Ministerial Responses — Report 1 of 2021[1]

1 This can be cited as: Parliamentary Joint Committee on Human Rights, Responses from legislation proponents, *Report 1 of 2021*; [2021] AUPJCHR 16.

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

MC20-038871

Senator Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
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Dear ~~Chair~~ Sarah

Thank you for your email of 10 December 2020 regarding the consideration by the Parliamentary Joint Committee on Human Rights (the Committee) of the Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020.

The Committee has requested further information to inform its consideration of the proposed measures and their compatibility with Australia's human rights obligations. The enclosed documents respond to the Committee's request.

I thank the Committee for its consideration of the regulations and trust the additional information enclosed will assist the Committee.

Yours sincerely

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

Encl. Response to Report 15 of 20 of the Parliamentary Joint Committee on Human Rights concerning the *Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020.*

Response to the Parliamentary Committee on Human Rights – Report 15 of 2020
Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020

(a) The objective sought to be achieved by increasing the application fee for migration matters in the Federal Circuit Court, and how this seeks to address a pressing or substantial need

The increased application fee for migration matters will raise $36.4 million over the forward estimates to offset costs associated with increasing judicial and registrar resourcing for the Federal Circuit Court of Australia, in its general federal law and family law jurisdictions.

This additional resourcing will support the Federal Circuit Court in managing the growing pressure of migration cases on the Court and assist with the timely resolution of both migraton and family law matters. This additional resourcing will provide the Federal Circuit Court with:

- three additional general federal law judges, accompanied by two additional registrars, and other support staff, to support the migration workload of the court,
- one additional family law judge, accompanied by five additional registrars, and other support staff, to support the family law workload of the court, and
- increased base funding to support the court's current and ongoing operations.

The number of migration matters filed in the Federal Circuit Court has grown from 3,544 in 2014-15 to 6,555 in 2019-20. While the Federal Circuit Court continues to increase the number of migration matters that it finalises each year, it has been unable to finalise as many matters as there are filings. The Federal Circuit Court noted, in its 2019-20 annual report, that the level of migration applications filed was a particular challenge for the court. The annual report went on to note that the court considers the provision of judicial resources to be essential to the timely resolution of the migration caseload, as well as noting that migration work presents added demands on the court and its administration, such as for interpreters, that do not arise in other areas of the court's jurisdiction.

The additional resourcing provided as part of this measure is estimated to allow the Federal Circuit Court to finalise approximately 1,000 additional migration matters each year.

The increase to the Federal Circuit Court migration fee will bring the Federal Circuit Court fee into line with the Federal Circuit Court's placement in Australia's court hierarchy. Currently, the Federal Circuit Court fee for migration litigant is 2.5 times lower than the fee for migration applicants to the Administrative Appeals Tribunal ($1,826). The Federal Circuit Court fee set by the regulation will adjust this fee so that it is appropriately set at the midpoint between the Administrative Appeals Tribunal and the Federal Court.

It is notable that of the 25,809 migration lodgements in the Migration and Refugee Division of the Administrative Appeals Tribunal in 2018-19, there were only 930 applications for a fee reduction, and of which, 490 fee reductions were granted. Of the migration matters that proceeded from the Administrative Appeals Tribunal to the Federal Circuit Court in 2018-19, 17 per cent of matters finalised were dismissed for non-appearance. It is also the case that around 84 per cent of bridging visa holders in Australia have work rights.

Moreover, the Productivity Commission's 2014 Access to Justice Arrangements report recommended increased cost recovery in civil courts (recommendation 16.2). The Commission noted that court fees generally bear little relationship to the resources used by the courts in settling disputes and that court fees are relatively low.

It is also useful to note the benefits that will be realised for family law matters from the increased resourcing to the Federal Circuit Court. The additional judge and five additional judicial registrars will help those using the family law courts to resolve their matters faster following a separation.

The Federal Circuit Court, in its 2019-20 annual report, noted that one of its priorities was allowing registrars in the Federal Circuit Court to provide greater support to judges by assisting with case management work and free up judicial time so that judges can focus on determining the most complex matters and hearing trials. The additional five judicial registrars provided by this measure will further increase the amount of judicial time that can be freed up, and assist the court to build on recent initiatives that have relied on registrar involvement.

As you know, the Federal Circuit Court hears the vast majority of family law matters – around 87 per cent of all final order applications in 2019-20 – and resolved almost 17,000 final orders last financial year. This additional support will assist the Federal Circuit Court to resolve more matters each year to the benefit of separating families and their children.

