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

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THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: MS19-004183

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Sarah,

Dear Ms Henderson

Thank you for your letter dated 6 December 2019 requesting my response in relation to the human rights compatibility of the Citizenship Cessation Bill 2019.

I note the Committee has sought further information regarding the compatibility of the proposed measures with Australia's international human rights obligations.

My response for the Committee's consideration is attached. I appreciate the extension until 8 January 2020 in which to provide the response.

Yours sincerely

PETER DUTTON 06/01/20.

Response to the Parliamentary Joint Committee on Human Rights – Australian Citizenship Amendment (Citizenship Cessation) Bill 2019

1.48 The committee considers that these measures may engage and limit a number of human rights, including the rights to freedom of movement and liberty, and the rights of the child and to protection of the family. In order to assess whether these are permissible limitations under international human rights law, the committee seeks the minister's more detailed advice as to the matters set out at paragraph [1.42].

• whether the criteria that a person has 'repudiated their allegiance to Australia', or has served in the armed forces of a country 'at war with Australia' is sufficiently certain and accessible for people to understand the legal consequences of their actions;

There is no standalone criterion that a person has repudiated their allegiance to Australia. The relevant criterion requires the Minister to be satisfied that the terrorism-related conduct the person engaged in demonstrates that the person has repudiated their allegiance to Australia.

This reflects the purpose clause in the Bill which states that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia. When people engage in terrorism-related behaviour, they demonstrate that they have rejected the values and interests that are fundamental to Australian citizenship.

An exhaustive list of the specific conduct and convictions that give rise to the operation of the terrorism-related citizenship cessation provisions is contained in the Bill in sections 36B and 36D (and in current sections s33AA, 35 and 35A).

The conduct specified in proposed paragraph 36B(5)(j), relating to where an individual serves in the armed forces of a country at war with Australia, reflects a long standing provision dating back to the *Australian Citizenship Act 1948*. That provision provided that an Australian citizen who is a national or citizen of that country and serves in the armed forces of a country at war with Australia shall, upon commencing so to serve, cease to be an Australian citizen. The provision does not apply to such service engaged in by a person before they became an Australian citizen. By making it clear that engaging in such activity is opposed to the responsibilities and values central to Australian citizenship, the legislation clearly notifies citizens that engaging in such activity will have the consequences provided for in the Bill.

The Bill also provides adequate safeguards. First, the Minister's satisfaction that a person's conduct demonstrates a repudiation of their allegiance to Australia must be reasonable. The High Court has said 'satisfaction' is a state of mind, which must be formed reasonably and on a correct understanding of the law. Second, the Bill provides an affected person the opportunity to apply for revocation of the determination to cease their citizenship. This enables the person to set out reasons that the decision should be revoked, including representations that they were not aware of the gravity or consequences of their actions. The

Minister is required to consider that application. Third, the Minister may revoke the determination on the Minister's own initiative, if satisfied that doing so would be in the public interest. Fourth, the affected person can also apply for judicial review of the determination, in which the Court can consider whether there has been an error of law in the making of the decision.

• whether evidence establishes that the measures seek to achieve a legitimate objective, in particular, advice as to the necessity of the measures noting that any threat posed by non-dual national Australians is not proposed to be managed by depriving them of citizenship;

The Government does not propose to manage all dual-national Australians that meet the relevant thresholds using citizenship cessation, only where it is the most effective, proportionate, and appropriate tool to manage the specific risks. The amendments will enable citizenship cessation to be chosen from amongst other administrative measures when it is considered the most appropriate and proportionate response for managing an Australian of counter-terrorism interest. The provisions will apply to those who have engaged in terrorism-related activities and where the relevant thresholds are met. As the Committee has noted, 'removing a person's citizenship, where this is possible, is a legitimate objective in that it ensures that there is less prospect of a person engaging in conduct which harms the Australian community'.

The Government's first priority is to keep the Australian community safe. Since their introduction, the citizenship cessation provisions have been effective in removing from the Australian community those who, through their conduct, have repudiated their allegiance to Australia and limited membership in the community to those who uphold and embrace Australian values.

Australia's national security and counter-terrorism laws are under constant review to ensure law enforcement and intelligence agencies have the powers required to counter the threat environment. It is appropriate that the Minister of the day make decisions about citizenship cessation based on all available information and with regard to certain criteria. The Bill's objective is to improve the effectiveness and flexibility of the framework of Australia's national security laws. The amendments will ensure the best outcomes are achieved for Australia's national security.

