SENATOR THE HON MURRAY WATT
MINISTER FOR AGRICULTURE, FISHERIES AND FORESTRY
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MC23-006130

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
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Dear ~~Chair~~ Dean,

I write in response to the correspondence from the Senate Standing Committee for the Scrutiny of Bills (the Committee) dated 9 March 2023, referring to its report, *Scrutiny Digest 2 of 2023*, in relation to the Export Control Amendment (Streamlining Administrative Processes) Bill 2022 (the Bill). Please find below the response to the Committee's request for further information to assist the Committee's consideration of the Bill:

a) *Further justification in relation to allowing non-Commonwealth employees to exercise broadly drafted information disclosure powers*

Schedule 1 to the Bill proposes a new framework for the management of information under the *Export Control Act 2020* (the Act), including to provide for a number of statutory authorisations for the use and disclosure of relevant information. Under this framework, there are only two provisions which may be relevant to the information disclosure powers of non-Commonwealth employees. Proposed section 388 provides that certain non-Commonwealth employees would be authorised to use or disclose relevant information. It would also be possible for a non-Commonwealth employee to be prescribed in the rules as a class of person who may use or disclose particular kinds of relevant information for a particular purpose under proposed section 397E. Non-Commonwealth employees would not be authorised by the Bill to use or disclose relevant information under the authorisations in proposed sections 389 to 397D, as the authorisations in proposed sections 389 to 397B are only available to entrusted persons, while the authorisations in proposed sections 397C and 397D are only available to the Secretary.

Firstly, under proposed section 388, a person covered by subsection 388(2) would be able to use or disclose relevant information, in the course of, or for the purposes of, performing functions or duties, or exercising powers under the Act, or assisting another person to do so. The current information sharing provisions in the Act are drafted with powers allowing 'a person' to exercise information disclosure powers. A new, key safeguard introduced by the Bill is that the list of persons set out in proposed subsection 388(2) is exhaustively defined, and would only comprise of the following:

- A person employed or engaged by the Commonwealth or a body corporate that is established by a law of the Commonwealth;
- An authorised officer (which is defined in section 12 of the Act to mean a person who is authorised under section 291 to be an authorised officer under the Act. This includes Commonwealth authorised officers, State or Territory authorised officers and third party authorised officers);
- An approved auditor (which is defined in section 12 of the Act to mean a person, or person included in a class of persons, approved under subsection 273(1), and includes a person included in a class of persons specified by rules made for the purposes of section 274);
- An approved assessor (which is defined in section 12 of the Act to mean a person, or person included in a class of persons, approved under subsection 281(1), and includes a person included in a class of persons specified by rules made for the purposes of section 282);
- An accredited veterinarian (which is defined in section 12 of the Act to mean a veterinarian who is accredited in accordance with rules made for the purposes of subsection 312(1));
- A nominated export permit issuer (which is defined in section 12 of the Act, in relation to a kind of prescribed goods, to mean a person who manages or controls export operations in relation to goods of that kind that are covered by an approved arrangement; and is nominated in the approved arrangement as a person who may issue export permits for goods of that kind);
- An issuing officer (which is defined in section 12 of the Act to mean a magistrate, a judge of a State or Territory court, or a judge of the Federal Court or the Federal Circuit Court).

Each of the persons identified in proposed subsection 388(2) have specific roles and responsibilities under the Act, which are necessary to facilitate trade, ensure the integrity of goods that are exported and to implement Australia's obligations under the relevant international treaties. The proper, effective and efficient performance of functions or duties, or the exercise of powers, under the Act will often involve the use or disclosure of relevant information. For this reason, it is important that these persons have the ability to use or disclose relevant information, in the course of, or for the purposes of, performing functions or duties, or exercising powers under the Act, or assisting another person to do so. It is also crucial that they are able to perform their roles or carry out their responsibilities effectively, without being subject to other statutory or common law restrictions that would prevent them from doing so.

