Appendix 3

Correspondence

The Hon Ken Wyatt AM, MP

Minister for Aged Care
Minister for Indigenous Health
Member for Hasluck

Ref No: MC17-015896

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

Dear Ian Chair

Thank you for your correspondence of 6 September 2017 regarding the Parliamentary Joint Committee on Human Rights (Committee) request for a response in relation to the human rights compatibility of the *Aged Care (Subsidy, Fees and Payments) Amendment Determination 2017* and *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment Determination 2017*.

I note the Committee's analysis raises questions as to whether the pause of indexation is compatible with the right to health and the right to an adequate standard of living. I have sought to provide a response for each Committee comment below:

- what effect the pausing of indexation will have on the level of attainment of the right to health and the right to an adequate standard of living

The Australian Government remains the principal funder of aged care, providing estimated funding of $17.5 billion in 2016–17 to support aged care consumers and the sector. Furthermore, Government spending on aged care will continue to grow over future years and is expected to reach over $22.3 billion by 2020–21, which will protect residential aged care recipients' rights to health and their rights to an adequate standard of living.

Funding to the residential aged care sector will continue to grow in aggregate at an average of 5.1 per cent per annum over the forward estimates.

Furthermore, legislation requires Government-subsidised aged care homes meet standards to ensure that quality care and services are provided to all residents, including that there are adequate numbers of appropriately skilled staff to meet the care needs of residents. These requirements are monitored by the Australian Aged Care Quality Agency in its assessment of an aged care facility against the standards.

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the measure is otherwise aimed at achieving a legitimate objective

The indexation pause, as legislated by the two Determinations, was announced at the Mid Year Economic Outlook 2016, and was in response to sector concerns that savings measures announced at Budget would have a disproportionate impact across the aged care sector. Following consultation with the sector, the Government replaced some of the previously announced changes relating to the delivery of complex pain management with an indexation pause for all Aged Care Financing Instrumet (ACFI) domains in 2017-18, and a 50 per cent indexation pause on the Complex Health Care domain in 2018-19. This change was to ensure the impacts of the original Budget measures were more evenly distributed amongst the aged care sector.

The original changes were precipitated by an increase over the forward estimates for residential care expenditure by $3.8 billion up to 2019-20 due to higher than estimated growth in ACFI claiming (in the context of total estimated residential care expenditure to 2019-20 of just over $50 billion).

As a responsible fiscal manager, Government had to take action to ensure future growth in expenditure occurred at a sustainable rate. The 2016–17 Budget measures reduced the unexpected growth by $2 billion over the forward estimates. This was less than the $3.8 billion amount that Government had increased its previous estimated expenditure. This is reflected in continuing expenditure growth going forward.

Similar measures, including an indexation freeze, were taken in 2012-13 to attempt to bring ACFI expenditure back in line with estimates.

- how the measure is effective to achieve (that is, rationally connected to) the objective

The ACFI measures were designed to help protect the integrity of the residential aged care sector funding model, while ensuring the highest levels of funding continued to be allocated to the residents with the highest care needs.

Removing some original components of the ACFI changes and replacing them with a two staged indexation pause meant that the impact on the average ACFI subsidy was more evenly distributed across providers, as the indexation pause applies across all three ACFI domains. The revised package provides more certainty for the sector and will deliver sustainable expenditure growth over the short term while paving the way for longer term reform options. The Government has commenced consulting with the sector on long term options.

- whether the limitation is reasonable and proportionate for the achievement of that objective (including whether there are any safeguards in relation to the measure, information regarding the number of approved providers that may be affected by the pausing of indexation of the amount of the subsidy, and any anticipated financial impact on the provision of aged care services)

All Commonwealth funded residential aged care providers will be impacted by the indexation pause of the ACFI basic subsidy. The Government recognised that small rural and remote, and homeless providers may be disproportionately affected by the impacts of the ACFI changes, and increased the viability supplement as a safeguard. As a result around 350 eligible services received a flat rate increase of an additional $2.12 per care recipient per day from 1 July 2017. For a 40 bed service, this equates to around $30,000 a year.

The measures are reasonable and proportionate in that they aim to reduce the rate of growth in funding to sustainable levels, with the $2 billion impact of the 2016-17 Budget measure less than the $3.8 billion increase in forward estimates expenditure. Funding to the residential care sector will continue to grow in aggregate at an average of 5.1 per cent over the forward estimates.

Thank you for bringing this matter to my attention. To assist the Committee in their deliberations I have enclosed a fact sheet on residential care subsidy for reference purposes.

Yours sincerely

The Hon KEN WYATT AM, MP
Minister for Aged Care
Minister for Indigenous Health

Encl (1)

26 SEP 2017

FACT SHEET – RESIDENTIAL CARE SUBSIDY – AGED CARE FUNDING INSTRUMENT (ACFI)

Residential care subsidy is paid to approved providers of Commonwealth funded residential aged care monthly and is calculated by adding the amounts due for each care recipient for each day of the month. An approved provider's residential care subsidy amount for the claim period (month) is calculated as:

1. the basic subsidy amount for each eligible permanent resident based on their classification under the ACFI. The amount payable for the ACFI depends on the ratings determined for each ACFI question claimed by the approved provider;
2. **plus** any primary supplements for each eligible care recipient (oxygen supplement, enteral feeding supplement);
3. **less** any reductions in subsidy (means testing, compensation recovery and adjusted subsidy reduction for state government homes);
4. **plus** any other supplements for each eligible care recipient (accommodation supplement, hardship supplement, viability supplement, veterans' supplement, homeless supplement).

The basic subsidy uses ACFI to determine the level of funding provided to aged care facilities. It is a resource allocation instrument and assesses care needs of residents across three domains as a basis for allocating the funding:

- Activities of Daily Living Domain (ACFI Questions 1-5) covers the assessed usual care needs for Nutrition (readiness to eat and eating), Mobility (transfers and locomotion), Personal Hygiene (dressing and undressing, washing and drying, and grooming), Toileting (use of toilet and toilet completion) and Continence.
- Behaviour Domain (ACFI Questions 6-10) covers the assessed usual care needs for Cognitive Skills, Wandering, Verbal Behaviour, Physical Behaviour and Depression.
- Complex Health Care Domain (ACFI Questions 11-12) covers the usual care needs for assistance with Medication and ongoing Complex Health Care Procedures.

Ratings are calculated from completing checklists in each domain which determines the level of the subsidy for that domain.

Maximum daily ACFI subsidy payable is currently $214.06.

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

MS17-002208

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

Dear Chair Ian

I refer to the Parliamentary Joint Committee on Human Rights' Report 10 of 2017 tabled on 12 September 2017, which includes a report on the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017*.

I would like to take this opportunity to thank the Committee for its consideration of the compatibility of the Bill with Australia's human rights obligations.

I provide the enclosed additional information in response to the Committee's requests for further advice on certain aspects of the Bill.

I trust this additional information is of assistance.

Yours sincerely

Michael Keenan

Encl: Response to the Parliamentary Joint Committee on Human Rights' Report 10 of 2017, concerning the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017*

Parliament House Canberra ACT 2600 • Telephone: (02) 6277 7290 Facsimile: (02) 6273 7098

Civil penalty provisions

Item 20, proposed subsections 76A(11) and 76P(3) of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2017

Item 73, proposed subsection 199(13) of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2017

Item 75, proposed subsection 200(16) of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2017

The committee requests the Minister's advice as to whether the civil penalty provisions in the Bill could be considered as 'criminal' in nature for the purposes of international human rights law, given the provisions attract civil penalties of up to 20,000 penalty units for an individual (or $4.2 million) and 100,000 penalty units (or $21 million) for a body corporate.

Minister for Justice's response:

It is well recognised that money laundering can be a very lucrative crime, and therefore penalties for behaviour that may allow money laundering to occur need to be sufficiently high to be an effective deterrent. All civil penalty provisions in the AML/CTF Act carry a maximum fine of 100,000 penalty units for corporations and 20,000 penalty units for individuals. Section 175 of the AML/CTF Act, containing the civil penalties framework, applies uniformly across the Act; as such, the severity of the maximum penalty is not determinative but rather its application to the circumstances of the offence. The scope of the civil penalties framework reflects the range of factors (e.g. the amount of money laundered through a reporting entities' services) that could be present in relation to a particular offence. For this reason, the appropriate penalty is a matter for judicial discretion. In determining the penalty, the Federal Court must consider a range of factors in section 175, including:

- the nature and extent of the contravention; and
- the nature and extent of any loss or damage suffered as a result of the contravention; and
- the circumstances in which the contravention took place; and
- whether the person has previously been found by the Federal Court in proceedings under this Act to have engaged in any similar conduct; and
- if the Federal Court considers that it is appropriate to do so—whether the person has previously been found by a court in proceedings under a law of a State or Territory to have engaged in any similar conduct; and
- if the Federal Court considers that it is appropriate to do so—whether the person has previously been found by a court in a foreign country to have engaged in any similar conduct; and
- if the Federal Court considers that it is appropriate to do so—whether the person has previously been found by a court in proceedings under the Financial Transaction Reports Act 1988 to have engaged in any similar conduct.

The significance of the offences that have been highlighted by the Committee should not be understated. For example, failure to notify AUSTRAC of changes in circumstances that could materially affect a person's registration can have serious consequences. Changes in key personnel or beneficial ownership of a digital currency exchange could expose the business to

money laundering and terrorism financing risks. Proper notification ensures that AUSTRAC has correct information to consider the ongoing suitability for that business to provide designated services, to consider whether the risk of ML/TF continues to be sufficiently mitigated and also to ensure that valuable information that may be of relevance to law enforcement and other relevant agencies is accurate.

The proposed civil penalty provisions in the Bill are consistent with other existing provisions in the Act. This is in accordance with the Guide to Framing Commonwealth Offences (The Guide), which notes that 'a penalty should be formulated in a manner that takes account of penalties applying to offences of the same nature in other legislation and to penalties for other offences in the legislation in question'. These businesses have the potential to generate significant criminal proceeds far exceeding the maximum penalties available under the standard ratio. The Guide contemplates the use of higher penalties to combat corporate or white collar crime to counter the potential financial gains from committing an offence.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS17-003402

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

Dear Mr Goodenough

Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017
and
Australian Border Force Amendment (Protected Information) Bill 2017

Thank you for your letters of 6 September 2017 in which further information was requested on the *Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017* and the *Australian Border Force Amendment (Protected Information) Bill 2017*.

I have attached the *Response to Parliamentary Joint Committee on Human Rights' Report 9 of 2017* as requested in your letters. I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 26/09/17

Response to Parliamentary Joint Committee on Human Rights - Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017

Public disclosure of sponsor sanctions

1.113 The preceding analysis raises questions about whether the limitation on the right to privacy is proportionate to achieve the stated objective.
1.114 The committee therefore seeks the advice of the minister as to whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective (including whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards with respect to the right to privacy).

The Department already undertakes a range of activities to deter businesses from breaching their sponsorship obligations, and inform visa holders and Australians about breaches. These include employer education and awareness visits, monitoring of compliance with sponsorship obligations and visa conditions, investigation of allegations, liaison with the Fair Work Ombudsman, imposition of sanctions, and publication of aggregate data on breaches.

The current framework does not allow Australians and overseas workers to sufficiently inform themselves about breaches as current information in the public domain does not identify businesses which have breached their legal obligations. The current framework also prevents the Department from advising persons making allegations that a sponsor has been sanctioned, which undermines public confidence in the compliance framework as complainants are unaware of any outcome of their allegation. The Department received 1585 allegations regarding the 457 programme in 2016-17.[1] By releasing a sponsor's adverse compliance history to the public, the Department will be able to demonstrate that there are repercussions for sponsors who breach their sponsor obligations described by Division 2.19 of the *Migration Regulations 1994*. This will encourage visa holders, and others, to report suspected breaches, and act as a deterrent to a sponsor who may otherwise breach their obligations.

Publication will only occur where it has been determined by a departmental delegate that a sponsor has breached a sponsor obligation and the breach is serious enough to warrant the imposition of a sanction under section 140K of the *Migration Act 1958* (the Migration Act). Sponsors will continue to be afforded natural justice regarding whether a sponsor obligation has been breached.