• how the measures are rationally connected to (that is effective to achieve) the stated objectives, in particular any evidence that demonstrates that the 2015 measures have been effective in protecting the community and acting as a deterrent;

The stated objective of the Bill is contained within the purpose clause at section 36A. It details that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared valued of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia. This is consistent with the objectives of the citizenship cessation provisions that have been in effect since 2015, and the provisions have been effective in protecting the integrity of Australian citizenship and the Australian community since then.

It is the view of the Australian Government, supported by commentary from the Department of Home Affairs, the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO) that the existing provisions have been effective in conjunction with other counter-terrorism tools and mechanisms available to Australian national security agencies. The provisions will allow citizenship cessation to sit alongside other available measures, thereby making citizenship cessation part of the suite of Australia's counter-terrorism measures, rather than something that occurs automatically through a person's own conduct.

These amendments strengthen the utility of the provisions by enabling the Minister to take into account a broader picture of a person's conduct and the degree of threat posed by the person and, where relevant, a broader appraisal of the seriousness of terrorism-related convictions. The measures in this Bill will enhance the safety of the Australian community by enabling the revocation of Australian citizenship in circumstances where such a person poses a threat to the community and has repudiated their allegiance to Australia.

ASIO has stated that it is too early to determine any direct deterrent effects or other security outcomes among the individuals whose citizenship has ceased under the current citizenship cessation provisions. However, they also note that the practical outcome of the provisions is to locate such individuals offshore, rendering them unable to physically execute an attack, or any face-to-face radicalisation activities, in Australia. ASIO concludes that citizenship cessation is a measure that works alongside a number of other measures to protect Australia and Australians from terrorism. ASIO has stated their support for a move to a Ministerial decision-making model, as such a model enables all of the relevant security factors to be weighed against broader national interests.

AFP has likewise supported citizenship cessation as a mechanism that sits alongside a number of legislative and other measures to assist in addressing the risk of terrorism in Australia. The AFP acknowledges the complexity of managing the terrorist threat to Australia, and that authorities need a range of mechanisms in order to manage that threat, one of which is citizenship cessation. The AFP has stated their support for the amendments in the Bill, noting that citizenship cessation contributes to mitigating the risk posed to Australians.

- **whether the measures are proportionate to achieve the stated objectives, in particular:**
    - **why proposed section 36E does not include an express requirement for the minister to consider a person's connection to Australia, including any impact on family members, before making a citizenship cessation determination;**

The Government's first priority is to keep the Australian community safe. In making a citizenship cessation determination, the Minister must be satisfied that it is not in the public interest for the person to remain an Australian citizen having regard to a number of factors which may include the person's connection to Australia and any other matters of public interest. This may extend to the consideration of any potential impact on family members. There are a range factors that the Minister must have regard to under the public interest criteria in considering whether to cease a person's Australian citizenship. As such, section 36E is not exhaustive because cases will vary on an individual basis; the provision is, however,

appropriately flexible in allowing the Minister to take into account any other matters of public interest.

As noted in the explanatory memorandum to the Bill, the Minister is well placed to make an assessment of public interest as an elected member of the Parliament. The Minister represents the Australian community and has a particular insight into Australian community standards and values and as to whether it would be contrary to the public interest for the person to remain an Australian citizen. As an extension of this, it is appropriate that the Minister should determine the weight that different considerations should be given, noting that this will vary from case to case.

The requirement to consider and balance the various factors is intended to ensure that any interference with the family, the right to re-enter one's own country, or the right to freedom of movement, is not arbitrary, since cessation will occur where the national security risks and threats to the Australian community are such that it is not in the public interest for the person to remain a citizen. The Minister must take into account the individual circumstances of the case in determining whether to exercise the power to cease a person's citizenship. Any limitation of a person's rights in an individual case would be proportionate to the legitimate goal of ensuring the security of the Australian community.

- **when consideration is given to making a determination in relation to a person under 18, why the best interests of the child is to be considered alongside a range of other factors and what 'as a primary consideration' means in this context;**

When making a citizenship cessation determination, the Minister is required to take into account the best interests of the child as a primary consideration. As the Committee is aware, this is consistent with Article 3(1) of the Convention on the Rights of the Child. Article 3(1) does not state more than that the best interests of the child are to be a primary consideration, not the only, or the only primary, consideration. The best interests of the child may be balanced by other relevant public interest considerations to which the Minister must have regard. This will vary from case to case, and it is not possible or appropriate to pre-empt the considerations, or the balancing of those considerations, that the Minister will take into account in any given decision, including those that involve a person under 18 years of age.