To the extent that a person identified in proposed subsection 388(2) is a non-Commonwealth employee, there are additional requirements that apply before the person is approved, authorised or accredited to perform such functions or duties, or to exercise powers under the Act. For example, under section 291 of the Act, the Secretary may authorise a person to be a third party authorised officer, only if specific requirements set out under the Act or prescribed by the rules are met. Similar requirements apply to the approval of auditors and assessors (see sections 273 and 281), as well as the accreditation of veterinarians (see section 312). Under section 151, the Secretary may also decide whether to approve a proposed arrangement for a nominated kind of export operations in relation to prescribed goods, which includes whether to approve a nominated export permit issuer identified in the arrangement.

In addition, as these non-Commonwealth employees are regulated entities under the Act, the Secretary also has the power under the Act to vary, suspend or revoke the relevant approval, authorisation or accreditation, if the Secretary considers it appropriate to do so. For example, sections 295 to 297 of the Act allow the Secretary to vary, suspend or revoke the authorisation

of third party authorised officers, while sections 165, 171 and 179 of the Act allow the Secretary to vary, suspend or revoke an approved arrangement, which includes a nominated export permit issuer identified in the arrangement. These provisions of the Act provide an important safeguard to ensure that the non-Commonwealth employees who are identified in proposed subsection 388(2), will demonstrate the skills, experience and integrity necessary to uphold the requirements of the Act, including in relation to the proposed framework in the Bill for the use and disclosure of relevant information.

As a further safeguard, the authorisation under proposed section 388 of the Bill is limited to the use or disclosure of relevant information, in the course of, or for the purposes of, performing functions or duties, or exercising powers under the Act, or assisting another person to do so. There is nothing in proposed section 388 that would permit non-Commonwealth employees who are identified in proposed subsection 388(2) to use or disclose relevant information beyond the scope of their specific roles and responsibilities under the Act. In addition, non-Commonwealth employees would not be authorised by the Bill to use or disclose relevant information for the purposes identified under proposed sections 389 to 397D, as the authorisations in proposed sections 389 to 397B are only available to entrusted persons, while the authorisations in proposed sections 397C and 397D are only available to the Secretary.

If non-Commonwealth employees use or disclose relevant information beyond the scope of their roles and responsibilities under the Act, then they should reasonably expect that the Commonwealth will take appropriate action against them. This may comprise of regulatory action under the Act, including the variation, suspension or revocation of the relevant approval, authorisation or accreditation, as appropriate. In addition, where the relevant information that was used or disclosed is protected information, then the civil penalty and offence provisions in proposed section 397G would also apply to such non-Commonwealth employees. This is intended to deter unauthorised uses or disclosures of protected information by such persons, and provides an additional safeguard to ensure that such information is appropriately protected under the Act.

Secondly, under proposed section 397E, the rules may prescribe the use and disclosure of relevant information by a person who is included in a prescribed class of persons. There may be situations where it is necessary for rules to be made by the Secretary to authorise the use or disclosure of relevant information under the Act by a class of persons who are non-Commonwealth employees. This is because the future needs of the Australian agricultural export industry are vast and diverse, spanning across agricultural production, export certification and trade opportunities in a changing global environment. To this end, there may be instances where it is necessary for relevant information to be used or disclosed by non-Commonwealth employees, who are working in partnership with the Commonwealth to achieve those objectives. For example, relevant information may be obtained or generated under the Act that could assist Australian farmers to improve the quality and yield of prescribed goods for export, or to assist Australian exporters with meeting importing country requirements or trade negotiations.

There are also additional safeguards that can be prescribed in rules made under proposed section 397E to limit the scope of the authorisation for the use and disclosure of the prescribed information. In particular, the rules may prescribe that the use or disclosure of relevant information is to be limited to certain prescribed purposes (see proposed paragraphs 397E(1)(b) and (2)(b)), or to certain prescribed kinds of information (see proposed paragraphs 397E(1)(c) and (2)(c)). The rules may also prescribe that the use or disclosure of the relevant information must comply with certain prescribed conditions (see proposed paragraphs 397E(1)(d) and (2)(d)), including requiring the person who is using or disclosing the information to ensure the

confidentiality of the information or to abide by certain agreements between the Commonwealth and the person in relation to the information.

Importantly, the rules made under proposed section 397E would be legislative instruments, which would be subject to parliamentary oversight through the disallowance process outlined in the *Legislation Act 2003*. Therefore, the Parliament would have oversight of the safeguards included in any future rules that allow non-Commonwealth employees to use or disclose relevant information.

