# Appendix 3

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# Correspondence

The Hon Dan Tehan MP
Minister for Social Services

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7560

MC18-002446

19 APR 2018

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
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Dear Mr Goodenough Ian,

Thank you for your letter of 28 March 2018 regarding the Parliamentary Joint Committee on Human Rights' consideration of the Crimes Amendment (National Disability Insurance Scheme – Worker Screening) Bill 2018 (the Bill) in its *Report 3 of 2018*.

I appreciate the Committee's consideration of the Bill and am pleased to have the opportunity to address the issues raised by the Committee in relation to permitting disclosure of spent, quashed and wrongful convictions of persons seeking to work with persons with disability under the National Disability and Insurance Scheme (NDIS).

I welcome the opportunity to respond to the Committee's comments and provide the following advice.

*Compatibility with the right to privacy and the right to work*

The Committee has acknowledged that in some circumstances, it may be appropriate to permit the disclosure, or the taking into account, of a person's criminal history information to enable proper assessment of whether the person poses an unacceptable risk of harm, including when the person works with vulnerable people.

While the Committee has raised the question of the taking into account of a person's entire criminal record, disclosure of a person's entire criminal record is important to ensure that the state and territory worker screening units tasked with making an informed assessment of an individual's suitability to work with people with disability can access and consider a complete picture of that person's criminal history.

Safeguards will be in place through a nationally consistent, risk-based approach that will provide state and territory worker screening units with a framework for considering a person's criminal history and patterns of behaviour over a lifetime that would indicate

potential future risk to people with disability. The more complete the information about patterns of behaviour, the more accurate the assessment of risk. Even offences that are minor, not violent or sexual in nature, are not directly related to disability employment or happened some time ago, contribute to an assessment of risk.

State and territory worker screening units will be required to undertake a rigorous process to determine the relevance of a particular event to whether an applicant for an NDIS Worker Screening Check poses a risk to people with disability. In particular, worker screening units are required to consider:

- the nature, gravity and circumstances of the event and how it is contributes to a pattern of behaviour that may be relevant to disability-related work;
- the length of time that has passed since the event occurred;
- the vulnerability of the victim at the time of the event and the person's relationship to the victim or position of authority over the victim at the time of the event;
- the person's criminal, misconduct and disciplinary, or other relevant history, including whether there is a pattern of concerning behaviour;
- the person's conduct since the event; and
- all other relevant circumstances in respect of their offending, misconduct or other relevant history, including attitudes towards offence or misconduct, and the impact on their eligibility to be engaged in disability-related work.

People with disability are some of the most vulnerable within the Australian community. It is not only sexual or violent offences that the worker screening regime seeks to mitigate against. Individuals employed within the NDIS are in a position of trust and in many cases will have access to the person with disability's personal belongings, finances and medication. Minor offences may be relevant to a person's integrity and general trustworthiness. On that basis, it is appropriate to have awareness of the circumstances of surrounding even minor offences.

It should be recognised that the fact that an individual may have a criminal conviction for a minor offence which occurred a long time ago forms only one part of the analysis and risk assessment undertaken by a state or territory worker screening unit. It will not necessarily prohibit that person from gaining employment with a provider within the NDIS.

Limiting the categories of offences that can be disclosed to worker screening units would create a risk that relevant information is not available to inform a decision by a worker screening unit and could undermine the value of an NDIS worker screening outcome as a source of information for people with disability and for employers. Inaccurate risk assessments may also be unfair to workers themselves.

The Committee also raises the issue of access to information on spent, quashed and pardoned convictions. Research supports criminal history, including spent, quashed or pardoned convictions, as a key indicator of past patterns of behaviour.

While, as the Committee points out, a person whose conviction is quashed may be factually and legally innocent, there are a range of reasons that a conviction may be quashed or pardoned that might not be so black and white. This will not be known until the specific circumstances surrounding the pardoned or quashed conviction are considered by the

worker screening unit, which is why they need access to such information as proposed in the Bill.

This is why the Working with Children Check currently undertakes a review of spent, quashed and pardoned convictions.

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

With regards the issues of proportionality and rational connection between the differential treatment of workers based on criminal history, criminal history checks are conducted as a matter of routine for a range of occupations, to allow employers to make recruitment decisions which support a safe and secure workplace for workers and participants alike.

The more comprehensive data collected as part of the NDIS Worker Screening Check reflects that there is a higher degree of risk an individual may pose to person with disability in the course of delivering supports and services. Differential treatment of individuals as a result of considering criminal history as a part of a risk-based worker screening would not constitute unlawful discrimination as there is sufficient research and objective evidence that supports the consideration of this information as a basis for determining risk.

A complete criminal history, leads to a more accurate and reliable risk-based worker screening assessment which benefits both people with disability and the worker being screened. A comprehensive assessment is likely to be fairer to workers and reduce the chance of unjustified discrimination.

It should be noted that employers do not get access to any criminal history information under the proposed approach to NDIS Worker Screening. Employers will only have access to worker screening outcomes, once the approved Worker Screening Unit has made a determination.

Finally, I note that Working with Children Checks already operate in all jurisdictions with access to, and assessment of, full criminal history. People with disability deserve the same level of protection.

Thank you again for bringing these matters to my attention. I trust this information is of assistance to the Committee and look forward to the Committee's final report.

Yours sincerely

**DAN TEHAN**

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# Senator the Hon Marise Payne
Minister for Defence

MC18-000774

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

Dear Mr Goodenough Ian

Thank you for your letter of 28 March 2018 regarding the interest of the Parliamentary Joint Committee on Human Rights in the Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018.

As you would be aware, the Bill received bi-partisan support and was passed without amendment by the parliament on 28 March 2018.

Notwithstanding the Bill's passage through the parliament, I am pleased to provide the enclosed advice regarding your committee's specific questions regarding the operation of particular provisions of the legislation.

I trust this information is of assistance.

Yours sincerely

**MARISE PAYNE**
Encl

13 APR 2018

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COPY

# Advice to the Parliamentary Joint Committee on Human Rights in response to questions regarding the Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018

**Question:**

**Communicating AUSTRAC information to foreign intelligence agencies and the compatibility with the right to privacy.**

***The preceding analysis [contained in the committee's Report 3 of 2018] raises questions as to whether the measure is compatible with the right to privacy.***

***The committee therefore requests the advice of the minister as to:***

- ***Whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;***
- ***how the measure is effective to achieve (that is, rationally connected to) that objective; and***
- ***whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards in relation to the operation of the measure).***

**Question:**

***In relation to the right to life, the committee seeks the advice of the minister about the compatibility of the measure with this right (including the existence of relevant safeguards).***

***In relation to the prohibition on torture, or cruel, inhuman or degrading treatment or punishment, the committee seeks the advice of the minister in relation to the compatibility of the measure with this right (including any relevant safeguards).***

**Combined Answer:**

As the committee would be aware, the Australian Transaction Reports and Analysis Centre (AUSTRAC) has made successive statements and provided advice to the parliament in relation to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, including specifically regarding the sharing of information with foreign partners, and provided assurances that while the Act does engage a range of human rights, to the extent that it limits some rights, those limitations are reasonable, necessary and proportionate in achieving a legitimate objective.

The new section 133BA for the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* includes a very important consequential amendment as a result of the Australian Signals Directorate (ASD) becoming an independent statutory agency.

At present ASD is part of the Department of Defence and is covered by the Department's own provision within *the Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. As ASD will be becoming its own entity on 1 July 2018 it now requires its own listing under this Act.

This amendment to the Act does not extend or alter the current arrangement ASD receives by being part of the Department of Defence. Similarly, it is consistent with arrangements provided for all other intelligence and security agencies that require this function. This amendment is not, in effect, creating a new arrangement for ASD. These provisions reflect longstanding arrangements for agencies in the intelligence and security community, and there are strong safeguards in place to ensure the function is appropriately exercised.

In this context, there already exists strong compliance safeguards and ASD is subject to some of the most rigorous oversight arrangements in the country. This includes being subject the oversight of the Inspector-General of Intelligence and Security, who has the powers of a standing royal commission and can compel officers to give evidence and hand-over materials. The Inspector-General regularly reviews activities to ensure ASD's rules to protect the privacy of Australians are appropriately applied.

This amendment made to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* is critical to ASD's work to combat terrorism, online espionage, transnational crime, cybercrime and cyber-enabled crime.

As an independent statutory agency, this amendment now ensures that information is able to be appropriately shared, consistent with how other Australian domestic intelligence and security agencies manage this type of information. This work across the intelligence and security community is central to defending Australia and its national interests.

**Question:**

**Operation outside the Public Service Act and compatibility with the right to just and favourable conditions at work.**

***The preceding analysis [contained in the committee's Report 3 of 2018] raises questions as to whether the measure is compatible with the right to just and favourable conditions at work. The committee therefore seeks the advice of the minister as to:***

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

**Answer:**

The Government is committed to ensuring that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to access employee representatives.

The amendments to the *Intelligence Services Act 2001* (Intelligence Services Act) that establish ASD as an independent statutory agency do not have the effect of intruding into the right to work on an unwarranted or unreasonable basis.

In relation to the employment of staff, ASD will now operate outside of the *Public Service Act 1999* (Public Service Act) framework. This will provide ASD with greater flexibility to recognise the skills of its specialised workforce. This structure reflects the need to retain those individuals with highly sought after skills, such as those with science, technology, engineering and maths qualifications. Mobility across the public sector is also recognised as an important tool to bring in critical talent into ASD, but to also enable the further development of skills in different environments. To support this, the amendments made to the Intelligence Services Act include the specific provision that will allow for the transfer of employment from ASD to the Australian Public Service. As part of these arrangements, the prior service and accrued leave balances of staff within the Australian Public Service and ASD will continue to be recognised and ASD staff will continue to be able to access public sector superannuation schemes. This amendment pursues the legitimate objective of providing ASD with greater flexibility to recruit, retain, train, develop and remunerate its specialist staff, in accordance with the recommendations of the 2017 Independent Intelligence Review.

As recognised by the Review, for ASD the option of continuing to operate within the Public Service Act employment framework, even with exemptions, is not the most effective way forward to ensure ASD can continue to deliver the outcomes required. It would increase the risk of further losing the critical skills needed to successfully perform this task and not address the need to improve ASD's position in the employment market to attract the highest quality candidates.

In seeking to achieve this for ASD the Government also recognises that ASD, while stepping outside of the Australian Public Service, will still be operating in close proximity to many public service agencies, and the Public Service Act provides several important protections for staff. In this context, an important safeguard has been included in the Bill to ensure that the new ASD employment framework would not be arbitrary. Under section 38F, the Director-General of ASD must adopt the principles of the Public Service Act in relation to employees of ASD to the extent to which the Director-General considers they are consistent with the effective performance of the functions of ASD. This has the effect of protecting ASD employees, similar to the protection received by public servants employed under the Public Service Act.