As mentioned above and in the explanatory memorandum to the Bill, the Minister is well placed to make an assessment of public interest as an elected member of the Parliament. The Minister represents the Australian community and has a particular insight into Australian community standards and values and if it would be contrary to the public interest for the person to remain an Australian citizen. As an extension of this, it is appropriate that the Minister determine the weight different considerations are given, noting that this will vary from case to case.

- **why there is no independent merits review of the minister's discretionary powers; and**

Avenues for review exist in the Bill, many of which are in addition to those provided for in the existing legislation. Consistent with the approach in the *Migration Act 1958* (Migration Act),

it is not appropriate for the Administrative Appeals Tribunal to review a decision made personally by the Minister in relation to the public interest, as the Minister is responsible to the Parliament.

Judicial review is an appropriate form of independent review, and an affected person will have the right to seek judicial review of the basis on which the citizenship cessation determination was made. Specifically, the Federal Court and High Court will have original jurisdiction over matters including whether or not the requisite conduct was engaged in by the person, and whether or not the person was a dual citizen at the time of the conduct. If a court finds either of these conditions are not satisfied, the cessation of citizenship will be automatically revoked under the provisions in the Bill.

The Bill also contains several safeguards so that, following a cessation determination, an affected person or their delegate can challenge the grounds of the Minister's satisfaction.

- First, once notice of cessation is provided, the person may apply to the Minister for a revocation of the determination (section 36H). The Minister must review an application and must revoke the determination if satisfied the person did not engage in the conduct to which the determination relates, or that the person was not a national or citizen of another country at the time the determination was made. The Minister must observe the rules of natural justice in this process.
- Second, the Minister may, on the Minister's own initiative, revoke a determination if satisfied this is in the public interest (section 36J).
- Third, the Minister's determination is automatically overturned and the person's citizenship taken never to have ceased if a court finds that the person did not engage in the conduct to which the determination relates (section 36K).

Furthermore, merits review of the relevant ASIO Qualified Security Assessment is available in the Security Appeals Division of the Administrative Appeals Tribunal.

- **why the discretionary powers apply to conduct or convictions up to 16 years ago; why this date was chosen, and why the period in the existing provisions is insufficient.**

The Bill proposes that section 36B(5)(a)-(h) and 36D apply from 29 May 2003 as this was the date the offences referenced in 36D were fully enacted in the *Criminal Code Act 1995* by the *Criminal Code Amendment (Terrorism) Act 2003*. Providing for both 36B and 36D to apply in respect of conduct (s36B) or convictions (s36D) to the same date ensures legislative consistency between the two provisions.

By adopting a Ministerial decision-making model, not everyone who has engaged in conduct or was subject to a terrorist-related conviction from 29 May 2003 onwards will necessarily have his or her citizenship ceased. Under the proposed model, the Minister must consider a range of factors including the severity of the conduct and the degree of threat currently posed by the person at the time of consideration. This requires the Minister to weigh up a number of public interest considerations in deciding whether a person's citizenship should cease. Further, once the Minister makes a cessation determination, the person's citizenship is taken to have ceased from the date of that determination.

Extending the period to 29 May 2003 increases the effectiveness of the provisions as it enables a broader picture of a person's conduct to be taken into account when determining whether to cease a person's Australian citizenship. It also recognises that past terrorist conduct is conduct that all Australians would view as repugnant and in contradiction of the values that define our society.

1.54 Further information is required in order to fully assess the compatibility of these measures with the obligation of non-refoulement and the right to an effective remedy. It would assist with the compatibility of the measure if section 36E included a requirement that the minister must consider whether the person, if removed from Australia following loss of citizenship, would be at risk of persecution or other forms of serious harm.

1.57 The committee seeks the minister's advice in relation to the matters set out at paragraph [1.54].

The provisions of the Bill are compatible with Australia's non-refoulement obligations. Australia is committed to its international obligations and does not seek to resile from or limit its non-refoulement obligations.

The Minister's discretionary power to cease a person's citizenship where the person is in Australia will not result directly in them being liable for removal from Australia. Any such liability would arise only after the person's lawful status in Australia was rescinded and the person was detained under the Migration Act as an unlawful non-citizen.

