Ministerial responses — *Report 9 of 2021*[1]

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The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MC21-019817

Dr Anne Webster MP
Chair of the Parliamentary Joint Committee on Human Rights
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15 JUL 2021

Dear Chair Anne

I refer to your correspondence of 24 June 2021 concerning the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No.2) Instrument 2021.

Please find below detailed responses to the issues that you have raised.

Governor-General's extension to the human biosecurity emergency period.

The extension of the human biosecurity period is necessary to ensure the Minister for Health can continue to exercise the emergency powers under the *Biosecurity Act 2015* (Act) to determine requirements or give directions necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australia.

The committee has previously noted that if the temporary measures were to be extended multiple times, the cumulative time period in which the measures could be in effect could be significant. The Governor-General agreed to extend the human biosecurity emergency period for a further three months until 17 September 2021, a decision that was informed by specialist medical and epidemiological advice provided by the Australian Health Protection Principal Committee (AHPPC) and the Chief Medical Officer. The AHPPC advised that the international COVID-19 situation continues to pose an unacceptable risk to public health and therefore the extension of the emergency period is an appropriate response to that risk to ensure the protection of the right to life and the right to health.

Determinations made under section 477 of the Act.

In your report you note that it is necessary to periodically assess the necessity and proportionality of each extension of the human biosecurity emergency period and relevant emergency powers. Before determining an emergency requirement, I must be satisfied under section 477(4) of the Act the requirement is likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined, the requirement is appropriate and adapted to achieve the purpose for which it is to be determined, the requirement is no more restrictive or intrusive than is required in the circumstances, the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances and the period during which the requirement is to apply is only as long as is necessary.

These tests set by the legislation intrinsically ensure that each requirement is directed to a health need and is a necessary, appropriate, adapted and proportionate response to that health need. I have reviewed these tests and each of the requirements every time that I have recommend an extension of the emergency period.

Thank you for writing on this matter.

Yours sincerely,

Greg Hunt

THE HON ALEX HAWKE MP
MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Ref No: MS21-001341

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
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by email: human.rights@aph.gov.au

Dear Dr Webster

Thank you for your correspondence of 17 June 2021 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee), regarding the *Migration Amendment (Bridging Visa Conditions) Regulations 2021* [F2021L004444].

These regulations allow the Minister to impose specified visa conditions on certain Bridging visas on a discretionary basis.

My response for the Committee's consideration is attached. I appreciate the extension until 8 July 2021 in which to provide the response.

Yours sincerely

ALEX HAWKE

5 / 7 / 2021

Response to the Parliamentary Joint Committee on Human Rights (PJCHR)
Human rights scrutiny report -Report 7 of 2021
Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444]

1.131 In order to fully assess the compatibility of this measure with human rights, further information is required, in particular:

(a) what standard of proof must be met in order for the minister to be satisfied that a visa condition has been breached;

Section 116 of the *Migration Act 1958* (the Act) requires the Minister to be "satisfied" that the relevant ground for cancellation is established. Accordingly, the Minister has a discretion to cancel a visa pursuant to s 116(1)(b) if the Minister is satisfied that the visa holder has not complied with a condition of the visa. It has been said in the High Court that '(t)he "satisfaction" required to found a valid exercise of the power to cancel a visa conferred by s 116(1)(b) of the Migration Act is a state of mind. It is a state of mind which must be formed reasonably and on a correct understanding of the law': *Wei v Minister for Immigration and Border Protection* [2015] HCA 51 at [33] per Gageler and Keane JJ. It is not appropriate to refer to the 'standard of proof' in this context (see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 136 ALR 481 at 498 – 499). It is accepted, however, that an administrative decision-maker is obliged to make decisions that are based on logically probative material and arrived at in a logical or rational way.

(b) noting that breaching a visa condition does not result in automatic visa cancellation, in what circumstances would the minister elect to exercise their discretion to cancel a visa under sections 116(1)(b) or 133C(3);

A primary consideration is public safety. The exercise of the discretion to cancel would be considered in circumstances where the Minister (or delegate) formed the view that allowing the non-citizen to remain in the community may present an unacceptable risk to public safety. Another primary consideration would be the best interests of any child who would be affected by a decision to cancel the visa.

Under s 116 of the Migration Act, the Minister, or their delegate, would carefully weigh up the available evidence, including any matters that weigh against the cancellation of the visa, including but not limited to the purpose of the Bridging visa, past compliance with visa conditions, degree of hardship to the non-citizen, family members and international obligations.