The provisions of the *Privacy Act 1988* (Privacy Act) are intended to protect individuals, not corporations, therefore in most cases the publication of sponsor sanctions does not impose on the rights of these sponsors to privacy. However, the Department recognises that some sponsors may be sole traders, and that publishing the details sanction details could include information that might identify the individual.

Although the Department could publish sanction details without amending the Migration Act, publication would be restricted to information that did not identify an individual, therefore sole trader details could not be published. Whilst this would be less restrictive, it would not fulfil the objective. It is imperative that publication apply to all sponsors so Australians and overseas workers are fully informed about all businesses and to avoid a loophole which companies could exploit.

It is intended that the Regulations will prescribe information that must be published. The scope of information published is narrow, and it is intended that this will be limited to information that identifies the sponsor, breach and sanction.

[1] Department of Immigration and Border Protection.

The proposed amendments provide flexibility by allowing the Minister to prescribe circumstances where a sanction should not be disclosed. At this time, no exemptions are proposed.

The Department intends that sanction information will remain in the public domain for a period proportionate to the seriousness of the breach, and will prescribe this in policy. In determining this, the Department will take into consideration the publication periods for sanctions by other regulators such as the Office of the Migration Agents Registration Authority and the Fair Work Ombudsman. Migration agent sanctions must be removed from the web site not later than 12 months, 5 years or 10 years, depending on the nature of the breach.

The implementation of the measure will include a comprehensive communications package to inform sponsors, visa holders, and the Australian public of the measure.

Requiring the publication of sponsor sanctions is reasonable and proportionate, as it will further reduce the potential for visa holders to be exploited, and allow workers to make informed decisions about potential employers. Publication will demonstrate to the public that there are repercussions for sponsors who breach their obligations, and act as a deterrent to a sponsor who may otherwise breach their obligations.

Disclosure of tax file numbers

1.124 The preceding analysis raises questions about whether the limitation on the right to privacy is proportionate to achieve the stated objective.
1.125 The committee therefore seeks the advice of the minister as to whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective (including whether there are effective safeguards with respect to the right to privacy).

The tax file number measure will be used for compliance and research purposes, which will assist the Department in identifying where visa holders are not being paid correctly. This will reduce the potential for visa holders to be exploited. The limitations on privacy introduced by the tax file number measure are reasonable and proportionate as they will protect and benefit visa holders.

The collection, use, recording and disclosure of tax file numbers will be prescribed in the Regulations. It is intended that the regulations will allow tax file number sharing in relation to a narrow list of subclasses, that is limited to temporary and permanent skilled visas, for research and compliance purposes. This includes identifying and preventing exploitation.

The implementation of tax file number sharing will include a comprehensive communications package. This will ensure affected persons are aware of their rights.

Whilst the tax file number measure engages the right to privacy, this is necessary and proportionate to achieve the measure's objectives, which will protect and benefit visa holders.

Response to Parliamentary Joint Committee on Human Rights – Australian Border Force (Protected Information) Bill 2017

Secrecy Provisions

1.41 The measure engages and limits the right to freedom of expression.
1.42 The proposed measure in the bill appears to provide a greater scope to freedom of expression than is currently the case.
1.43 The preceding analysis raises questions about whether the measure imposes a proportionate limit on this right.
1.44 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 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; and**
- **whether it is possible to narrow the range of information to which the offence in section 42 applies or provide greater safeguards including in relation to whether a document is inappropriately classified.**

The proposed amendments in the Australian Border Force (Protected Information) Bill 2017 (the Bill) clarifies Part 6 of the *Australian Border Force Act 2015* (ABF Act), and related provisions, to reflect the original intention of the legislation. That intention was to prevent the unauthorised disclosure of specific types of information—the disclosure which could cause harm to the public interest.

The secrecy and disclosure provisions in Part 6 of the ABF Act were adapted from the now repealed *Customs Administration Act 1985* (the Customs Administration Act). Those provisions prohibited the unauthorised making of a record or disclosure of information, and was incorporated into the ABF Act. The ABF Act was designed to regulate an increasingly complex and dynamic modern border environment. The ABF Act sets a different regulatory framework to the Customs Administration Act, by seeking to prevent the unauthorised disclosure of harmful material to preserve the secrecy provisions of that earlier legislation.

The amendments do not alter the original intention of the provisions but rather clarify the original intent by recalibrating the information disclosure model to make it more efficient and better suited to address the needs of the Department and its officers. Specifically, the amendments make it clear that protection is not required unless the information is a specified category of information, the disclosure of which would, or foreseeably could, cause harm to a public interest of a kind that is reasonably apparent from the particular category of that information. Crucially, the Bill provides assurance to the Australian public, business, government and our foreign partners that sensitive information provided to the department will be appropriately protected without unnecessarily hindering robust and informed public debate.

The Australian Law Reform Commission Secrecy Laws and Open Government in Australia, Report 112 (December 2009) identified 506 secrecy provisions across the Commonwealth in 176 different

pieces of legislation. Of those provisions, 70 per cent created criminal offences.[2] There was either a blanket or full prohibition in 15 per cent of those pieces of legislation. The fact that there is an offence provision attached to an unauthorised or improper disclosure of information is not unique.

Since the ABF Act came into effect in 2015, the law has been developing and emerging, most importantly with the additional tests added by the High Court in the McCloy test,[3] which postdates the introduction of the legislation. The High Court's view is that freedoms of expression need to be attended to in a way that is not necessarily a blanket freedom of expression—it can be limited by legislation, but that legislation has to balance the interests of the information to be protected with the freedom for communication.

The Department has moved to a series of six categories, rather than the previous model, which commenced with a prohibition against information sharing unless it fell into a series of permissions or exemptions. The Bill has identified, in the broad business of the Department, the types of information that warrant legitimate protection:

a) Information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia;
b) Information the disclosure of which would or could reasonably be expected to prejudice the prevention, detection or investigation of, or the conduct of proceedings relating to, an offence or a contravention of a civil penalty provision;
c) Information the disclosure of which would or could reasonably be expected to prejudice the protection of public health, or endanger the life or safety of an individual or group of individuals;
d) Information the disclosure of which would or could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of duty of confidence;
e) Information the disclosure of which would or could reasonably be expected to cause competitive detriment to a person;
f) Information of a kind prescribed in an instrument under subsection (7).

In determining whether disclosure of information is prohibited under the amendments, a number of tests must be applied. The first test is to whom the ABF Act applies. Currently, the ABF Act applies to employees of the Department, but it also extends to Immigration and Border Protection workers including people providing a contracted service who have access to Departmental premises or systems. Since October 2016, the ABF Act has not applied to medical professionals.

The second test is consideration of the type of information that is protected. Under the amendments, there is free access and egress of information unless it comes within the above six categories of information specified in the Bill.

The third test examines whether the information falls within any of the exceptions provided for in the ABF Act. These exceptions provide a lawful means of disclosing information, even if the information is of a kind that is otherwise protected. In these circumstances, it is not an offence to disclose that information. This approach maintains the approach provided for in the ABF Act.

Part 6 of the ABF Act does not change or alter what any criminal prosecution of an alleged breach must prove. An individual who is subject to a prosecution remains innocent until found guilty by a court, and the offence in no way limits a defendant's right to a fair trial nor limits their right to be

[2] Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report 112 *(Dec 2009)*, p 22.
[3] *McCloy v New South Wales (2015) HCA 34*

presumed innocent. The onus remains on the prosecution to prove each element of the offence beyond reasonable doubt. If the defendant is claiming a defence to a breach of the prohibition on recording or disclosure of protected information, he or she bears the evidential burden in relation to whether one or more of the exceptions applied to his or her recording or disclosure. That is, any defendant who wishes to deny criminal responsibility bears an evidential burden in relation to that matter. This evidential burden of proof in relation to exceptions to an offence is set out in subsection 13.3(3) of the Criminal Code, not Part 6 of the ABF Act. This evidential burden applies to all offences across the Commonwealth. An evidential burden in relation to a matter means the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Having acknowledged that the amendment engages in the right to freedom of expression, the limitation is reasonable and proportionate to ensure Immigration and Border Protection Information is provided with the necessary level of protection, in a targeted manner, but is also able to disclose when it is appropriate to do so.

1.46 The engagement of this right was not addressed in the statement of compatibility and accordingly no assessment was provided about this issue.
1.47 The preceding analysis raises questions about whether the measure is compatible with the right to an effective remedy. This right was not addressed in the statement of compatibility.
1.48 The committee therefore seeks the advice of the minister as to whether the measure is compatible with the right to an effective remedy.

The measure is compatible with the right to an effective remedy, as it does not affect an individual's ability to seek redress.

The *Public Interest Disclosure Act 2013* (PID Act) provides protection to 'whistleblowers' who provide information in breach of the provisions of Part 6 of the ABF Act, where the disclosures are made in accordance with the PID Act. This protection mirrors section 16 of the now repealed Customs Administration Act.

The PID Act will, in certain circumstances, protect an entrusted person who discloses protected information in contravention of Part 6 of the ABF Act (for example if the disclosure was made by an entrusted person who was not authorised to make the disclosure under sections 44 and 45 of the ABF Act). Under the PID Act, the disclosure must relate to 'disclosable conduct'. 'Disclosable conduct' is set out in section 29 and includes, for example, conduct engaged in by a public official in connection with their position as a public official that contravenes a law of the Commonwealth. The disclosure must also be a 'public interest disclosure', the requirements for which are set out in section 26 the PID Act.

The PID Act provides immunity from any civil, criminal or administrative liability for making the disclosure in accordance the PID Act. Therefore, even if the disclosure breaches Part 6 of the ABF Act, the entrusted person would not be subject to criminal liability for the offence under Part 6.

SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate

REF: MC17-004177

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

Dear Chair

I refer to your letter dated 6 September 2017 seeking further information about the item for the National Facial Biometric Matching Capability measure in the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2017*.

The Minister for Justice, the Hon Michael Keenan MP, is responsible for this item, and has provided a response to the Committee's request. The response at Attachment A includes the Minister's response. I trust this advice will assist the Committee with its consideration of the instrument.

Thank you for bringing the Committee's comments to the Government's attention. I have copied this letter to the Minister for Justice.

Kind regards

Mathias Cormann
Minister for Finance

19 September 2017

Attachment A

Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2017

Provided by the Minister for Justice and Minister Assisting the Prime Minister for Counter-Terrorism

Response to the Committee's questions about the 'National Facial Biometric Matching Capability' program

I thank the Committee for its request for further information in relation to the privacy implications of the National Facial Biometric Matching Capability (the Capability).

Australia has international obligations relating to privacy under the International Covenant on Civil and Political Rights (ICCPR). Article 17 of the ICCPR prohibits unlawful or arbitrary interference with a person's privacy, family, home and correspondence. The right to privacy articulated in Article 17 may be subject to permissible limitations. In order for an interference with this right to be permissible, it must be authorised by law, be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted 'reasonableness' in this context to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

The face matching services provided by the Capability enable access to facial images used by Australian Government agencies to issue passports, citizenship certificates and immigration visas, which are held within the databases of the document issuing agencies (i.e. the Department of Foreign Affairs and Trade and the Department of Immigration and Border Protection). Subject to the agreement of the states and territories, facial images used on driver licences will also be made available, via a National Driver Licence Facial Recognition Solution.

The face matching services provided by the Capability engage and limit the right to privacy as they involve the collection, use and disclosure of personal information. This includes biographic details such as name, date of birth and gender and facial images used for biometric matching purposes which are considered to be sensitive information under the *Privacy Act 1988*. This collection, use and disclosure of personal information may only occur where it is authorised by law and is consistent with objectives which are consistent with the ICCPR. The Capability facilitates, rather than authorises information sharing. The operation of the Capability is premised upon the legislative authorities and permissions to collect, use and disclose personal information that apply to those agencies which will use the Capability's face matching services.