Upon the Minister's determination to cease a person's citizenship, the person will be granted an ex-citizen visa by operation of law, i.e. automatically, under section 35 of the Migration Act. The ex-citizen visa is a permanent visa allowing the holder to remain in, but not re-enter Australia. Any action in relation to the cancellation of this visa on character grounds involves a separate process under the Migration Act. Whether the person engages one of Australia's non-refoulement obligations would be considered as part of any cancellation process. A visa cancellation decision by the Minister's delegate will be subject to merits review, and a cancellation decision by the Minister personally would be subject to judicial review.

The Committee has commented that consideration should be given to amending section 36E of the Bill to include a requirement that the Minister must consider whether the person, if removed from Australia following loss of citizenship, would be at risk of persecution or other forms of serious harm. Prior to making a determination to cease a person's citizenship, the Minister must consider the person's connection to the other country of which the person is a national or citizen, and any other matters of public interest. Matters relating to any possible risk facing a person in the other country could be considered as part of this assessment.

The Hon Michael McCormack MP

Deputy Prime Minister
Minister for Infrastructure, Transport and Regional Development
Leader of The Nationals
Federal Member for Riverina

Ref: MC19-010686

06 JAN 2020

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Senator for Victoria
Parliament House
CANBERRA ACT 2600

Dear Sarah Chair

Thank you for your letter of 6 December 2019 in relation to Civil Aviation Order 48.1 Instrument 2019 (the Order).

In raising your concerns about the Order, as set out in the Committee's Human Rights Scrutiny Report No. 6 of 2019 (the Report), you requested further information as to what type of physiological and other data might be collected about individual pilots; how this data will be stored; and who such data may be disclosed to. You also requested further information on the adequacy and effectiveness of any relevant safeguards, including whether the *Commonwealth Privacy Act 1988* (the Privacy Act) will be an adequate and effective safeguard.

I am advised by the Civil Aviation Safety Authority (CASA) that the kind of physiological and other data to be collected by an Air Operator's Certificate (AOC) holder would relate to an individual pilot's sleep and wake patterns. This data can be collected through self-reporting, written diaries or via portable electronic monitoring devices. In the course of electronic collection, other physiological data may be incidentally collected, for example, heart rate and body movements. The collected data can be applied to biomathematical fatigue models to produce predictions of alertness, performance, or risk of impairment for given work/rest or wake/sleep schedules.

The collected data is understood to be stored by AOC holders on each individual's personal file, electronically or in hard copy, and resides there along with other private and personal information related to employment history. Where third parties are used to collect data, for example medical practitioners or through the use of recording devices, the data is also stored on electronic files pertaining to that individual pilot. Both AOC holders and those third parties must observe the requirements of the Privacy Act.

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CASA presumes that an individual's sleep data may be accessed only in accordance with the AOC holder's requirements and procedures which must be in conformity with the Privacy Act. In practice, it is assumed that such access is by the relevant AOC holder's flight rostering managers for the purpose of evaluating the actual fatigue impact of duty scheduling practices that have been based on a predictive algorithm, for example, a biomedical model.

The Privacy Act does not permit any other legitimate access not authorised by law, nor does it permit use of the data for other purposes. All such information, including that collected by the use of third party electronic devices, is protected by the Privacy Act and may not be used for purposes other than those for which it was collected. CASA has no legal control over how an AOC holder deals with pilot sleep-data collected by the AOC holder for the AOC holder's purposes.

When an AOC holder applies to CASA for an interim or final approval of their proposed Fatigue Risk Management System (FRMS), a number of strict CASA procedures and standards come into play. AOC holders are notified in advance by CASA FRMS assessors that only de-identified sleep data may be supplied to CASA with the application. Electronic information received by CASA is stored on CASA's information system which is subject to both external IT security protections and internal security access protocols. The latter limits access to relevant recorded sleep-data to only those CASA officers involved in advising on, or actually taking, assessment decisions. That data is only evaluated as aggregated or "grouped" and no individual information is accessed or used by CASA. The restrictions imposed by the Privacy Act also apply to CASA.

CASA is satisfied that, under the current law, the Privacy Act protects relevant pilot sleep related data, collected for the purposes of an AOC holder's aviation FRMS, to the standard that is the prevailing standard acceptable to the Australian Parliament.