It is important to recognise that the Government has put in place measures to ensure that this change will not prevent access to justice for migration litigants. The current full fee exemption will apply to applicants who would otherwise be in financial hardship, and this will also be accompanied by the creation of a new reduced fee, set at half the full fee. The creation of a half fee reduced rate is consistent with the half fee reduction already in place for the Administrative Appeals Tribunal. Introducing a proposed partial exemption, which will enable eligible migration litigants to pay a reduced fee set at $1,665 in the Federal Circuit Court, and retaining the current full fee exemption provisions, ensures the Court has the discretion to reduce or waive the fee requirement if appropriate in individual cases.

(b) What would be regarded as 'financial hardship' in the context of an application for (i) a 50 per cent reduction in the application fee, and (ii) waiver of the full application fee

Registrars or Authorised Officers (trained Court staff who have been authorised) determine an application for financial hardship. They have regard to the liquid assets and income of a party, as well as any other relevant factors including financial dependents.

There are general waivers and discretionary hardship fee reductions/exemptions. General waivers apply throughout the jurisdictions of the Court, including in migration matters.

Applicants are entitled to a complete waiver of the filing fees if they hold a Centrelink Health Care Card, are receiving Legal Aid, are in detention or a correctional facility or are minors. This general waiver is not discretionary.

(c) What guidance, if any, is or would the Registrar or authorised court officer be provided with in determining whether payment of a full (or partial) migration matter application fee would cause an applicant financial hardship?

A hardship waiver or reduction is discretionary and the decision to approve one is made by a Registrar or Authorised Officer. In addition to general training, internal guidelines will assist with guidance on these matters. Those internal guidelines are based on the guidelines used in the Family Court of Australia and Federal Circuit Court’s family law jurisdiction.

The existing guidelines focus on liquid assets and income tests, rather than capital assets. If the applicant does not meet any or all parts of the test, the applicant may still qualify for a reduction or exemption if the Applicant can show there are circumstances which would cause them to face hardship if they were required to pay the full fee. Registrars and Authorised Officers will consider not only the internal guidelines, but also factors unique to migration applicants such as the types of visa an applicant holds and what, if any, work rights they might have.

(d) What other safeguards, if any, would operate to assist in the proportionality of this measure?

The availability of fee exemptions, both full and partial, are a longstanding and important feature of Australia's court and tribunal system to ensure access to justice. However, for completeness, as well as these features, it is worth noting that the Administrative Appeals Tribunal has jurisdiction under regulation 2.21 of the Federal Court and Federal Circuit Regulation 2012 to hear reviews of decisions which are made in respect to fee reductions or exemptions.

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-002720

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 26 November 2020 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) regarding the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 (the Bill).

In the Committee's *Human Rights Report: report 14 of 2020* (Report), the Committee sought my advice on number of issues, including:

- the nature and scope of personal information that is authorised to be disclosed with a foreign government and whether there are any specific safeguards in place;
- the necessity of the new directions power and what safeguards, if any, are in place; and
- whether any of the civil penalties would be considered criminal for the purposes of international human rights law.

My response is set out in Annexure 1 to this letter.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

22 / 12 /2020

Annexure 1

In paragraph 1.13 of the Report, the Committee requested the Treasurer's advice as follows:

> In order to assess the compatibility of this measure with human rights, further information is required as to:
>
> (a) what is the nature and scope of personal information that is authorised to be disclosed to a foreign government or entity;
>
> (b) whether the proposed limitation on the right to privacy is only as extensive as is strictly necessary, noting that the purpose for which protected information can be disclosed to a foreign government or entity is very broad;
>
> (c) what are the consequences, if any, of a foreign government failing to use protected information in accordance with an agreement, particularly where an individual's right to privacy is not protected;
>
> (d) how the specific safeguards in the Australian Privacy Principles and the *Privacy Act 1988* operate with respect to this measure;
>
> (e) why there is no requirement in the bill requiring that the agreement with the foreign government or entity must seek to include privacy protections around the handling of personal information, and protection of personal information from unauthorised disclosure;
>
> (f) what is the level of risk that the disclosure of protected information relating to national security could result in: the investigation and conviction of a person for an offence to which the death penalty applies in a foreign country; and/or a person being exposed to torture or cruel, inhuman or degrading treatment or punishment in a foreign country; and
>
> (g) what, if any, safeguards are in place to ensure that information is not shared with a foreign government or entity in circumstances that could expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment, including:
>
> > (i) the approval process for authorising disclosure; and
> >
> > (ii) whether there will be a requirement to decline to disclose information where there is a risk that it may expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment.