There are also additional measures to safeguard workers.

First, the *Fair Work Act 2009* (Fair Work Act) will continue to apply to ASD employees and provide them with an avenue for redress for their employment-related grievances. The Fair Work Act provides protections of employee rights, including:

a. workplace rights as currently defined by the Fair Work Act;
b. the right to engage in industrial activities;
c. the right to be free from unlawful discrimination; and
d. the right to be free from undue influence or pressure in negotiating individual arrangements.

The amendments to the Intelligence Services Act do not extinguish these rights for the staff of ASD. Additionally, the right of employees to be members of industrial associations and the ability to engage in industrial activities will continue, as well as have their workplace interests represented by industrial or employee advocates.

In addition to the continuation of the protections afforded to staff by the Fair Work Act, the Inspector-General of Intelligence and Security (IGIS) provides additional safeguards not normally afforded to workers outside of the intelligence community. Through the amendments made to the Intelligence Services Act the IGIS will be given powers to investigate complaints regarding employment-related grievances from ASD employees. Previously the IGIS was not able to investigate these complaints, and ASD employees sought redress through the Public Service Commissioner or the Merit Protection Commissioner. From 1 July 2018, ASD employees can bring their grievances to the IGIS in the same way as for employees of the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service.

Operating outside the Australian Public Service also provides the flexibility to design over time new employment categories and career pathways that are in addition to the standard public service structures. This will enable ASD to more directly market itself to the types of trades and skills it needs to attract, and highlight the skill development and career progression that can occur within these streams of work in the agency.

It is recognised that ASD operates within a highly competitive employment market, even within the Australian security and intelligence community. There are several other agencies that also offer rewarding careers to people with many of the skills and attributes ASD seeks to engage. Overall, in recognition of the environment ASD seeks to recruit from, the amendments to the Intelligence Services Act effectively give the same flexibility to the Director-General of ASD for the recruitment and retention, and establishing workplace agreements, as the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service.

# THE HON PETER DUTTON MP
## MINISTER FOR HOME AFFAIRS
## MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS18-001251

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

Dear Ian, Mr Goodenough

Thank you for your letters of 28 March 2018 in which further information was requested on the *Identity-matching Services Bill 2018* (Cth) and *Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018*.

I have attached my response to the *Parliamentary Joint Committee on Human Rights' Report 3 of 2018* as requested in your letters. The response to the *Identity-matching Services Bill 2018* (Cth) should be considered in conjunction with my letter dated 04 April 2018, which outlined our response to the Chair of the Senate Standing Committee on the Scrutiny of Bills.

I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 26/04/18

*IMMI 18/003: Specified courses and exams for registration as a migration agent Instrument 2018*

Committee's Questions:

**The Committee requests advice of the Minister as to how the measures are effective to achieve (that is, rationally connected to) the stated objectives; and**

**Whether the measures are reasonable and proportionate to achieving the stated objectives of the instrument (including how the measures are based on reasonable and objective criteria, whether the measures are the least rights-restrictive way of achieving the stated objective and the existence of any safeguards).**

Guided by the 2014 Kendall Review, the Government is committed to protecting vulnerable visa applicants by ensuring that new and re-registering migration agents be required to prove that they have English language proficiency. The amendments made to the English language tests *in IMMI 18/003: Specified courses and exams for registration as a migration agent instrument* were a correction to the previous instrument *IMMI 12/097 Prescribed courses and exams for applicants for registration as a Migration Agent (Regulation 5).* The Test of English as a Foreign Language (TOEFL) scores set out in the previous instrument 12/097 (with the exception of the writing subtest) were incorrect and did not align with the benchmarked International English Language Testing System (IELTS-TOEFL) equivalent scores.

With IMMI 12/097 being repealed and replaced to reflect the new educational requirements for migration agents, it was an opportune time to revise the TOEFL scores. The TOEFL scores in IMMI 18/003 align with the benchmarks for all departmentally accepted English language tests.

The broad application of these accepted English language proficiency levels for registered migration agents (which aligns with benchmarks required for certain visa applicants) is non-discriminatory. The measures are also reasonable and proportionate to ensure the quality and standards of advice to protect clients of migration agents.

**THE HON JULIE BISHOP MP**

Minister for Foreign Affairs

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

Dear Mr Goodenough

Thank you for your letter of 28 March 2018 regarding the human rights compatibility of various instruments (together, the Instruments) made under the *Autonomous Sanctions Act 2011* (the Act).

As noted by the Committee in its *Report 3 of 2018* ('the Report'), the effect of the Instruments is to subject designated and declared persons to targeted financial sanctions and travel bans.

The Government is committed to ensuring the human rights compatibility of Australia's sanctions regime. I have previously addressed in some detail the issues raised in the Report in my responses to the Committee in 2015 and 2016. Without repeating the detail of those responses, it remains the Government's view that sanctions measures are proportionate and appropriate in targeting those responsible for repressing human rights and democratic freedoms or to end regionally or internationally destabilising actions.

Modern sanctions regimes impose highly targeted measures designed to limit the adverse consequences of a situation of international concern, to seek to influence those responsible for it to modify their behaviour, and to penalise those responsible. Australia does not impose sanction measures on individuals lightly.

I continue to be satisfied that Australia's implementation of autonomous sanctions is proportionate to the objectives of each regime. I note that the Department of Foreign Affairs and Trade (DFAT) keeps the operation of Australia's sanction regimes under regular review.

Non-refoulement

The Committee's Report raises concerns at the potential for designated or declared individuals to be removed from Australia contrary to Australia's non-refoulement obligations.

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Under the *Autonomous Sanctions Regulations 2011*, I may declare a person who meets the criteria specified in regulation 6 for the purpose of preventing the person from travelling to, entering or remaining in Australia. A 'declared person' holding an Australian visa may therefore have their visa cancelled by the Minister for Home Affairs under the *Migration Regulations 1994*, regulation 2.43.

However, under regulation 2.43(1)(aa) of the *Migration Regulations 1994*, the Minister for Home Affairs cannot cancel a visa that is classified as a 'relevant visa'. Regulation 2.43(3) of the *Migration Regulations 1994* provides that a 'relevant visa' includes, among others, a protection, refugee, or humanitarian visa. I note that under the *Autonomous Sanctions Regulations 2011*, I may also waive the operation of a declaration that was made for the purpose of preventing the person from travelling to, entering or remaining in Australia, on the grounds that it would be in the national interest, or on humanitarian grounds. This decision is subject to natural justice requirements, and may be judicially reviewed.

I also note the Committee's comments in relation to section 197C of the *Migration Act 1958*. As outlined in the Explanatory Memorandum to this section at the time of its introduction, Australia will continue to meet its non-refoulement obligations through mechanisms other than the removal powers in section 198 of the *Migration Act 1958*, including through the protection visa application process, and through the use of the Minister's personal powers in the *Migration Act 1958*. These mechanisms ensure that non-refoulement obligations are addressed before a person becomes ready for removal under section 198.

Statements of compatibility with human rights

I note the Committee's concerns that the statement of compatibility with human rights (SCHR) in the Instruments does not engage in any substantive analysis of the rights and freedoms that are engaged and limited by the Instruments.

As I have indicated above, I consider that the Instruments and the broader sanctions framework is proportionate and compatible with human rights. I have asked DFAT to consider whether additional detail can be included in future statements.

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

Yours sincerely

Julie Bishop

The Hon. David Littleproud MP

**Minister for Agriculture and Water Resources**
**Federal Member for Maranoa**

Ref: MS18-000543

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

30 APR 2018

Dear Mr Goodenough

The Parliamentary Joint Committee on Human Rights (the Committee) has requested further information about measures in the Export Control Bill 2017 (the Bill). The enclosure sets out my detailed response to the questions raised by the Committee.

I thank the Committee for their consideration of this Bill to better regulate Australia's agricultural exports into the future.

Yours sincerely

**DAVID LITTLEPROUD MP**

Enc.

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7630 Email: minister@agriculture.gov.au

## Response to a request from the Parliamentary Joint Committee on Human Rights for information in relation to the Export Control Bill 2017.

**Request at paragraph 1.53-1.54 – Fit and proper person test**

**1.53 The preceding analysis indicates that there are questions as to the proportionality of the limitation on the right to work, the right to freedom of association and engagement of the right to equality and non-discrimination.**

**1.54 The committee therefore seeks the advice of the minister as to whether:**

**the limitation is a reasonable and proportionate measure for the achievement of its stated objective (including whether the measure is sufficiently circumscribed, the breadth of the secretary's discretion and the availability of relevant safeguards); and**

**consideration could be given to: amending section 372 to restrict the range of factors that the secretary may consider as adversely affecting whether a person is a 'fit and proper person'; restricting the list of 'associates' in section 13; and setting out who is required to be a fit and proper person in primary legislation rather than in delegated legislation.**

Australia's access to markets and the ability to export agricultural goods depends on its trading reputation and the confidence of its trading partners. The fit and proper person test is necessary, reasonable and proportionate for the legitimate objective of ensuring that persons who are approved to export goods from Australian territory are persons that are trustworthy and demonstrate the required integrity necessary to uphold Australian law and protect our trading reputation.

Clause 372 of the Bill will provide the Secretary with the ability to apply a fit and proper person test in circumstances provided for by the Bill or prescribed by the Rules. Persons will be required to notify the Secretary if they have been convicted of certain specified offences, or ordered to pay a pecuniary penalty in relation to certain specified contraventions (clause 374 of the Bill). When determining whether a person is a fit and proper person, the Secretary may consider the nature of the offences resulting in the conviction or pecuniary penalty, the interest of the industry, or industries, relating to the person's export business and any other relevant matter. Whilst these factors, along with a person's associates, will be taken into account by the Secretary when applying the fit and proper persons test, these matters do not, in and of themselves, automatically give rise to a negative finding. Rather, it will be up to the Secretary to consider whether a person is fit and proper as a result of these matters.

The consideration as to whether a person is a fit and proper person forms part of the decision in relation to an application under the Bill (e.g. to register an establishment), and is a reviewable decision under the Bill. This is reflective of administrative law principles.

The integrity of Australia's agricultural export framework is underpinned by appropriate regulatory controls, including who is permitted to perform certain roles within it and who should be granted with certain privileges. A fit and proper person test is necessary for the legitimate objective of ensuring that persons who are approved to export goods from Australia

are persons who are trustworthy and have demonstrated the required attributes necessary to uphold Australia's trading reputation.

A fit and proper person test can be used to consider a person or company's history of compliance with Commonwealth legislation and then deny them approval to register an establishment, or to suspend, revoke or alter the conditions on an existing approved arrangement. This ensures that persons or companies seeking these approvals are suitable entities to be responsible for the appropriate management of relevant risks. For example, an approved arrangement may set out the ways in which an exporter will meet legislative and importing country requirements in relation to a kind of prescribed goods. It is important that such persons are considered fit and proper to be able to conduct these activities and that there is no reason to believe that the person will not operate within the scope of their approval or adhere to any conditions or requirements that are placed on it.