In so far as the international right to privacy is limited by the Privacy Act, both CASA and I consider that, in the specific context of the collection and use of pilot sleep-related data for the purposes of an aviation FRMS, any such limitation is reasonably proportionate to the risks, dangers, and goal to be achieved. The risks and dangers are to life, both in the air and on the ground. The goal is individual pilot fatigue risk management in those areas of aviation where the absence or failure of such management may have catastrophic effects in relation to passenger transport, heavy and other cargo carriage, and aerial work operations.

Thank you for raising this matter and I trust this information is of assistance.

Yours sincerely

Michael McCormack

Senator the Hon Anne Ruston

Minister for Families and Social Services
Senator for South Australia
Manager of Government Business in the Senate

Ref: MB19-001827

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Senator Henderson

Thank you for your email of 6 December 2019, from the Parliamentary Joint Committee on Human Rights about the Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 (the Bill).

The Committee has requested further information regarding the human rights compatibility of the Bill. Further information is provided in relation to each of the points requested below.

Transition
The Government announced the transition of Income Management to the Cashless Debit Card (CDC) in the Northern Territory (NT) and Cape York region as part of the 2019-20 Budget to offer a more streamlined approach with improved technology for the participant. The CDC has been informed by the experience of Income Management and has been consistently improved. The CDC is being introduced in these regions to offer greater flexibility and consumer choice for these participants. For example, the CDC is accepted at over 900,000 EFTPOS terminals nationally compared to the BasicsCard, which is accepted at fewer than 17,000 merchants.

As the CDC operates as a standard Visa Debit Card, it places fewer restrictions on purchases that allow participants to shop from a wide variety of sellers that accept EFTPOS, including online retailers via BPAY. Participants in the Northern Territory should not have to wait to have access to the improved technology offered by the CDC.

Consultation
My department has been engaging with communities and stakeholders in the Barkly region of the NT since August 2018 and has continued engaging with broader NT and Cape York communities and stakeholders since late September 2019 to support the transition.

My department has conducted community information sessions in 43 locations across the NT with nearly 1500 community members and in four locations across Cape York with over 65 community members. Further community sessions will continue up to and throughout the transition to the CDC.

Voluntary Measures
The purpose of the CDC is to limit the amount of welfare payments being spent on products that can harm the broader community. The evidence demonstrates that the CDC is most effective when most people in a community who receive a welfare payment participate in the program. Individuals on a welfare payment but who are not on the CDC program can volunteer for the program in the Ceduna, East Kimberley and Goldfields trial sites. The Bill also enables volunteers from the Bundaberg and Hervey Bay region, NT and Cape York sites.

Evaluation
The Bill amends section 124PS to improve the workability of the evaluation process. It does not remove any requirements for a review of the evaluation process to be undertaken. The amendments simplify the requirements on an independent expert reviewing the evaluation to directly consult trial participants who may have already participated in an evaluation. This appropriately reduces repeat contact with vulnerable CDC participants and reduces respondent burden on this cohort.

Ministerial Power
The Government has amended the Bill to reduce the scope of the Ministerial power to vary the restricted portion placed on the CDC in the Northern Territory from 100 per cent to 80 per cent. This power does not extend to participants in the Cape York region.

As outlined in the Explanatory Memorandum, this will only be considered in response to a request from a community. When moving these amendments, consistent with the approach taken in *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010,* it was not considered appropriate to specify the requirements for exercising this power in the legislation itself. This decision was made to ensure the format of community requests and the nature of any necessary engagement with the community following a request, is flexible to respond to the specific circumstances of that community.

Given that this power will only be used in response to a community request, making the determination by notifiable instrument is appropriate to respect the autonomy of the community making the request.

I trust this information is of assistance to the Committee.

Yours sincerely

Anne Ruston

Senator the Hon Anne Ruston

Minister for Families and Social Services
Senator for South Australia
Manager of Government Business in the Senate

Ref: MB19-001828

20 DEC 2019

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Senator Henderson

Thank you for your letter of 6 December 2019 regarding the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (the Bill). I appreciate the time the Parliamentary Joint Committee on Human Rights (the Committee) has taken to scrutinise the Bill in the *Human Rights Scrutiny Report 6 of 2019* (the Report) and bring these matters to my attention.

As you would be aware, legislation to implement the Drug Testing Trial measure (the trial) has been introduced into the Parliament twice before. First, in Schedule 12 of the Social Services Legislation Amendment (Welfare Reform) Bill 2017 and then in the Social Services Legislation Amendment (Drug Testing Trial) Bill 2018. The Committee has previously scrutinised the trial in its *Report 8 of 2017*, *Report 11 of 2017* and *Report 3 of 2018*.