The collection, use and disclosure of personal information through the face matching services will only be conducted where it is authorised by law, including the *Privacy Act 1988* and the Australian Privacy Principles (APPs). The APPs permit the collection (APP 3) and the use and disclosure (APP 6) of personal information in a range of circumstances, including where this is done with a person's consent or where it is authorised or required by an Australian law. Other relevant legislation which authorises the collection, use or disclosure of personal information, includes the *Crimes Act 1914*, the *Australian Passports Act 2005*, the *Migration Act 1958* and the *Australian Citizenship Act 2007*.

The Capability is designed to facilitate the secure, automated and accountable sharing and matching of facial images and related information amongst relevant government agencies for the purposes of identity security (including the prevention of identity crime), national security and law enforcement, while maintaining robust privacy safeguards. This sharing already occurs under existing legislative authority – the Capability will introduce a technical system to enable more efficient and auditable sharing.

The Capability's Face Verification Service (FVS) is designed to help prevent identity theft by strengthening the tools available to government agencies to verify a person's identity and help prevent identity crime.

Identity crime is one of the most common crimes in Australia. Research conducted by the Attorney-General's Department, in conjunction with the Australian Institute of Criminology, indicates that identity crimes affect around 1 in 20 Australians every year (and around 1 in 5 Australians throughout their lifetime), with an estimated annual cost of over $2.2 billion. In addition to financial losses, the consequences experienced by victims of identity crime can range from mental health impacts, to wrongful arrest, to significant emotional distress when attempting to restore a compromised identity.

The use of fraudulent identities is also a key enabler of organised crime and terrorism. Australians previously convicted of terrorism related offences are known to have used fake identities to purchase items such as ammunition, chemicals that can be used to manufacture explosives and mobile phones to communicate anonymously in order to evade detection by police and security agencies. A joint operation by the joint Australian Federal Police and New South Wales Police Identity Security Strike Team found that the fraudulent identities seized from just one criminal syndicate were linked to: 29 high profile criminals who were linked to historic or ongoing illicit drug investigations; more than $7 million in losses associated with fraud against individuals and financial institutions, and more than $50 million in funds that were discovered to have been laundered offshore and were likely to be proceeds of crime.

The Capability's Face Identification Service (FIS) will assist law enforcement and intelligence agencies to detect and prevent the use of fraudulent identities by terrorist or organised crime groups. It will also assist in identifying people involved in other serious criminal activity.

The FIS compares identity information across multiple records and may disclose the image and other personal information of people who were not the subject of the initial search. The service is being designed to limit the disclosure of images and other personal information of multiple people as far as is practicable, achieving the legitimate objective of identifying persons in accordance with existing legislative authority while balancing the privacy of unrelated persons. The service will only be available to agencies with criminal law enforcement or national security functions. Access will be further limited to users who have been trained in facial recognition, to help minimise the risk of false matches.

Other privacy safeguards include formal data sharing agreements amongst agencies participating in the face matching services and annual auditing of agencies' use of the services. These privacy safeguards have been informed by the 'Privacy by Design' approach that is being taken to the implementation of the Capability. As part of this approach the Attorney-General's Department has commissioned multiple privacy impact assessments to

obtain independent advice on the potential privacy risks posed by the face matching services and how these can be mitigated in the design, implementation and governance of the Capability. These assessments are conducted in accordance with guidelines issued by the Office of the Australian Information Commissioner.

The face matching services will provide significant benefits in combatting terrorism and organised crime, and in reducing the privacy and associated financial and health impacts that are experienced by victims of identity crime. To the extent that the Capability can limit the right to privacy beyond the existing legislative authorities to collect, use and disclose personal information on which it relies, that intrusion is reasonable and proportional to the objectives of this measure.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS17-003444

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

Ian,

Dear ~~Mr~~ Goodenough

Migration Amendment (Validation of Decisions) Bill 2017

Thank you for your letter of 13 September 2017 in which a further response was requested in relation to the human rights compatibility of the *Migration Amendment (Validation of Decisions) Bill 2017*.

I have attached the *response to Parliamentary Joint Committee on Human Rights' Report 10 of 2017* as requested in your letter. I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 25/09/17

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Response to the Parliamentary Joint Committee on Human Rights Report 10 of 2017

Migration Amendment (Validation of Decisions) Act 2017

The *Migration Amendment (Validation of Decisions) Act 2017* (the Act) supports the Australian Government's commitment to protect the Australian community from people who have had their visa cancelled or their visa application refused because they are of serious character concern. The amendments in this Act proactively address the risk to the safety of Australians and reflect the Government's and the Australian community's low tolerance for criminal behaviour by those who are given the privilege of holding a visa to enter into and stay in Australia. I note that the Act came into force on 6 September 2017.

Committee question:

The committee seeks the minister's further advice as to the compatibility of the measure with the right to due process prior to expulsion in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection [2017] HCA 33.*

Right to due process

The High Court's decision does not affect my previous advice. I reiterate and refer the committee to my previous response.

The Act validates decisions that used information protected by section 503A. The Act does not affect the ability of non-citizens to contest information or the assessment of the confidentiality of information, nor does it seek to limit review or due process prior to expulsion.

Standards for the need for confidentiality of section 503A

Under section 503A law enforcement and intelligence agencies provided information to the Department, on the basis it was protected from disclosure to any other person or body. The ability to protect information is essential to these agencies, as information provided to the Department may have originated from at-risk sources and may include information whose disclosure would endanger either individuals, the community or Australia's national security if released.

The Department does not assess what information is to be 'protected' under section 503A of the Migration Act. Law enforcement and intelligence agencies determine what information is 'protected' for the purposes of section 503A by providing it on condition that it be treated as confidential information. The Department and Government trust their assessment of the confidentiality of the information. It is essential that information that is provided by intelligence and security agencies is protected from disclosure where it is fundamental to Australia's national security interests and the safety of the Australian community.

Right to judicial review

As stated in my previous response, persons who have had their visa cancelled, or visa application refused, on the basis of section 503A protected information will remain able to seek judicial review of their visa decision following the commencement of this Act.

At the time of consideration, these persons failed the character test in accordance with Australian law and had no lawful right to hold a visa allowing them to enter or remain in Australia. They have had, and continue to have, access to judicial review of this decision and some of these individuals have challenged their cancellation or refusal decisions. The Act does not affect the ability of non-citizens to contest information or the assessment of the confidentiality of information.

Committee question:

The committee seeks the minister's further advice as to the compatibility of the measure with the right to liberty in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection [2017] HCA 33*.

The High Court's decision does not affect my previous advice. I reiterate and refer the committee to my previous response.

As noted above, persons who have had their visa cancelled, or visa application refused, on the basis of section 503A protected information will remain able to seek judicial review of their visa decision following the commencement of this amendment. This amendment does not prevent these individuals' access to judicial review should they decide to seek it. Nor does this amendment affect a person's right to seek merits review of a relevant decision to the extent that such review is provided for under existing law.

At the time of consideration, affected individuals failed the character test due to serious character concerns, and range from being members of so-called outlaw motorcycle gangs to those with serious criminal records. The safety of the Australian community was integral to these considerations. As a result of the cancellation or refusal decision, they have no lawful right to hold a visa allowing them to enter or remain in Australia and, if they are in Australia, must be detained under the Migration Act.

Should the Government have not passed the Act, the resultant release of affected individuals from immigration detention, or their ability to return to Australia, while their cases were being reconsidered would have put the Australian community at an unacceptable risk. This would understandably undermine public confidence in the integrity of Australia's migration framework. Less rights restrictive criminal justice or national security mechanisms to address the risk to the Australian community posed by affected individuals is unavailable. Since section 503A was introduced in 1998 by the *Migration Legislation Amendment (Strengthening of Provisions Related to Character and Conduct) Act*, protected information has been provided to the Department by law enforcement agencies. Validation of visa cancellation and refusal decisions that utilised this protected information is essential given the risk to the Australian community, and there are no alternative criminal justice or national security mechanisms available to address the risk posed by these individuals. As such, the measure is proportionate and effective in ensuring safety of the Australian community and integrity of Australia's migration framework.

Committee question:

The committee seeks the minister's further advice as to the compatibility of the measure with the right to family life in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection [2017] HCA 33.*

The High Court's decision does not affect my previous advice. I reiterate and refer the committee to my previous response.

Committee question:

The committee seeks the minister's further advice as to the compatibility of the measure with the obligation of non-refoulement in conjunction with the right to an effective remedy in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection [2017] HCA 33.*

The High Court's decision does not affect my previous advice. I reiterate and refer the committee to my previous response.

As previously advised, the Act introduces no new decision-making capability or power, seeking only to uphold decisions already made. The considerations relating to *non- refoulement* remain unchanged in the cancellation of visas or refusal of visa application on character grounds. The validation of decisions that used information protected by section 503A will not affect Australia continuing to uphold its *non-refoulement* obligations.

Committee question:

The committee seeks the minister's further advice as to the compatibility of the measure with the right to freedom of movement in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection [2017] HCA 33.*

The High Court's decision does not affect my previous advice. I reiterate and refer the committee to my previous response.

Committee question:

The committee seeks the minister's further advice as to the compatibility of the measure with the right to an effective remedy in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection [2017] HCA 33.*

The High Court's decision does not affect my previous advice, as the scope of this Act does not impact on the ability of affected non-citizens to challenge their visa cancellation or visa application review decisions anew. The High Court's decision in the *Graham* and *Te Puia* cases does not affect the scope of this Act, and any affected non-citizen who seeks to challenge their visa refusal or cancellation decision following the High Court's decision may do so as provided under law.

The Hon Alan Tudge MP

Minister for Human Services

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
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Dear ~~Chair~~ Ian

Thank you for your letter of 6 September 2017 regarding the Social Services Legislation Amendment (Cashless Debit Card) Bill 2017, requesting further information around the human rights compatibility of the legislation as assessed in the Parliamentary Joint Committee on Human Rights' (the Committee) Report 9 of 2017. Please find responses to the Committee's comments below.

Why it is necessary to extend and expand the trials (including why the extension and expansion is proposed before the final evaluation report is finalised and why no end date to the current trial is specified).

The initial decision to extend the Cashless Debit Card program in the existing sites of Ceduna, South Australia and the East Kimberley, Western Australia, was based on:

a. strong results from the interim independent evaluation, and
b. ongoing positive feedback about the impacts of the card from local people, including community leaders such as the Mayor and the Chief Executive Officers of Indigenous organisations in the regions.

The final evaluation of the Cashless Debit Card trial was released on 1 September 2017. It has seen an even further increase in positive outcomes against the three key indicators of a reduction in alcohol and drug use and gambling. The extension is necessary to allow communities to continue to see positive outcomes as demonstrated in the evaluation and through ongoing positive feedback from the community. The extension of the program in each location will be determined by disallowable legislative instruments that specify parameters including sunset dates and participant criteria. Specifying the end date in the instrument allows Parliament to accept or reject new sites by considering the impacts and level of community support for the measure on a case by case basis, including the level of community support in a specific area.

The expansion of the Cashless Debit Card is necessary to allow the Government an opportunity to build on the research findings of the interim and final reports, to help test the card and the technology that supports it in more diverse communities and settings.

The expansion also provides for a greater number of communities to see positive outcomes as have been shown in previous communities. Many communities around the country have shown an interest in the card. There is a sense of urgency from these communities, which are looking for more tools to address the devastating impact of alcohol, drugs and gambling on their people.

How the measures are effective to achieve the stated objectives (including whether there is further evidence in relation to the stated effectiveness of the trial).

The final independent evaluation concluded that the Cashless Debit Card trial "has been effective in reducing alcohol consumption and gambling in both trial sites and [is] also suggestive of a reduction in the use of illegal drugs", and "that there is some evidence that there has been a consequential reduction in violence and harm related to alcohol consumption, illegal drug use and gambling."