The test streamlines and consolidates the character tests in the current framework. This includes the fit and proper person test in the *Export Control (Prescribed Goods—General) Order 2005* and the requirement of an export licence holder to be a person of integrity under the *Australian Meat and Live-stock Industry Act 1997*.

Enabling the Secretary to take into account a broad range of matters is important when considering whether a person is a fit and proper person because such a person might be involved in the export of a wide range of goods, with varying degrees of risk. The matters provided for in the Bill seek to reflect the broad range of matters in the current framework that can be taken into account by the Secretary to ensure that he or she may have regard to any relevant matter. This ensures that the integrity of the regulatory framework is not compromised by limiting conduct that can be considered in this context. As the agricultural export sector is regularly changing and evolving, this is reasonable and proportionate and ensures that the current level of market access can be maintained and possibly even increased in future.

The associates' test is designed to ensure that an applicant for a regulatory control under the Bill (e.g. a registered establishment) is a suitable person to be responsible for managing relevant risks, in light of the potential consequences of non-compliance. It is appropriate for associates to be included in the consideration so as to ensure that the conduct of all types of entities may be taken into account where the Secretary considers it appropriate to do so.

It is appropriate for the rules to be able to provide who can be a fit and proper person. The Bill and the rules will allow the Australian Government to respond in an appropriate and timely manner to any changes to importing country requirements or to implement any necessary policy or regulatory reforms in the future. The rules will be able to prohibit the export of certain kinds of goods (called prescribed goods) unless they meet the conditions set out in the Rules. The requirements for prescribed goods must be appropriately tailored to ensure that only the necessary level of regulatory burden is imposed on exporters and this includes the imposition of the fit and proper person test which should only be imposed where it is required (e.g. as a result of an importing country requirement). The rules are a legislative instrument and therefore will be subject to Parliamentary scrutiny through the disallowance process, and sunsetting in accordance with the *Legislation Act 2003*.

# Senator the Hon Simon Birmingham

Minister for Education and Training
Manager of Government Business in the Senate
Senator for South Australia


Our Ref MC18-001774

16 APR 2018

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

Dear Mr Goodenough Ian

Thank you for your letter of 28 March 2018 and for the opportunity to respond to the Committee's assessment relating to the Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018 (the SLS Bill) in its *Report 3 of 2018*. I note the Committee's concerns about two measures in the SLS Bill: changes to the repayment rates and indexation; and the Higher Education Loan Program (HELP) loan limits. The additional information requested by the Committee is attached.

The lower repayment rates included in the SLS Bill maintain the principle that graduates should only repay their debts if and when they can afford to do so, and it ensures that any impact is minimal – being one per cent of their annual taxable income which equates to less than $9 per week. The measure also involves higher repayment rates for those at the higher end of the income scale, ensuring that high income earners also contribute to improving the sustainability of HELP.

This legislation introduces a combined HELP maximum loan limit that is, firstly, sufficient to support almost nine years of full time study as a Commonwealth supported student and, secondly, can reasonably be repaid within a borrower's lifetime. I consider that this measure is consistent with fair and shared access to education.

Making the lifetime limit a renewable loan limit, through Government amendments, enables interested students to pursue lifelong learning. It provides scope for individuals whose HELP debt repayments for an income year have replenished their HELP loan balance to re-borrow those funds. I would note that these amendments were moved and passed by the House of Representatives on 27 March 2018, which was after the Committee's consideration of the SLS Bill in their report. It is likely that the amendments substantially address the concerns raised.


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The Australian Government does not consider that these measures will limit the right to education or the right to equality and non-discrimination. The SLS Bill will ensure access to, and affordability of, higher education by continuing to allow students to borrow the costs of their study without having to pay upfront fees. This position was supported by Professor Bruce Chapman, the architect of HECS, in his evidence at the hearing of the Senate Standing Committee on Education and Employment on 5 March 2018.

I thank the Committee for its consideration of the SLS Bill.

Yours sincerely

**Simon Birmingham**

Encl.

# THE HIGHER EDUCATION LEGISLATION AMENDMENT (STUDENT LOAN SUSTAINABILITY) BILL 2018

## Detailed response to the Joint Parliamentary Committee on Human Rights

The Parliamentary Joint Committee on Human Rights (the Committee) requested further information in relation to various measures in the Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2017 (the Bill), which was introduced on 14 February 2018. The Bill:

- sets new repayment thresholds for the Higher Education Loan Program (HELP) from 1 July 2018, starting with a lower minimum repayment threshold of $45,000 with a one per cent repayment rate, with a further 17 thresholds and repayment rates, up to a top threshold of $131,989 at which ten per cent of income is repayable
- aligns the indexation of the HELP repayment thresholds to the Consumer Price Index (CPI) instead of Average Weekly Earnings (AWE)
- brings repayment thresholds for SFSS managed by the Social Services portfolio in line with the HELP repayment thresholds from 2019–20, and beneficially changes to the order of repayment of student loan debts with consequential implications for Student Start-up Loans and Trade Support Loan debt repayment
- retains the current three-tier repayment threshold for SFSS, with the existing indexation, for 2018–19
- sets FEE-HELP loan limits for 2019 for FEE-HELP loans, VET FEE-HELP loans and VET Student Loans
- introduces the combined HELP loan limits for HECS-HELP loans, FEE-HELP loans, VET FEE-HELP loans and VET Student Loans from 1 January 2020 (rather than 2019)
- allows for renewable HELP balances, beginning with HELP debt repayments made during and after the financial year 2019-20 re-crediting HELP balances from 2020.

The last three measures were part of a Government amendment that was introduced into the House of Representatives and agreed to on 27 March 2018. The revised Bill entered the Senate on 28 March 2018 and remains to be debated. The Bill will be addressed in its current amended form in this response.

The Bill engages the right to an adequate standard of living – Article 11 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the right to education – Article 13 of the ICESCR, and the right to equality and non-discrimination – Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR).

The response to specific human rights-based issues raised by the Committee, and an analysis of the human rights implications of the Bill, is set out below. Any limitations on human rights resulting from these measures are reasonable, necessary, and proportionate to the broader policy objectives of ensuring the ongoing financial sustainability for higher education.

## Schedule 1 - Changes to the repayment thresholds

**Schedule 1** of the Bill establishes a new minimum repayment threshold for HELP loans of $45,000. In the 2017–18 income year, taxpayers are not required to start paying back their HELP loans until their annual incomes reach $55,874. In the 2018–19 income year, the new threshold at which people will start repaying debts will be $45,000. If the Bill does not pass, a new minimum repayment threshold of $51,957 will apply from 1 July 2018 under the *Budget Savings (Omnibus) Act 2016*.

Under HESA, where a person's financial and family circumstances result in them either being exempt or receiving a reduction in their Medicare levy, they are not required to make compulsory HELP repayments for that income year.

In addition to a change in the minimum repayment amount, Schedule 1 of the Bill establishes a new maximum threshold of $131,989 with a repayment rate of 10 per cent compared with a maximum threshold of $107,214 with a repayment rate of 8 per cent. This will ensure that HELP debtors at the higher end of the income scale repay their debt faster.

The legal obligations of States parties concerning the right to education is to demonstrate that, in aggregate, the measures being taken are sufficient to release the right to education for every individual by every appropriate means. It is therefore incumbent on government to formulate policy and allocate resources to ensure maximal enjoyment of the right to education for all students. Although progressive realisation means that States parties have a specific and continuing obligation to 'move as expeditiously and effectively as possible towards the full realisation of article 13', ICESCR acknowledges constraints due to the limits of available resources. The sustainability of HELP is crucial to ensure continued access to higher education to the broadest spectrum of students. HELP ensures that students do not face upfront costs for their higher education and are able to further their study on the basis of capacity to learn rather than capacity to pay. Moreover, measured adjustments to the repayment threshold could be seen to support and augment the right of access to education by establishing a robust and functional loan access scheme. Further, the measure does not alter the general availability of loan support for higher education (and therefore does not hinder or displace the core right of access to education or interfere with the broader enjoyment of the right to education). This maintains the principles of concessional rates and income contingency.

### Right to education

The measures in Schedule 1 engage but do not limit the right to education. The changes to the payment thresholds do not undermine or impede access to higher education, by every appropriate means, nor could they be regarded as regressive to the broader imperative of the progressive introduction or realisation of free higher education contained in Article 13(2)(c) of the ICESCR. Notably, Article 2 of the ICESCR recognises that economic, social and cultural rights require resources in order to implement them, and imposes a general obligation of progressive achievement. Further, the concept of accessibility necessitates fair distribution of resources.

In terms of access to education, there should be no effect on access to higher education based on the new repayment threshold. Eligible students will remain able to defer their student contribution

amounts or tuition fees via a HELP loan. This includes individuals who earn more than the minimum repayment threshold.

The proposed minimum repayment threshold is still above the minimum wage (currently around $36,100 for a full-time worker from 1 July 2017, according to Fair Work Australia). Additionally, the lower repayment rate ensures that any impact is minimal - one per cent of their annual taxable income equates to less than $9 per week.

## Schedule 1 - Changes to indexation

**Schedule 1** of the Bill will also change the way in which HELP thresholds are currently indexed. From 1 July 2019 onwards, all HELP thresholds will be indexed at the CPI instead of AWE.

Indexing the HELP repayment thresholds at CPI will ensure the value of the thresholds is maintained in real terms, as the thresholds will increase in line with consumer prices rather than average wages. With AWE being typically higher than CPI, indexation by CPI will slow growth in repayment thresholds, bringing more individuals into the repayment scope over time.

Access to higher education will be maintained through the continued availability of HELP loans. As thresholds are lowered, it is likely that a greater number of individuals will commence repayment sooner and repayments will increase for some others. However, by lowering the repayment threshold, and altering the indexation of the threshold to grow in line with CPI, this measure makes the overall scheme more affordable in the long-term, and is a reasonable and proportionate response to improve both the equity and efficiency of the higher education sector, make public funding more sustainable through economic fluctuation and downturn, and bolster the overall fiscal viability of the sector to ensure it remains available for current and future students. The Government provides considerable direct funding to the higher education sector, as well as substantial financial support to almost all domestic students through direct subsidies, caps on tuition fees or subsidised income-contingent loans.

Since earnings and inflation growth are currently similar, the practical effect of CPI indexation is likely to be minimal in the short term; however, in the medium to longer term, the new indexation arrangements will ensure repayments keep their real value. It is also notable that thresholds for many other government benefits are generally indexed to CPI and there is arguably a rights-based discrepancy at play if students who obtain substantial private benefits (both monetary and non-monetary) from the sector are conferred a more generous indexation policy than other Australians, including vulnerable Australians, who are recipients of other government programs that are indexed to CPI.