The Minister may exercise his or her personal power to cancel a visa under s 133C(3) of the Migration Act if they are satisfied that a ground for cancelling the visa under section 116 exists, and it would be in the public interest to cancel the visa.

Section 133C was introduced in 2014 because from time to time there may be a situation that requires visa cancellation action to be taken quickly and decisively, and without notice. It is appropriate that the Minister is able to cancel the visas of high risk individuals, where it is in the public interest to do so, the cancellation decision is time critical, and it is appropriate for the individual to be invited to comment on the decision only after (but not before) the decision. The public interest test is reflective of the threshold at which it is appropriate that a visa cancellation decision may be made without notice. Rare circumstances can and do arise where a non-citizen is of sufficient concern to the Minister that he or she considers the case personally.

Where the Minister is considering exercising his or her power to cancel a visa under s 133C(3), the Department provides the Minister with all relevant details and evidence available to inform his or her consideration.

As soon as practicable after making a decision to cancel a visa under s 133C(3), the Minister must give the person a written notice setting out the original decision and particulars of the relevant information. Relevant information is information (other than non-disclosable information) that the Minister considers:

- would be the reason, or part of the reason, for making the original decision; and

- is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.

The Minister must also invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision. This provides an opportunity for a person whose visa has been cancelled without prior notice to make representations to the Minister about revocation of the original decision. As part of this process, the Minister can only revoke the cancellation if the person satisfies the Minister that the ground for cancelling the visa referred to in s 133C(3) does not exist.

(c) do the additional conditions satisfy the requirements of legal certainty and foreseeability;

It is important to note that the amending regulations do not create any new visa conditions. The amending regulations make a range of existing conditions available to the Minister, on a discretionary basis, to impose on the Subclass 050 and Subclass 070 visas using the Minister's personal intervention powers under s195A of the Migration Act.

The conditions are sufficiently certain and reasonably foreseeable. For example, in relation to the Committee's example at clause 1.116 of the Committee's report, it is sufficiently clear that condition 8303 would not be breached by undertaking peaceful protest activity in Australia. It would be unsustainable to interpret peaceful and lawful protest as an activity that was disruptive to the Australian community or a group within the Australian community. In assessing the acceptability of broadly worded visa conditions, it is also important to bear in mind any available independent merits review by the Administrative Appeals Tribunal for cancellations and judicial review by the courts.

When an individual is granted a Subclass 050 or Subclass 070 visa, it is standard practice for the Department to organise a meeting to provide them with the visa grant notification. The visa grant notification contains the list of visa conditions that have been imposed by the Minister on that particular visa. During this meeting, the Department will advise the individual of which conditions are imposed on their Bridging visa and an interpreter will be provided, as required. The Department will also provide the individual with some common examples of breaches of the visa conditions. This provides the individual with the opportunity to ask questions and seek clarification about the conditions imposed. As all possible breaches cannot be discussed practically, the individual is given the means and knowledge to, at any time, seek more information on the visa conditions.

Visa holders can also access the Department's Visa Entitlement Verification Online system at any time to check which conditions are attached to their current visa and the Department's website also contains information about visa conditions. It is also possible for visa holders or their representatives, such as migration agents, to request further guidance from the Department if necessary. It is not possible for the Department to anticipate, and address in advance, every factual circumstance that may arise.

(d) would condition 8564 (which states that the holder must not engage in criminal conduct) be breached if the holder was arrested or charged, but not yet convicted, of a criminal offence;

The existence of an arrest warrant or charge may be evidence that the non-citizen has engaged in criminal activity while holding a visa and they may possibly pose a risk to the Australian community. Condition 8564 could be breached if the holder was arrested or charged with a criminal offence, as this may indicate non-compliance and that consideration of visa cancellation may be warranted. Imposition of condition 8564 is intended to encourage compliance with reasonable standards of behaviour.

The Government is committed to ensuring that non-citizens given the privilege of living in the Australian community on a Subclass 050 or Subclass 070 visa behave in a manner that is in accordance with Australian laws and which respects Australia's community values and standards of democracy, multiculturalism, respect, inclusion, cohesion, tolerance, and cooperation. All non-citizens in Australia are expected to abide by the law. This is particularly relevant where the Minister has used their personal non-delegable power to grant a non-citizen in immigration detention a visa in the public interest.

The Australian Government has a low tolerance for criminal behaviour by non-citizens who are in the Australian community on a temporary basis, and do not hold a substantive visa. In the case of a non-citizen who, but for the Minister granting them a visa in the public interest, would be subject to mandatory detention, it is a privilege and not a right to be allowed to live in the community while their immigration status is being resolved.