Protected information is defined in subsection 120(1) of the *Foreign Acquisitions and Takeovers Act 1975* (FATA) to mean information obtained under and in accordance with the FATA (with certain exceptions). Protected information obtained under the FATA is used by the Treasurer to make decisions on whether certain foreign acquisitions or mergers are contrary to the national interest. Protected information can include personal information as defined under the *Privacy Act 1988*. Personal information may include a person's name, address, email address and phone number.

The amendments provide that protected information under the FATA may be shared with foreign governments in limited circumstances. These circumstances are where national security risks may exist, where it is not contrary to the national interest to do so, and where there is an agreement in place between Australia and the foreign government. The permitted scope of sharing information with foreign governments needs to be sufficiently broad to provide the Treasurer with sufficient flexibility in assessing and addressing national security risks. However, there are protections to put appropriate limits on disclosure.

The exchange of information with foreign governments may be necessary for the Treasurer to obtain a ‘full picture’ of the applicant, as the applicant may be making similar investments in other countries. This would allow the Treasurer to leverage the knowledge and experience of other countries. Being able to draw on the knowledge and experience of other countries would allow the Treasurer to better assess any potential national security risks and make an assessment on cases related to national security. Additionally, sharing may be necessary where a national security risk for another country is identified and that risk poses an indirect national security risk for Australia.

Information would only be used in accordance with the agreement between Australia and the foreign government and that information would not be further disclosed unless in accordance with that agreement. Information cannot be shared unless such an agreement is in place. Australia would need to negotiate individual agreements with foreign governments setting out mutually agreed standards for handling personal and commercial-in-confidence information. These individual agreements would need to provide that the information can only be used for the purpose for which it is shared. The agreement would provide for adequate protections for the use of information and could have mechanisms in place to resolve differences with the foreign government. Proposed paragraph 123B(1)(e) stipulates the sharing of information would not occur unless the foreign government undertakes not to use or further disclose the information in accordance with the agreement or otherwise as required or authorised by law. Additionally, if further constraints or protections are required when the information is shared, proposed subsection 123B(3) allows the Treasurer to impose conditions in relation to the information to be disclosed.

In line with its obligations under the *Privacy Act 1988*, the Government would seek to include privacy related protections in the agreements, as appropriate, to prevent any unnecessary release of information. However, as any information proposed for sharing will relate to national security risks, and therefore possible law enforcement actions, the receiving agencies should be able to receive sufficient information to identify persons or entities of interest for further inquiries. This approach is consistent with exceptions under the *Privacy Act 1988*, which exempts the applications of the Australian Privacy Principles for appropriate action relating to suspected unlawful activity or serious misconduct. It is difficult to predict whether the sharing of protected information may result in persons being at risk of the death penalty, or a person being exposed to torture or cruel, inhuman or degrading treatment or punishment in a foreign country because such risk is highly dependent on the particular circumstances of each case. Such risk can be considered in any decision to share information, where relevant.

In negotiating the relevant agreements, the Government intends to act consistently with the Australian Government’s official policy to oppose the death penalty in all circumstances for all people. Further, negotiators intend to be guided by the Australian Government’s broader approach to seek assurances of protection against exposing a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment in relation to extradition treaties and mutual assistance arrangements, to the extent relevant. For example, an agreement may limit the use of the information for the investigation and enforcement of foreign investment related legislation only, and require that the other country does not impose the death penalty. In such instances, seeking explicit assurances would appear unnecessary.

In negotiating and finalising these agreements, the Government will seek advice from all relevant agencies on appropriate measures and assurances to ensure effective outcomes, whilst ensuring appropriate human rights protections.

The Government has not yet commenced negotiating any international agreements under proposed section 123B. Where the negotiations result in a treaty level agreement, then in accordance with established practice, any agreement proposed to be entered into by the Government will be tabled in Parliament and subject to scrutiny by the Joint Standing Committee on Treaties.

The Joint Standing Committee on Treaties would be able to review the appropriateness of the international agreement and provide adequate oversight and scrutiny on any proposed agreements between Australia and foreign governments

In paragraph 1.29 of the Report, the Committee requested the Treasurer's advice as follows:

> In order to assess the compatibility of this measure with the rights to work, equality and non-discrimination and privacy, further information is required as to:
>
> (a) what is the substantial and pressing concern that the measure seeks to address and how is the measure rationally connected to the objective;
>
> (b) what, if any, safeguards are in place to ensure that the measure does not unlawfully discriminate against persons with protected attributes, particularly national origin;
>
> (c) why is it appropriate that the standard of 'reason to believe' should be required for the Treasurer to make directions, noting the potential interference with human rights by making a direction, and whether 'reason to believe' imports a requirement that the belief must be one that is reasonable;
>
> (d) why the bill does not set out that the Treasurer is required to afford a person an opportunity to make submissions on the matter before the Treasurer makes or varies a direction;
>
> (e) whether consideration has been given to other less rights restrictive ways to achieve the objective; and
>
> (f) whether there is the possibility of oversight and the availability of review of the Treasurer's decision to make a direction.