I would like to reaffirm comments made to the Committee by the former Ministers for Social Services, the Hon Christian Porter MP and the Hon Dan Tehan MP, in relation to the compatibility of the trial with human rights considerations.

I enclose a response to the Committee in relation to each of the questions identified in the Report.

I trust this information is of assistance.

Yours sincerely

Anne Ruston

Encl. Additional information responding to Human Rights Scrutiny Report 6 of 2019

Suite MG.60, Parliament House, Canberra ACT 2600 Tel: 02 6277 7560 Email: minister@dss.gov.au

Additional information responding to Human Rights Scrutiny Report 6 of 2019
Social Services Legislation Amendment (Drug Testing Trial) Bill 2019

What evidence was relied on to indicate that the trial is likely to achieve its stated objectives

The Drug Testing Trial (the trial) is designed to identify job seekers who may have ongoing drug dependency issues and may benefit from treatment. The aim of the trial is to improve the capacity of job seekers with illicit drug use issues to find employment or participate in education or training to improve their work readiness, by assisting them to access appropriate treatment and overcome their barriers to work. The trial will test the effectiveness of drug testing as a means of identifying people with drug use issues, as well as intervention strategies including income management, medical assessment and treatment.

This model has not been tested before in Australia or internationally. This is why comparable evidence for this approach does not exist and the measure has been designed as a trial. The trial will evaluate the effectiveness of drug testing job seekers in the Australian social security context and will help to identify where illicit drug use may be a barrier to work. The trial will also evaluate the efficacy of income management and supporting people to undertake appropriate treatment. The evaluation of the trial will help to establish an evidence base for this type of intervention.

What evidence was relied on to choose the three trial sites, in particular whether there is evidence and data about a high prevalence of drug use in these locations

The trial will be conducted in the local government areas of Canterbury-Bankstown (New South Wales), Logan (Queensland) and Mandurah (Western Australia). These locations were selected by considering a range of available evidence and data, including social security administrative data, crime statistics, drug use statistics and drug and alcohol treatment information.

The average inflow of new claimants of Newstart Allowance and Youth Allowance (other) was considered in the first instance. In order for the drug testing to be random, sites needed to have sufficient new claimant inflow to enable 5,000 new recipients to be tested across the three trial sites, while ensuring that not all new job seekers would be selected for testing.

Other factors considered included:

- the Australian Criminal Intelligence Commission's National Wastewater Drug Monitoring Program Report 2017
- the Australian Institute of Health and Welfare's 2013 National Drug Strategy Household Survey
- state/territory government crime statistics in relation to drug use and possession
- state/territory hospitalisation data
- administrative data from the Department of Human Services (Services Australia) on job seekers with identified drug dependency issues
- the location of drug and alcohol treatment services.

The evidence and data was considered holistically during site selection rather than hierarchically.

How subjecting a person to income management for two or more years, or reducing the payments of persons who fail to undertake treatment activities, will be likely to be effective in removing a person's barriers to employment and ensuring they get the necessary support to address any drug dependency issues

The trial is not about penalising job seekers who are drug dependent. Rather, job seekers who are likely to have more serious drug dependency issues, as evidenced by more than one positive drug test result, will be supported to seek treatment for their dependency through a medical assessment and referral to appropriate treatment options.

Job seekers who test positive to a first test will be placed on income management for a 24 month period. The use of income management is intended to help job seekers identified through the trial to manage their drug use by restricting the amount of their income support payment that is available to them as cash. Income management helps people to budget their social security payments and helps make sure they are getting the basic essentials of life, such as food and housing. Improved control of their finances helps people to stabilise their lives so they can better care for themselves and their children. It can also support job seekers to become work ready and to seek or take up work.

Once on income management, the job seeker will have access to a range of support services. These services include the income management phone line and the ability to check their income management and BasicsCard balance using a range of channels including online, phone or in person. Financial support services and referrals are also available.

Job seekers who test positive to a second test and are considered likely to have more serious ongoing drug dependency issues will be referred for medical assessment and supported by a local case manager to access treatment and rehabilitation services.

The Government considers that these are appropriate means to encourage job seekers to get the support they need to address drug dependency issues. The trial will be comprehensively evaluated to determine whether this kind of intervention is an effective means of achieving this result.