### Right to education

Changes to the indexation of the repayment thresholds similarly do not limit the right to access higher education and are not retrogressive in terms of the introduction of free education, because properly characterised, the change to indexation is not a measure that reduces the extent to which an economic, social and cultural right is guaranteed.

Article 4 of the ICESCR provides that countries may subject economic social and cultural rights only to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. The UN Committee has stated that such limitations must be proportionate and the least restrictive alternative where several types of limitations are available. The Minister considers that the change to the indexation of the repayment thresholds is a measure which is democratically aligned to the broader welfare and support of the student populace. Further, to the extent that the measure represents a reasonable adjustment to enable student debt to be aligned with, and re-paid based on CPI indexation, this change is legitimately directed to the continuing fiscal viability of the sector and, by extension, a higher education sector which is economically sustainable and capable of supporting Australia's future growth and productivity as well as ensuring that government can invest in its human capital to improve their skills and capabilities, promote knowledge through higher levels of educational attainment and support general social cohesion.

According to the Grattan Institute, the AWE figure is distorted by several factors including increasingly larger incomes due to a rise in professional occupations over low-skilled occupations, and an ageing population staying longer in the workforce with high salaries. As growth in CPI is slower than growth in AWE, this results in people commencing repayments towards their HELP debt sooner. This does not equate to people paying more for their education. As individuals may begin repaying their debts more quickly as their incomes grow in real terms, it may reduce the amount they repay over the life of their HELP debt, as faster repayments mean that there is less debt to index each year.

Further, it should be noted that the growth in HELP repayments has not kept pace with the growth in HELP lending. The rate of spending on the HELP scheme increases pressure on the Commonwealth's finances and needs to be addressed. The amount of HECS-HELP loans accessed annually has increased from over $2.2 billion in 2009[1] to over $4.3 billion in 2016[2]. Additionally, the expansion of HELP to the vocational education and training sector has led to VET FEE-HELP loans increasing from over $25 million in 2009[3] to over $1.4 billion in 2016[4]. From 2010-11 to 2016-17, the level of debt not expected to be repaid on new debt has increased from 16 per cent[5] to 25 per cent[6].

The savings arising from this measure will help reduce this growth in the HELP scheme, and ensure that it remains available for future generations of students. Any perceived limitation on the right to education, including the progressive introduction of free higher education, is reasonable, necessary and proportionate to the legitimate policy objective of ensuring that the higher education loan scheme remains sustainable.

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[1] 2011-2013 Higher Education Report
2 Department of Education and Training Higher Education Statistics – 2016 Liability Status Categories
3 2015 VET FEE-HELP Statistical Report
4 2016 VET FEE-HELP Statistical Report
[5] 2011-12 Department of Industry, Innovation, Science, Research and Tertiary Education Annual Report
[6] 2016-17 Department of Education and Training Annual Report

## Right to equality and non-discrimination

As acknowledged in the original statement of compatibility with human rights in the Explanatory Memorandum, there may be a disproportionate effect on women as a result of the measures contained in this Schedule. Women, and other low-earning demographic groups, may represent a disproportionately larger number of those students required to make HELP repayments for the first time as a result of the introduction of the new, lower threshold. This may present an indirect limitation on the right to non-discrimination.

Due to the income-contingent nature of the HELP scheme, those who earned less than the minimum repayment threshold have not previously been required to meet any repayment obligations and, in addition, income-contingent loan schemes offset any general tendency for higher fees to deter low socio-economic students. Any disproportionate impact on women as a result of this measure is the result of broader and complex social and economic factors that influence participation in higher education, and subsequent labour market experience, which are not within the scope of a student loan scheme to address or mitigate.

It should be noted however, that women make up the majority of higher education students, graduates and HELP debtors. Women made up 58 per cent of domestic students in 2016[7], and between 2007 and 2015 had a completion rate of 75.2 per cent, compared with 71.3 per cent for men over the same period for commencing bachelor level study at a Table A or Table B university[8]. Given that women make up a larger proportion of HELP debtors due to their proportionally greater enrolments and success in higher education, any measure that affected repayment would therefore proportionally affect women more. This is invariably the case by virtue of the demographic make-up of the student group as majority women (and the allied variables of institutional disadvantage and structural inequities attaching to this group) as opposed to as a result of the rights-based integrity or otherwise of the measure.

The repayment thresholds remain progressive with lower repayment rates for lower incomes.

As outlined above, this measure is properly tailored to the legitimate policy objective of directly improving the sustainability of HELP and ensuring it remains a viable option for students in the future. HELP expenses, which consist mainly of debt not expected to be repaid and the deferral subsidy from the concessional interest applied to HELP loans, are estimated to be $2.2 billion in 2017-18[9].

This measure is expected to bring approximately 124,000 new individuals into the repayment stream, and is expected to increase HELP repayments and reduce the amount of outstanding debt not expected to be repaid.

Any limitation on the right to non-discrimination as a result of the measures contained in Schedule 1 is reasonable, and proportionate to the policy objective of creating a sustainable higher education

[7] Department of Education and Training data
[8] Completion Rates of Higher Education Students – Cohort Analysis, 2005-2015
[9] 2017-18 Education Portfolio Budget Statement

system, and to ensure that higher education remains accessible, noting that maximising opportunities for broad student participation, is beneficial for the development of society including to business, industry and community participation, making it a collective economic asset and social and cultural good.

***Committee comment***

**1.108 The preceding analysis raises questions as to whether the measures are compatible with the right to education.**

**1.109 Accordingly, the committee requests the further advice of the minister as to:**

- **whether the proposed change in indexing from AWE to CPI means that students would pay more or less for their university degrees (including for their degree overall and as a proportion of their wages);**

The proposed change to index the HELP repayment thresholds from AWE to CPI does not affect university fees or HELP debts incurred by students – it only affects the repayment thresholds themselves.

With AWE being typically higher than CPI, indexation by CPI is likely to slow growth in repayment thresholds. The Grattan Institute reported in 2016 that indexation based on AWE had led to an increase in the minimum threshold by 17 per cent higher in real terms from 2004–05 to 2015–16 than would have been the case under indexation at CPI. Had the minimum threshold been linked to CPI instead of AWE, the 2015-16 minimum threshold of $54,126 would instead have been $46,457; that is, similar to the proposed new lowest threshold.

It is also notable that this change may lead to students paying slightly less in nominal terms for their degree over their lifetime compared with what they would pay under the current arrangements. This is due to the reduced indexation of debt. If the HELP repayment thresholds are indexed by CPI, some debtors are likely to make higher per year repayments. In such cases debts are being paid down more quickly, there is less debt to index at a given time and therefore total indexation is lower. The lower amount of indexation on debts would lead to the individual repaying a slightly lower amount of total debt over their lifetime, all else being equal.

- **whether requiring some classes of low income earners to repay HELP-debts could constitute an indirect reduction in the amount of government funding of higher education;**

The new minimum threshold of $45,000 in 2018-19 will result in more debtors falling within a repayment scope, which means some people, who would not repay any of their debt under current arrangements, may pay part or all of their debt under the proposed arrangements.

However, the low repayment rate of one per cent for these people will maintain the principle that graduates should only repay their debts when they start receiving a financial benefit from their study. This proposal is fair, measured and modest in its scope and effect.

In addition, and relevant to the rights-based integrity of the measure, under the *Higher Education Support Act 2003*, where a person's financial and family circumstances result in them either being exempt or receiving a reduction in their Medicare Levy, they are not required to make compulsory HELP repayments for that income year. For example, in 2016-17 a single person with one dependent child with an income below $49,871 was exempt from HELP repayments in that income year. The income level rises with each additional dependent.

Universities will continue to benefit from an estimated $17.6 billion of funding in 2018. This follows average funding for universities per student having increased by 15 per cent between 2010 and 2015.

- **whether the proposed changes to the repayment threshold and indexation could have an adverse impact on access to education;**

The new HELP repayment threshold arrangements do not restrict accessibility and affordability of higher education. The Higher Education Loan Program (HELP) will continue to ensure that eligible Australian students are able to fully defer the cost of their higher education through income-contingent loans. The HELP scheme has, and will continue to be, critical for ensuring high-quality university education is accessible to all Australians, enabling admission on the basis of merit as opposed to wealth.

International evidence suggests that the availability of a strong student loan scheme reduces or eliminates any effects of price increases on accessibility. A 2014 report prepared for the European Commission (the Usher report [10]) explored the impacts of changes to cost-sharing arrangements on higher education students and institutions across nine countries. The Usher report found that there was no trend of declining enrolments after a fee increase, and that in cases where students were able to access financial support, in the form of loans or scholarships, the impact of a fee increase on university applications was negligible.

In addition, Professor Bruce Chapman from the Australian National University has argued that "the evidence is now overwhelming that changes to the level of the charge, or other aspects of HECS-HELP, such as the first threshold of repayment, have no discernible effects on student behaviour or choices."[11][12]

While the minimum HELP repayment threshold will be reduced, the one per cent repayment rate at this minimum threshold will ensure the scheme remains affordable for those who incur a HELP debt, and that there are no adverse impacts on access to higher education.

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[10] Usher, Orr and Wespel, 'Do changes in cost-sharing have an impact on the behaviour of students and higher education institutions?', Report for European Union, United Kingdom, May 2014.

[11] Chapman, B CBE Blogisphere *2016/17 Budget: Changes to HECS-HELP and University Funding* (15 May 2017) accessible at https://blog.cbe.anu.edu.au/2017/05/15/201617-budget-changes-hecs-help-university-funding/

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

The existing HELP thresholds have been in place for a number of years and do not take into account the changes in access to HELP that have occurred in recent years. HELP lending has grown rapidly with the expansion of the demand driven system, and the amount of HECS-HELP loans accessed has increased from over $2.2 billion in 2009[13] to over $4.3 billion in 2016[14]. In addition, the expansion of HELP to the Vocational Education and Training (VET) sector in 2008 led to increases in VET FEE-HELP loans from over $25 million in 2009[15] to over $1.4 billion in 2016.[16]

HELP expenses, which consist mainly of debt not expected to be repaid and the deferral subsidy resulting from the concessional interest rate applied to the loans compared with costs of borrowing by the Commonwealth for on-lending, are estimated at $1.8 billion in 2017–18.[17] The fair value of the HELP debts was estimated to be $35.9 billion as at 30 June 2017.[18]

In this context, there is a strong need for the Government to improve the sustainability of the HELP scheme. The changes to HELP repayment thresholds and indexation contained in the Bill will result in approximately 124,000 additional HELP debtors making repayments in 2018–19. The changes also involve higher repayment rates for those on higher incomes. As a result, the measure is expected to deliver savings of $345.7 million in fiscal balance terms and $245.2 million in underlying cash balance terms over the forward estimates (2017–18 to 2020–21). Therefore, the new HELP repayment threshold arrangements contribute strongly to the sustainability of the scheme, ensuring that future generations of students also benefit from access to both HELP and higher education more broadly.