In particular, the evaluation reported the following findings:

- Of people surveyed who drank alcohol before the trial started, towards the end of the 12 months 41% reported drinking alcohol less frequently (up from 25% in the Wave 1 survey, which was done approximately six months into the trial); 37% of binge drinkers were doing this less frequently (up from 25% at Wave 1).
- A decrease in alcohol-related hospital presentations including a 37% reduction in Ceduna in the first quarter of 2017 compared with first quarter of 2016 (immediately prior to the commencement of the trial).
- A 14% reduction in Ceduna in the number of apprehensions under the *Public Intoxication Act* compared to the previous year.
- In the East Kimberley, decreases in the alcohol-related pick-ups by the community patrol services in Kununurra (15% reduction) and Wyndham (12%), and referrals to the sobering up shelter in Kununurra (8% reduction).
- A decrease in the number of women in East Kimberley hospital maternity wards drinking through pregnancy.
- Qualitative evidence of a decrease in alcohol-related family violence notifications in Ceduna.
- A noticeable reduction in the number of visible or public acts of aggression and violent behaviour. Nearly 40% of non-participants perceived that violence in their community had decreased.
- People are now seeking medical treatment for conditions that were previously masked by alcohol effects.
- 48% of gamblers reported gambling less (up from 32% at Wave 1).
- In Ceduna and surrounding local government areas (which covers a much bigger region that the card's operation), poker machine revenue was down 12%. This is the equivalent of almost $550,000 less spent on poker machines in the 12 month trial.
- The card has had "a positive impact in lowering illegal drug use" across the two sites.
- Of drug takers, 48% reported using illegal drugs less often (up from 24% at Wave 1).
- 40% of participants who had caring responsibility reported that they had been better able to care for their children (up from 31% at Wave 1).
- 45% of participants have been better able to save more money (up from 31% at Wave 1).
- Feedback that there has been a decrease in requests for emergency food relief and financial assistance in Ceduna.
- Merchant reports of increased purchases of baby items, food, clothing, shoes, toys and other goods for children.

- Considerable observable evidence being cited by many community leaders and stakeholders of a reduction in crime, violence and harmful behaviours over the duration of the trials

How the limitation on human rights is reasonable and proportionate to achieve the stated objectives (including the existence of safeguards and whether affected communities have been adequately consulted in relation to the extension of the trial)

This amendment does not remove the legislative safeguards protecting how, when and where the Cashless Debit Card can operate. The legislation continues to ensure that the program cannot be implemented in any location without the introduction of a disallowable instrument. These instruments can also specify other safeguards, including sunset dates and participant criteria. This provides the opportunity for the Government to co-design these parameters with interested communities, and tailor the program to meet community needs. It also allows those communities to make decisions about these arrangements in their own time, rather than being restricted by the legislation end date. These safeguards ensure that Parliament retains the right to consider each proposed application of the cashless debit card. Instead of passing legislative amendments for potential hypothetical communities and participants, Parliament can accept or reject new sites by considering the impacts and level of community support for the measure on a case by case basis.

The legislation does not indefinitely extend the Cashless Debit Card program. The legislation only removes a date beyond which the program could not continue. For the program to continue, disallowable instruments pursuant to Section 124PG(1) of the Social Security (Administration) Act 1999 must be registered on the Federal Register of Legislation and tabled before both Houses of Parliament.

Where the amendment engages human rights considerations, it does so reasonably and proportionately to pursue the following legitimate objectives:

a. reduce the amount of certain restrictable payments available to be spent on alcoholic beverages, gambling and illegal drugs; and
b. determine whether such a reduction decreases violence or harm in the Region; and
c. determine whether such arrangements are more effective when community bodies are involved; and
d. encourage socially responsible behaviour.

The right to social security is limited only in the participant's ability to use a proportion of their payment to purchase harmful goods, in an area where there are demonstrated high levels of community harm. The amendment does not detract from the eligibility of a person to receive welfare, nor reduce the amount of a person's social security entitlement.

The limitation on the right to a private life is limited to restricting a proportion of a payment being spent on harmful goods. This limitation is directly related to the objective of the Cashless Debit Card and is proportionate given the high levels of harm in potential communities, and the demonstrated positive results of the program to date.

While the program is not applied on the basis of race or cultural factors, and locations are chosen on the basis of objective criteria, to date there has been a significant proportion of Aboriginal and Torres Strait Islander people, women and Disability Support Pensioners participating. This amendment allows Government the opportunity to test the program in more diverse settings, through the Cashless Debit Card expansion.

The bill engages the right to self-determination in a proportionate way, directly limited to the objectives as the only restriction is that people are able to spend a proportion of their funds on any goods or services except alcohol, gambling and illegal drugs.

All decisions around the extension of the Cashless Debit Card have been made and will continue to be made in close partnership with community leaders. Engagement with community members and leaders has been ongoing, informally and formally (through the independent evaluation) in all locations to help Government better understand local needs and gauge interest in the extension of the program. Topics of consultation include objectives; benefits of the program in terms of community safety/wellbeing for vulnerable people; the identification of gaps and possible support services; the role of community bodies; the evaluation; and differences between the Cashless Debit Card and Income Management arrangements.

Whether the use of the cashless debit card could be restricted to instances where:

- *there has been an assessment of an individual's suitability to participate in the scheme rather than a blanket imposition based on location in a particular community, and*
- *individuals opt-in on a voluntary basis.*

While Income Management, the Australian Government's other welfare quarantining program, is targeted towards vulnerable individuals, the Cashless Debit Card is testing whether restricting the amount of cash in a community can reduce the overall social harm caused by welfare-fuelled alcohol, gambling and drug misuse at the individual and community level. The community wide impacts of these harmful goods mean that the Cashless Debit Card program is most effective when a majority of people in a community who receive a welfare payment participate in the program. In current sites, the program applies to all people who receive a working age welfare payment in Cashless Debit Card locations, with the exception of Age Pension and Veterans' Pension recipients. However, people receiving these two payments may volunteer to participate. People who earn money from other sources, such as paid work, are also able to volunteer.

The Cashless Debit Card is not designed to operate as a punitive measure. For people who do not spend a large proportion of their money on alcohol, gambling or drugs, the Cashless Debit Card has very little impact and will ensure that those receiving welfare payments and their children will have money available for life's essentials.

Another key difference between Income Management and the Cashless Debit Card is that Cashless Debit Card participants are able to use their card to purchase anything other than alcohol and gambling products, providing greater consumer choice to participants. Using a card that is delivered by a commercial provider also means less involvement from government employees. This helps people to engage in the mainstream financial market; encouraging improved financial capability and removing interference from government in people's lives.

This amendment seeks only to remove restrictions around the number of locations, the number of participants and the end date of the program as a whole, and does not change the parameters of the Bill, which were recommended for passage by the Community Affairs Legislation Committee under the *Social Security Legislation Amendment (Debit Card Trial) Bill 2015*. The same safeguards, such as sunset dates and participant criteria, will still require the introduction of a disallowable instrument.

The card is a not a panacea, but it has led to stark improvements in communities as demonstrated in the final evaluation, offering vulnerable people protection from abuse of harmful substances, and any associated harm and violence. Critically, it also promotes the human rights of children, including the right of children to the highest attainable standard of health and the right of children to adequate standards of living (articles 24, 26 and 27 of the Convention on the Rights of the Child, respectively), by ensuring that a portion of welfare payments is available to cover essential goods and services to improve living conditions for the children of welfare recipients. This amendment simply seeks to allow these positive results to continue in communities that ask for the program.

Yours sincerely

Alan Tudge

The Hon Christian Porter MP
Minister for Social Services

MC17-010169

29 AUG 2017

Mr Ian Goodenough MP
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Dear Mr Goodenough

Thank you for your letter of 16 August 2017 regarding the Committee's Human Rights Scrutiny Report No. 8 of 2017 which requested additional information in relation to the Social Services Legislation Amendment (Welfare Reform) Bill 2017.

Please find enclosed a response to the Committee in relation to each of the issues identified. This response includes input from the Minister for Employment, Senator the Hon Michaelia Cash, in relation to the elements of the Welfare Reform Bill which fall within her portfolio responsibilities. I have also copied this letter to Minister Cash.

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

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

Attachment A

SOCIAL SECURITY LEGISLATION AMENDMENT (WELFARE REFORM) BILL 2017

Schedules 1 – 7 - Creation of a new jobseeker payment and cessation of other payment types: ***Compatibility of the measures with the right to social security and the right to an adequate standard of living***

1.238 – The statement of compatibility acknowledges that the measure engages the right to social security. However, it is unclear whether the measures constitute a reduction in the level of attainment of the right to social security.

1.239 – Accordingly the committee requests the advice of the Minister as to

- whether the cessation of certain social security types could result in reductions in the amount payable or qualification for any new or existing social security recipients, or whether such payments will be equivalent to the types of payments that are ceasing;

The cessation of **Newstart Allowance** will not result in reductions in the amount payable to recipients or impact on qualification. All existing Newstart Allowance rules and rates will be rolled into the JobSeeker Payment.

The cessation of **Widow B Pension** will not result in reductions in the amount payable to recipients. The payment has been closed to new entrants since 20 March 1997 so ceasing the payment does not impact qualification. Existing recipients will transition to Age Pension which is paid at the same rate as Widow B Pension.

The cessation of **Partner Allowance** will not result in reductions in the amount payable to recipients. The payment was closed to new entrants on 20 September 2003 therefore ceasing the payment does not impact qualification. Existing recipients will transition to Age Pension. Partner Allowance is paid at the lower allowance rate and therefore recipients will receive a payment increase when they transition to Age Pension.

The cessation of **Wife Pension** may result in reductions to the amount payable to a small number of recipients. Wife Pension has been closed to new entrants since 1 July 1995 so ceasing the payment does not impact qualification. On the implementation date there will be around 7,750 recipients:

- Around 2,250 will transition to Age Pension and 2,400 will transition to Carer Payment. Age Pension and Carer Payment are paid at the same rate as Wife Pension so these recipients will not experience any reduction in assistance.
- Around 2,900 Wife Pension recipients will transition to JobSeeker Payment. JobSeeker Payment will be paid at the lower allowance rate. However, transitional arrangements described in the Explanatory Memorandum will ensure that these recipients do not experience a nominal reduction in their payment rates.
- Around 200 Wife Pension recipients residing overseas will no longer be eligible for a social security payment. These recipients are under Age Pension age and would not be eligible for either another payment under an international agreement or a portable payment. The implementation date of 20 March 2020 will allow these recipients to return to Australia where they can continue to receive social security payments, or adjust to their new circumstances by obtaining employment.

The cessation of **Widow Allowance** will not result in reductions to the amount payable existing to Widow Allowance recipients. Widow Allowance will close to new entrants on 1 January 2018. Existing Widow Allowance recipients will gradually transition to Age Pension by 1 January 2022 as they reach Age Pension age. Widow Allowance is paid at the lower allowance rate so recipients transitioning to Age Pension will experience an increase in their payment rates. In relation to new recipients:

- Widow Allowance is only open to women over 50 born before 1 July 1955 who are no longer partnered and have become widowed, divorced or separated since turning 40 years of age, and have no recent workforce experience. All those who could be eligible would have reached Age Pension age by 1 January 2022.
- Between 1 January 2018 and 1 January 2022, women who would otherwise have been eligible for Widow Allowance will be able to claim Newstart Allowance. As a result of the Newstart Allowance upper age limit (Age Pension age), recipients will have to claim Age Pension when they reach Age Pension age.

The cessation of **Sickness Allowance** may result in small reductions to the amount payable to some recipients. Sickness Allowance criteria will be rolled into JobSeeker Payment so there will be no impact on qualification for payment. Existing recipients will be gradually transitioned to JobSeeker Payment. Sickness Allowance is paid at the same rate that Jobseeker Payment will be paid, so recipients will not experience a reduction in their base rate. However, Sickness Allowance automatically entitles a person to the Pharmaceutical Allowance supplement ($6.20 per fortnight singles, $3.10 per fortnight partnered). In line with existing Newstart Allowance rules, JobSeeker Payment recipients will be assessed to determine their eligibility for Pharmaceutical Allowance. It is estimated that around 400 former Sickness Allowance recipients will be ineligible for Pharmaceutical Allowance when they transition to JobSeeker Payment as they will not meet the relevant criteria. That is, up to 5 per cent of recipients are expected to have capacity to work of 15 hours or more per week and will therefore not automatically qualify for Pharmaceutical Allowance. They will be referred to an employment service provider where they would enter a Job Plan and undertake suitable mutual obligation activities. This represents less than 5 per cent of the Sickness Allowance population on 20 March 2020.

