Appendix 3

Correspondence

The Hon Christian Porter MP
Minister for Social Services

MC16-009043

Ms Toni Dawes
Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

27 OCT 2016

Dear ~~Ms Dawes~~ Toni

Thank you for your letter of 12 October 2016 to the Office of the Treasurer, regarding the Parliamentary Joint Committee on Human Rights - Report 7 of 2016. Your letter has been referred to me as the matter raised falls within my portfolio responsibilities.

I have noted the comments in the Committee's report and have provided my response to these comments in the enclosed document. The Treasurer will respond to your letter separately.

Thank you for raising this matter with me.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

Social Services Legislation Amendment Budget Savings (Omnibus) Bill 2016

The Parliamentary Joint Committee on Human Rights, in 'Report 7 of 2016' has sought advice from the Treasurer on whether certain measures included in the Budget Savings (Omnibus) Bill 2016 (the Bill) are compatible with human rights, as defined in the Act.

Specifically the Committee has questioned the compatibility of some of the proposed changes with the right to equality and non-discrimination, the right to social security, and the right to an adequate standard of living. This document provides responses to the Committee's request for advice on compatibility of the measures identified with those rights.

Schedule 10 - Newly arrived residents waiting period

Committee comment:

1.22 As recognised by the statement of compatibility to the bill, waiting periods engage the right to social security. The preceding analysis explains why the amendments constitute a limitation on the right to social security.

1.23 The committee seeks the advice of the Treasurer as to:

- whether the removal of exemptions for the newly arrived resident's waiting period is aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

This Schedule aligns the newly arrived residents waiting period that is applied to working-age social security payments (e.g. Newstart Allowance, Youth Allowance), concession cards and farm household allowance by removing the exemption provided to family members of Australian citizens or permanent resident visa holders. This ensures all newly arrived migrants will be required to serve the same 104-week newly arrived residents waiting period.

Human rights implications

As outlined in the Explanatory Memorandum to the Bill, consideration has been given to the human rights implications particularly with reference to the right to social security contained within Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is concluded that the Bill does not place limitations on human rights.

This measure aligns the 104-week newly arrived resident's waiting period for income support payments for all migrants (except for permanent humanitarian entrants) by removing an exemption which allows some people to qualify for income support payments earlier than others.

Permanent Humanitarian entrants will continue to be exempt from all social security payment waiting periods.

In conclusion, these amendments are compatible with human rights. To the extent that they may limit a person's access to social security, the limitation is reasonable and proportionate.

Schedule 16 - Carer Allowance

Committee comment:

1.31 As recognised by the statement of compatibility to the bill, the removal of the backdating provisions for carer allowance payments beyond the date of lodgement of a claim or the date of first contact engages the right to social security. The preceding analysis explains why the amendments constitute a limitation on the right to social security.

1.32 The committee seeks the advice of the Treasurer as to:

- whether the removal of the backdating provisions is aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective (including the availability of other forms of financial support).

This Schedule amends the *Social Security Administration Act 1999* to change the earliest date of effect for a grant of carer allowance to the date the claim is lodged or the date of first contact with the Department of Human Services. New claims for carer allowance received after 1 January 2017 will no longer be able to be backdated up to 12 weeks before the person contacted the Department of Human Services about carer allowance.

The start day for carer allowance for a person caring for a child under the age of 16 years can currently be backdated up to 12 weeks before the date of claim for a person caring for a child with disability.

The start day for carer allowance (adult) can currently be backdated up to 12 weeks before the date of claim for a person caring for an adult with a disability, provided the disability is due to an acute onset.

Human rights implications

As outlined in the Explanatory Memorandum to the Bill, this Schedule engages the right to social security as recognised in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system. The social security scheme must provide a minimum level of benefits to all individuals and families that will enable them to cover essential living costs. Carer allowance itself is not an income support payment and may be paid in addition to an income support payment, such as carer payment. Carer allowance recipients, therefore, have access to additional personal income or social security income support to cover essential living costs. Other social security payments are not affected by this measure.

The United Nations Committee on Economic, Cultural and Social Rights (the committee) has stated that a social security scheme should be sustainable and that the conditions for benefits must be reasonable, proportionate and transparent (see General Comment No. 19). This measure will ensure that the social security system remains sustainable and targeted to those recipients with the greatest need.

The amendments will also align the date of effect for the grant of carer allowance with other social security payments made under the Social Security Act.

In conclusion the amendments made by this Schedule are compatible with human rights because:

- they do not affect a person's entitlement to income support payments, such as carer payment;
- to the extent that the changes reduce the period from which carer allowance is payable, the reduction is reasonable, necessary and proportionate to achieving a legitimate aim; and
- they do not limit or preclude eligible persons from gaining or maintaining access to carer allowance under the Social Security Act, 1991.