I trust that the information provided above will assist the Committee in its consideration of the Bill.

Yours sincerely

MURRAY WATT 23 / 3 / 2023

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MC23-000725

Senator Dean Smith
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Dear ~~Chair~~ Dean

I am writing in response to a request from Ms Fattimah Imtoual, Acting Secretary of the Senate Scrutiny of Bills Committee (Committee) on 9 March 2023, seeking further information on the Housing Australia Future Fund Bill 2023.

My response to the questions outlined in the Committee's Scrutiny Digest 2 of 2023 is attached. I trust this additional information is sufficient to address the Committee's concerns.

I have copied this letter to the Treasurer and the Minister for Housing.

Yours sincerely

Katy Gallagher

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Response to issues raised by the Senate Scrutiny of Bills Committee in relation to the Housing Australia Future Fund Bill 2023 and the Treasury Laws Amendment (Housing Measures No. 1) Bill 2023

1.10 [T]he committee requests the minister's further detailed advice in relation to the exceptional circumstances that are said to justify exempting an instrument made under subclause 11(2) from the usual parliamentary disallowance process.

The Housing Australia Future Fund Bill 2023 (HAFF Bill) would establish the Housing Australia Future Fund (HAFF), with $10 billion to be credited to the HAFF as soon as practicable after commencement of the legislation (see HAFF Bill s.11(1)). Subclause 11(2) would allow additional amounts to be credited in the future, by written determination made by the responsible Ministers.

Before amounts were to be credited under subclause 11(2), they would need to be appropriated by the Parliament for this purpose through an Appropriation Act and would be a Budget measure. This mechanism would allow for appropriate parliamentary authorisation and oversight of this allocation of public money. In this respect, the subsequent determination under 11(2) would be an administrative tool for the Government to manage its financial arrangements and give effect to a matter that had received parliamentary oversight. Consequently, the Government considers that it is appropriate to exempt this determination from the parliamentary disallowance process.

In addition, subjecting this determination to potential disallowance would undermine the ability of the Future Fund Board of Guardians (the Board) to invest the additional credits in suitable investments to provide an acceptable level of investment returns prior to the completion of the disallowance period, as the additional credits would need to be readily available to be returned should the determination be disallowed. This would be the case whether disallowance would be likely or not, as the Board would be obliged to act in a manner that ensured that the additional credits were available to be returned at any time before the disallowance period expired.

This exemption therefore provides certainty. Further, it is consistent with the determination making powers in certain other legislation that provide for amounts to be placed in a special account for later use. For example, section 8 of the *Fuel Indexation (Road Funding) Special Account Act 2015* provides for amounts to be credited to the Fuel Indexation (Road Funding) Special Account by the Treasurer by way of non-disallowable determination.

1.17 The committee therefore requests the minister's advice as to:

- **how the criteria for the award of grants of financial assistance will be developed, noting that there is limited guidance on the face of the Housing Australia Future Fund Bill 2023 (HAFF Bill) as to how the power to make grants is to be exercised;**

- **whether the HAFF Bill can be amended to include at least high-level guidance as to the terms and conditions on which financial assistance may be granted; and**

- **whether the HAFF Bill can be amended to include a requirement that written agreements with the states and territories for grants of financial assistance made under subclause 18(3) are:**
  - **tabled in the Parliament within 15 sitting days after being made; and**
  - **published on the internet within 30 days after being made.**

Criteria for grants

The HAFF Bill provides that the designated Ministers can only make grants for specified purposes in relation to acute housing needs, social housing or affordable housing (section 18 refers). Payments under the HAFF made by Housing Australia can also only be made for the same specified purposes (section 33 refers). These requirements in the Bill ensure that the Ministers can only provide funding for purposes that are directed towards achieving the intent of the legislation.

Where appropriate, HAFF funding programs will have guidelines published on the relevant departmental website to ensure that applicants are treated equitably, and that funding recipients are selected based on merit addressing the program's objectives. Grant programs under the HAFF will be developed in accordance with the *Commonwealth Grant Rules and Guidelines 2017* (CGRG) and the requirements of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

Grant guidelines will be developed for all new grant opportunities and approved grants will be reported on the GrantConnect website no later than 21 days after the grant agreement takes effect. HAFF grant administration will be conducted in a manner consistent with the CGRG's principles of:

- robust planning and design;
- collaboration and partnership;
- proportionality;
- an outcomes orientation;
- achieving value with relevant money;
- governance and accountability; and
- probity and transparency.