Treasury's approach to managing compliance has evolved over recent years as the nature and type of acquisitions has changed. It has become increasingly clear that community expectations have risen, and Members of Parliament expect Treasury to be able to assure the Australian community that effective monitoring and compliance arrangements are in place.

The amendments meet these expectations by enhancing and expanding the Treasury's enforcement and compliance toolkit. The Bill brings the compliance and enforcement tools available to Treasury in line with other regulators, including those in the Treasury portfolio.

The Bill introduces new powers to provide the Treasurer with the ability to give directions to investors to prevent or address suspected breaches of conditions or of foreign investment laws, providing the Treasurer the ability to respond to actual or likely non-compliance. This is similar to the Australian Prudential Regulation Authority's power under the *Superannuation Industry (Supervision) Act 1993* to issue a direction to a person who is in control of the RSE licensee to relinquish that control, where APRA has reason to believe that the person has been, or is unlikely to be, able to satisfy one or more of the trustee's obligations, does not have the relevant approvals, or provided false or misleading information.

The Treasurer's directions are designed to provide a quick and efficient response to the conduct of a person and to require the person to promptly remedy a breach of the FATA. The power supports early regulatory intervention in order to protect further or ongoing harm to the national interest.

The measure will ensure that the Treasurer will have sufficient powers to intervene early to ensure compliance with the FATA. Directions given by the Treasurer are aimed at protecting Australia's national interest and preventing or addressing suspected breaches of the law.

The term 'reason to believe' is not intended to create a lower or different bar to the term 'reasonably believes'. It is an appropriate standard to apply here as the directions and interim directions are intended to be flexible and responsive mechanisms to enable prompt regulatory action and remedies, as stated above.

The issue of a directions order by the Treasurer is aimed at correcting or preventing non-compliance. Therefore the provisions do not apply to the general public, but to persons and entities who should be reasonably aware of their obligations under the FATA.

Procedural fairness and the opportunity for a person to engage with the Treasury prior to enforcement action being taken is inherent in the approach taken to administering Australia's foreign investment screening regime. It has been longstanding practice of the Treasury to work with a foreign investor to achieve compliance where non-compliance is identified. Procedural fairness obligations already apply to the Government's ongoing administration of the FATA, and a requirement to meet its procedural fairness obligations being placed on the face of the Bill would create doubt elsewhere in the FATA where procedural fairness obligations already apply. In accordance with existing procedural fairness obligations, Treasury gives persons an opportunity to make submissions on a matter before Treasury provides advice or the Treasurer makes or varies a direction.

Finally, in terms of review, administrative decisions made under the FATA are subject to judicial review under section 39B of the *Judiciary Act 1903*.

In paragraph 1.39 of the Report, Committee requested the Treasurer's advice as follows:

> Further information is required in order to conduct a full assessment of the potential limitation on criminal process rights, in particular:
>
> (a) noting the potential severity of the civil penalties, why any of the civil penalties would not be characterised as criminal for the purposes of international human rights law; and
>
> (b) if such penalties are 'criminal' for the purposes of international human rights law, how are these compatible with criminal process rights under international human rights law

Consideration has been given to the guidance set out in the Parliamentary Joint Committee on Human Rights' *Guidance Note 2: Offence provisions, civil penalties and human rights* and to the Attorney General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

The Guidance Note observes that civil penalty provisions may engage criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), regardless of the distinction between criminal and civil penalties in domestic law. This is because the word 'criminal' has an autonomous meaning in international human rights law. When a provision imposes a civil penalty, an assessment is therefore required as to whether it amounts to a 'criminal' penalty for the purposes of articles 14 and 15 of the ICCPR.

While the civil penalties under the Bill are not classified as criminal under Australian law, consideration is nonetheless given to the nature, purpose and severity of the penalties.

The purpose of the increase to the maximum civil penalty is to act as a sufficient deterrent for misconduct. Treasury considers that the increased penalties do not amount to criminal penalties because the penalties do not apply to the public at large and are limited to persons and entities whose investments are screened under the FATA. These persons and entities should be aware of their obligations under the FATA. For example, a foreign person who has been given a no objection notification under section 74 or 75 or an exemption certificate given under Division 5 of Part 2 must not contravene a condition specified in the notification or in the certificate.