Schedule 18 – Pension Means Testing for Aged Care Residents

Committee comment:

1.40 As recognised by the statement of compatibility to the bill, the changes to means testing for the pension in respect of new aged care residents engages and limits the right to social security.

1.41 The committee seeks the advice of the Treasurer as to:

- whether the differential treatment of new entrants to aged care is rationally connected to and a proportionate means of achieving the objective; and
- whether the limitation will affect a person's ability to access an aged care facility.

This Schedule improves the sustainability and equity of the income support system by removing the social security income and assets test exemptions that are available to aged care residents who are renting their former home and paying their aged care accommodation costs by periodic payments.

New entrants to residential and flexible aged care from the commencement of this Schedule have: the net rental income from their former home assessed under the social security income test; and the value of their former home assessed under the social security assets test after two years, unless the home is occupied by a protected person, such as their partner, in which case it will continue to be exempt.

The changes will not impact income support recipients who enter residential and flexible aged care before commencement provided they remain in care or are only absent from care for a period not exceeding 28 days. They will continue to be eligible for these income and assets test exemptions.

This Schedule commences on the first 1 January or 1 July to occur after the day this Act receives the Royal Assent

Human rights implications

As outlined in the Explanatory Memorandum to the Bill, this Schedule is consistent with supporting the right to social security. The social security system uses income and assets testing to ensure the social security system:

- is sustainable, by reducing pension outlays
- is targeted to those in need, by reducing pension support to those who have the financial capacity to be more self-reliant
- encourages self-provision, by progressively withdrawing pension payments as an individual's level of income and asset increases to ensure that people with additional private income and assets are better off than those relying solely on the pension; and
- is fair, by ensuring individuals with similar levels of income and assets receive similar levels of assistance through the pension.

While the effect of this Schedule will be that pension payments for some recipients who enter aged care from the commencement of this Schedule will be lower than would have been the case if the income and assets test exemptions had not been removed, those affected will hold substantial levels of private income and assets. They have the capacity to be more self-reliant and it is appropriate that they:

- use their income and assets to help support themselves; and
- do not get higher pension payments that other people in aged care who have similar levels of income and assets, but who are not eligible for the income or assets test concessions.

In conclusion, the amendments in this Schedule are compatible with human rights because they do not limit access to social security.

Schedule 19 – Employment income (nil rate periods)

Committee comment:

1.48 As recognised by the statement of compatibility to the bill, the removal of two income test exemptions engages the right to social security. The preceding analysis explains why the amendments constitute a limitation.

1.49 The committee seeks the advice of the Treasurer as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the changes are otherwise aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

This Schedule, from 1 July 2018, removes existing income test exemptions for parents in employment nil rate periods under the: family tax benefit Part A income test; and the parental income test that applies to dependent young children receiving youth allowance and ABSTUDY living allowance.

Human rights implications

As outlined in the Explanatory Memorandum to the Bill, the Schedule is consistent with supporting the right to social security.

The Schedule removes the exemption from the income test for family tax benefit Part A recipients and the exemption from the parental income test for dependent young people receiving youth allowance and ABSTUDY living allowance if the parent is receiving either a social security pension or social security benefit, the rate of which is reduced to nil, either wholly or in part, because of employment income.

Removal of the exemptions recognises that they cause an inequity between families, where those families subject to the exemptions can receive greater financial assistance from family and youth payments than families not subject to the exemptions, even though they have the same income.

Removal of the exemptions also recognises that a family with income, including employment income sufficient to reduce their social security payment to nil, has financial means greater than a family that is receiving a social security payment. The measure will encourage greater self-sufficiency by reducing perverse incentives for families to maintain contact with the income support system rather than move to higher labour force attachment.

In conclusion, the amendments in the Schedule are compatible with human rights because they do not limit access to social security.

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

MC16-141201

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

Dear Mr Goodenough Ian

I am writing in relation to Report 7 of 2016, in which the Parliamentary Joint Committee on Human Rights sought further advice about the limitation on the right to privacy imposed by the *Australian Crime Commission Amendment (National Policing Information) Regulation 2016* (the Regulation). In its Report, the Committee has sought the advice of the Attorney-General on these matters. As I have portfolio responsibility for the subject matter of the Regulation, I am pleased to provide the response to the Committee's request.

The Regulation prescribes a number of bodies that may collect, and a number of information systems that may hold, 'national policing information' for the purpose of the *Australian Crime Commission Act 2002* (ACC Act). National policing information includes operational information collected and used by law enforcement agencies and basic identifying information of people applying for police records checks.

The Committee has noted in its Report that the Regulation prescribes a list of 310 bodies that collect national policing information. For the record, I can advise that the Regulation, in Item 4 of Schedule 1, prescribes a list of 210 such bodies (numbered from 101 to 310).