The terms and conditions of grants or arrangements will be set out in a written agreement between the Commonwealth and the relevant funding recipient. This approach is consistent with the CGRGs, which state that grant agreements should provide for:

- a clear understanding between the parties on required outcomes, prior to commencing payment of the grant;
- appropriate accountability for relevant money, which is informed by risk analysis;
- agreed terms and conditions in regards to the use of the grant, including any access requirements; and
- the performance information and other data that the grantee may be required to collect as well as the criteria that will be used to evaluate the grant, the grantee's compliance and performance.

The Bill also requires designated Ministers to publish detailed and up-to-date information about grants made under the HAFF on their department's website. This information, which may include amounts paid and payable to recipients as well as the names of recipients, is in addition to the reporting obligations under the CGRGs. This information will not need to be reported for recipients that are individuals, to protect personal privacy.

I do not consider an amendment is necessary or that it would add to the effective administration of the HAFF. There are sufficient reporting obligations in the HAFF Bill that, when combined with the existing requirements in existing Commonwealth legislation and frameworks, ensure that detailed information on grants and arrangements is transparently available to the general public.

I consider the HAFF Bill includes sufficient high-level guidance on the terms and conditions for financial assistance to be granted. Where appropriate, terms and conditions will be included in grant guidelines and funding agreements with recipients, rather than placing it within the primary legislation.

Agreements with states and territories

Amendments to the HAFF Bill are not required. Any disbursements from the HAFF to states and territories will be subject to the Federation Funding Agreements (FFA) Framework. This framework has been reflected in the HAFF Bill, where the Government can allocate disbursements from the HAFF to states and territories via the existing Council of Australian Governments (COAG) Reform Fund.

The Intergovernmental Agreement on Federal Financial Relations (IGA FFR), under the FFA Framework, outlines the objectives, principles and institutional arrangements governing financial relations between the Commonwealth and State and Territory governments.

In accordance with the HAFF Bill, the terms and conditions on which financial assistance is granted must be set out in a written agreement between the Commonwealth and the grant recipient (section 19 refers). This written agreement will form a new Schedule under the Federation Funding Agreement (FFA) – Affordable Housing, Community Services and Other, which sets out the standard terms and conditions for funding agreements with the states and territories in these sectors.

FFA schedules can be tailored to establish milestones for initiatives, their relationship to program activities, expected completion dates, relevant reporting dates, and expected payments to be made. The parties agree to meet the milestones and/or performance benchmarks set out in the schedule.

To ensure transparency, all funding agreements with state governments are published on the Federal Financial Relations website and detailed in Budget Paper 3: Federal Financial Relations and equivalent documents in the MYEFO and the Final Budget Outcome.

1.22 [T]he committee requests the minister's further detailed advice in relation to the exceptional circumstances that are said to justify exempting an Investment Mandate from the usual parliamentary disallowance process.

The investment mandate is a legislative instrument and a direction by the Treasurer and the Minister for Finance, as the responsible Ministers under the HAFF Bill, to the Future Fund Board of Guardians (the Board).

The HAFF is intended to be a long-term investment that will provide an additional source of sustainable funding for social housing, affordable housing and acute housing needs. Similar to the other long-term Commonwealth Investment Funds (including the Future Fund, the Medical Research Future Fund, the Future Drought Fund, and the Disaster Ready Fund), it is expected that the investment mandate will set a long-term target rate of return. In these cases, it is envisaged that investment mandates would only be reissued if there was a significant change in Government policy or a structural change in the investment landscape.

In setting the investment mandates for the different investment funds, responsible Ministers need to ensure that:

- targeted returns are consistent with the policy intent (including consideration of the intended cash flows from the fund and growth of the underlying capital);
- resultant risks are aligned with the targeted returns, are reasonable and within tolerances; and
- the mandate is informed by appropriate and expert advice and set with regard to current and expected economic and financial market conditions.