The new minimum repayment threshold is around 25 per cent above the full time minimum wage (currently around $36,100 for a full-time worker from 1 July 2017, according to Fair Work Australia). At a repayment rate of just one per cent, a person with a HELP debt will pay back less than $9 per week. Therefore, the Government considers that any limitations on the right to education constitute a reasonable, proportionate and properly tailored measure to achieve long-term improvements in sustainability of the HELP scheme.

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[13] 2011-2013 Higher Education Report
[14] Department of Education and Training Higher Education Statistics – 2016 Liability Status Categories
[15] 2015 VET FEE-HELP Statistical Report
[16] 2016 VET FEE-HELP Statistical Report
[17] 2017–18 Education Portfolio Additional Estimates Statement
[18] 2016-17 Department of Education and Training Annual Report

***Committee comment***

**1.118 The measure engages the right to equality and non-discrimination.**

**1.119 The preceding analysis raises questions as to whether the disproportionate**

**negative effect on women (which indicates prima facie indirect discrimination) amounts to unlawful discrimination.**

**1.120 Accordingly, the committee requests the further advice of the minister as to:**

- **whether the measure pursues a legitimate objective for the purposes of international human right law and whether there is reasoning or evidence that establishes that this objective addresses a pressing or substantial concern; and**
- **how the measure is effective to achieve (that is, rationally connected to) the stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

As stated above, the objective of this change is to improve the sustainability of the HELP scheme and enable the Government to manage ongoing financial support to tertiary students. The Government believes that is fair that those who benefit from access to higher education contribute towards the cost of the scheme. The substantial private benefits conferred by higher education justify contributions by students who are earning above a certain threshold (at a manageable level to balance minimising repayment hardships and the risks of non-repayment) as a means to help defray higher education sectoral costs and sustain economic growth. Given the substantial savings delivered by this change, the new arrangements contribute strongly to the sustainability of the scheme and are the least restrictive means to achieve this core policy objective.

Due to the demographics of those impacted by the change, more women than men will be required to make HELP repayments for the first time. This is because statistically women make up the majority of higher education students, graduates and HELP debtors. In 2016, women made up 58 per cent of domestic students. Between 2007 and 2015 women had a completion rate of 75.2 per cent, compared with 71.3 per cent for men over the same period for commencing bachelor level study at a Table A or Table B university[19].

However, the new thresholds represent a purely income-based change and do not target particular groups such as women. Given that women make up a larger proportion of HELP debtors due to their proportionally greater enrolments, any measure that affected repayment would therefore proportionally affect women more. It would not be appropriate to adopt HELP repayment arrangements that differed according to demographic characteristics of debtors.

The change affects anyone earning between $45,000 and $51,956 (the minimum repayment income that would otherwise commence on 1 July 2018). While the minimum threshold is being reduced,

[19] Completion Rates of Higher Education Students – Cohort Analysis, 2005-2015

the one per cent repayment rate at this minimum threshold will ensure the scheme remains fair and affordable. In this context, the Government considers that any limitations on the right to equality and non-discrimination constitute a reasonable and proportionate measure to achieve critical and future-proofing improvements in sustainability of the HELP scheme.

## Schedule 3 - HELP loan limits

**Schedule 3** of the Bill introduces a new, combined, and renewable limit on how much students can borrow under HELP to cover their tuition fees from 1 January 2020. The combined limit will be an indexed amount of the 2019 FEE-HELP limit set in **Schedule 2A** of the Bill.

By limiting borrowing to a maximum amount that is, firstly, sufficient to support almost nine years of full time study as a Commonwealth supported student and, secondly, can reasonably be repaid within a borrower's lifetime, this measure is consistent with fair and shared access to education.

The loan limit is indexed annually according to CPI, so that it keeps pace with inflation.

The combined loan limit is not retrospective for HECS-HELP loans. From 1 January 2019, all new HECS-HELP borrowing will count towards a student's loan limit. However, no previously incurred HECS-HELP debt will be taken into account. This means that these students' right to education will not be compromised by amounts they have previously borrowed through HECS-HELP while they were Commonwealth supported students.

As FEE-HELP, VET FEE-HELP or VET Student Loans debt were already subject to a limit, any debt already accrued by students under the existing FEE-HELP limit will be transferred onto the new HELP tuition limit for that student. Any new FEE-HELP, VET FEE-HELP or VET Student Loans borrowing will continue to count towards students' combined loan limit.

### Right to education

The introduction of an amendment to make the lifetime limit a renewable loan limit enables interested students to pursue lifelong learning. It provides scope for individuals whose HELP debt repayments for an income year have replenished their HELP loan balance to re-borrow those funds.

This will enable them to pursue further study in order to retrain, change careers, or further specialise in their current profession – giving them lifelong access to education.

To the extent that this measure may limit the right to education, these measures are reasonable, necessary, and proportionate to the policy objective of ensuring access to tertiary education for those who cannot afford to pay their tuition upfront. Moreover, the measure could be seen to support and augment the right of access to education by establishing a fiscally responsible student loan scheme. It does not alter the general availability of tuition loan support for higher education and is justified in the context of available resources and the spirit of maximising educational access and inclusion.

***Committee comment***

**The committee therefore seeks the advice of the minister as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; and**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including in the context of lifelong learning or a future need for retraining); and**
- **whether alternatives to the measure have been fully considered; and**
- **how the measure complies with Australia's obligation to use the maximum of its available resources to ensure higher education is accessible to all, on the basis of capacity, by every appropriate means, and by the progressive introduction of free education.**

The Government introduced a range of measures as part of the December 2017 Mid Year Economic and Fiscal Outlook to ensure the long term viability of Australia's higher education sector so that future students would be able to benefit from the generous loan scheme.

On 15 February 2018, the Senate referred the Bill to the Senate Education and Employment Legislation Committee for inquiry and report by 16 March 2018. In its majority report, the Senate Committee recommended that the Bill be passed. In doing so, the Committee further recommended that the Government consider amending Schedule 3 of the Bill to introduce a renewable limit on outstanding HELP debts, rather than a lifetime limit.

Under current legislation, Commonwealth supported places and HECS-HELP loans are not limited. In the interest of sustainability, a limit on borrowing will prevent these students from undertaking multiple courses over their lifetime at taxpayer expense with little likelihood of ever repaying their debt. Although a loan cap is unlikely to affect the majority of students, as at 30 June 2017, only around 0.5 per cent of all HELP debtors had a debt greater than $100,000, so the loan cap acts as a ceiling that will prevent individuals from exploiting the generosity of the HELP scheme by encouraging them to select their courses carefully.

Nevertheless, the Government adopted the recommendation of the Senate Committee and introduced an amendment to change the lifetime limit to a renewable loan limit. This measure will enable interested students to pursue lifelong learning. It will provide scope for individuals, whose HELP debt repayments for an income year have replenished their HELP loan balance, to re-borrow those funds. This will enable them to pursue further study in order to retrain, change careers, or further specialise in their current profession.

The objective of the proposed measures is to improve the sustainability of the HELP scheme while retaining sufficient flexibility for students in furtherance of the core value of promoting the enjoyment of the right to education. The Government believes that it is fair and justifiable by reference to the totality of rights provided for in the ICESCR and in the context of the full use of the government's maximum available resources, that those who benefit from access to higher education contribute towards the cost of the scheme, but also recognises that those who repay their debts should be able to access the loan scheme in the future. Providing for a renewable loan limit substantially addresses the concern of numerous stakeholders that the loan limit changes could result in inequities in access to higher education.

There is a strong need for the Government to improve the sustainability of the HELP scheme. The changes to the HELP loan scheme contained in the Bill in Schedules 2A and 3 will result in a cost of $0.9 million, in fiscal balance terms, over the forward estimates (2017-18 to 2020-2021). In underlying cash balance terms, the measures come at a cost of around $14.2 million over the forward estimates.[20]

The new HELP combined and renewable loan limits will contribute meaningfully to the sustainability of the HELP loan scheme, ensuring that future generations of students also benefit from access to both HELP and higher education more broadly. While the overall amount that students may borrow may have a new combined limit, students will continue to benefit from not having to pay upfront fees. The addition of renewability to the loan scheme also provides students with the lifelong capacity to study and defer tuition fees through loans as long as they have a viable HELP balance, which works both to prevent exploitation of the HELP scheme while permitting flexibility for students.

[20] Financial Impact Statement in the Revised Explanatory Memorandum of the Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018, 28 March 2018.

# THE HON ANGUS TAYLOR MP
## MINISTER FOR LAW ENFORCEMENT AND CYBER SECURITY

MS18-001465

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

Dear Mr ~~Goodenough~~ Ian

Thank you for your correspondence of 28 March 2018 in which further information was requested on the *Anti-Money Laundering and Counter- Terrorism Financing Amendment Instrument 2017 (No. 4)* and *Legislation (Deferral of Sunsetting- Australian Crime Commission Regulations) Certificate 2017.*

I have attached the response to the *Parliamentary Joint Committee on Human Rights' Report 3 of 2018* as requested in your letters.

Thank you for raising this matter.

Yours sincerely

ANGUS TAYLOR

**Response to the Parliamentary Joint Committee on Human Rights – Legislation (Deferral of Sunsetting – Australian Crime Commission Regulations) Certificate 2017**

Following the establishment of the Home Affairs portfolio, the Minister for Law Enforcement and Cyber Security, the Hon Angus Taylor MP, has policy and administrative responsibility for the *Australian Crime Commission Act 2002* and the Australian Crime Commission Regulations 2002.

***Committee comment***

*1.201 The measure appears to engage and limit a range of human rights. The preceding analysis raises questions as to whether the measure is compatible with human rights.*

*1.202 The committee therefore seeks the advice of the Attorney-General as to:*

- *the human rights engaged by subsections 8A(1) and (2) and schedules 3 and 4 of the ACC regulations;*
- *where these measures engage and limit human rights:*
    - *whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;*
    - *how the measures are effective to achieve (that is, rationally connected to) a legitimate objective; and*
    - *whether the limitations are reasonable and proportionate to achieve that objective; and*
- *whether it would be feasible to amend the ACC regulations, when remade, to require that any state powers conferred on the ACIC or its personnel which limit human rights will only be exercisable where accompanied by the conferral of the corresponding duties and safeguards in the relevant state law.*

I note the Committee's comments on the Legislation (Deferral of Sunsetting – Australian Crime Commission Regulations) Certificate 2017.

In re-making the Australian Crime Commission Regulations prior to the sunsetting date of 1 April 2019, I will develop a statement of human rights compatibility, which canvasses whether the identified measures engage and limit human rights, and whether these measures represent a reasonable and proportionate means of achieving a legitimate objective for the purposes of human rights law. As part of the re-making process, I will consider any necessary amendments to ensure the ACC Regulations remain fit-for-purpose and contain appropriate safeguards to protect human rights.