The Regulation is essential to enable the Australian Criminal Intelligence Commission (ACIC) to undertake its function of receiving, holding and sharing national policing information to and from relevant agencies. The Regulation creates a reasonable and proportionate limitation on the right to privacy in order to achieve this objective, and the ACC Act provides sufficient safeguards to protect the right to privacy.

Reasonable and proportionate limitation

The prescription of each relevant body by the Regulation is necessary and reasonable to ensure either that information needed for the effective performance of policing functions is available to all Australian police agencies or that information submitted in support of a person's application for a police record check is protected against inappropriate disclosure.

Similarly, each information system prescribed by the Regulation meets a particular information need of Australian police agencies, and the information held on each does not go beyond what is reasonably necessary for the purpose of each system.

Safeguards

Access to national policing information is restricted and there are appropriate safeguards against inappropriate access and use. All information held by the ACIC (which includes national policing information) is subject to robust information protection provisions set out in the ACC Act. Additional restrictions are applied to national policing information, with the approval of the ACIC Board being required for disclosure to bodies other than a small list of law enforcement agencies (namely, police agencies, DIBP, ASIO, ASIC, the ATO, the Independent Commission Against Corruption of New South Wales and the Crime and Corruption Commission of Queensland).

As with the other types of sensitive information that it holds, the ACIC has also put technical and administrative mechanisms in place to ensure that national policing information continues to be collected, used and stored securely.

The ACIC is also subject to a strict system of oversight and accountability that is specifically designed to ensure that the ACIC exercises its powers appropriately while maintaining the appropriate balance between secrecy and accountability. Should an individual have a complaint about how the ACIC deals with their personal information, depending on the nature of that complaint, the ACIC's conduct can be examined by the Commonwealth Ombudsmen, the Integrity Commissioner or the Parliamentary Joint Committee on Law Enforcement.

While the ACIC is not subject to the *Privacy Act 1988*, it is an agency that deals with a diverse range of sensitive information as part of its core business and is very experienced in ensuring information is appropriately handled and secured. Its safeguards and accountability mechanisms are specifically designed for the sensitive nature of its operations. The ACIC is also subject to the *Freedom of Information Act 1982* (Cth) and individuals have a right to seek access to and correction of their personal information where held by the ACIC.

Further information

Further information on the Regulation's limitation on the right to privacy, and the safeguards in place to prevent inappropriate use of personal information, is set out in Attachment A.

Should your office require any further information, the responsible adviser for this matter in my office is Talitha Try, who can be contacted on 02 6277 7290.

Yours sincerely

Michael Keenan

Encl:
Attachment A: Further information on the privacy implications of the Regulation
Attachment B: 'Privacy Impact Assessment, Proposed CrimTrac and Australian Crime Commission Merger'

Attachment A

Further Information on the privacy implications of the Australian Crime Commission Amendment (National Policing Information) Regulation 2016

In its Report 7 of 2016, the Parliamentary Joint Committee on Human Rights (the Committee) sought further advice in relation to the *Australian Crime Commission Amendment (National Policing Information) Regulation 2016* (the Regulation). In particular, the Committee has sought further information about the limitation on the right to privacy by the Regulation, whether the limitation is a reasonable and proportionate measure for the achievement of its stated objective and whether there are sufficient safeguards to protect the right to privacy of individuals (including safeguards that are comparable to those contained in the *Privacy Act 1988*).

The Regulation amends the *Australian Crime Commission Regulations 2002* (ACC Regulations), prescribing for the purposes of the *Australian Crime Commission Act 2002* (ACC Act) a number of items relating to the collection and disclosure of 'national policing information' by the Australian Criminal Intelligence Commission (ACIC). In particular, the Regulation prescribes a number of 'national policing information bodies' and 'national policing information systems'.

Limitation on the right to privacy

National policing information will often encompass personal information of individuals. The collection and disclosure of national policing information, which is in part facilitated by the Regulation, therefore engages and limits the right to freedom from unlawful or arbitrary interferences with a person's privacy under Article 17 of the *International Covenant on Civil and Political Rights*. Lawful interferences with the right to privacy will be permitted, provided they are reasonable in the particular circumstances. The UN Human Rights Committee has interpreted 'reasonableness' in this context to imply that 'any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case'.[1]

The Regulation is necessary

The Regulation is essential to enable ACIC to undertake its function of receiving, holding and sharing national policing information to and from relevant agencies. Section 7A(fa) of the ACC Act provides that the ACIC has the following 'national policing information functions':

> ... to provide systems and services relating to national policing information, including the following:
> (i) collecting, correlating and organising national policing information;
> (ii) providing access to national policing information;
> (iii) supporting and facilitating the exchange of national policing information;
> (iv) providing nationally coordinated criminal history checks on payment of a charge imposed by the Charges Act.