The cessation of **Bereavement Allowance** will not result in reduction in the amount payable to existing recipients on 20 March 2020. In relation to new recipients:

- Up to 960 people annually who would have previously claimed Bereavement Allowance will now be able to claim JobSeeker Payment or another income support payment. It is expected that the majority will claim JobSeeker Payment.
- As per existing Newstart Allowance rules, JobSeeker Payment will have a more stringent means test than Bereavement Allowance. An estimated 30 bereaved people per year will not qualify for an income support payment due to their income, assets or other circumstances, such as age.
- JobSeeker Payment will be paid at the allowance rate compared to Bereavement Allowance which is paid at the pension rate. However, JobSeeker Payment will provide a triple upfront payment to newly bereaved people to assist with the high upfront costs associated with the death of a partner. While the overall assistance provided on JobSeeker Payment will be less than that currently available on Bereavement Allowance over a 14 week period, JobSeeker Payment will provide a substantially higher level of support in the first fortnight. Additionally, many recipients leave Bereavement Allowance before the end of the 14 week bereavement period, so JobSeeker Payment recipients would receive a

higher level of overall assistance than some shorter-term Bereavement Allowance recipients due to the higher upfront payment on the JobSeeker Payment.

- If a person is eligible for another payment such as Parenting Payment Single which is paid at the pension rate, they will receive that payment with a 14 week exemption from mutual obligations, consistent with existing provisions in the Bereavement Allowance.

1.239 – whether any new or existing social security recipients would be worse off under the transitional arrangements;

Transitional arrangements will only apply to existing recipients. The impacts of transitional arrangements have been addressed in the previous question. As a result of the transitional arrangements, over 99.9 per cent of existing recipients will be the same or better off.

1.239 – what safeguards are provided in relation to the measures (for example, to ensure that individuals continue to receive social security); and

With the exception of around 200 Wife Pension recipients living overseas, all existing payment recipients impacted by the creation of JobSeeker Payment will continue to receive social security. Further information about the 200 Wife Pension recipients is provided below.

The package of measures is designed to automatically transfer existing payment recipients to the income support payment best suited to their circumstances. For example, recipients who are over Age Pension age will be transferred to Age Pension; Wife Pension recipients receiving Carer Allowance will be transferred to Carer Payment and recipients under Age Pension age will be transferred to JobSeeker Payment.

Safeguards to ensure existing recipients continue to receive social security include:

- people over Age Pension age will be deemed to satisfy the residency requirements for Age Pension, regardless of actual qualifying residence;
- recipients of Widow B Pension and Wife Pension will retain their existing exemptions from Australian Working Life Residence requirements;
- people aged 55 years or older transferring to JobSeeker Payment would be exempt from compulsory mutual obligation requirements but would be able to opt in to employment services;
- recipients aged under 55 years with significant barriers to employment will be assisted by jobactive (Stream C) or Disability Employment Services to re-enter the workforce;
- JobSeeker Payment will include mutual obligation exemptions for newly bereaved recipients; and
- Wife Pension recipients who transfer to JobSeeker Payment will continue to receive the Pensioner Concession Card while in receipt of a transitional rate of Wife Pension.

Additional safeguards will help to ensure future claimants are not precluded from accessing social security when they need it. These safeguards include:

- JobSeeker Payment eligibility criteria will be broader than current Newstart Allowance criteria to provide access for persons who have temporarily stopped working or studying to recover from illness or injury;

- exemptions from the ordinary waiting period, the liquid assets test waiting period, the income maintenance period and the seasonal work preclusion period will apply to newly bereaved claimants of JobSeeker Payment and Youth Allowance;
- JobSeeker Payment and Youth Allowance will provide additional bereavement assistance for persons who have recently experienced the death of their partner; and
- women who claim Newstart Allowance from 1 January 2018 who would have otherwise qualified for Widow Allowance will be exempted from the activity test requirements.

Schedule 8 of the Social Security Legislation Amendment (Welfare Reform) Bill 2017 also provides for the Minister for Social Services to make rules of a transitional nature in relation to the JobSeeker Payment package of measures should they become necessary, for example, as a result of an anomalous or unexpected consequence.

1.239 - if there are any reductions in the amount of social security payable (retrogressive measures), whether they pursue a legitimate objective; are rationally connected to their stated objective; and are a reasonable and proportionate measure for the achievement of that objective.

The creation of JobSeeker Payment will result in approximately 2,900 Wife Pension recipients who transfer to JobSeeker Payment receiving no nominal increase in payment until the rate of the JobSeeker Payment equals or exceeds their frozen rate of Wife Pension. These recipients are all under Age Pension age and in similar circumstances as males or some single women of similar age who currently receive other activity-tested payments such as Newstart Allowance. The Government expects that those who have capacity to work, should be encouraged and supported to find work, and that this objective should apply consistently to people of working age who are in similar circumstances. Wife Pension is a dependency based payment that does not support these objectives. Removing Wife Pension and transitioning Wife Pension recipients under Age Pension age to the activity-tested JobSeeker Payment will support partnered women of working age to find employment, reduce their welfare dependence and improve their wellbeing. Pausing rate increases for these Wife Pension recipients is considered justified to achieve consistent treatment of people in similar circumstances in the longer term.

Around 200 Wife Pension recipients who are under Age Pension age and living overseas are expected to no longer be eligible for an Australian Government payment unless they return to reside in Australia. This loss of payment is consistent with the above-mentioned objectives and the residence-based nature of Australia's social security system. The Government expects that people have some reasonable connection to the Australian economy and society before being granted an Australian income support payment and this is reflected in residence requirements for payments including Age Pension, Disability Support Pension and Newstart Allowance.

Wife Pension was introduced in 1972 and is payable to the female partner of a male recipient of either Age Pension or Disability Support Pension. Wife Pension was granted without any other eligibility criteria or mutual obligations. The payment no longer reflects social and economic norms regarding women's workforce participation or government expectations in relation to income support.

While 200 overseas recipients under Age Pension age are expected to cease income support, their partners will continue to receive their Age Pension or Disability Support Pension. Additionally, a large proportion (over 75 per cent) of the 200 Wife Pension recipients overseas currently receive a part-rate of payment, suggesting they already have access to

other income sources besides Australian income support. The implementation date of 20 March 2020 will allow these recipients to return to Australia where they can continue to receive social security payments, or adjust to their new circumstances by finding new or further employment.

Schedule 10 – Start date for Newstart and Youth Allowance payments: ***Compatibility of the measure with the right to social security and right to an adequate standard of living***

1.251 The preceding analysis raises questions as to whether the measure is a proportionate limit on the right to social security and the right to an adequate standard of living.

1.252 – The committee therefore seeks the advice of the Minister as to:

- how the measure is effective to achieve (that is, rationally connected to) the objective; and
- how the limitation is a reasonable and proportionate measure to achieve the stated objective (including why existing measures are insufficient to achieve the stated objective of the measure, the existence of relevant safeguards and the period of time a person may be required to go without payment or back pay).

Approximately two thirds of job seekers connect with their jobactive/Transition to Work provider within two days. Over one third of job seekers wait longer than this to connect with their jobactive/Transition to Work provider. These delays are inconsistent with community expectations that those on income support are taking all reasonable efforts to connect with employment services and find work as quickly as possible. By being connected more quickly to employment services, job seekers are more readily able to access assistance to build their skills and experiences and help them find a job faster.

The Committee notes concerns over the time period between the date a claim for payment is made and the date the requirement to attend an interview with an employment services provider. There are existing processes in place to ensure that once a job seeker submits their claim that they engage the Department of Human Service to be referred to employment services. The booking of the interview with the Department of Human Services (where the job seeker is referred to jobactive/Transition to Work) forms part of the process for the claimant when submitting an online claim for Newstart or Youth Allowance (other).

The Department of Human Services has appointments available for the claimant to book, usually within two days of them submitting their claim and also monitors the availability of appointments so the interview can be conducted in a timely manner. It is the responsibility of the claimant to book the interview with the Department of Human Services to finalise their income support claim. The sooner the claimant books this appointment the quicker the Department of Human Services can organise their jobactive/Transition to Work provider appointment.

The Committee also notes concerns over how the Schedule 10 interacts with the Ordinary Waiting Period. The intent of Schedule 10 is that the Ordinary Waiting Period will apply in the same way to job seekers who are subject to RapidConnect and to job seekers who are not subject to RapidConnect. For those job seekers subject to Schedule 10, but who are also required to serve an Ordinary Waiting Period, it would be served concurrently with time taken to connect with employment services. This ensures that job seekers who are subject to RapidConnect and an Ordinary Waiting Period will not have to wait longer to receive their payment than job seekers who are not subject to RapidConnect.

Schedule 12 – Mandatory drug-testing trial: ***Compatibility of the measure with the right to privacy***

1.270 – The right to privacy is engaged and limited by this measure. The preceding analysis raises questions as to whether the measure is a permissible limitation on that right.

1.271 – The committee therefore seeks further advice from the minister as to how the measure is effective to achieve and proportionate to its objectives, including

- whether overseas experience indicates that this trial will be effective to achieve its objectives;

Drug testing of certain welfare recipients has been legislated in at least fifteen states in the United States of America on either a fully rolled-out or trial basis and is also conducted in New Zealand as a pre-employment option that potential employers can request.

The international evidence that is available on the effectiveness of drug testing of welfare recipients is limited as many overseas experiences have not been evaluated comprehensively, the evaluations have not been published or the results are not comparable to the trial proposed in Schedule 12.

The measure in Schedule 12 uses drug testing in combination with other interventions through Income Management and assessments by an appropriately qualified medical professional. This measure is designed to support job seekers with substance abuse issues to better manage their payments and to access treatment where appropriate. To the best of the Government's knowledge, this model has not been implemented previously in any other country.

The benefits of mandatory treatment in helping people overcome substance abuse issues are well documented through evaluations of Australian drug courts. The trials of the Cashless Debit Card also provide evidence of the effectiveness of welfare quarantining in reducing drug usage.

This measure is being implemented as a trial in order to assess the effectiveness of this particular model in the Australian welfare context as a way of helping to identify where drug abuse might be a barrier to work and supporting people to undertake treatment. There will be a comprehensive evaluation of all aspects of the trial.

- whether there will be a process to apply to remove income quarantining measures if no longer necessary or if special circumstances exist;

Income Management is an existing welfare quarantining mechanism applied to help vulnerable recipients and has been in place in a number of locations across Australia since 2007. The Income Management program has been established as an effective financial stabiliser, especially in the short and medium term.

The use of Income Management as part of the drug testing trial is designed to assist individual job seekers with proven drug use to manage their payments and to reduce further drug use by restricting their capacity to spend their payments on illicit drugs. Income Management is not just about limiting access to cash but also ensuring that payments are directed towards meeting the person's priority needs, such as housing and utilities.

Under the trial, job seekers who test positive to a drug test will be placed on Income Management for 24 months. This is an appropriate period that will enable the job seeker to stabilise their financial arrangements.

There will be safeguards in place for removing people from Income Management earlier than 24 months (or not placing them on Income Management). These safeguards have been strengthened in response to comments made by the Senate Standing Committee for the Scrutiny of Bills in Scrutiny Digest No.8 of 2017. These comments noted it might be appropriate to review the provisions in the *Social Services Legislation Amendment (Welfare Reform) Bill 2017* governing when and how the Secretary might make determinations to remove people from Income Management. In response, the Government will propose an amendment to the provisions in the Bill to limit the Secretary's discretion to make determinations to remove people from Income Management.

As a result of the proposed amendment, the Secretary must determine that a person is not subject to the income management regime if the Secretary is satisfied that being subject to the regime poses a serious risk to the person's mental, physical or emotional wellbeing. This is designed to balance the objectives of Income Management as part of the drug testing trial and the needs of individuals whose wellbeing is at serious risk.