***Committee comment***

*1.213 The measure engages and limits the right to privacy. The committee previously concluded, based on information provided by the then Minister for Justice, that there appear to be relevant safeguards in place that may assist to ensure that it is a proportionate limit on the right to privacy.*

*1.214 The committee requests an update from the Attorney-General regarding the preparation of an information handling protocol by the ACIC, and reiterates its request that a copy of this document be provided to the committee.*

I note the Committee's comments on the Legislation (Deferral of Sunsetting – Australian Crime Commission Regulations) Certificate 2017.

In re-making the Australian Crime Commission Regulations prior to the sunsetting date of 1 April 2019, I will develop a statement of human rights compatibility, which canvasses how the identified measures engage and limit the right to privacy, and whether these measures represent a reasonable and proportionate means of achieving a legitimate objective for the purposes of human rights law.

As the Committee notes, the Attorney-General's Department, the Australian Crime Commission (ACC) and CrimTrac provided a joint submission 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. On 10 March 2016, the Committee published its final report which recommended that the Bills be passed and noted that:

> *the department and relevant agencies intend to develop and publish an information handling protocol in consultation with the OAIC to address in more detail the information handling procedures and protections that would apply, and the assurance provided that the principles in this document would be consistent with the Australian Privacy Principles.*

The Australian Criminal Intelligence Commission (ACIC) has advised that the development of an information handling protocol is well advanced and consultation will occur with the Office of the Australian Information Commissioner shortly.

The finalisation of this protocol has been delayed due to the need to address the implications of two major changes in administrative arrangements affecting the ACIC. First, as a merged agency, the ACIC has faced significant legal issues in seeking to amalgamate and consolidate the functions and services formerly provided by the ACC and CrimTrac. These issues particularly concern the handling of information. Secondly, the establishment of the Home Affairs portfolio has raised additional legal and policy issues that need to be taken into account in developing the protocol.

***Committee comment***

*1.219 The measure engages and limits the right to privacy. The preceding analysis raises questions as to whether the measure is compatible with that right.*

*1.220 The committee requests the Attorney-General's advice as to:*

- *whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;*
- *how the measure is effective to achieve (that is, rationally connected to) a legitimate objective; and*
- *whether the limitations are reasonable and proportionate to achieve that objective.*

I note the Committee's comments on the Legislation (Deferral of Sunsetting – Australian Crime Commission Regulations) Certificate 2017.

In re-making the Australian Crime Commission Regulations prior to the sunsetting date of 1 April 2019, I will develop a statement of human rights compatibility, which canvasses how the identified measures engage and limit the right to privacy, and whether these measures represent a reasonable and proportionate means of achieving a legitimate objective for the purposes of human rights law.

**The Hon Greg Hunt MP**
**Minister for Health**

Ref No: MC18-002695

26 FEB 2018

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

Dear Chair Ian

I refer to your letter of 7 February 2018 in which you sought my advice in relation to the *My Health Records (National Application) Rules 2017* (the Rules).

In Report 1 of 2018, the Committee questioned whether the opt-out arrangements for the My Health Record system, implemented by the Rules, are a permissible limitation on the right to privacy. In particular, the Committee questioned the automatic inclusion of health information, and the retention of information regarding cancelled My Health Records, and sought advice regarding the nature of communications with the public and their adequacy in respect of children and persons with a disability.

The My Health Record system is an electronic summary of a consumer's key health information which consumers can share with their health care providers. It will deliver health benefits to consumers by improving the quality of health care they receive, and deliver direct economic benefits to the health system, making the health system more sustainable.

Having a My Health Record is likely to improve health outcomes, making getting the right treatment faster, safer, easier and more cost-effective:

- faster – because doctors and nurses and other health care providers will not have to spend time searching for past treatment information;
- safer – because authorised health care providers can view an individual's important health care information, including any allergies and vaccinations and the treatment the individual has received;
- easier – because consumers will not have to remember the results of tests they have had, or all the medications they have been prescribed; and
- more cost-effective – because health care providers won't have to order duplicate tests – for example, when an individual visits a different GP whilst on holidays. The time necessary to provide treatment may also be reduced as an individual's health information will be available in one place. As a result, the cost of treatment may be reduced, freeing up funds for improving health outcomes in other areas.

Everyone can benefit from having a My Health Record, not just people with chronic or complex conditions. For example, if a person becomes sick while on holiday, the GP that treats them will be able to look at their My Health Record to see if there is any information relevant to their condition, such as previous medications they have been prescribed or the results of a recent blood test. Another example is if a person has an accident and arrives at hospital unconscious, their emergency doctor can check their My Health Record to find out if they have any allergies or conditions that should inform treatment.

In November 2013, the then Minister for Health commissioned a review of the system[1] which confirmed some key issues that needed to be resolved so consumers and health care providers would be more likely to use the system. Among other things, the number of people with a My Health Record (then known as a personally controlled electronic health record) was too small to warrant health care providers learning how to use it or checking it for updated information. Feedback from health care providers was that they would be more inclined to use it if all of their patients had one, and feedback from the Consumers Health Forum was that the system would be more successful if it were opt-out. The review subsequently recommended the system transition to opt-out participation arrangements.

In 2016, the Australian Government chose to undertake trials of My Health Record participation arrangements – an opt-out model was trialled in Northern Queensland and Nepean Blue Mountains, and innovative opt-in models were trialled in the Ballarat Hospital, Victoria, and several private general practices in Perth, Western Australia.

The independent evaluation of these trials found 'overwhelming and almost unanimous support' by both consumers and health care providers for opt-out arrangements. For consumers, opt-out affords them the benefits of having a My Health Record without taking any action, while for health care providers, opt-out ensures the majority of their patients have a My Health Record without the administrative burden of explaining it and assisting patients to register. The opt-out trial sites recorded a significant increase in health information being uploaded and viewed by health care providers, well above that experienced in the rest of Australia, proving health care providers actively engaged with the system where the majority of their patients have a My Health Record. The trials evaluation recommended the opt-out model be implemented nationally.

While the growth rate of My Health Records and their content has continued to increase[2], the proportion of consumers with a My Health Record still provides little incentive to health care providers to use the system.

In 2017, the Government agreed to implement opt-out because it allows the My Health Record system to deliver health benefits to all Australians at least nine years sooner that opt-in options. In considering participation models, opt-in models offered limited benefits realisation, higher cost in some cases (as a result of consumer engagement), and the models did not effectively engage health care providers other than GPs or effectively leverage Government investment.

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[1] *Review of the Personally Controlled Electronic Health Record*, December 2013

[2] As of 28 January 2018, 5,513,545 consumers have a My Health Record and 20,670,631 clinical and pharmaceutical records are available.

The Government has committed $27.75 million to ensure all Australians are aware of the My Health Record and their right to opt-out during the three month opt-out period, and $52.38 million to supporting education and training.

Lessons learned from the opt-out trials of 2016 have informed the planning of communications, and the comprehensive communications strategy that has been developed for the implementation of opt-out will see information in every general practice in Australia.

It will also reach out to consumers through other health and non-health channels. It will include national and local partnerships with Medicare, Primary Health Networks, corporate, peak and consumer organisations, as well as through direct Australian Digital Health Agency activities. In partnership with these organisations, we will reach Australians through a range of channels including, traditional and social media, public relations, and events.

The comprehensive strategy ensures hard-to-reach audiences have been considered, such as people with communication difficulties, and will receive enhanced support should they choose to opt-out. This will ensure all Australians are informed about the opt-out process and specifically how to access the opt-out portal.

Communication activities over the opt-out period will include thousands of face-to-face briefings at community events around the country, distribution of collateral through consumer peak organisations, and the provision of information at the point of care and other community places such as doctors' surgeries, hospitals, libraries and post offices.

A consumer will be able to opt-out by going online to the opt-out portal, or by calling the helpline on 1800 723 471 (free call). These channels will become available when the opt-out period commences.[3] A consumer will simply need to identify themselves and, if applicable, their children or dependents in order to opt-out.

If a consumer chooses not to opt-out, a My Health Record will be created for them and they will be able to exercise their rights to control how their information is collected, used and disclosed. They will be able to:

- set access controls restricting access to their My Health Record entirely or restricting access to certain information in their My Health Record – for example, they can set an access code so that a health care provider organisation can only access the My Health Record if they have been given this code;
- request that their health care provider not upload certain information or documents to their My Health Record, in which case the health care provider will be required not to upload that information or those documents;
- request that their Medicare data not be included in their My Health Record, in which case the Chief Executive Medicare will be required to not make the data available to the System Operator;
- monitor activity in relation to their My Health Record using the audit log or via electronic messages alerting them that someone has accessed their My Health Record;
- effectively remove documents from their My Health Record;
- make a complaint if they consider there has been a breach of privacy; and
- cancel their My Health Record.

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[3]This date will be specified by the Minister through a notifiable instrument that will be published on the Federal Register of Legislation.

Consumers can set these access controls online or over the telephone.

If a consumer decides that they no longer want a My Health Record, they can choose to cancel their record at any time. This can be done online via the consumer portal, by calling the helpline on 1800 723 471(free call), or by visiting a Department of Human Services Medicare service centre.

The My Health Record system provides special arrangements to support children and vulnerable people to participate in the system by allowing authorised representatives to act on their behalf and protect their rights. Authorised representatives can control access to the consumer's My Health Record and, in an opt-out setting, opt them out. The consumer can also nominate other people, such as family members or friends, to be their nominated representative to help the consumer manage their My Health Record.

In an opt-out setting, health information will not automatically be uploaded to a My Health Record. When a My Health Record is created, the only information that may be included is information held by Medicare, specifically two years' of Medicare and Pharmaceutical Benefits claiming information, Australian Organ Donation Register information and Australian Immunisation Register information. A consumer can choose not to include this information.

Health care providers are likely to only include information in the consumer's My Health Record when the consumer has an interaction with the health system. As such, consumers who are healthy and rarely interact with the health system will have little, if any, health information in their My Health Record.

If a consumer decides to cancel their My Health Record, the System Operator (i.e. the Australian Digital Health Agency), is required by law to store certain information until 30 years after the consumer dies; however, the information is not generally available to any entity other than in specific circumstances, such as to lessen or prevent a serious threat to public safety. The requirement to retain information was implemented to:

- ensure there is capacity to store a minimum critical set of health information about consumers, thus providing long-term efficacy for the purposes of health care delivery – this is critical since the system operates on the basis of distributed public and private repositories that are subject to differing jurisdictional laws;
- provide that, if a consumer changes their mind and decides to get a My Health Record, the information that existed before they cancelled it will be available to them;
- provide a source of information that, in a de-identified form, can be used to inform and improve health services;
- provide for medico-legal needs, such as if a clinical decision is made on the basis of My Health Record information and the decision is being legally challenged; and
- reflect Commonwealth record-keeping requirements.