'National policing information' comprises all the information held on the national policing information systems maintained by the ACIC. This includes information collected and used by police and law enforcement agencies for law enforcement purposes as well as basic identifying information collected by 'accredited agencies' from applicants for the purpose of conducting national police records checks.

To be 'national policing information' under the ACC Act, particular information must *both* have

[1] *Toonen v Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994.

been collected by an Australian police agency or another prescribed body *and* have been incorporated into a prescribed ACIC system. As noted above, the Regulation prescribes both bodies and systems that contribute to this definition.

'National policing information' is a subset of 'ACC information' under the ACC Act. ACC information includes all information held by the ACIC (subsection 4(1) of the ACC Act).

Sufficient safeguards are in place

General safeguards for information held by ACIC

All information held by the ACIC, including national policing information, is subject to the information protection provisions of the ACC Act.

The ACC Act contains strict limitations on the dissemination of any information in the ACIC's possession. The ACIC can only disclose information in its possession to other government agencies if the ACIC CEO considers it appropriate, disclosing the information is relevant to a listed permissible purposes, and the disclosure would not be contrary to a Commonwealth, state or territory law (section 59AA).

In addition to this, the ACIC can only disclose information to bodies corporate that have been prescribed by the regulations and where the body has undertaken in writing not to use or disclose that information except for the purpose it was shared with it (section 59AB).

Specific safeguards for handling of national policing information by ACIC

The ACC Act imposes additional restrictions on the disclosure of national policing information, by requiring ACIC Board approval before disclosure is made to a body that is not set out in the ACC Act or prescribed in the ACC Regulations. The ACC Act sets out all Australian Police agencies, Department of Immigration and Border Protection (DIBP), the Australian Security Intelligence Organisation, the Australian Securities and Investments Commission and the Australian Taxation Office. The heads of these agencies (the Commissioner of the Australian Border Force in the case of DIBP) are all members of the ACIC Board. This level of Board oversight will ensure close scrutiny of the release of any information to non-law enforcement bodies.

The ACC Regulations prescribe the Independent Commission Against Corruption of New South Wales and the Crime and Corruption Commission of Queensland. These two bodies are able to receive national policing information in connection with their function of combating corruption.

Using or disclosing information in the ACIC's possession in breach of these provisions is an offence punishable by up to 2 years imprisonment.

As with the other types of sensitive information it holds, the ACIC has also put technical and administrative mechanisms in place to ensure that national policing information continues to be collected, used and stored securely.

Safeguards for handling of national police information by other bodies

Most information defined as 'national policing information' is collected by Australian police services. Access to, and use of, that information is strictly limited by the ACC Act to police services, ACIC Board agencies and a limited number of law enforcement agencies prescribed in the regulations or approved by the ACIC Board.

Accredited agencies collect limited personal information from individuals to allow the agency to apply for national police history checks for employment and other vetting purposes. These agencies have access only to the results of police history checks conducted at their request. They are required to deal with the personal information in those results in accordance with the Privacy Act through contractual obligations with the ACIC.

Section 59AAA of the ACC Act also provides rules that apply to the disclosure of information from a nationally coordinated criminal history check. This information may be disclosed to the person to whom it relates and to an 'accredited body', being a body approved by the CEO of the ACIC under subsection 46A(5) of the ACC Act to apply on behalf of individuals for police checks of those individuals. These rules reflect the fact that, unlike other national policing information services provided by the ACIC, the criminal history check is a service provided to members of the public for a fee.

ACIC's accountability framework

The ACIC is also subject to a robust accountability framework. Should an individual have a complaint about how the ACIC deals with their personal information, depending on the nature of that complaint, the ACIC's conduct can be examined by:

- the Commonwealth Ombudsman – who can investigate complaints about the ACIC's actions and decisions to see if they are wrong, unjust, unlawful, discriminatory or just plain unfair
- the Integrity Commissioner – who can investigate allegations of corrupt activity by current and former staff of the ACIC, and
- the Parliamentary Joint Committee on Law Enforcement – whose role is to monitor and review the ACIC's performance.

While the ACIC is not subject to the Privacy Act, it is an agency that deals with a diverse range of sensitive information as part of its core business and is very experienced in ensuring information is appropriately handled and secured. Its safeguards and accountability mechanisms are specifically designed for the sensitive nature of its operations. The ACIC is also subject to the *Freedom of Information Act 1982* (Cth) and individuals have a right to seek access to and correction of their personal information where held by the ACIC.

A Privacy Impact Assessment ('PIA', copy at **Attachment B**) was prepared by the Attorney-General's Department (AGD), the Australian Crime Commission (ACC) and CrimTrac as part of the proposal to merge the ACC and CrimTrac to form the ACIC.[2] A recommendation of that assessment was for the ACIC to develop and publish, in consultation with the Office of the Australian Information Commissioner, an information handling protocol that addresses the way in which the agency will treat personal information. The preparation of this information handling protocol is currently underway.