Exemption from disallowance

As a direction from the Treasurer and the Minister for Finance to a body (the Board), investment mandates are exempt from disallowance under item 2 of the table at section 9 of the *Legislation (Exemption and other Matters) Regulation 2015*, which provides that a class of instruments not subject to disallowance is 'an instrument that is a direction by a Minister to any person or body'.

This is consistent with the long-standing and established operational arrangements for other funds currently managed by the Board, and is appropriate in the case of the investment mandate. The investment mandate provides direction to the Board in relation to the performance of its investment functions, and will include the setting of a benchmark rate of return and an acceptable level of risk that is aligned with the purpose of the HAFF.

This process for setting investment mandates provides the Board with an appropriate level of operational certainty in managing their investments on behalf of the Government over the long term. It also allows the Government to issue updated directions to the Board through new investment mandates when appropriate.

Although investment mandates are exempt from disallowance, the Bill provides for appropriate parliamentary and public scrutiny because the investment mandate direction is a legislative instrument. The Bill requires that, prior to issuing the investment mandate, the responsible Ministers must consult the Board (section 44(1) refers). If the Board chooses to make a submission regarding the draft investment mandate, this submission must be tabled in both houses of Parliament (section 44(2) refers). This requirement ensures that Parliament is informed of any matters raised by the Board with respect to proposed investment mandates.

Additionally, the Future Fund Management Agency publishes annual and quarterly performance reports, including comparisons against the benchmark rates specified in the Fund investment mandates.

1.25 The committee therefore requests the minister's advice as to whether the bill could be amended to provide that a submission made by the Future Fund Board in accordance with paragraph 44(1)(b) must be tabled in both Houses of the Parliament within an explicitly stated timeline, for example, within 15 sitting days of the minister receiving a submission.

Any submissions received from the Future Fund Board of Guardians (the Board) under paragraph 44(1)(b) would be considered by the Government at the time of settling the investment mandate direction. It is therefore appropriate to table the Board's submission at the same time as the investment mandate direction itself. This would also allow Members and Senators to review the direction and any submission of the Board together. I therefore do not consider that the Bill would be improved by requiring the Board's submission to be tabled within a set timeframe.

The Hon Clare O'Neil MP
Minister for Home Affairs
Minister for Cyber Security

Ref No: MC23-008480

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Dear Senator

Response to the Senate Scrutiny of Bills Committee – Scrutiny Digest 2/23 - Migration Amendment (Australia's Engagement in the Pacific and Other Measures) Bill 2023

Thank you for your correspondence of 9 March 2023 concerning matters raised by the Senate Scrutiny of Bills Committee (the Committee) in the Scrutiny Digest 2 of 2023 for advice in relation to the Migration Amendment (Australia's Engagement in the Pacific and Other Measures) Bill 2023 (the Bill). I welcome the opportunity to respond to the Committee's comments, as outlined below.

Committee questions related to use of delegated legislation in the Bill
The Committee requested more detailed advice as to why it is considered necessary and appropriate to include much of the detail of the operation and requirements of a visa pre-application process in delegated legislation.

It is necessary and appropriate to include detail of the operation and requirements of a visa pre-application process in delegated legislation because of the requirement for flexibility in relation to that detail. As the use of a visa pre-application process in the form of a ballot will be a novel methodology for filtering potential visa applicants, it would be inappropriate to lock down the detailed eligibility requirements for entering the ballot, or the procedures surrounding the ballot, in the *Migration Act 1958* (the Migration Act). Those details will vary between different visas. The requirements may also be subject to adjustment in light of practical experience with the use of ballots. The migration system needs to be adaptable and responsive to economic changes and the policies of the Australian Government of the day, with adaptation and response occurring as quickly as possible. Primary legislation is not suitable for this purpose.

As with existing criteria for making an application for a visa and criteria for the grant of visas, these are matters of detail that need to respond to current climates. Because of the volume of legislation and frequency of amendment, they are appropriate for delegated legislation. Criteria relating to the grant of visas have been located in delegated legislation since detailed statutory visa criteria were first introduced in 1989.

