conclusive certificate, pursuant to section 399 of the Migration Act, stating that it would be contrary to the national interest to change a decision or for the decision to be reviewed. The committee has already noted its concerns about the exclusion of merits review for BVE cancellation decisions subject to a conclusive certificate in its comments on the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013.

3.135 The Minister's response says that 'historically, this power has been exercised rarely'. The response does not explain whether and how the exercise of this power would be appropriate in the context of decisions to cancel a BVE for a breach of the code.

3.136 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to the types of situations envisaged and possible examples where it would be appropriate to issue a conclusive certificate for visa cancellation decisions relating to a breach of the code of behaviour.

I am not prepared to speculate about the type of situations where it may be appropriate for me to issue a conclusive certificate. I may issue a conclusive certificate if I believe it would be contrary to the national interest for a decision to be reviewed. The courts have accepted that the term 'national interest' is a broad term and that such a decision is one that is entrusted to me as Minister.

3.139 The committee notes that:

- Payment for income support under the CAS and ASAS is 89% of the equivalent Centrelink Special Benefit (which is comparable to 89% of Newstart Allowance).
- Decisions to reduce or terminate income support payments are not subject to merits review.
- BVE holders who arrived by boat after 13 August 2012 (that is, the majority of BVE holders) do not have permission to work.

3.140 Our predecessor committee had noted that the absence of work rights combined with the provision of minimal support for asylum seekers on BVEs risks resulting in their destitution, contrary to the right to work and an adequate standard of living in article 6 and 11 of the ICESCR and potentially the prohibition against inhuman and degrading treatment in article 7 of the ICCPR.

3.141 In light of the already minimal support that is provided to BVE holders, the committee is concerned that any further reduction to their income support payments is likely to have a disproportionately severe impact on the person and their family. The committee is hard pressed to see how terminating a BVE holder's income support in these circumstances could ever be a reasonable option given that the person is also barred from working.

3.142 For these measures to be proportionate, the committee considers that:

- the power to sanction a BVE holder for breach of the code by reducing or terminating their income support must only be possible if the decision maker is satisfied that such action will not result in the destitution of the person or their family; and
- decisions to reduce or terminate a person's income support for breach of the code must be subject to independent merits review.

3.143 The committee intends to write to the Minister for Immigration and Border Protection to recommend that appropriate legislative amendments be made to give effect to the requirements set out above.

I note the Committee's recommendation. As explained previously, income support payments and support under the Asylum Seeker Assistance Scheme (ASAS) and Community Assistance Support (CAS) is not a legislative entitlement. The provision of this support is provided administratively, and to prescribe within legislation the circumstances in which a decision to reduce or terminate these types of payments would therefore not be appropriate. The decision making framework that has been established to support the consideration of using this particular sanction includes natural justice provisions which will enable the circumstances of each case to be assessed on a case by case basis. No decision to reduce or terminate a person's income support payments would be made where that decision would result in destitution.

3.146 The committee accepts that the Immigration Department has strong relationships with service providers dealing with BVE holders in the community and this provides an important channel for relevant information to be passed to the department.

3.147 The committee, however, notes that these processes appear to be ad hoc rather than a systematic approach to monitoring the impacts of the behaviour code on individuals in the community. The committee considers that there should be express monitoring mechanisms in place to assess the impact of these measures on BVE holders, including regular opportunities to consult with the affected individuals and other interested parties.

I note the Committee's views. My department has well established reporting arrangements and communication channels in place under the Community Assistance Support (CAS) and Asylum Seeker Assistance Scheme (ASAS) programmes, including an incident reporting protocol. The department's engagement with service providers also includes a schedule of monthly meetings and quarterly conferences, as well as meetings on specific issues such as the code of behaviour. These arrangements provide the department with information on specific incidents affecting individual BVE holders, and opportunities for service providers to raise issues of broader concern. Through these processes there is oversight and monitoring of substantial issues affecting BVE holders.

***Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*** **[F2013L02104]**

The Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 was disallowed on 27 March 2014.

Regulations supporting the Temporary Humanitarian Concern Visa (THC) have been in place since July 2000 and are not within the scope of the Committee.

***Migration Act 1958 – Determination of Granting of Protection Class XA Visas in 2013/2014 Financial year – IMMI 14/026*** **[F2014L00224]**

The Government will continue to abide by section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, which outlines when Statements of Compatibility are required to be prepared. This instrument does not fall within the scope of section 9 and therefore does not require a Statement of Compatibility; therefore I do not propose to respond to questions in relation to this instrument.

***Migration Amendment (Disclosure of Information) Regulation 2013*** **[F2013L02101]**

Provision of the Memoranda of Understanding to the Committee

The Committee has sought confirmation that copies of the final Memoranda of Understanding will be provided for its information and assessment. The Memoranda of Understanding are still being developed with the various Federal, State and Territory police and none have been finalised at this stage. I will provide copies of the Memoranda of Understanding once they are finalised and signed.

Use of provisions in amendments

The Committee also sought clarification as to whether the disclosure powers authorised by these amendments are intended to be used prior to the relevant Memoranda being finalised. I can confirm that the information authorised for disclosure by these amendments has not been released, and will not be released, prior to the relevant Memoranda of Understanding being finalised.