<u>The limitation is proportional to the end sought</u>

As noted above, the Regulation prescribes national policing information bodies and national policing information systems for the purpose of the definition of 'national policing information'

[2] The PIA was attached to the joint submission from AGD, the ACC and CrimTrac to the Senate Legal and Constitutional Affairs Legislation Committee's *Inquiry into the Australian Crime Commission Amendment (National Policing Information) Bill 2015 and the Australian Crime Commission (National Policing Information Charges) Bill 2015* in February 2016.

under the ACC Act. Prescription of these bodies and systems is necessary to enable ACIC to undertake its national policing information functions provided for under the ACC Act, and the Regulation does not go beyond what is reasonably necessary for the ACIC to undertake those functions..

'National policing information bodies'

Most national policing information is collected and uploaded to relevant national policing information systems by Australian police agencies. These agencies are already collectively specified in the definition of 'national policing information' in the ACC Act, and therefore do not need to be prescribed as national policing information bodies in regulations.

There are a few cases where information of significant value to policing is supplied to national policing information systems by other agencies. For example:

- DIBP uploads bridging visa data to the National Police Reference System (NPRS) and fingerprint information from checks made at the border to the National Automated Fingerprint Identification System
- AGD uploads certain information obtained in the performance of its functions to the NPRS and the National Firearms Identification Database (NFID), and
- the New Zealand Police contribute policing information to data held on the systems.

Each of these agencies is prescribed as a national policing information body by the Regulation. The prescription of these agencies is a necessary and reasonable measure to ensure that information needed for the effective performance of policing functions is available to all Australian police agencies.

Contributors of information for national police history checks

Most of the bodies prescribed as national policing information bodies by the Regulation are included solely because they are 'accredited bodies' to submit applications for nationally coordinated police history checks to the National Police Checking Service Support System (NSS). As noted above, these checks are a service provided to the public for a fee. Applications for a check are submitted by persons who are typically applicants for any of the following:

- recruitment and job applications
- volunteer and not for profit positions
- working with children or vulnerable groups
- licencing or registration schemes applications
- work-related checks due to legislation or regulations
- Australian citizenship and visa applications, and
- adoption applications.

The police history checking service plays an important role in ensuring that bodies such as charities, educational institutions, government agencies and healthcare providers can ensure as far as possible that they do not employ or confer any benefits on unsuitable applicants.

Where a person seeks a nationally coordinated police history check, an accredited body will submit identifying details of the applicant to the NSS to enable the check to be conducted. This information is treated as 'national policing information', being used in initial checks of the NPRS and disclosed to police agencies in each jurisdiction (if any) in which the checks indicate the person may have a

criminal record.

Before the ACIC CEO approves non-government bodies to be accredited bodies, they must be subject to police checks to ensure they are suitable bodies to deal with sensitive personal information. Approval is also dependent on their agreement to comply with the requirements of the Privacy Act in dealing with information for the purposes of the criminal record checking process.

Categorising information as 'national policing information' means that the information may be disclosed to a much narrower group of entities than if it were simply treated as 'ACC information'. Prescribing these accredited bodies under the Regulation is necessary to allow the information they submit on behalf of individuals to become 'national policing information'. The results of the check are available to the accredited body that made the application and the individual concerned. Other than this, the results are only available to the limited group of government bodies that may receive national policing information.

The prescription of these accredited bodies as national policing information bodies by the Regulation is a necessary and reasonable measure to ensure that information submitted in support of a person's application for a police record check is protected against inappropriate disclosure. Moreover, it does not have the effect of authorising these bodies to disclose information to the ACIC in circumstances where they could not otherwise have lawfully done so.

National Policing Information Systems

The Regulation prescribes a list of ACIC systems as national policing information systems, allowing the information that they hold to be treated as by national policing information. Information held in these systems relates directly to the day to day operations of the ACIC's national policing information function. Each system was originally established by CrimTrac to meet a particular information need of Australian police agencies and contains information that is necessary to enable the system to operate or is otherwise of a type likely to be of significant value to police in connection with the purpose of the system.

Details of the purposes of, and types of information held in, each system were provided in Attachment B (pages 18 – 38) to the PIA (copy at **Attachment B**).

The purpose of prescribing these systems is to set clear limits around the concept of national policing information. The PIA demonstrates that the information held on each system is necessary for the function of the system and that the purpose of each system is in the public interest.

The purpose of the prescriptions in the Regulation is to ensure that the ACIC has authority (where needed) to hold the information in each of the prescribed systems and that the information can be dealt with as national policing information. This limits its disclosure to a narrower range of recipients than ACC information generally may be disclosed to. The information held on each of the prescribed systems does not go beyond what is reasonably necessary for the purposes of that system.