(e) regarding condition 8303 (which states that the holder must not become involved in activities disruptive to the Australian community), what activities would be considered 'disruptive' and would this condition limit a visa holder's right to freedom of assembly (for instance, by preventing the visa holder from engaging in peaceful protest);

As noted in an answer above, the right to peaceful and lawful protest would not be affected by condition 8303. The intention of condition 8303 is twofold. Firstly, it is a messaging tool, explicitly requiring that temporary visa holders' behaviours are consistent with Government and community expectations. Secondly, it empowers the Department to capture adverse behaviour within the community, such as objective evidence of activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community, but which is not necessarily subject to criminal sanctions.

These activities may include public 'hate speech', and online vilification of groups based on gender, sexuality, religion and race. These activities should be considered against the well-established tradition of free expression in Australia. Condition 8303 does not provide a charter for continued stay to persons merely because they hold or express unpopular or offensive opinions. However, where these opinions attract strong expressions of disagreement and condemnation from the Australian community, the current views of the community should be a consideration in terms of assessing the extent to which particular activities or opinions vilify a part of the community. Examples of online 'hate speech' includes the advocacy of extremist views and violence as a legitimate means of political expression, the vilification of a part of the community, encouragement to disregard law and order, or an incitement to violence or to cause harm.

Non-compliance with visa condition 8303 does not require a visa holder to be convicted of a criminal offence. However, a relevant conviction would be strong evidence that a visa holder has not complied with condition 8303. In the absence of a conviction, demonstrating that the visa holder has not complied with condition 8303 would require reliance on reasonable evidence.

Whether or not a conviction recorded against a visa holder would trigger the application of condition 8303 would depend on the nature of the offence or offences involved. Non-compliance with condition 8303 only occurs if the visa holder actually becomes involved in such activities. In order for a conclusion to be drawn that the visa holder has not complied with condition 8303, any offence of which the holder has been convicted would need to be of such a kind as to demonstrate the holder's involvement in such activities or violence.

For example, a breach of parole reporting conditions of itself would not amount to a visa holder becoming involved in activities (or violence) of the kind described in condition 8303.

(f) what is the basis on which the minister has concluded that Subclass 050 and 070 visa holders pose a particular risk to public safety and how is this risk assessed in each instance;

The assessment would be done on a case by case basis. The issue that arises is that some unlawful non-citizens in immigration detention may present a risk to the community because of their background. However, removal of those detainees from Australia may not be feasible for lengthy periods. The availability of the additional bridging visa conditions is intended to provide a basis on which it may be acceptable to release certain detainees who would otherwise be subject to continued detention. The capacity to cancel those bridging visas, if necessary, is an important part of the overall scheme, which is intended to limit the need for immigration detention as far as possible.

Section 195A of the Migration Act provides Portfolio Ministers with the power to grant any subclass of visa to a non-citizen in immigration detention if they consider that it is in the public interest to do so. This power is non-delegable and non-compellable and the grant of a visa by the Minister using these powers is not an

entitlement, as the holder has not met the eligibility criteria for a visa that would otherwise be required by the migration legislation.

There is no suggestion that Subclass 050 and Subclass 070 visa holders as a cohort pose a risk to public safety and it is important to re-iterate to the Committee that it is Government policy that the additional visa conditions will only be imposed on Subclass 050 and Subclass 070 visas granted under s 195A of the Migration Act to unlawful non-citizens in immigration detention who pose a risk to public safety. A high risk individual may be a non-citizen who, due to reasons such as criminal history, behavioural concerns or previous non-compliance, presents a significant risk to themselves, the community or the migration program. This amendment improves options for managing these unlawful non-citizens in the community in a manner that would seek to protect the Australian community while addressing the risks associated with long-term detention. Previously, the release of these non-citizens may not have been considered to be in the public interest due to community protection risks.

Bridging visas are often used to manage non-citizens in the community while they resolve their immigration status. The amending regulations provide additional discretionary conditions for Portfolio Ministers to impose on Subclass 050 and Subclass 070 visas only. The grant of a Subclass 050 visa means the holder is a lawful non-citizen pending their departure from Australia or while they are awaiting the outcome of a visa application or review process. The grant of a Subclass 070 visa means the holder is a lawful non-citizen pending their departure from Australia.