The drug test provider may also withdraw or revoke a referral to Income Management if they become aware of circumstances that lead them to believe that the positive result which triggered the referral is not valid, for example the job seeker provided evidence of legal medications which could have caused this result.

In addition, the decision that a person is subject to Income Management, based on a referral from a third party (such as the drug testing provider), is a decision under social security law. Recipients have the right to appeal any decision made under social security law in accordance with existing review and appeal provisions in the *Social Security (Administration Act) 1999*.

A person can also come off Income Management at any point by obtaining employment and exiting the welfare system.

- whether there will be additional safeguards in place in relation to the disclosure of drug test results, particularly to law enforcement, immigration authorities, other agencies and the public and the nature of those safeguards; and

Under existing privacy and confidentiality laws, including in the *Privacy Act 1988* and the Social Security (Administration) Act, protected information about a person can only be disclosed in limited circumstances. For example, under social security law, this includes for the purposes of administering that law; for research, statistical analysis or policy development; and where it has been certified as being in the public interest.

Any information obtained as part of the drug testing trial, including test results, will be protected information and therefore covered by these existing laws.

Section 38FA in Schedule 12 also allows for the creation of Drug Test Rules via legislative instrument that will set out certain details relating to the establishment and operation of the trial. This includes the rules for conducting the tests, including the taking of samples, carrying out of the tests and disclosure of results. These rules will provide additional safeguards to ensure the operation of the drug testing and the conduct of the drug testing provider is consistent with the requirements under the Privacy Act and the confidentiality provisions in the Social Security (Administration) Act.

It is intended that an exposure draft copy of the Drug Testing Rule will be tabled by the Department of Social Services when it appears at the hearings for the Senate Community Affairs Legislation Committee's inquiry into the Welfare Reform Bill on 30 August 2017. These draft rules may be subject to change following further consultation with the health and alcohol and other drug sectors and the procurement of the drug testing provider.

Disclosure of test results will only occur in accordance with the existing privacy laws and the Drug Test Rules. Test results will not be shared with police, immigration or other authorities, specifically as part of this trial.

Under the existing confidentiality provisions in the Social Security (Administration) Act personal information can be disclosed to the police or state authorities in very limited circumstances where it has been certified as being in the public interest. This includes in relation to certain offences, to prevent or lessen a threat to the life, health or welfare of a person, or for child protection purposes. For example, where a recipient threatens the health, safety and welfare of their child, the Secretary can release relevant information to the appropriate authorities in order for these concerns to be investigated and addressed as necessary. These processes will remain in place. Information collected as part of the drug test testing would only be disclosed where relevant and necessary under these processes. This information will not be shared routinely as part of the trial itself.

- the availability of less rights restrictive measures to achieve the objectives of the trial.

There are some existing mechanisms in place which enable job seekers to self-disclose to the Department of Human Services (DHS) or their employment services provider that they have substance abuse or dependency issues. For example, job seekers may disclose drug and alcohol abuse or dependency as part of the Job Seeker Classification Instrument (a tool used to determine a person's relative disadvantage in the labour market in order to stream them to the appropriate employment services) and have this recorded as a vulnerability indicator on their record. Job seekers may also provide medical evidence of drug or alcohol dependency for the purposes of claiming an exemption from mutual obligation requirements or as part of an assessment of their capacity to work.

Data from the 2013 National Drug Strategy Household Drug Use Survey reveals that 24.5 per cent of unemployed people reported recent drug use. However, administrative data from the DHS system shows that less than two per cent of job seekers in most locations self-disclose their drug or alcohol dependency issues through these existing mechanisms.

This indicates that while some job seekers do already disclose their drug abuse or dependency issues and receive support from DHS and/or their employment services provider to address these issues, many do not.

This measure is designed to trial a new approach to identifying job seekers with drug use issues and assisting them through Income Management and referral to appropriate treatment to address their barriers to employment and find work. As noted above, there will be a comprehensive evaluation of all aspects of the trial.

To the extent that the measure at Schedule 12 engages or limits the right to privacy, including by seeking to collect new forms of protected information through drug testing, this is reasonable and proportionate to the objective of better identifying job seekers who have drug abuse issues that may be a barrier to work but have not necessarily self-disclosed these issues in order to support them to address those barriers.

Schedule 12 – Mandatory drug-testing trial: ***Compatibility of the measure with the right to social security and the right to an adequate standard of living***

1.282 – The right to social security and an adequate standard of living is engaged and limited by this measure. The preceding analysis raises questions as to whether the measure is compatible with these rights.

1.283 - The committee requests the Minister's advice as to as to the effectiveness and proportionality of the measure including:

- whether recipients will be informed that they may request a retest or provide evidence of legal medications, and how these processes will occur;

Job seekers who are selected for an initial drug test will first attend an appointment with the Department of Human Services. During this appointment, they will be notified of the requirement to undergo a drug test. They will also be advised:

- that they can provide evidence of any legal medications or other substances that they are taking which may affect the test result,
- that they may request a re-test if they dispute the result of the test, and
- their review and appeal rights in relation to any decision made under social security law following a positive test result.

Job seekers will also have a short pre-test interview with the drug testing provider to help identify any legal medications a job seeker may be taking which could interfere with the accuracy of the test result. Job seekers will also have the opportunity to provide evidence of any legal medication or other substances they are taking after the test, including after the results of the test are available, and have this taken into account.

It is intended that the sample taken by the drug testing provider will be split into two samples. This is common practice with other forms of testing used in Australia. If the job seeker requests a re-test, this will be done using the second sample.

Job seekers who request a re-test will have to repay the cost of the re-test if the result is again positive. This is designed to discourage job seekers from requesting frivolous re-testing where they know they have used illicit drugs. Job seekers will be informed of the possible repayment of the cost of the re-test prior to confirming that they want to proceed with a re-test. Job seekers will not have to pay for the cost of the re-test if the result is negative.

- whether there is a mechanism to challenge or review the imposition of income management;

It should be noted that Income Management does not reduce the amount of payment a recipient receives, it just changes the way in which they receive their payment.

Under Income Management, the majority of a recipient's payment is paid into an Income Management account and quarantined for basic essentials. Recipients are still be able to buy items at a wide range of approved merchants and pay bills with their quarantined funds; however, these funds are not able to be used on harmful products, such as alcohol, cigarettes or gambling. The remaining, non-quarantined amount is paid into their regular bank account and accessible as cash to pay for discretionary items.

As noted above, recipients have the right to appeal any decision made under social security law, including a decision to place a person on Income Management. Under existing review

and appeal mechanisms in the Social Security (Administration) Act, recipients can request a review of the decision by a DHS Authorised Review Officer and, if they disagree with the decision by this officer, can appeal the decision to the Administrative Appeals Tribunal.

As outlined above, the drug test provider may also withdraw or revoke a referral to Income Management to the Secretary if a re-test is conducted and the result is negative; or if the provider becomes aware of circumstances that lead them to believe that the positive result which triggered the referral is not valid, for example the job seeker provided evidence of legal medications which could have caused this result.

- whether a person can successfully have their rate of repayment reduced where they would experience severe hardship, but their circumstances are similar to others;
- further detail as to how the discretion of delegates will operate to consider the vulnerability of those with drug dependencies and ensure that their payments are not reduced such that they are unable to afford basic needs;

This measure will only reduce a job seeker's income support payment through the repayment of the cost of a positive drug test, other than the initial test, or re-test. Recipients will not have to repay the cost of their first positive test or the cost of any negative test result. This means that recipients who test positive to their first test but then abstain from further drug use and do not record any further positive results will experience no reductions in payment.

The amount that will be repaid for the cost of a positive drug test will be an amount set to represent the lowest cost of a test available to the Government, and not the cost of the test they were given. The exact costs of each of the drug tests to be used under the trial – saliva, urine and hair – will depend on the drug testing provider contracted to deliver the tests. The Government will approach the market to engage a suitable drug testing provider or providers which represent best value for money to deliver the required range of drug testing methods. Consideration will be given to ensuring the drug testing methods used in the trial are cost-effective.

If the job seeker is required to pay for the cost of a drug test, the cost will be repaid through deductions from the job seeker's fortnightly payment. To protect the job seeker from potential hardship, deductions to pay for the cost of a test would be set at a small percentage of the job seeker's fortnightly payment which will be determined by the Department of Social Services Secretary, capped at no more than 10 per cent. This is significantly lower than the standard rate for recovery of social security debts, which is 15 per cent.

Job seekers will also be able to have their repayment percentage reduced if required to ensure they are not placed in hardship. This is consistent with existing arrangements for repayment of debts through payment withholdings, and the process for application of this reduction will also be the same as existing arrangements.

- whether there will be limits placed on the disclosure of drug test results to law enforcement, immigration authorities or other agencies; and

As noted above, disclosure of test results will only occur in accordance with existing privacy laws, including in the Privacy Act and the Social Security (Administration) Act. There will be further safeguards set out in the Drug Test Rules under section 38FA in Schedule 12.

- whether there are less rights restrictive methods to achieve the objectives of the measure.

As outlined above, the measure at Schedule 12 is designed to trial a new approach to identifying job seekers with drug abuse issues and assisting them to address their barriers to employment, including support through Income Management to manage their payments to meet their priority needs.

This trial will not remove access to social security payments. Income Management does not change the amount received, just the way it is received. Income Management is designed to better ensure that the priority needs of vulnerable individuals (such as those with proven drug use issues) are met, ensuring these individuals are better placed to maintain an adequate standard of living.

As noted above, job seekers will not be required to repay the costs of their first positive test; they will only be required to repay any second or subsequent positive test. The use of repayment of these positive tests is designed to test this as a means of deterring further drug abuse. There are safeguards in place to ensure that the job seeker is only required to repay an amount equivalent to the lowest cost option of any test used under the trial and that the repayment percentage can be reduced (including to nil) in cases of financial hardship.

Schedule 12 – Mandatory drug-testing trial: ***Compatibility of the measure with the right to equality and non-discrimination***

1.291 The right to equality and non-discrimination is engaged by this measure. The preceding analysis raises questions as to the compatibility of the measure with this right.

1.292 - The committee seeks further advice from the Minister as to whether the measure is proportionate to its objective, in particular whether there are less rights restrictive alternatives to the measure to achieve the objective.

Drug or alcohol dependency is a known barrier to work or to undertaking activities to find or prepare for work. In 2016-17 there were 22,133 temporary incapacity exemptions given to 16,157 job seekers because they had drug and/or alcohol dependence issues that prevented them from meeting mutual obligation requirements, such as job search.

This is a significant number of job seekers; however, as outlined above, data from the 2013 National Drug Strategy Household Drug Use Survey indicates that there may be many more job seekers with drug and/or alcohol abuse issues who are not being identified.

Supporting job seekers with drug and/or alcohol abuse issues to seek treatment will better enable them to meet the mutual obligation requirements associated with their payments and ultimately find and maintain a job. This trial is designed to test a new way of identifying job seekers in these circumstances and providing them with support. To the extent that the trial is targeted at people with drug abuse issues, this is reasonable and proportionate to the objective of ensuring that these job seekers get the support they need to address their issues.

Research indicates that certain groups within the population may be at greater risk of developing harmful drug use behaviours or undergoing drug-related harm. These groups may require particular targeting in terms of education, treatment and prevention programs.[1]

In relation to the potential use of risk profiling, it was intended that this would be used to inform the selection of job seekers for the trial in order to maximise the chances of

[1] http://www.aihw.gov.au/alcohol-and-other-drugs/data-sources/ndshs-2013/ch8/

identifying job seekers who may have drug abuse issues and may need help to address their barriers to work.

Schedules 13-14 – Removal of exemptions for drug or alcohol dependence; and changes to reasonable excuses: ***Compatibility of the measures with the right to equality and non-discrimination***

1.309 – The preceding analysis indicates that Schedules 13 and 14 engage the right to equality and non-discrimination.

1.310 – The committee seeks further information from the Minister as to whether the measures are reasonable and proportionate for the achievement of their objective and in particular:

- whether less rights restrictive measures would be workable; and
- whether adequate safeguards are available to protect the rights of people with disabilities relating to alcohol or drugs.