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

Ref No: MC16-030506

25 OCT 2016

Ms Toni Dawes
Committee Secretary
Joint Parliamentary Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dawes

Thank you for your correspondence of 12 October 2016 regarding the Parliamentary Joint Committee on Human Rights (the Committee) assessment of the Biosecurity (Human Health) Regulation 2016 (the Regulation), in particular the requirements for taking, storage, transportation and labelling of body samples as a requirement of a human biosecurity control order.

Individuals operating under section 10 of the Regulation will always be a qualified medical professional. The included reference to appropriate professional standards captures all standards and requirements that apply to medical professionals in their care and treatment of patients, as well as standards for laboratories in the storage, transportation and labelling of body samples.

I consider that adherence to existing professional medical standards and requirements appropriately manage human rights concerns, including privacy and respect for personal rights and liberties.

Thank you for bringing this matter to my attention.

Yours sincerely

The Hon Sussan Ley MP

TREASURER

Ref: MC16-019165

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

Dear Chair

Thank you for your correspondence of 12 October 2016 concerning the Parliamentary Joint Committee on Human Rights' request for the Treasurer to provide a response in their Human Rights Scrutiny Report released on 11 October 2016 (Report 7 of 2016). The Committee requested information on the compatibility with human rights of the Budget Savings (Omnibus) Bill 2016; the *Census and Statistics Regulation 2016* (F2016L00706); and the *Federal Financial Relations (National Partnership payments) Determination No. 104-8 (March 2016) – (July 2016).*

I have referred the response on the Budget Savings (Omnibus) Bill 2016 to the Minister for Social Services as it concerns policy matters within his portfolio.

A detailed response to the Committee's requests relating to the *Census and Statistics Regulation 2016* and the *Federal Financial Relations (National Partnership payments) Determination No. 104-8 (March 2016) – (July 2016)* is attached.

I trust this information will be of assistance to you.

Yours sincerely

The Hon Scott Morrison MP

27 / 10 / 2016

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

ATTACHMENT

Census and Statistics Regulation 2016

The Parliamentary Joint Committee of Human Rights (the Committee) noted that the statement of compatibility accompanying the Regulation did not address any limitations imposed by sections 9 to 12 of that Regulation on the prohibition on the interference with privacy contained in Article 17 of the International Covenant on Civil and Political Rights. The Committee has requested advice on whether any such limitation is a reasonable and proportionate measure for the achievement of a legitimate objective, and in particular, whether there are sufficient safeguards in place to protect the right to privacy.

Sections 9 to 12 of the Regulation list the matters in relation to which the Statistician may collect statistical information for the purpose of taking the Census. These matters were previously prescribed in the *Census and Statistics (Census) Regulation 2015*, and were consolidated into the Regulation to simplify the Australian Bureau of Statistics' regulatory framework. The Regulation did not make any substantive changes to those matters. I do not consider that human rights have been engaged or affected by the movement of these matters into a new legislative instrument.

I also note that the compulsory collection, use and retention of personal information through the Census is authorised by the *Census and Statistics Act 1905*, not the Regulation.

However, given the Committee's concerns, I would like to provide the Committee with information on the significant safeguards that the Australian Bureau of Statistics (ABS) has in place to protect Census data, which support the ABS' ongoing commitment to maintaining community trust and protecting the confidentiality of individuals and businesses.

The ABS complies with its obligations under the Privacy Act 1988, and manages personal information in accordance with the Australian Privacy Principles. In accordance with Australian Privacy Principle 1, the ABS publishes both an ABS Privacy Policy and a Census Privacy Policy on their website at www.abs.gov.au. I refer you to these policies for detailed information on the safeguards put in place to protect the privacy of Census data.

In addition, it is an offence for a person who is or has been a Statistician or an officer to, either directly or indirectly, divulge or communicate to another person (other than the person from whom the information was obtained) any information given under the Census and Statistics Act 1905 (the Act) (including information collected under the Census) (section 19 of the Act). The penalty for this offence is 120 penalty units or imprisonment for 2 years, or both.

Exceptions apply where the person divulges or communicates the information for the purposes of the Act, or in accordance with a determination made under section 13 of the Act. The Act does not allow personal or domestic information to be disclosed in a manner likely to enable the identification of a particular person.

As the Committee noted in their report, the continued collection of information through the Census has a range of potential benefits for human rights. Statistics compiled by the ABS are used by governments to make more informed decisions on how to distribute resources, including government funds. This may impact on many different aspects of government planning, including those relating to housing, healthcare, education and infrastructure.

The collection of personal information, including names and addresses, is critical to ensuring the quality and value of the Census. Names and addresses have been collected in every Census conducted by the ABS, and their collection is consistent with international practice.