The additional conditions cannot be imposed on Subclass 050 and 070 visa holders in circumstances where the visa was not granted by the Minister under s 195A of the Migration Act. The vast majority of Subclass 050 visas are granted by departmental delegates and these additional conditions are not available in those circumstances.

(g) what factors does the minister consider in determining which conditions to impose on an individual;

It will depend on the circumstances of the case and the criminal or security history and profile of the particular individual.

The visa conditions made available by the amending regulations can only be imposed in limited circumstances. That is, by Ministers, and only if they decide to grant a Subclass 050 or Subclass 070 visa using their Ministerial Intervention powers under s 195A of the Migration Act.

The visa conditions made available by the amending regulations are not mandatory. The discretionary nature of these conditions was intentional and allows the Minister to consider the individual's circumstances when deciding whether to impose one or more of these conditions on a Subclass 050 or Subclass 070 visa. Ultimately, it is the Minister's personal decision and it is open to the Minister to impose any condition available for that subclass of visa. However, it is not envisaged that these additional, discretionary conditions will be imposed on visas where the individual has a history of compliance with Australian laws and where no character concerns have been raised previously.

To support the Ministers' consideration of cases under s 195A of the Migration Act, including which conditions to impose, the Department provides a comprehensive submission to the Minister that includes the detainee's biodata, immigration history, health, identity, character and removal issues. These submissions also set out risks and intervention options. Ministers can request additional information as required in order to make an informed decision about whether to exercise their personal powers. Ministers outline the types of information they require in the *Guidelines on Minister's detention intervention power - section 195A of the Migration Act 1958.*

The Minister's intervention powers are only used to intervene in a relatively small number of cases which present unique and exceptional circumstances, or compelling and compassionate circumstances.

(h) noting the stated intention to impose conditions only on visa holders who pose a real risk to public safety and to apply only the minimum conditions necessary to mitigate that risk, why is this not contained in the legislation;

The framework provided by the Migration Act and Migration Regulations distinguishes between mandatory conditions, which must be imposed on a visa, and discretionary conditions, which the Minister or delegate can choose to impose on a visa. Different discretionary conditions are made available by the Migration Regulations for different cohorts of applicants as defined in the Migration Regulations (i.e. applicants who satisfy particular visa criteria). Apart from that limitation, the discretionary conditions are not subject to any further level of legislative control in relation to when they can be imposed. The Migration Regulations, in their current form, have been in place since 1994 and the policy based approach to the imposition of discretionary visa conditions has been in place for all of that period.

The intention of these amending regulations is to provide Ministers with sufficient flexibility when considering using their personal intervention powers under s 195A of the Migration Act to release non-citizens from immigration detention, specifically non-citizens whose past behaviour indicates they may pose a public safety risk. It is the Minister's personal decision as to whether intervention is in the public interest and whether it is appropriate for these additional conditions to be imposed. The Minister's decision will be based on the individual's circumstances. As previously noted in this response, it is Government policy that these additional discretionary conditions will not be imposed on visas where the individual has a history of compliance with Australian laws and where no character concerns have been raised previously.

(i) how does the measure address a public or social concern that is pressing and substantial enough to warrant limiting rights;

It is relevant to re-iterate the Government's long-standing policy that detention in an immigration detention centre continues to be an option of last resort for managing unlawful non-citizens who cannot be removed and present a risk to the community. Whether the person is placed in an immigration detention facility, or other arrangements are made, including consideration of the grant of a visa (including a Bridging visa), is determined using a risk-based approach. Where appropriate, it is the Government's preference to manage individuals in the community. Having access to these additional discretionary conditions on the Subclass 050 and Subclass 070 visas provides Ministers with greater confidence that there are appropriate community protection safeguards in place for individuals that would normally not be released from immigration detention due to the risk they pose to public order and national security. The availability of these discretionary conditions provides a more robust community based alternative.

The Government is committed to ensuring that non-citizens given the privilege of living in the Australian community on a Subclass 050 or Subclass 070 visa behave in a manner that is in accordance with Australian laws and which respects Australia's community values and standards of democracy, multiculturalism, respect, inclusion, cohesion, tolerance, and cooperation. This expectation is especially heightened when the person has been granted a Subclass 050 or Subclass 070 visa by Ministers using their personal powers, and in such cases, the grant of a Subclass 050 or Subclass 070 visa is a privilege and not an entitlement, as the holder has not met the eligibility criteria for a visa that would otherwise be required by the migration legislation.

As previously noted to this Committee, the amending regulations themselves are designed to be an additional safeguard to complement the recently passed *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* by improving the viability of Bridging visas granted using the Minister's personal intervention powers under s 195A of the Migration Act as an alternative to detention.