The maximum penalty for contravening a civil penalty provision for an individual is either 5,000 penalty units or 75 per cent of the value to which the alleged contravention relates, determined according to the introduced valuation rules. While this penalty is substantial, it is also comparable to recent penalty increases in the *Australian Securities and Investments Commission Act 2001*. The maximum penalty enables the imposition of an effective and commensurate penalty, noting that certain investments are not screened under the FATA unless the value of the investment exceeds $1.192 billion. The increased penalty reflects the size and nature of the investments being screened under the FATA. The increased penalty also ensures civil penalties for individuals proportionately align with the increase in civil penalties for bodies corporate, and act as a sufficient deterrent for misconduct.

In practice, it is intended that courts would use their discretion to impose an appropriate penalty. The penalties in the Bill are the maximums that a court can impose, taking into account the facts and circumstances of each case.

The method for calculating the applicable civil penalty provides flexibility which ensures that the penalty reflects the seriousness of the contravention and community expectations. It will ensure that incurring a civil penalty is not merely considered a cost of doing business, and that the penalty amount is appropriate to deter and address misconduct.

While the civil penalty amounts are intended to deter misconduct, none of the civil penalty provisions carry a penalty of imprisonment. The civil penalty provisions should not be considered ‘criminal’ for the purpose of human rights law due to their application in ensuring compliance with the FATA. Therefore, the civil penalty provisions do not create criminal offences for the purposes of articles 14 and 15 of the ICCPR.

Furthermore, the increased penalties for civil penalty provisions will apply to offences that are committed after the Bill commences and will apply prospectively, therefore upholding article 15 of the ICCPR.

The Hon Greg Hunt MP
Minister for Health
Minister Assisting the Prime Minister for the Public Service and Cabinet

Ref No: MC20-043858

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

7 DEC 2020

Dear Chair Sarah

I refer to your correspondence of 26 November 2020 concerning additional information about human rights issues in relation to the Health Insurance Legislation Amendment (Bulk-billing Incentive (No.2)) Regulations 2020 [F2020L01203] and the Health Insurance Legislation Amendment (Extended Cessation Date of Temporary COVID-19 Items) Determination 2020 [F2020L01190].

On 11 March 2020, the Prime Minister, the Hon. Scott Morrison MP, announced a comprehensive health package to protect all Australians, including vulnerable groups such as the elderly, those with chronic conditions and Aboriginal and Torres Strait Islander communities, from COVID-19.

An expansion of Medicare Benefits Scheme (MBS) telehealth services during the COVID-19 health emergency was announced on 24 March 2020, which commenced in a staged approach from 30 March 2020. As part of this staged approach, the Australian Government provided extra bulk-billing incentives to support the health professional sector during this period.

Between March and September 2020, the Government required GPs and other medical practitioners to bulk-bill certain patient groups for the telehealth services. The Government also temporarily increased the bulk-billing incentive and established an incentive payment to ensure practices could stay open to provide face-to-face services where they were essential for patients that could not be treated through telehealth.

The fee increases were introduced temporarily and were scheduled to cease on 30 September 2020. The standard schedule fee for these items returned from 1 October 2020 and included the application of the 2020 indexation parameter of 1.5 per cent.

On 1 October 2020, the Government also removed the mandatory requirement to bulk-bill certain telehealth and phone consultation services provided by GPs and other medical practitioners in general practice. This meant that from 1 October 2020, GPs and other medical practitioners returned to normal MBS billing arrangements, including the discretion for them to bulk-bill their services or charge co-payments. This change was considered necessary to support the continued viability of the sector and is consistent with the billing arrangements for the equivalent face-to-face services.

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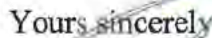
Under the MBS, medical practitioners are free to set their own value on the services they provide. While the Government is responsible for setting the Schedule fee on which Medicare rebates are based, there is nothing to prevent medical practitioners setting fees that exceed those in the Schedule. The Government encourages bulk-billing, but it is at the provider's discretion whether or not to do so.

As part of its health care package to protect all Australians from COVID-19, the Government has been continually consulting with the medical sector. The Australian Medical Association, the Royal Australian College of General Practitioners, the Australian College of Rural and Remote Medicine and the Rural Doctors Association of Australia were consulted on the temporary changes to the bulk-billing incentives.

The return of the scheduled fees for the bulk-billing incentives maintain rights to health and social security by ensuring access to publicly subsidised health services which are clinically effective and cost-effective. The return of the scheduled fees retains the incentives for medical practitioners to provide bulk-billed services to financially disadvantaged patient groups.

Thank you for writing on this matter.