The retention of statistical information, including names and addresses, is consistent with the *Archives Act 1988*. This information may be destroyed when no longer required in accordance with the Administrative Functions Disposal Authority and the ABS' Records Disposal Authority.

I consider that the prescription of matters in sections 9 to 12 of the Regulation is a reasonable, necessary and proportionate method in pursuit of a legitimate objective, given the privacy safeguards in place.

Federal Financial Relations (National Partnership payments) Determination No. 104-8 (March 2016) – (July 2016)

The Committee has requested advice on whether the setting of benchmarks for the provision of funds through National Partnership payments is compatible with human rights.

National Partnership payments are made by the Commonwealth to the States and Territories to support the delivery of specified services or projects, and to facilitate and reward the undertaking of nationally-significant reforms. The *Federal Financial Relations Act 2009* requires the Treasurer to determine National Partnership payments to be made to each State and Territory. As these payments are generally made on the 7th day of each month, the Treasurer usually makes a determination at least once a month.

Each National Partnership agreement sets out mutually-agreed objectives, outcomes, outputs and performance requirements for the specific services, project or reform to be delivered under that agreement. Each agreement is negotiated between the Commonwealth and the relevant States and Territories. Through the negotiation process, the States and Territories have input into the setting of benchmarks to be used to measure progress in delivering services, projects and reforms. The benchmarks in National Partnership agreements are agreed by all parties as achievable and as supporting achievement of the mutually-agreed policy objectives.

The States and Territories meet the overwhelming majority of performance requirements in National Partnership agreements. The associated funding is then paid by way of the determinations for National Partnership payments, consistent with the terms and conditions of the relevant agreement. The setting of performance requirements promotes the progressive realisation of human rights by creating an incentive for the efficient delivery of services, projects and reforms where National Partnership payments support human rights in sectors such as health, education, housing and community services.

The Committee also sought my advice on whether there have been any retrogressive trends over time indicating reductions in payments which may impact on human rights. National Partnerships are time-limited agreements and, as mentioned above, the overwhelming majority of funding available under National Partnerships is paid to the States and Territories. There is no evidence to suggest that the setting of performance requirements leads to a situation where states and territories frequently become ineligible for National Partnership payments due to failure to meet those requirements. To the extent that payments cease under individual agreements, this is usually because the agreed project or reform is completed and no further funding is required. In such cases, localised decreases in payments are a direct result of the achievement of the agreement's stated objective.

At an aggregate level, total National Partnership payments vary from month to month and year to year for a variety of reasons. Different projects and reforms are delivered over different time periods, and annual funding allocations under individual agreements vary over the term of the agreement depending on the pace at which services, projects or reforms are expected to occur. Structural changes to the way that services are provided can also generate changes to funding arrangements. For example, funding mechanisms for the provision of disability services are currently changing significantly as the Commonwealth and the States and Territories move to full implementation of the National Disability Insurance Scheme. In this case, and more generally, changes to National Partnership payments for sectors that support human rights do not necessarily reflect trends in Commonwealth funding for service provision in those sectors.

There is no evidence to suggest that there are retrogressive trends in National Partnership payments which may impact on human rights. Since the Intergovernmental Agreement on Federal Financial Relations was agreed in November 2008, total Commonwealth payments to the States and Territories have increased from $84.0 billion in 2008-09 to $106.2 billion in 2015-16. Total payments to the States and Territories are estimated to be $116.5 billion in 2016-17.

The Hon Christian Porter MP
Minister for Social Services

MS16-001424

27 OCT 2016

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

Dear Chair

Thank you for the opportunity to provide comment on the Parliamentary Joint Committee on Human Rights' *Report 7 of 2016*.

The Committee has requested clarification about the engagement and limitation on human rights associated with the *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Amendment Principles 2016* (the Principles). It asks whether they are reasonable and proportionate to the objectives the Vulnerable Welfare Payment Recipient Measure (Vulnerable Measure).

The changes to the Principles place a 12-month limit to automatic Vulnerable Measure determinations. The changes were applied in response to findings of the Consolidated Placed-Based Income Management Evaluation 2015 (the PBIM evaluation), which show that the effectiveness of the Vulnerable Measure as a financial stabiliser is maximised in the short-term.

The changes to the Principles were designed through an evidence base to ensure any limitations to the Vulnerable Measure pursues a legitimate objective, is rationally connected to achieving that objective, and imposes only a proportionate limitation on human rights.

Is the limitation reasonable and proportionate for the achievement of its stated objective?

The limitations imposed by the Vulnerable Measure are reasonable and proportionate to the objectives of the program, and as the Committee notes, the new arrangements create a time limit for determinations, and are preferable to the preceding arrangements.