The current migration regulations, the *Migration Regulations 1994* (the Migration Regulations) have been in effect since 1 September 1994. Over that period of almost 29 years it has been the consistent practice of all Governments to include detailed visa criteria in the Migration Regulations rather than the Migration Act. This is consistent with the structure of the Migration Act, as amended from 1 September 1994 by the *Migration Reform Act 1992.*

In particular, subsection 46(3) of the Migration Act provides that the regulations may prescribe criteria that must be satisfied for an application of a specified class to be a valid application. It is consistent with that overarching approach for the details of the visa pre-application process to also be set out in delegated legislation. The effect of the Bill is that the Migration Regulations will need to be amended to require an applicant for a visa to have been selected in an applicable visa pre-application process in order to make a valid application for a particular visa.

The details of the visa pre-application processes will be set out in determinations by the Minister in the form of a legislative instrument. The use of legislative instruments for this purpose is to provide additional flexibility, as compared to requiring regulations to be made. However, there is no loss of accountability to the Parliament as the Ministerial determinations are subject to disallowance. In particular, the core provisions, stating who is eligible to enter a particular ballot, must always be set out in a Ministerial determination. This ensures that there is full accountability to the Parliament – the regulations requiring a person to have been selected in a ballot will be disallowable, and the Ministerial determination of eligibility to enter the ballot will also be disallowable.

Safeguards in relation to the use of automated systems to decisions will be made appropriately and not subject to legal error
The Committee requested more detailed advice as to what safeguards are in place, if any, to ensure that automated decisions will be made appropriately and not subject to legal error.

The proposed automation is limited to acceptance of a person's registration in a ballot and the random selection of registered entrants. There does not appear to be any risk of legal error in this process (e.g. wrongly blocking a person's attempted registration), as the eligibility requirements, which will be few in number, are required to be objective (e.g. age, passport held – see paragraph 46C(21)(c) of Bill). The process of random selection will involve a simple algorithm.

It does not appear to be necessary to provide for legislative safeguards to ensure appropriate decision-making or to avoid legal error.

Safeguards to ensure the transparency and integrity of automated systems
The Committee requested more detailed advice as to whether the Bill can be amended to include specific safeguards that ensure the transparency and integrity of any automated system used.

The limited nature of the proposed automation (as outlined immediately above) is such that specific legislative safeguards do not appear to be required. The use of an automated process to conduct the random selections is itself an assurance of transparency and integrity, in that it eliminates manual intervention in the process.

The operation of the computer system will be subject to standard quality assurance processes within the Department of Home Affairs and the Department's operations are subject to review by the Australian National Audit Office.

A general power to create visa pre-application processes in relation to any category of visa
The Committee requested more detailed advice in relation to the reasons for providing a general power to create visa pre-application processes in relation to any category of visa.

The use of a ballot is an accepted part of immigration systems around the world (e.g. the green card system in the USA and the Pacific Access Category in New Zealand). The methodology has a potential for use in visas where the number of eligible applicants greatly exceeds the number of places available under the visa program. Whether the ballot is used in relation to any visa will be a matter for the Government of the day and subject to Parliamentary scrutiny and disallowance. It is therefore appropriate to create the capacity to utilise a ballot, subject to necessary, disallowable future amendments to the Migration Regulations, if that is the decision of Government. As noted in the Explanatory Memorandum to the Bill, the benefits of a ballot to select eligible visa applicants may include:

- more efficient visa processing and more effective management of departmental resources, by managing the rate of visa applications received by the Department and avoiding large numbers of applications that cannot be accommodated within the annual migration program and which may lead to long and unrealistic visa processing queues, or visa refusals where the annual cap has been met;
- equitable and fair access to temporary and permanent migration programs which are regularly over-subscribed;
- avoidance of the requirement for visa applicants to pay the non-refundable first instalment of the visa application charge (VAC) for an application which may be subject to a lengthy queue due to the limited number of places in the migration program, or refusal where the annual cap has been met. Although a prospective visa applicant may be required to pay a small registration charge to enter the ballot, the person will only be required to pay the VAC if a visa application is made following selection in the ballot, selections for which would match allocated places in the migration program; and
- accurate targeting of priority cohorts for particular visas. For example, the eligibility requirements to enter the ballot will be able to limit eligibility to participate in the ballot by reference to any objective criteria that are relevant to the particular visa, including nationality in the case of the PEV, and possibly including matters such as occupation, skills, and work experience for other visas.

I thank the Committee for its consideration of this important Bill.

Yours sincerely

CLARE O'NEIL

23 March 2023