Yours sincerely



Greg Hunt

The Hon Dan Tehan MP

Minister for Education

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Our Ref: MC20-027768

11 DEC 2020

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

Dear ~~Senator~~ Sarah,

Thank you for your letter of 26 November 2020 regarding the Parliamentary Joint Committee on Human Rights Report 14 of 2020, which included consideration of the Higher Education Support Amendment (Freedom of Speech) Bill 2020 (the Bill). I am pleased to provide the following response to matters raised by the Committee.

The Bill amends the *Higher Education Support Act 2003* (HESA), to align its terminology around free intellectual inquiry with the Model Code on freedom of speech and academic freedom in Australian higher education providers recommended by the Hon Robert French AC, in his 2019 Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers. It also introduces a definition of academic freedom as recommended by the review.

The Committee has noted that it considers the proposed amendments will promote the right to freedom of expression and the right to education in Australian higher education providers. I commend the Committee for its recognition of the foundational importance of the right to freedom of expression in relation to the realisation of other human rights, and the importance of academic freedom. The Committee further notes that the promotion of freedom of expression must also be balanced with the realisation of other related human rights, and that the right to freedom of expression may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

The Committee has sought my advice on the following matters:

a) whether these proposed provisions may engage and limit other human rights, including the right to equality and non-discrimination, freedom of religion, privacy and reputation, and the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence
b) how these legislative provisions would operate in relation to existing Commonwealth, state and territory legislative prohibitions against discrimination

c) whether these legislative provisions could restrict higher education providers' ability to take action against academic staff who engage in conduct that has been found to constitute incitement to discrimination.

Response to the Committee's questions

The effect of the Bill will be to require a higher education provider under HESA to have a policy that upholds freedom of speech and academic freedom, instead of the current requirement to have a policy that upholds free intellectual inquiry. In practice, this is not a major change and is intended to align the language of the legislation with that of the Model Code.

The Explanatory Memorandum notes that, 'freedom of speech' does not mean that speech cannot be subject to reasonable limitations. The proposed provisions do not prevent speech being subject to reasonable and proportionate limits. As the Model Code itself, outlines, such limitations may be imposed by:

- law
- the reasonable and proportionate regulation of conduct necessary to the discharge of the university's teaching and research activities
- the right and freedom of others to express themselves and to hear and receive information and opinions
- the reasonable and proportionate regulation of conduct to enable the university to fulfil its duty to foster the wellbeing of students and staff
- the reasonable and proportionate regulation of conduct necessary to enable the university to give effect to its legal duties including its duties to visitors to the university.

While the Bill defines academic freedom for the purposes of HESA, it does not displace the operation of other relevant legislation such as Commonwealth, state or territory anti-discrimination law, or the *Fair Work Act 2009* and any enterprise agreements that operate under it (which may include anti-discrimination provisions).

The policies developed by providers to comply with HESA will also need to comply with other relevant legislated prohibitions against discrimination.

I thank you again for the opportunity to respond to the Committee's concerns.

Yours sincerely

DAN TEHAN

The Hon Alan Tudge MP

Minister for Population, Cities and Urban Infrastructure
Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Ref No: MS20-002989

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
via email human.rights@aph.gov.au

Dear ~~Chair~~ Sarah

Thank you for your letter dated 26 November 2020 requesting a response to the Committee's questions about the *Migration (LIN 20/166: Australian Values Statement for Public Interest Criterion 4019) Instrument 2020.*

I note the Committee has sought further information about this Instrument to enable the Committee's consideration of the compatibility of the proposed measures with Australia's international human rights obligations.

My response for the Committee's consideration is attached.

Yours sincerely

Alan Tudge
4/12/2020

The Hon Alan Tudge MP
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Response to the PJCHR – Australian Values Statement

Signing the Australian Values Statement (AVS) is a requirement for grant of most visas if the person is 18 years and over, or in limited instances, 16 years and over. Only the version of the AVS for permanent visa applicants contains an undertaking about making reasonable efforts to learn English.

As the Parliamentary Joint Committee on Human Rights (PJCHR) has noted, the purpose of including an undertaking about making reasonable efforts to learn the English language for persons seeking permanent residence in Australia is to support prospective migrants to understand the importance of learning English and the benefits this will bring them in their life in Australia. The previous version of the AVS included that applicants understood that the English language, as the national language, is an important unifying element of Australian society.

The AVS seeks to support social cohesion within the Australian community.

According to the Organisation for Economic Co-operation and Development (OECD), the integration of immigrants and their children is vital for social cohesion, inclusive growth and the ability of migrants to become self-reliant, productive citizens. It is also a prerequisite for the host population's acceptance of further immigration.