I trust that this additional information will be sufficient to address the Committee's comments.

Yours sincerely

Greg Hunt

The Hon Dan Tehan MP
Minister for Social Services

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7560

MC18-002445

19 APR 2018

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
PO BOX 6100
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 28 March 2018 regarding the Committee's Human Rights Scrutiny Report No. 3 of 2018, which requested information in relation to the Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018.

Please find enclosed a response to the Committee in relation to each of the issues identified.

Thank you for raising these matters and allowing us to provide additional information.

Yours sincerely

DAN TEHAN
Encl.

**Response to the Parliamentary Joint Committee on Human Rights**

**Human rights scrutiny report – Report 3 of 2018**

*Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018*

***Compatibility of the measure with the right to social security, the right to an adequate standard of living and the right to health***

**Committee comment**

**1.249 The preceding analysis raises questions as to the compatibility of the measure with the right to social security and the right to an adequate standard of living.**

**1.250 The committee therefore seeks the advice of the minister as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve its stated objective (including the extent of the reduction in access to social security payments; what level of support Special Benefit payments provide; and whether the measure is the least rights restrictive approach); and**
- **whether alternatives to reducing access to social security, in the context of Australia's use of its maximum available resources, have been fully considered.**

Response

The primary purpose of Australia's welfare payments system is to provide financial support for individuals and families who are unable to fully support themselves. The welfare payments system is targeted to ensure that payments are directed to those most in need and that those who are able to support themselves are encouraged to do so.

The Newly Arrived Resident's Waiting Period (NARWP) is a longstanding part of Australia's welfare payments system. It is designed to ensure that new migrants seeking to settle permanently in Australia make plans for their own support during their initial settlement period.

The NARWP applies primarily to new migrants settling in Australia under the skilled and family streams of Australia's migration program – those who are well placed to support themselves and their families, through existing resources, work or support from family already in Australia.

This is reflected in the eligibility criteria for permanent residency through the skilled and family visa streams of the migration program:

- The skilled visa stream provides a pathway for skilled overseas workers with skills needed in Australia to settle permanently in Australia with the expectation that they will support themselves and their families through work.
- The family visa stream provides a pathway for existing Australian citizens and permanent residents to bring family members to Australia with the expectation that they will support those family members.

It is important that Australia's welfare payments systems remains sustainable into the future and continues to provide the best possible encouragement for people to support themselves where they are able. This includes migrants settling permanently in this country.

Returning the Budget to balance by living within our means remains a key element of the Government's economic plan.[1] To achieve the Government's fiscal strategy, including a return to surplus in 2020-21, fiscally responsible decisions are required to keep spending under control.

In 2016-17, Australia's expenditure on welfare payments to individuals (including social security payments, family assistance payments and paid parental leave payments) was $109.5 billion,[2] representing around a quarter of the overall Commonwealth Budget.

Given the substantial expenditure associated with the welfare payments system, maintaining the ongoing sustainability of the system is critical to the Government's fiscal strategy. The *Encouraging Self Sufficiency for Newly Arrived Migrants* measure announced in the 2017-18 Mid-Year Economic and Fiscal Outlook (MYEFO) contributes to achieving this fiscal outcome.

The measure is estimated to improve the Budget bottom line by around $1.3 billion over the four years from 2017-18. There will continue to be savings beyond the forward estimates period, contributing to the ongoing sustainability of the welfare payments system.

The measure will increase the existing NARWP from two to three years and will apply the waiting period more consistently across the welfare payments system. The measure will apply primarily to migrants granted a permanent skilled or family visa – migrants who are more likely to be in a position to support themselves and their families during this initial period.

In addition, the measure will apply to people granted a relevant visa on or after commencement, intended to be 1 July 2018. This is designed to provide individuals and families seeking to migrate to Australia time to be aware of the new rules so that they can make an informed decision when applying for or accepting a permanent visa and make plans to support themselves during the waiting period. Migrants already granted permanent residency before 1 July 2018 will not be affected by this measure. This means that no one who is already serving a NARWP will have their NARWP extended. Similarly, those who have previously served any applicable NARWP and are already eligible for or receiving payments will not have a further NARWP applied or lose any entitlements they are already receiving.

Australia accepts around 183,000 permanent migrants each year under the skilled and family visa streams. The majority of these are able to support themselves and their families and do not seek to access welfare payment during their first three years in Australia.

A 2016 Productivity Commission report[3] noted that permanent non humanitarian migrants who arrived between 2000 and 2011 and would have been subject to a two year waiting period (unless exempt) had lower take-up rates of income support in 2011 than the general population. In particular, only three per cent of permanent skilled migrants and 13 per cent of family migrants who arrived between 2000 and 2011 were receiving any form of income support in 2011, compared to 17 per cent for the general population. This research indicates that most new migrants who have come under the skilled and family migration program since the introduction of the two year waiting period have been able to support themselves without needing to rely on income support, both during and following their waiting period. This is consistent with the intention of the waiting period to encourage self-sufficiency for migrants coming to Australia.

The impact of this measure will only be felt by those migrants who would have otherwise sought and received certain payments during this period. It is estimated that when the measure is fully implemented in 2020-21 around 50,000 families will be serving a waiting period for Family Tax Benefit Part A and around 30,000 will be serving a waiting period for other payments. These figures

[1] MYEFO 2017-18, pg. 8: budget.gov.au/2017-18/content/myefo/html/.
[2] DSS Annual Report 2016-17, pg. 110: www.dss.gov.au/publications-articles/corporate-publications/annual-reports/dss-annual-report-2016-17.
[3] Productivity Commission, *Migrant Intake Report*, 2016: www.pc.gov.au/inquiries/completed/migrant-intake/report

may encompass the same individuals as these payments are not mutually exclusive. The overall financial impact on affected individuals and families will depend on their circumstances and the payments they would otherwise have received.

Importantly, there is a comprehensive range of exemptions which ensure that a safety net continues to be available to those who find themselves in need. Some exemptions apply to all payments, while others apply to specific payments based on the nature of the payment.

Permanent humanitarian migrants and their family members will continue to be exempt from the NARWP for all payments, including social security payments, family assistance payments and parental leave payments. Temporary humanitarian-type visa holders will be exempt from the NARWP for Special Benefit, the Low Income Health Care Card, Family Tax Benefit, Parental Leave Payment and Dad and Partner Pay.[4]

These exemptions recognise that refugees and their family members are often particularly vulnerable and are not usually in a position to make plans for their own support prior to applying for a humanitarian visa.

People who become a lone parent after becoming an Australian resident are exempt from the NARWP for Parenting Payment, Newstart Allowance, Youth Allowance and Farm Household Allowance. This exemption ensures that parents, often mothers, who no longer have the support of a partner can still access financial support for themselves and their children.

Migrants who experience a substantial change of circumstances and are in financial hardship will be exempt from the NARWP for Special Benefit which is delivered through the Department of Human Services. Special Benefit is a payment of last resort that provides support for people in financial hardship who are unable to obtain or earn a sufficient livelihood for themselves and any dependants and who are not eligible for any other income support payment.

Special Benefit provides a basic level of support, usually equal to Newstart Allowance (or Youth Allowance if the person is aged under 22 years).[5] Supplementary payments such as Rent Assistance, may also be paid in addition to these basic rates. Recipients of Special Benefit are also entitled to an automatic Health Care Card or Pensioner Concession Card, depending on their circumstances.

The exemption from the NARWP for Special Benefit provides a safety net for those who find themselves in hardship with no other means of support for reasons beyond their control. Situations which constitute a substantial change of circumstances for the purposes of this exemption include:

- experiencing domestic violence
- losing a job organised prior to coming to Australia
- suffering a prolonged injury or illness and being unable to work
- having to care for a dependent child who develops a severe medical condition, disability or injury, or
- being left with no other means of support after their sponsor or partner dies, becomes a missing person or is imprisoned.

This exemption recognises that migrants who have made plans to support themselves when they arrive in Australia may experience a change of circumstances that prevents them from realising those plans.

[4] These temporary visa holders only have access to these payments and concession cards.

[5] The current rates of Newstart Allowance are $545.80 per fortnight for a single person without children, $590.40 per fortnight for a single person with children and $492.80 per fortnight for a partnered person.

There are a number of new exemptions being introduced through this Bill in relation to the new payments that will be subject to a NARWP for the first time. This includes exemptions designed to ensure the new NARWP operates coherently with the existing exemptions outlined above:

- People with a Family Tax Benefit eligible child will be exempt from the NARWP for the Low-Income Health Care Card. These families would previously have qualified for a Health Care Card as part of their Family Tax Benefit. The exemption ensures that they can still receive a concession card where eligible and access associated health concessions, including discounted items under the Pharmaceutical Benefits Scheme.
- People who are receiving a social security pension or benefit or Farm Household Allowance (for example, because they are exempt from the NARWP for that payment) will also be exempt from the NARWP for family payments and Carer Allowance. This will ensure that exemptions operate consistently across welfare payments and those exempt can access both primary income support payments and supplementary assistance for dependent children and/or caring responsibilities where eligible.

Finally, New Zealand citizens on a Special Category Visa will be exempt from the NARWP for Family Tax Benefit, Parental Leave Pay and Dad and Partner Pay. This exemption only applies for certain payments as Special Category Visa holders are generally not eligible for other payments. This exemption ensures that New Zealand citizens in Australia will continue to access the same benefits in recognition of the particular Trans-Tasman arrangements between Australia and New Zealand. Special Category Visa holders who later move to a permanent visa will continue to be eligible for this exemption, ensuring they can continue to receive these payments while serving the NARWP for other payments.

The above exemptions ensure that this measure strikes a balance between promoting self-reliance for migrants and providing appropriate safeguards for those in vulnerable circumstances.

This measure is designed to achieve the dual objectives of:

- encouraging new migrants to make plans to support themselves and their families during their initial settlement period, and
- reducing the burden placed on Australia's welfare payments system and improving the long-term sustainability of the system.

This measure is the least restrictive approach to achieving both these objectives. Residency waiting periods are an existing and longstanding element of the welfare payments system. This measure does not introduce new principles or settings to the welfare payments system, rather it applies the existing principles and settings consistently across payment types. It also ensures the current comprehensive range of exemptions and safeguards are maintained and extended.

As noted above, these objectives reflect the Government's ongoing fiscal strategy to balance the Budget and ensure continued economic growth. The Government considers a range of options for achieving its fiscal strategy in the policy development process.

To the extent that this measure places any limitation on the rights to social security and an adequate standard of living, this limitation is reasonable and proportionate in the context of achieving these fiscal objectives that benefit the nation, while ensuring a safety net is available for the most vulnerable.

In addition, permanent migrants will still have access to broader Government-funded services to support their integration and wellbeing, including health care and education services. Access to child care services will also be available for those who work or study and have children.