The broad objective of the Vulnerable Measure is to promote short-term financial stability in vulnerable welfare recipients by helping direct funds towards priority needs such as food, housing, clothing and utilities. To achieve this, the Department of Human Services (DHS) sets aside fifty per cent of clients' welfare payments by allocating funds for priority items and preventing expenditure of excluded items.

The automatic triggers under the Vulnerable Measure are applied to payments that are associated with financial vulnerability, including:

- the Unreasonable to Live at Home allowance;
- the Special Benefit payment; and
- crisis payments due to prison and psychiatric confinement release.

Short-term financial stability improvements were observed in the PBIM evaluation, which noted the positive impact of the Vulnerable Measure in relation to housing stability and the ability to provide for self, such as ensuring money is available for food.

Equality and non-discrimination

The criteria for determinations under the Vulnerable Measure make no reference to race or gender. The instrument primarily influences individuals in Place-Based income management locations on the Vulnerable Measure, of which 22 per cent are Indigenous and 47 per cent are female (as at 28 August 2016). These proportions reflect the degree to which Indigenous and female populations are represented in vulnerable trigger payment populations. The Principles provide minimal limitations to the right for equality and non-discrimination as the determinations are not linked to race or gender, and to the extent that these rights are engaged, it is reasonable and proportionate to the financial stability enhanced by the Vulnerable Measure.

The right to social security

Young people subject to the Vulnerable Measure retain their right to the same rate of social security, while being provided assistance to acquire essential items. The requirement to allocate a percentage of their social security payments on self-maintenance, via food, clothing and housing costs supports the aim of this right.

The Committee noted a broader aim of Social Security, being to prevent social exclusion and promote social inclusion. In the medium to long term, social inclusion is enhanced by assisting welfare recipients' short term financial sustainability and encouraging more sound spending patterns.

The right to privacy and family

While the Vulnerable Measure limits a person's right to freely dispose of tax payer resources, this limitation is capped at 12 months to ensure that it is proportionate and reasonable to the objective of developing and enhancing financial stability. The purpose of the Vulnerable Measure is to help vulnerable people stabilise their circumstances and promote general welfare while addressing issues of vulnerability. Practically, the Vulnerable Measure is consistent with the right to privacy and family as the objective proportionally outweighs any asserted human rights limitations to this right.

The Committee noted in its 2016 Review of Stronger Futures measures that the right to privacy is linked to notions of individual autonomy and human dignity. The changes to the instrument are compatible with these notions as there is evidence to suggest that the Vulnerable Measure promotes short-term financial stability for many customers and, with the introduction of the 12-month limit, will promote long-term autonomous development for individuals to progress their lives freely.

Why was a shorter period of operation for a determination, or the removal of the automatic trigger for vulnerable income management for young people, not deemed more appropriate?

The policy change was developed in response to the PBIM evaluation, which showed that the program broadly had a positive influence over financial stability and management for customers and had encouraged changes in spending on goods for which restrictions were applied. The longitudinal survey showed that positive indicators of financial stability and purchase restraint flattened between 12 and 18 months after participants were triggered (during the second wave of interviews). Twelve months is at the lower limit of that time that the program has shown to be most effective. A shorter determination, or the elimination of this trigger, would not be appropriate considering the balance of this evidence.

Why does the 12-month limit on a determination not apply to young people who have recently been released from jail or psychiatric confinement?

The Committee should note that the 12-month limit to vulnerable determinations still applies to individuals who are on crisis payment triggers for prison release or psychiatric confinement. New Subsection 8(1B) in the Vulnerable Principles introduces a limitation of 12 months' duration to any determination based upon an occurrence of the circumstances in paragraph 8(1)(a) or (b) of the *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013*, which outline the eligibility for crisis payment triggers. Similarly, a single release from gaol or psychiatric confinement can only result in one determination, limited to a maximum of 12 months' duration.

The Vulnerable Principles are drafted to allow for subsequent determinations (each of which is individually limited to 12 months) to be made should an individual become eligible for a Vulnerable determination trigger on multiple occasions. For example, if a person was placed on the Vulnerable Measure due to being granted the Unreasonable To Live At Home (UTLAH) rate of payment, their period on the program would cease after 12 months. However, should they subsequently qualify due to having received a Crisis Payment following release from prison, a second 12 month period of participation in the program would apply. However, the 12-month limit applies to each individual determination following release from prison in exactly the same way as it applies to those determinations made due to the person being granted UTLAH.

As the underpinning policy rationale for automatic triggers now emphasises short-term financial stability as a policy objective, there is a need for income management to apply to all individuals subject to Vulnerable determinations that apply to people receiving a crisis payment due to release from prison or psychiatric confinement, independent of whether an individual has received a previous determination.

Thank you again for bringing your concerns to my attention.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services