Conversely, a lack of integration can result in significant economic costs due to lower productivity and growth. It can lead to political costs and instability and have negative effects on social cohesion.[1]

Only 13 per cent of those with no English skills are in work compared to 62 per cent of those who speak English well[2].

Compared to other OECD countries, migrants in Australia achieve success in many areas contributing to integration, particularly given the diversity of our population. Migrants in Australia perform well above the average in terms of indicators like education, health and wellbeing, and job quality.[3]

As the PJCHR has also noted, the Government has recently committed to increase access to publicly-funded English language tuition to assist new migrants.

The Government invests $250 million a year into the Adult Migrant English Program (AMEP), which helps people learn foundational English language and settlement skills to enable them to participate socially and economically in Australian society.

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[1] OECD 'Settling in 2018 – Indicators of Immigrant Integration'. See: https://www.oecd-ilibrary.org/sites/9789264307216-5-en/index.html?itemId=/content/component/9789264307216-5-en - p 15

[2] Australian Bureau of Statistics Census 2016

[3] OECD 'Settling In 2018 – Main Indicators of Immigrant Integration'. See: http://www.oecd.org/els/mig/Main-Indicators-of-Immigrant-Integration.pdf

Major reforms to the AMEP were announced on 28 August 2020, to improve English language acquisition outcomes for migrants and humanitarian entrants in Australia.

Subject to amendment of the *Immigration (Education) Act 1971*, key changes will include:

- uncapping the 510 hour English tuition entitlement, to provide unlimited hours of tuition;
- raising the AMEP eligibility threshold and exit point for the program from functional to vocational English; and
- removing the time limits on enrolling, commencing and completing AMEP tuition (for those already in Australia as at 1 October 2020).

This is the most significant reform to the AMEP in many years and means that more migrants will be able to access free English tuition for longer, and until they reach a higher level of proficiency.

English language proficiency is especially important, not only for communicating and connecting, but also because it improves employment prospects.

When a person undertakes to make reasonable efforts to learn English, they would do so in the context of what is reasonable in their own circumstances. In some cases, this may mean that they try to learn some basics to be able to undertake everyday interactions, such as shopping or talking to their neighbour.

Where an applicant does not sign the AVS, the delegate would seek to explain the AVS to the applicant and request again that they sign it. Where the applicant refuses, the delegate may consider if a waiver is applicable. If no waiver is applicable, the delegate, in consultation with the relevant policy area, would determine whether the application should be refused due to the applicant not satisfying a criteria for the grant of the visa.

1.84 In order to form a concluded view of the human rights implications of this legislative instrument, the committee seeks the minister's advice as to the matters set out at paragraph [1.80].

1.80 As this instrument is exempt from disallowance, no statement of compatibility is required to be included in the explanatory statement. Consequently, there is insufficient information with which to assess the compatibility of the instrument with human rights. Further information is required in order to assess whether the rights to equality and non-discrimination and the rights of persons with disabilities may be engaged and limited, and in particular:

(a) whether a person's compliance with an undertaking to make reasonable efforts to learn English pursuant to this instrument is assessed following their agreement to the statement of values, and, if so, how;

There is no compliance component associated with the AVS after the person has signed it.

The changes to the AVS do not alter English language requirements already in place as criteria for the grant of certain visas, and does not alter the Australian Citizenship Test which is conducted in English.

(b) whether an undertaking to make reasonable efforts to learn English pursuant to this instrument is enforceable and, if so, what type of action could be taken in response to a failure to make such reasonable efforts (for example, whether a person's visa could be cancelled on that basis);

As above, there is no compliance component associated with the AVS after the person has signed it, and hence it is not enforceable.

The changes to the AVS do not alter existing visa cancellation grounds.

(c) whether the requirement that a person undertake to learn English could be severed from the remainder of the Australia values statement; and

Australian values are the 'glue' that holds the nation together. They define and shape our country and culture. Among our values is the importance of a shared language as a unifying element of Australian society, and the requirement in the AVS that a permanent visa applicant undertakes to make reasonable efforts to learn English reflects this.

As compliance with this requirement is not assessed, I consider it unnecessary to sever it from the remainder of the AVS. However, as explained further below, the requirement to sign the statement may be waived.

The requirement to undertake to make reasonable efforts to learn English is only included in the AVS to be signed by permanent visa applicants. This recognises that English language proficiency is a key contributor to successful migrant settlement and integration outcomes.

As outlined above, eligible migrants and humanitarian entrants are able to access free English language tuition through the AMEP.

(d) what kind of circumstances would be captured by the 'compelling circumstances' which may excuse an applicant from the requirement to sign a values statement, and whether this could include flexibility to excuse visa applicants based on their age, disability status, or other personal circumstances.