***Compatibility of the measure with the right to maternity leave***

**Committee comment**

**1.260 The preceding analysis raises questions as to the compatibility of the measure with the right to paid parental leave.**

**1.261 The committee therefore seeks the advice of the minister as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve its stated objective (including the extent of the reduction in access to parental leave payments; the existence of relevant safeguards; and whether the measure is the least rights restrictive approach); and**
- **whether alternatives to reducing access to paid parental leave, in the context of Australia's use of its maximum available resources, have been fully considered.**

Response

The *Paid Parental Leave Act 2010* provides for the Paid Parental Leave scheme, comprised of Parental Leave Pay and Dad and Partner Pay, which complements the entitlement to unpaid leave under the National Employment Standards in the *Fair Work Act 2009*.

The Government remains committed to assisting parents to balance their work and family responsibilities through a range of programs and payments. However, this must be balanced with the responsibility to ensure family assistance and social security payments are well targeted and sustainable into the future.

Waiting periods for new migrants already exist for a number of welfare payments, including Parenting Payment. These waiting periods reflect the expectation that new permanent residents should be able to support themselves. Introducing a consistent waiting period for Parental Leave Pay and Dad and Partner Pay is consistent with the existing principle of self-reliance for new migrants.

The changes detailed in this Bill do not interfere with the existing rights and protections under the *Fair Work Act 2009*, including access to 12 months of unpaid parental leave without loss of employment or seniority within the workplace. The changes also do not limit parents' ability to access employer-provided leave following the birth or adoption of a child. In addition, parents who do return to work or study or other approved activities and are using approved child care will continue to have access to child care subsidies.

The majority of newly arrived migrants in scope for this measure are expected to be able to provide for themselves and their family members during the NARWP, as they are settling in Australia through the skilled and family streams of the migration program. These migrants are well placed to support themselves through work, existing resources or family support. Most are also expected to be able to make informed decisions about growing their families within the settlement period.

This measure does not affect humanitarian migrants and their family members, acknowledging these people are often particularly vulnerable and may have less capacity to plan for their own support prior to coming to Australia.

The Government is ensuring that appropriate information is available to prospective migrants prior to the new rules commencing to ensure they are aware of the changes and can make informed decisions about whether to apply for or accept a permanent visa.

The measure was publically announced in December 2017 as part of the 2017-18 MYEFO. Following announcement of the measure, a brief summary of the upcoming changes and a fact sheet was

published on the Department of Social Services (DSS) website at www.dss.gov.au/living-in-australia-and-overseas/upcoming-changes. Information has also been included on other departmental websites, directing people to the DSS website for further information. More detailed information will be provided across a broader range of channels, including through migration agents, pending passage of the legislation, to ensure that existing visa applicants and prospective applicants will be able to access information on the new rules that will apply to them. This will allow them to make informed decisions and plans for how they will support themselves during their waiting period.

Transitional arrangements are also being provided to support those who may already be pregnant and have planned leave arrangements so they are not disadvantaged. Under these arrangements, people granted a permanent or eligible temporary visa on or after 1 July 2018 will still be able to access Parental Leave Pay and Dad and Partner Pay if they have a newborn or adopt a child between 1 July 2018 and 31 December 2018 (inclusive) and they are otherwise qualified for the payment (including meeting the work test and income test).

In addition, as outlined above, there are a number of key exemptions to the NARWP for Parental Leave Pay and Dad and Partner Pay for families with children who experience a change of circumstances and are unable to support themselves as originally planned, including those who become a lone parent after arrival and no longer have the support of their partner, and those in financial hardship.

Targeting expenditure remains an essential part of balancing the distribution of available resources with the most effective measures for addressing barriers and creating opportunity. Residency waiting periods already play a fundamental role in targeting immediate access to social security payments. This measure will strengthen the existing waiting periods by applying consistent rules across welfare payments types, including social security and family payments, ensuring that migrants support themselves and their families for a reasonable period before becoming eligible for taxpayer-funded parental leave or other payments.

As highlighted in the response above, ensuring that the welfare payments system, including the Paid Parental Leave Scheme, is targeted and sustainable over the long-term is a key part of the Government's commitment to fiscal responsibility and a balanced Budget.

To the extent that this measure places any limitation on the right to maternity leave, this limitation is reasonable and proportionate in the context of encouraging self-reliance by new migrants and maintaining the ongoing sustainability of the Paid Parental Leave Scheme and the welfare payments system more broadly. The measure provides for a safety net for the most vulnerable through a comprehensive range of exemptions and transitional arrangements; and does not affect other non-Government parental leave which will continue to be available.

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

**Committee comment**

**1.266 The preceding analysis raises questions as to the compatibility of the measure with the right to equality and non-discrimination.**

**1.267 The committee therefore seeks the advice of the minister as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve its stated objective (including whether it is based on reasonable and objective criteria; the extent of the reduction in access to parental leave payments; the existence of relevant safeguards; and whether the measure is the least rights restrictive approach); and**

- **whether alternatives to reducing access to paid parental leave, in the context of Australia's use of its maximum available resources, have been fully considered.**

Response

This measure will extend the existing NARWP to new payment types, ensuring that the rules governing access to taxpayer-funded payments are consistent across the welfare payments system.

The new payments types that will be subject to the NARWP under this measure – the Paid Parental Leave Scheme, Family Tax Benefit and Carer Allowance – are not targeted specifically to women. However, it is acknowledged that women are more likely to access these payments as they often bear the majority of caring responsibilities for children and/or family members with a disability. As a result, women are more likely to have a NARWP applied in relation to these payments.

However, while the range of exemptions from the NARWP are not specifically targeted to women, some circumstances that attract an exemption for income support payments – for example, becoming a single parent or experiencing a change in circumstances such as domestic violence – are most likely to be experienced by women.

These exemptions ensure that migrants in these circumstances, particularly migrant women, can still access financial support through payments, such as Parenting Payment or Special Benefit, where eligible. Those who granted one of these payments under an exemption will also be exempt from the NARWP for the Paid Parental Leave Scheme, Family Tax Benefit and Carer Allowance. This ensures that migrants in these circumstances who have dependent children or caring responsibilities for a person with disability can also access additional support where eligible. For example, a woman granted Special Benefit because she is in hardship due to a change in circumstances would also be able to receive Family Tax Benefit for any eligible children and would also be able to transfer to Parental Leave Pay if she has a new baby and meets all the requirements.

The comprehensive range of exemptions and safeguards ensure migrants, particularly migrant women, retain access to payments, including Paid Parental Leave payments, where they find themselves in hardship. Given these exemptions, this measure is the least restrictive way of applying consistent rules and expectations for new migrants in order to improve the sustainability of the welfare payments system, both in the short and longer term.

This measure supports the Government's ongoing fiscal strategy to balance the Budget and ensure continued economic growth. To the extent that this measure places any limitation on the rights to equality and non-discrimination, this limitation is reasonable and proportionate in the context of achieving these fiscal objectives, while continuing to provide a safety net, particularly for vulnerable women.

Minister for Revenue and Financial Services
Minister for Women
Minister Assisting the Prime Minister for the Public Service
The Hon Kelly O'Dwyer MP

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

Dear Mr Goodenough Ian

The Treasurer has asked me to respond to the Parliamentary Joint Committee on Human Rights (the Committee) request dated 28 March 2018, to *Report 3 of 2018* which seeks further advice on the human rights compatibility of the following legislation:

**Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018**

As noted by the Committee in its Report, Schedule 1 to the Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill (the Bill) introduces offence provisions in relation to the production or supply of electronic sales suppression tools and the acquisition, possession or control of such tools where the person is required to keep or make records under an Australian taxation law. A person will also commit an offence where they have incorrectly kept records using electronic sales suppression tools. Each of these offences are offences of strict liability.

The Committee has sought advice about the following:

- whether the strict liability offences are aimed at achieving a legitimate objective for the purposes of human rights law;
- how this measure is effective to achieve that objective; and
- whether the limitation on the right to be presumed innocent is proportionate to achieve the stated objective.

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*Achieving a legitimate objective for the purposes of human rights law*

Schedule 1 to the Bill operates to prohibit the production, distribution and possession of sales suppression tools in relation to entities that have Australian tax obligations. The object of Schedule 1 to the Bill is to deter the production, use and distribution of tools to manipulate or falsify electronic point of sale records to facilitate tax evasion.

This is a legitimate objective for the purposes of human rights law because electronic sales suppression tools serve no legitimate function. They are specifically designed to understate income and assist in avoiding tax obligations. Such behaviour undermines the integrity of the tax system.

*Whether the measures are effective to achieve that objective?*

The measures contained in Schedule 1 to the Bill introduce strict liability offences. These offences will be effective in achieving the objective of prohibiting the production, distribution and possession of sales suppression tools.

Applying strict liability to these offences is appropriate because it substantially improves the effectiveness of the prohibition on electronic sales suppression tools. The provision has a rational connection to the objective as it will act as a significant and real deterrent to those entities who seek to profit by facilitating tax evasion and fraud through the tools' production and supply. Because an electronic sales suppression tool's principal function is, by definition, to facilitate tax evasion, there are no reasons for an entity to produce or supply such a tool beyond those covered by the applicable defences. The ability to prosecute people who facilitate the fraud earlier in the supply chain will significantly reduce the instances of fraud at the user level.

The maximum penalty for these offences exceeds the upper threshold for penalties specified in the *Guide to Framing Commonwealth Offences*. The amount of the penalty is justified on the basis that the offence relates to systematic fraud and tax evasion. The amount of the penalties are comparable to the penalties that currently apply to existing offences for promoting tax exploitation schemes under Division 290 of Schedule 1 to the TAA 1953 and in respect of breaches of directors' duties under the *Corporations Act 2001*.

*Whether the limitation on the right to be presumed innocent is proportionate to achieve the stated objective?*

The Committee states in its Report that Schedule 1 to the Bill engages and limits the right to the presumption of innocence by imposing strict liability offences.

I believe that Schedule 1 to the Bill does not engage or limit the right to the presumption of innocence. A strict liability offence removes the requirement for a fault element to be proven before a person can be found guilty of an offence. However the prosecution must still prove all of the physical elements to the offence before a court will impose any criminal liability.

The strict liability offences in Schedule 1 to the Bill are considered appropriate and proportionate in the context of tax evasion and fraud because an electronic sales suppression tool's principal function is, by definition, to facilitate tax evasion and fraud.

There are no reasons for an entity to produce or supply such a tool beyond those covered by the applicable defences.

Schedule 1 to the Bill provide offence-specific defences as safeguards to ensure that entities who undertake certain conduct in relation to an electronic sales suppression tool are protected from committing an offence where their conduct is undertaken to prevent or deter tax evasion, or to enforce a taxation law. These defences operate in conjunction with the general defences for honest and reasonable mistakes.

I appreciate the Committee's consideration of this Bill, and I trust this information will be of assistance to the Committee.

Yours sincerely

**Kelly O'Dwyer**