Responses from legislation proponents — Report 10 of 2020[1]

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Senator the Hon Sarah Henderson
Chair
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Dear Senator Sarah,

I write in response to the comments of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Education Legislation Amendment (2020 Measures No. 1) Bill 2020 (the Bill) as outlined in the Committee's *Report 8 of 2020*. I appreciate the time taken to review the Bill and thank you for the opportunity to address the important issues raised by the Committee. I note that the Bill was passed by Parliament on 18 June 2020 and received the Royal Assent on 19 June 2020. As such, throughout this letter I refer to the *Education Legislation Amendment (2020 Measures No. 1) Act 2020* (the Act).

The Committee's *Report 8 of 2020* requested additional information about measures contained in the Act; in particular whether:

- the requirement that higher education students obtain a Unique Student Identifier (USI) in order to be eligible for Commonwealth assistance pursues a legitimate objective that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right to education; and
- any exemption from the requirement that higher education or vocational education and training (VET) students must possess a USI before they may receive Commonwealth financial assistance will apply.

Requirement that higher education students obtain a USI in order to be eligible for Commonwealth assistance

The Committee requested additional information on the expansion of the USI to higher education, and in particular whether the mandate that higher education students must obtain a USI in order to be eligible for Commonwealth financial assistance is compatible with the right to education.

The Act mandates that new higher education and VET students commencing studies from 1 January 2021, and all higher education students from 1 January 2023, must obtain a USI in order to be eligible for Commonwealth financial assistance. This means that students will not be able to use the Commonwealth Higher Education Loan Program (HELP) or VET Student Loans (VSL) schemes to pay for their studies if they do not have a USI. However, crucially, students will still be able to study at higher education and VET providers if they do not have a USI—they will simply need to pay their tuition fees up front. Whilst this requirement does place some limitations on the ability for students to study (as some students may not be able to afford to pay their tuition fees up front), these limitations are reasonable, necessary and proportionate to achieve the legitimate policy objectives of the Act.

There are currently two Government-issued student identifiers in the tertiary education sector: the student identifier in the VET sector, and the Commonwealth Higher Education Student Support Number (CHESSN) in the higher education sector. The Act will facilitate the provision of a single student identifier to each student that will record a student's entire tertiary education journey by expanding the student identifier to higher education.

The amendments in the Act mirror the current requirement that a student be assigned a CHESSN in order to access Commonwealth financial assistance. Rationalising the number of student identifiers in tertiary education from two to one will reduce red tape for students and providers, and will ensure a seamless journey for students in the tertiary education sector.

Further, there are limited barriers impeding a student from obtaining a USI and, in turn, accessing Commonwealth assistance, as the process for applying for a USI is simple, and there is no associated cost for applicants. Existing students will also have ample time between the commencement of the Act and 1 January 2023 to ensure that they have applied for, and obtained, a USI. Further, when necessary, higher education providers, Tertiary Admission Centres and the Australian Government Department of Education, Skills and Employment may also assist a student by applying for a USI on behalf of the student (with consent from the student).

To the extent the Act limits the right to education, these limits are justifiable as they are reasonable, necessary and proportionate to achieving the legitimate objectives of the Act described above.

Exemption from the requirement that higher education or VET students must possess a USI before they may receive Commonwealth financial assistance

The Committee requested clarification on whether any exemption from the requirement to possess a USI prior to receiving Commonwealth financial assistance would be granted.

Under section 53 and section 53A of the *Student Identifiers Act 2014*, the Student Identifiers Registrar may grant an exemption to the requirement to hold a student identifier if an 'issue' applies. The effect of this provision is that student may apply to the Registrar for an exemption. Approval of an application for an exemption would allow a student to receive their VET statement of attainment, or higher education award, in the absence of a student identifier.

However, this exemption does not extend to an application for financial assistance under the *Higher Education Support Act 2003* or the *VET Student Loans Act 2016*. This is to ensure that the legitimate objectives described in response to the Committee's first question (set out above) are achieved.

It is important to note that in 2019, less than 20 students applied to the Registrar for an exemption to the requirement to hold a USI, and all applications were granted. As such, it is expected that only a very small number of students would seek to apply for an exemption from the requirement to have a USI, and these students would still be able to study and obtain a VET statement of attainment or higher education award.

Thank you for bringing the concerns of the Committee to my attention.

Yours sincerely

DAN TEHAN

The Hon Stuart Robert MP
Minister for the National Disability Insurance Scheme
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Ref: MC20-012055

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Dear Senator Henderson

Thank you for your email of 1 July 2020, regarding the Parliamentary Joint Committee on Human Rights consideration of the National Disability Insurance Scheme Amendment (Strengthening Banning Orders) Bill 2020 (the Bill).

The committee has requested further information in order to fully assess the compatibility of this measure with right to privacy in particular:

- Why the bill allows the NDIS Provider Register to include any 'information about the banning order', without any restriction on the level of detail that will be included;
- Why it is necessary to list the names of current and former employees of NDIS providers who are subject to a banning order on a public website, and whether there are other less rights-restrictive means to achieve the stated objective (for example, allowing the Register to be accessed on request)
- When is such information included in the Register and what safeguards are in place to ensure that an individual's right to privacy is adequately protected pending any review of a banning order decision.

I appreciate the opportunity to address the issues raised by the committee as part of its consideration of the bill, and I provide the following advice.

The practical effectiveness of a banning order relies on appropriate publication of information about the banned provider or worker on a register accessible to the public. People with disability are a vulnerable cohort and only a public register provides sufficient visibility to ensure people with disability are informed of the risks associated with certain providers and individuals.

The NDIS Provider Register is generally publically available, and people with disability and their representatives can search to ensure that particular providers or workers are not subject to banning orders. It will also be a tool for providers looking to employ workers to ensure the employees they recruit are safe to work with people with disability and provide NDIS services.

Publishing information authorised by rules may impact a person's privacy. However, the overarching aim of a banning order is to protect persons with disability, noting that there must be an objective basis for making the order, and some impact on privacy is necessary. The rules are disallowable and open to scrutiny by the Australian parliament.

The publication of the NDIS Provider Register is discretionary, although the rules prevent the Commissioner from publishing information that is considered contrary to the public interest or to the interests of persons with disability receiving supports or services.

In deciding what is to be published, the Commissioner is guided by the principles underlying the provisions in the NDIS Act that preclude the inappropriate disclosure of personal or otherwise sensitive information, as well as privacy legislation. These provisions place appropriate limitations on the Commissioner's discretion to include personal information on the register.

The matters included in the NDIS Provider Register do not, and will not under the Bill, extend to any highly sensitive information about the person subject to the banning order. However, a high level of flexibility in relation to the NDIS Provider Register is necessary to support the exercise of choice and control by people with disability in response to the developing NDIS market. In this case, the flexibility of enabling additional matters to be prescribed by the rules will allow the Commissioner to respond if situations arise where the person's name and ABN (if any) are insufficient to adequately and accurately identify the person. Any matters prescribed would be directed to factors which would avoid confusing the person with someone else, such as the location, nature of services or manner of operation.

As a request for an internal review does not affect the operation of the banning order. It would not be in keeping with the protective function of a banning order to remove the name of the banned provider or worker from the NDIS Provider Register. Rather, a notification on the register that the decision is under review could be included.

For the reasons outlined above, it is important for the NDIS Commissioner to have flexibility in relation to the information to be published on the register. Given this, I do not consider it appropriate to include prescription around such information in the primary legislation.

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

Yours sincerely

Stuart Robert