Where compelling circumstances exist, the Minister or delegate may decide that the applicant is not required to sign the AVS. Examples of compelling circumstances include where an applicant is mentally or physically incapacitated. However, there is no minimum threshold for circumstances to be 'compelling'. It is open to the Minister or delegate to regard other circumstances as 'compelling'.

As noted above, a person undertaking to make reasonable efforts to learn English would be doing so in the context of what is reasonable in their own circumstances, which would include circumstances such as age or disability. However, this will not be assessed by the Department.

Senator the Hon Anne Ruston

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

Ref: MC20-018029

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

Dear ~~Chair~~ Sarah

Thank you for your letter dated 26 November 2020, on behalf of the Parliamentary Joint Committee on Human Rights, concerning the Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020 (the Bill).

The Committee has requested additional information regarding the human rights compatibility of the Bill, which has been provided below.

Evaluation

The Cashless Debit Card (CDC) is a tool operating alongside other reforms and initiatives to address the impacts of alcohol and drug misuse, and problem gambling.

Evaluations show that the CDC is working, with a range of evidence showing the program has had a positive impact for participants and communities.

Consistent findings across CDC evaluations are:

- That alcohol consumption has reduced since the introduction of the CDC.
- Levels of substance abuse appear to have reduced.
- The CDC is helping to reduce gambling, with positive impacts for families and broader social life.
- In relation to financial planning and money management, the CDC is reported to make things better for those who are most vulnerable and who need it most.
- Participants were better able to budget for rent and bills, as well as improvements in their ability to save money.

The purpose of CDC evaluations is to further develop the evidence base, to better understand what works, for whom, and in what context so that continued improvements can be made to the CDC program.

Various reviews of the CDC have been commissioned, including a first impact evaluation, a second impact evaluation and baseline data collections in the Goldfields region and the Bundaberg and Hervey Bay region.

Evaluation and data monitoring activities will strengthen the evidence base and ensure that participants, their families and the wider community continue to receive ongoing support.

CDC as an ongoing program and transition in the Northern Territory and Cape York region

The continuation of the CDC is a direct response to calls from community leaders requesting that the Government deliver certainty to participants, stakeholders and communities by making the trial an ongoing measure. This provides certainty for participants, leaders and stakeholders in CDC communities, and will sustain the positive impacts and effectiveness of the CDC.

The Department of Social Services has continued its regular engagement with community leaders in the CDC existing sites. This includes regional meetings with government, community leaders and service providers to discuss the impact and operations of the cashless debit card and its supporting programs. Feedback from community leaders has included that it would be beneficial if certainty on the future of the CDC was provided as opposed to its current nature as a trial.

The department has also delivered 84 information sessions to over 70 communities, engaged with around 3,500 community members and met with over 120 stakeholders and local organisations in the Northern Territory and Cape York region.

Stakeholders include service providers, community leaders, community reference groups, program participants, support service representatives, advocacy bodies (both Indigenous and non-Indigenous), the general community, government officials, and all levels of government. The department has also consulted with the National Indigenous Australians Agency.

A common theme from these sessions is that participants are pleased with the increased functionality of the card and the flexibility it provides in comparison with the BasicsCard.

The continuation of the CDC program as an ongoing measure in exiting sites and the transition of participants from Income Management to the CDC program in the Northern Territory and Cape York region will advance the protection of human rights by ensuring that welfare payments are spent in the best interests of welfare recipients and their dependents by restricting spending on alcohol, drugs and gambling. Engagement with participants, stakeholders and communities will continue to ensure the objectives of the CDC continue to be delivered. The measures are reasonable, necessary and proportionate to achieving their objectives.

Exits and wellbeing exemptions

The primary purpose of the CDC is to reduce harm at a community level from the use of harmful products such as alcohol, illicit drugs and gambling. The CDC applies to eligible people on working-age welfare payments in current sites, and not according to other factors such as gender or ethnicity. As a result, each exit and wellbeing exemption application is considered on a case-by-case basis to ensure the individual circumstances of each person are taken into account before a decision is made.

If a participant's wellbeing is at risk, the participant may be referred to a Services Australia social worker who undertakes an assessment of the participant's circumstances, considers any supporting information that may be relevant and has a discussion with the participant as required.

Data

As at 6 November 2020, the percentage of CDC participants who identify as an Indigenous Australian is 40 per cent. The percentage of current Income Management participants in the Northern Territory and participants captured under Cape York Income Management who identify as Indigenous Australian is 81 per cent.

I trust this information is of assistance to the Committee.

Yours sincerely

Anne Ruston

16/12/2020