Schedule 13

Drug or alcohol dependency is known barrier to work or to undertaking activities to find or prepare for work. As highlighted in 2016-17 there were 22,133 temporary incapacity exemptions given to 16,157 job seekers because they had a drug and/or alcohol dependence issues that prevented them from meeting mutual obligation requirements, such as job search.

Allowing people to be exempt from their mutual obligations due to drug or alcohol issues supports a disengagement from the employment services support process, and from potential referral to treatment, which may impede a person's return to work in the longer term.

This measure is designed to ensure that job seekers with drug and alcohol abuse issues remain connected to their employment services provider so that they can be supported to engage in appropriate activities to address their barriers to work.

As per existing arrangements, the provider will work with the job seeker to develop a Job Plan that is individually tailored and responds to their issues and needs. This could include drug and/or alcohol treatment where appropriate.

People who have a disability, such as acquired brain injury or liver disease, that may have been caused or exacerbated by drug and/or alcohol abuse will remain eligible to apply for a temporary incapacity exemption on the basis of this disability if it is impacting on their ability to meet their mutual obligation requirements. Job seekers that have other circumstances not connected to drug or alcohol misuse which impact their ability to meet their mutual obligation requirements may also qualify for another type of exemption. This may include circumstances, such as domestic violence, temporary caring responsibilities or a major personal crisis.

To the extent that this measure is targeted at people with drug and/or alcohol misuse or dependency issues, this is reasonable and proportionate to the objective of ensuring that these job seekers get the support they need to address their issues, noting that other exemptions will continue to be available.

Schedule 14

As part of the tightening of reasonable excuse, job seekers, including those with disabilities related to drugs or alcohol, will be able to unconditionally use reasonable excuse due to drug

or alcohol dependency only once. Job seekers will then have the choice of seeking treatment, if it is available and appropriate, which will help them meet their mutual obligation requirements. If job seekers elect not to undertake treatment they will no longer be able to use drug or alcohol dependence as a reasonable excuse if they do not meet their mutual obligation requirements.

This measure is the least restrictive method of achieving the policy objective of ensuring that job seekers are unable to repeatedly use drug or alcohol as a reasonable excuse unless they agree to participate in treatment, if it is available and appropriate. Job seekers will also only be affected by the measure if they continually fail to meet their mutual obligation requirements and refuse to participate in available and appropriate treatment (see further detail on available protections in the response to 1.311 and 1.316). Those with drug or alcohol conditions that do not impair the ability to meet their requirements or who agree to participate in treatment will not be affected by the tightening of reasonable excuse.

1.311 - Noting that the details of what is to constitute a 'reasonable excuse' is to be provided by legislative instrument, the committee seeks the Minister's advice on the safeguards to be included in this instrument.

The instrument will include a number of safeguards to ensure that job seekers with drug or alcohol dependency affecting their ability to meet their requirements are not adversely affected by the measure through no fault of their own. The intent of the measure is to remove the ability for job seekers to repeatedly use reasonable excuse only in those instances where they have previously had it accepted and subsequently refused available and appropriate treatment.

Accordingly, the instrument will specify that drug or alcohol dependency cannot be considered as a reasonable excuse only if it has been previously used and accepted and if the individual has refused to participate in appropriate and available treatment. This would mean that the only time job seekers would not be able to have their drug or alcohol considered as a reasonable excuse would be if they had decided not to participate in treatment. In any instance where the job seeker had made a decision to participate in available and appropriate treatment, drug and alcohol dependence would be required to be considered in determining if the job seeker had a reasonable excuse (as per current arrangements).

As an additional protection, it will be specified in the instrument that if appropriate treatment is not available for the job seeker, then the existing reasonable excuse provisions will continue to apply.

More broadly, the instrument will continue to specify those matters that must be taken into account when deciding whether a job seeker has a reasonable excuse. The instrument will not limit the discretion of the decision-maker to take into account any factor that may provide a reasonable excuse (except for drug and alcohol dependency while refusing to participate in appropriate treatment).

Schedules 13-14 – Removal of exemptions for drug or alcohol dependence; and changes to reasonable excuses: ***Compatibility of the measures with the right to social security and an adequate standard of living***

1.315 – The preceding analysis indicates that Schedules 13 and 14 engage and limit the right to social security and an adequate standard of living.

1.316 – The committee further information from the Minister as to whether the measures are reasonable and proportionate for the achievement of their objective and in particular:

- whether less rights restrictive measures would be workable; and
- whether adequate safeguards are available to protect people from suffering deprivation.

Schedule 13

This measure recognises that, while job seekers with substance misuse issues may be unable to undertake job search or other work-related activities, they should be encouraged to pursue treatment to overcome their barriers to work.

A job seeker's rate of payment is not impacted by whether or not they have an exemption from their mutual obligation requirements. As such, this measure will not change the amount of income support a job seeker receives.

Where a job seeker's request for an exemption is rejected on the basis that it is wholly or predominantly related to substance dependency or misuse, they will remain connected to their employment services provider and need to satisfy mutual obligation or participation requirements.

Mutual obligation activities are tailored by employment service providers to the job seeker's needs, taking into account their individual circumstances. This may include drug or alcohol treatment. Intensive treatment (such as residential rehabilitation) which prevents the job seeker from participating in any other activities will fully meet the job seekers requirements. Less intensive treatment (such as fortnightly counselling) will contribute to meeting their requirements and the job seeker may have to undertake other activities, depending on their circumstances and capacity.

Job seekers (other than those participating in the trial) undertaking treatment will have this included in their Job Plan as a voluntary activity. This means that compliance action, such as a financial penalty, will not apply if the job seekers ceases to undertake that activity or fails to attend. However, in these circumstances, the job seekers will be required to undertake other activities to meet their mutual obligation requirements.

Limiting access to certain exemptions where the reason is wholly or predominantly attributable to drug or alcohol misuse or dependency is reasonable and proportionate to the objective of ensuring that job seekers are encouraged to address their substance-related issues rather than remaining disengaged.

Schedule 14

The impacts of Schedule 14, the tightening of reasonable excuse, on the rights to social security and an adequate standard of living are reasonable and proportionate. This measure is the least restrictive method of achieving the policy objective of ensuring that job seekers are unable to repeatedly use drug or alcohol as a reasonable excuse. Job seekers will also only be affected by the measure if they continually fail to meet their mutual obligation requirements and refuse to participate in available and appropriate treatment. Those with drug or alcohol conditions that do not impair the ability to meet their requirements will not be affected.

The protections outlined in the response to 1.311 will ensure that only those job seekers who actively refuse to participate in treatment will be unable to repeatedly use reasonable excuse

due to drugs or alcohol. Additionally, all job seekers, whether or not they subsequently refuse to participate in treatment, will be able to use drug or alcohol dependency as a reasonable excuse once. This will ensure that job seekers are not adversely affected if they are unaware of what treatment is available in their area.

To ensure that all job seekers who elect to participate in treatment are able to do so, their usual mutual obligation requirements will be reduced, depending on the amount of hours of treatment required.

Schedules 13-14 – Removal of exemptions for drug or alcohol dependence; and changes to reasonable excuses: *Compatibility with the right to protection of the family and the rights of the child*

1.319 – The preceding analysis indicates that Schedules 13 and 14 engage and limit the right to protection of family and the rights of the child.

1.320 – The committee seeks further information from the Minister as to whether the measures are reasonable and proportionate for the achievement of their objective and in particular:

- whether less rights restrictive measures would be workable; and
- whether there are adequate safeguards to protect the rights of children.

Schedule 13

As outlined above, whether a job seeker is granted an exemption or not doesn't change the amount of income support they receive.

Where a job seeker's request for an exemption is rejected on the basis that it is wholly or predominantly related to substance dependency or misuse, they will remain connected to their employment services provider and need to satisfy mutual obligation requirements, tailored to their individual circumstances. Job seekers who are the principal carer of a dependent child aged under 16 years are subject to part-time mutual obligation requirements of 15 hours per week. This recognises their caring role and is designed to ensure they are able to balance their caring responsibilities with their participation obligations.

Ensuring that parents with substance misuse or dependency issues remained connected and can be referred to appropriate treatment will put these parents in a better position to overcome their issues, find a job and provide for their families. As noted above, job seekers undertaking treatment will have this included in their Job Plan as a voluntary activity (unless participating in the trial under Schedule 12) and will not be subject to a financial penalty if they cease to undertake that activity or fail to attend.

Family Tax Benefit, which is paid to parents to assist with the costs of children, is not subject to mutual obligation or participation requirements and will not be impacted by this measure.

Schedule 14

As a result of the tightening of reasonable excuse in Schedule 14, job seekers who continually fail to meet their usual mutual obligation requirements due to drug or alcohol dependence, and actively refuse to participate in treatment to which they have been referred, may face financial penalties. In some cases, where these job seekers are parents, this may indirectly have flow on impacts to their children (although in no circumstances would the application of

a financial penalty impact family payments, including rent assistance where paid with the family payments).
However, the primary purpose of the measure is to incentivise job seekers with serious drug or alcohol issues into treatment. Continued drug or alcohol dependency by parents to an extent that they are repeatedly unable to meet their requirements is likely to have significant adverse effects for the child. Children in this circumstance would likely be better off if their parents participated in the treatment they need. Also, as part of the tightening of reasonable excuse measure, no significant increase in the number of financial penalties applied is expected. Further, given that the ultimate policy objective is to ensure job seekers address drug and alcohol barriers so that they are able to more quickly move into paid work, this will be beneficial for children as there is evidence that when parents are in paid employment this improves outcomes for children.

Schedule 15 – Compliance Framework: ***Payment suspension for mutual obligation failures - Compatibility of the measure with the right to social security and right to an adequate standard of living***

1.329 – The statement of compatibility acknowledges that the measure engages the right to social security and the right to an adequate standard of living.

1.330 – The committee requests the advice of the Minister as to whether the measure is reasonable and proportionate for the achievement of its legitimate objective, in particular, what criteria will apply to whether a person is considered to have a 'reasonable excuse' for failing to comply with a mutual obligation requirement.

Schedule 15, which would allow the implementation of the targeted compliance framework, is reasonable and proportionate in achieving the objective of encouraging job seekers to remain engaged with employment services and actively seeking and accepting suitable work.

The measure will ensure that only those who are deliberately and repeatedly not complying with their mutual obligation requirements will face financial penalties. Job seekers will generally only face any lasting financial penalty if they have missed five requirements within six months and had their requirements assessed as suitable for their particular circumstances by both their employment service provider and the Department of Human Services. Prior to this, job seekers who miss requirements without reasonable excuse will have their payment suspended until they re-engage, with any missed payment back-paid.

Reasonable excuse criteria will be largely identical to those applying under current arrangements. When determining if an individual has a reasonable excuse, decision makers will be required to consider if the job seeker's failure was directly contributed to by:

- lack of access to safe, secure and adequate housing;
- literacy and language skills;
- an illness, injury, impairment or disability;
- a cognitive, neurological, psychiatric or psychological impairment or mental illness;
- a drug or alcohol dependency;
- unforeseen family or caring responsibilities;
- criminal violence (including domestic violence and sexual assault);
- adverse effects of the death of an immediate family member or close relative; or
- working or attending a job interview at the time of the failure.

The instrument does not limit the discretion of decision-makers, who will also be able to consider any other factor that directly prevented job seekers from meeting their requirements (with the exception of repeated use of drug or alcohol dependency if the person has actively refused treatment).

Schedule 15 – Compliance Framework: Financial penalties for refusing work - *Compatibility of the measure with the right to social security and right to an adequate standard of living*

1.340 – The statement of compatibility acknowledges that the measure engages the right to social security and the right to an adequate standard of living.

1.341 – The preceding analysis indicates that the measure may limit these rights and there are some questions about whether the safeguards are sufficient to ensure that the limitation is proportionate.