What safeguards are in place to ensure a person is able to meet their basic needs if their payments are suspended for failure to comply with their employment pathway plan

If a job seeker does not participate in the treatment activity included in their Job Plan, they may face temporary payment suspension or penalty under the Targeted Compliance Framework (TCF). However, job seekers will not face compliance action if they have a reasonable excuse. From 1 July 2018, job seekers are no longer able to repeatedly use drug or alcohol dependency as a reasonable excuse for failing to meet their mutual obligation requirements if they refuse to participate in available or appropriate treatment.

To better identify job seekers who are having difficulty meeting their mutual obligation requirements, including treatment, employment service providers will assess a job seeker's capability and requirements after their third demerit under the TCF, and Services Australia will do so after their fifth demerit. At either point, if a job seeker is found to be unable to meet the terms of their Job Plan because of an underlying issue (for example homelessness or mental health issues), their requirements will be adjusted appropriately.

This will help to make sure that any capability issues or vulnerabilities that a job seeker may have are identified and taken into account before they face temporary payment suspension.

Whether there is a process to remove income quarantining where it is not necessary or appropriate to an individual's circumstances (but where it doesn't reach the threshold of posing a 'serious risk' to a person's mental, physical or emotional wellbeing)

Job seekers who test positive to a first drug test will be placed on income management for a 24 month period. The use of income management is intended to help job seekers identified through the trial as using illicit drugs to manage their drug use by restricting the amount of their income support payment available as cash. Income management is an established method of welfare quarantining applied to help vulnerable job seekers and is currently operating in a number of locations across Australia.

The trial includes safeguards to ensure vulnerable individuals are not adversely affected by having their payment income managed. A person may be taken off income management if it is assessed that being on income management may seriously risk the person's mental, physical or emotional wellbeing. Where required, this assessment would be undertaken by a Services Australia social worker based on all the facts, which may include documentary evidence provided by suitably qualified professionals.

Whether independent merits review of the contractor's decision to issue a notice referring a person to income management will be available, and whether there will be an independent process to review the accuracy of any drug test results

It is intended that job seekers undergoing a drug test will be screened by the drug testing provider to identify any legal medications they are taking which may cause a positive test result. If a job seeker provides evidence that they are taking legal medications, such as a valid prescription, the drug testing provider will take this into account and will record a negative test result, subject to no other illicit drugs being identified in the drug test.

The drug testing will be conducted under applicable Australian drug testing standards. It is intended that the sample taken by the drug testing provider will be split into two samples. This is a common practice with other forms of testing used in Australia. Job seekers who dispute an initial positive test result will be able to request a re-test, using the second sample.

If the re-test is again positive, the job seeker will have to repay the cost of the re-test and will remain on income management. This is designed to discourage job seekers from requesting frivolous re-testing where they know they have used an illicit drug. If a job seeker requests a re-test and the result is negative, they will not have to pay the cost of the re-test.

In addition, job seekers will have access to existing review and appeal processes, if they disagree with a decision Services Australia has made as a result of a positive drug test. For example, if Services Australia makes a decision to place a job seeker on income management following a positive drug test result, the job seeker may request an administrative review under Social Security law. Under these processes, job seekers can request a review of any administrative decision by an Authorised Review Officer (ARO) and if they disagree with the result of the ARO review, they may appeal to the Administrative Appeals Tribunal for independent merits review of the decision.

The drug testing provider may also withdraw or revoke a referral to income management. 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 if the job seeker provided evidence of legal medications which could have caused the result, the referral may be withdrawn. However, it should be noted that the purpose of income management being applied if a person tests positive to a drug test is to limit their access to cash to purchase illicit substances.

Whether other, less restrictive, methods have first been trialled to improve a job seeker's capacity to find employment or participate in education or training and receive treatment

The 2017-18 Budget included a suite of measures designed to prevent income support payments from being used to fund drug and alcohol addictions and to assist people to overcome drug dependency issues that prevent them from finding work.

From 1 July 2018, job seekers have no longer been able to be exempt from mutual obligation requirements solely due to drug or alcohol dependency. Instead, they are actively supported through their employment services provider to undertake tailored activities as part of their Job Plan, which may include drug or alcohol treatment.

Also from 1 July 2018, job seekers have no longer been able to repeatedly use drug or alcohol dependency as a reasonable excuse for failing to meet their mutual obligation requirements, unless they agree to seek treatment.