1.342 – The committee therefore requests the advice of the Minister as to whether the measure is reasonable and proportionate for the achievement of its stated objective, and in particular:

- whether the waiver was being misused or was ineffective;
- whether there are less rights restrictive options that are reasonably available, for instance, whether a waiver could be provided where circumstances justify the waiver in accordance with a more structured framework that allows for consistent and appropriate application of the waiver; and
- whether there are any safeguards in relation to the application of the measure

Waivers are not appropriate for job seekers who turn down suitable work. This is because, by definition, any job seeker who turns down suitable work is able to work to help support themselves.

Job seekers may only be penalised for turning down work, where the work is suitable. That is, where it meets a range of legislated criteria, including that the person has the skills required to do the work, or will be trained to do so, the work would not aggravate any medical or psychological condition, the work meets all relevant safety and wage legislation, commuting time to and from the work is reasonable and the person has appropriate childcare available.

The presence of waivers undermines the efficacy of penalties for refusing work. As was highlighted in the statement of compatibility of human rights, the vast majority of serious penalties are waived under current arrangements. Further, as part of the policy development process for the development of the targeted compliance framework, consultation with Department of Human Services' staff reported that the cycle of assessments and the ability for cash-in-hand workers and serially non-compliant job seekers to remain on payment is exacerbated by the ability to too easily waive the eight week non-payment period for serious failures. A large number of recipients do not serve applied eight week non-payment penalty periods, having them provisionally waived by simply agreeing to participate in a Compliance Activity. Many recipients reportedly attend Compliance Activity appointments necessary to unconditionally waive the penalty and re-start their payment, but do not attend any other appointments or participate in the Compliance Activity. The Department of Human Services' staff reported that recipients in this situation are often very knowledgeable about the compliance system and pre-empt advice about how to receive payment again.

Although not able to be waived, the penalty for refusing an offer of suitable work will be halved. Also, as is currently the case, compliance penalties will not affect family payments. Further, job seekers who turn down suitable work under the new framework will continue to have access to support during crises delivered by welfare organisations and funded under the Emergency Relief program, administered by the Department of Social Services.

Schedule 15 – Compliance Framework: Repeated non-compliance penalties- ***Compatibility of the measure with the right to social security and right to an adequate standard of living***

1.350 – The statement of compatibility acknowledges that the measure engages the right to social security and the right to an adequate standard of living.

1.351 – The preceding analysis indicates that the measure may limit these rights and there are some questions about whether the safeguards are sufficient to ensure that the limitation is proportionate.

1.352 – The committee therefore requests the advice of the Minister as to whether the measure is reasonable and proportionate for the achievement of its stated objective, in particular:

- whether the waiver was being misused or was ineffective;
- whether there are less rights restrictive options that are reasonably available;
- whether there are any safeguards in relation to the application of the measure (such as, crises or when a person is unable to meet basic necessities);
- whether a waiver could be provided where circumstances justify the waiver in accordance with a more structured framework that allows for consistent and appropriate application of the waiver; and
- what criteria will be set out in the legislative instrument as matters the Secretary must or must not consider as constituting persistent noncompliance.

The measure is proportionate and reasonable and will be fairer and less harsh than the current framework for the vast majority of job seekers who are generally compliant. Job seekers will only face penalties where they repeatedly and persistently do not meet their requirements without reasonable excuse, refuse work or voluntarily become unemployed. The response to 1.342 outlines the protections for refusing suitable work or voluntarily becoming unemployed under the new framework.

Existing protections for the 200,000 job seekers who have some sort of exemption from their mutual obligations or are fully meeting their obligations through approved activities will also be preserved.

In addition, numerous safeguards will exist to ensure that only those job seekers who are deliberately and persistently non-compliant will face financial penalties. This recognises the fact that the majority of job seekers consistently do the right thing and should not have payment deducted, when payment suspension (with back-pay) alone is sufficient to get them to re-engage. Job seekers will generally have to miss a minimum of five appointments in six months, without good reason, before they actually lose money. In contrast, job seekers may lose money for their first failure under the current one-size-fits-all system.

To ensure that job seekers with circumstances affecting their ability to meet their requirements are not unfairly penalised, job seekers will also have their capabilities assessed

twice before they face any loss of money, by both their provider (on their third failure) and the Department of Human Services (on their fourth failure). Job seekers whose vulnerabilities have impacted their ability to meet agreed commitments will be able to renegotiate their job plan at either of these assessments and have their demerits reset to zero (allowing a further five failures without reasonable excuse before any payment is lost). These protections are in contrast to the current framework, where job seekers on average have almost four penalties applied before they undergo a Comprehensive Compliance Assessment to see if they have any vulnerabilities.

Regarding the inability for penalties for persistent and deliberate non-compliance to be waived, as with penalties for refusing work, the vast majority of penalties for repeated non-compliance are waived under current arrangements, undermining the deterrent effect of penalties – particularly for persistently non-compliant job seekers.

Although not able to be waived, the maximum penalty for persistent non-compliance will be halved. Also, as is currently the case, compliance penalties will not affect family payments. As with job seekers facing penalties for refusing work, job seekers facing financial penalties for persistent non-compliance will continue to have access to support during crises delivered by welfare organisations and funded under the Emergency Relief program, administered by the Department of Social Services.

The legislative instrument determining the circumstances in which the Secretary must or must not be satisfied that a person has persistently committed mutual obligation failures will specify the number and timeframe within which prior failures must have been committed to constitute persistent non-compliance. However, the determination of individual failures contributing to a finding of persistent non-compliance will continue to be guided by the reasonable excuse provisions and instrument. As outlined above, reasonable excuse criteria will be largely identical to those applying under current arrangements. It should also be reiterated that the instrument does not limit the discretion of decision-makers, who will continue to be able to consider any other factor that directly prevented job seekers from meeting their requirements (with the exception of drug or alcohol dependency if the person has refused treatment).

Schedule 17 – Information gathering powers and referrals for prosecution:
Compatibility of the measure with the right to privacy

1.361 – The preceding analysis indicates that there are questions as to whether the measure is a permissible limitation on the right to privacy.

1.362 – 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.

The proposed changes within schedule 17 are aimed at achieving a legitimate objective, by preventing the need to obtain, via a search warrant, information already obtained administratively. This not only provides administrative benefits to the Department of Human

Services and the Australian Federal Police, but also benefits those persons providing the information, typically third parties, by reducing the burden placed on them.

The limitation of the right to privacy of this measure is reasonable and proportionate.

In cases where this measure is used to obtain evidence from individuals other than the person under investigation for welfare fraud, this method does not impose any additional interference to their privacy, family, home or correspondence. This is because any evidence obtained under this measure would previously have been obtained using a search warrant, sometimes after they had already provided this information for administrative purposes.

In cases where this measure is used to obtain information from the individual under administrative investigation, this information is only obtained for the purposes of ensuring the sustainability and integrity of the social security system. This does not entail any risk of reputational harm, except where an individual commits an offence by providing false or incomplete information. This measure does not change the scope of information being provided and only requires individuals to make a limited disclosure of information necessary for the proper administration of the social security system.

Schedule 17 – Information gathering powers and referrals for prosecution: ***Compatibility of the measure with the right not to incriminate oneself***

1.367 – The preceding analysis indicates that there are questions as to whether the measure is a permissible limitation on the right not to incriminate oneself.

1.368 – 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 (including whether the exceptions to the 'use/derivative use' immunities are sufficiently circumscribed).

As outlined above, the proposed changes within schedule 17 are aimed at achieving a legitimate objective, by preventing the need to obtain, via a search warrant, information already obtained administratively. This not only benefits the administration of the Department of Human Services and the Australian Federal Police, but also benefits those persons providing the information, typically third parties, by reducing the burden placed on them.

The limitation on the right to self-incrimination is reasonable and proportionate. The common law right to silence preventing use of the information or documents against the person providing them is retained, other than in proceedings for the provision of false information. In these circumstances, this measure is a proportionate limitation on an individual's right to freedom from self-incrimination, because the Department of Human Services depends on individuals disclosing complete and accurate information in order to ensure the sustainability and integrity of the social security system.

This limitation is also consistent with section 9.5.1 of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement,* which deals with the privilege against self-

incrimination. The Guide states that the privilege against self-incrimination does not apply "where it is alleged that a person has given false or misleading information".

Schedule 18 – Exempting social security laws from disability discrimination Law: *Compatibility of the measure with the right to equality and non-discrimination*

1.376 – The committee therefore seeks further information from the Minister as to how the broad exemption of all social security law is permissible under international law, in particular why such an exemption is required in view of section 45 of the Disability Discrimination Act.

The *Disability Discrimination Act 1992* plays a vital role in protecting people with disability from unfair treatment and promoting equal rights, opportunity and access. These changes are required to align social security and disability discrimination law to ensure consistent treatment in relation to social security entitlements.

Payments under social security law are made to eligible people on the basis of a variety of factors such as their health, disability, age, income and asset levels. This ensures that Australia's social security system is targeted based on people's circumstances and need.

As noted in the Explanatory Memorandum, the *Social Security Act 1991* has been exempt from the operation of the disability discrimination law since the Disability Discrimination Act commenced in 1992. This ensures that pensions and allowances, including for those with disability, can be appropriately targeted to particular groups without this being considered discriminatory.

The amendments at Schedule 18 will ensure that this existing exemption from the Disability Discrimination Act in relation to pensions and allowances applies consistently to all of the social security law, in line with its original intent. This does not change eligibility for payments under social security law (which will continue to be appropriately targeted according to their purpose) or the broader protections that the Disability Discrimination Act provides to people with disability.

Section 45 of the Disability Discrimination Act is designed to ensure that special measures – i.e. programs, facilities, employment opportunities – that exist and are limited to people with disabilities in order to particularly support their participation are not considered to be discriminatory under the Act. Special measures could be considered a form of positive discrimination towards people with disabilities. This section of the Act does not relate to the exemption of social security law from the Disability Discrimination Act.

The Government considers that the appropriate ways of ensuring that the disability discrimination law applies consistently across social security law is through the amendments proposed at Schedule 18.

TREASURER

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

Dear Chair

Thank you for your letter of 6 September 2017 concerning the *Treasury Laws Amendment (Agricultural Lending Data) Regulations 2017* ('the Regulations').

The Regulations allow the Australian Prudential Regulation Authority (APRA) to collect data on debt held by the agricultural sector and share it with the Department of Agriculture and Water Resources (DAWR) for the purpose of assisting DAWR to perform its functions and exercise its powers. This is consistent with existing arrangements for APRA to collect and share financial sector information with the Australian Bureau of Statistics and the Department of Health.

I consider that the limitations on the right to privacy imposed by the Regulations are reasonable for the achievement of the stated objective and that there are adequate and effective safeguards in place with respect to the right to privacy.

As the Committee notes, the explanatory statement identifies improved targeting of assistance measures to farmers as an objective of the Regulations. Reflecting this, the relevant reporting standard (ARS 750.0) only seeks to collect information on the amount and nature of debt at a state and agricultural activity level.

In addition to the recent public consultation on the collection of the data, APRA will consult further on the publication of statistics on agricultural lending later this year. This will provide a further opportunity to address any concerns about confidentiality.

In collecting, sharing and using the information in question, APRA and DA WR must comply with the *Privacy Act 1988* ('Privacy Act') and the *Australian Prudential Regulation Authority Act 1998* ('APRA Act').

To support compliance, APRA and DAWR are entering into a Cooperative Working Agreement that outlines the two agencies' use of the data. This covers DAWR's policies and procedures to maintain the confidentiality of data, and stipulates that DAWR will only publicly release data obtained from APRA if that data is prepared by APRA for public release, consistent with its obligations. APRA will prepare that data in such a way that it will not be possible to derive information relating to any particular person.

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When preparing that data for public release, APRA will comply with its internal policy and procedure for the Release of Statistics, which exceeds the legal requirements in the APRA Act and the Privacy Act. This policy contains further measures to ensure confidentiality and privacy are maintained when releasing the data publicly, including a privacy risk assessment and a confidentiality analysis that measures an entity's representation in a statistic.

In addition to the above, the application of the Australian Public Service Code of Conduct to APRA and DAWR provides for additional protection of confidential information.

Yours sincerely

The Hon Scott Morrison MP

28 / 9 / 2017