These measures were complemented by another change made on 1 January 2018, allowing job seekers in all jobactive streams to undertake drug or alcohol treatment as an approved activity in their Job Plan to meet their Annual Activity Requirement. Previously, this was only available to Stream C job seekers. This change recognises that undertaking recovery or rehabilitation programs for drug dependency is a necessary step to reduce barriers to employment and towards finding work.

THE HON JOSH FRYDENBERG MP
TREASURER
DEPUTY LEADER OF THE LIBERAL PARTY

Ref: MS19-003120

Senator Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Senator Henderson,

I am writing to in response to a letter from the Parliamentary Joint Committee on Human Rights dated 6 December 2019, relating to the Treasury Laws Amendment (International Tax Agreements) Bill 2019. In that letter, the Committee requested information regarding:

- what legislative provisions in both Australia and Israel protect the confidentiality of taxpayer information, including what safeguards are in place to protect confidential information from unauthorised disclosure; and
- what processes exist, if any, to inform a taxpayer if there has been an unauthorised disclosure of their information.

Issue 1: Provisions which protect the confidentiality of taxpayer information

Paragraph 2 of Article 26 of the *Israel-Australia Convention* (the Convention) obliges both Australia and Israel to treat any information obtained under Article 26 as being secret in the same manner as information obtained under their respective domestic laws. Paragraph 2 also prohibits the disclosure of such information except where it is to be used for the purposes of assessment, collection, enforcement, prosecution, or determination of appeals in relation to tax. Both Australia and Israel's domestic laws are consistent and support the obligations in paragraph 2 of Article 26.

In the case of Australia, the confidentiality of taxpayer information is protected by Division 355 in Schedule 1 to the *Taxation Administration Act 1953*, which imposes strict obligations on taxation officers and others who acquire protected tax information. The main protection for taxpayer's confidentiality is contained in Subdivision 355-B, which makes it an offence, punishable by imprisonment for up to 2 years, for taxation officers to make a record or disclose tax information that identifies an entity, or is reasonably capable of being used to identify an entity, except in certain specified circumstances. These specified circumstances include disclosure of publically available information and disclosures in the course of performing duties (for example, for the purposes of administering a taxation law, disclosures to a Court or for the purposes of exchanging information under an international agreement).

Subdivision 355-C also makes it an offence, punishable by imprisonment for up to 2 years, for a person who is not a taxation officer to record or disclose taxpayer information, except in specified circumstances. This offence extends the prohibition on disclosure to third-parties who receive protected taxpayer information that was allowed to be disclosed to them.

In the case of Israel, sections 231 to 233 of the Income Tax Ordinance 5721-1961 requires officials, taxpayers and third parties to keep as a 'secret matter and as a personal confidence' any information concerning another person that has been obtained for tax purposes. A person who breaches this confidentiality requirement is liable to six months imprisonment or to a fine of ILS12,900 (approximately AU$5,400). Consistent with Australia's approach to taxpayer information, information obtained for tax purposes in Israel can also be used for specified purposes (these include disclosures in tax related court proceedings and for statistical purposes).

While this approach is consistent with Israel's obligations under the Convention, section 196 of the Income Tax Ordinance 5721-1961 also provides that information received from other jurisdictions under an agreement providing for relief from double taxation (such as the Convention) is to be treated in line with the agreement. This ensures that in the event of any inconsistency between Israel's domestic laws and its international obligations under the Convention, the provisions of the Convention protecting the confidentiality of taxpayer's information will prevail.

Issue 2: Procedures for taxpayers to be informed of an unauthorised disclosure

In the case of Australia, Part IIIC of the *Privacy Act 1988* contains requirements to contact impacted individuals where it has reasonable grounds to believe there has been an 'eligible data breach'. This occurs where personal information that an entity holds is subject to unauthorised access or disclosure and is likely to result in serious harm to any of the individuals to whom the information relates. The *Privacy Act 1988* also enables individuals to make complaints about the handling of their information, including tax information, by specified Australian government agencies and private sector organisations.

I am not aware of any provisions of Israel's domestic law requiring a taxpayer to be informed if there has been an unauthorised disclosure of their information. However, Israel requires taxation officers to notify taxpayers within 14 days of a request for their information to be shared under an international agreement, unless the requesting jurisdiction specifically requests that the taxpayer not be notified. This means that taxpayers will generally be aware of any disclosures of their information that Israel makes in accordance with Article 26 of the Convention.

I trust this information will be of assistance to the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG MP

18/12 /2019