It is important for the Committee to note that contrary to observations made at para 1.129 of the Committee's report, a Subclass 070 visa is not only granted to a non-citizen who has been found to engage Australia's international obligations.

(j) what review options are available (including merits and judicial review) to Subclass 050 and 070 visa holders in relation to decisions concerning the imposition of visa conditions and the cancellation of visas; and

The Migration Act provides circumstances in which a migration decision is merits reviewable by the Administrative Appeals Tribunal (AAT). Depending upon the circumstances of a visa cancellation, such as the location of the person cancelled and the cancellation ground used, the decision may give rise to a right to merits review in the Migration and Refugee Division of the AAT, with some other decisions reviewable in the General Division of the AAT.

Generally speaking, persons who have had a visa cancelled due to non-compliance with a visa condition would be able to seek merits review of the cancellation of their visa.

In terms of judicial review, 'migration decisions' are generally reviewable by the Courts under Part 8 of the Migration Act.

Concerning the imposition of visa conditions on any visa, s 41 of the Migration Act enables the Regulations to provide for visas to be subject to specified conditions. Regulation 2.05 of the *Migration Regulations 1994* (the Regulations) provides that Schedule 2 to the Regulations specifies the visa conditions for a subclass of visa including, for s 41(1) of the Migration Act, mandatory visa conditions that must be imposed and, for s 41(3) of the Migration Act, discretionary conditions that may be imposed. In relation to the discretionary imposition of visa conditions for grants under s 195A, there will still be a judicial pathway through the constitutional writs.

(k) what, if any, other safeguards exist to ensure that any limitation on rights is proportionate to the objectives being sought.

As previously noted, it is the Government's preference to manage individuals in the community where appropriate and that detention in an immigration detention centre continues to be an option of last resort for managing unlawful non-citizens who cannot be removed and present a risk to the community. These amending regulations align with this objective by providing the Minister with a community alternative for those individuals that may pose a heightened risk to the Australian community, with greater safeguards than currently available, and who would otherwise remain in immigration detention until the legitimate purpose of their detention no longer exists.

In addition to the review rights set out in the answer to paragraph 1.131(j) and the ability for individuals to seek revocation of decisions under s 133C(3) as set out in the answer to paragraph 1.131(b) above, in the rare circumstance that non-compliance with a visa condition does result in visa cancellation and the individual is returned to immigration detention, the Department has an internal assurance framework in place, and external oversight is required under the Migration Act to help care for and protect people in immigration detention, and maintain the health, safety and wellbeing of all detainees. This includes regular oversight by the Commonwealth Ombudsman and the Australian Human Rights Commission.

Code of Behaviour

1.147 In order to fully assess the compatibility of this measure with human rights, further information is required, in particular:

(a) what is the pressing or substantial concern that the measure seeks to address;

The availability of condition 8566, like the other conditions associated with this amendment, improves Ministerial Intervention options for managing unlawful non-citizens in the community in a manner that would seek to protect the Australian community while addressing the risks associated with long-term detention. Previously, the release of these non-citizens may not have been considered to be in the public interest due to community protection risks.

The Committee may wish to note that the Code of Behaviour has not been altered by these amending regulations and remains unchanged.

(b) what particular public safety risk do Subclass 070 visa holders pose and what level of public safety risk must exist to justify imposing the code of behaviour on visa holders;

The amending regulations allow the Minister to grant a Subclass 070 visa and impose condition 8566 if the Minister thinks it is in the public interest to do so. Condition 8566 complements the other conditions made available to the Minister by this amendment. This amendment also brings the Subclass 070 visa into closer alignment with the Subclass 050 visa, which already has condition 8566 as a mandatory condition for individuals who have signed a Code of Behaviour.

It is Government policy that the additional visa conditions, including condition 8566, will only be imposed on Subclass 070 visas granted under s 195A to unlawful non-citizens in immigration detention who pose a risk to public safety. A high risk individual may be a non-citizen who, due to reasons such as criminal history, behavioural concerns or previous non-compliance, presents a significant risk to themselves, the community or the migration program. This amendment improves options for managing unlawful non-citizens in the community in a manner that would seek to protect the Australian community while addressing the risks associated with long-term detention. Previously, the release of these non-citizens may not have been considered to be in the public interest due to community protection risks. It is not Government policy to impose condition 8566 on a Subclass 070 visa where the individual has a history of compliance with Australian laws and where no character concerns have been raised previously.

(c) why are the additional discretionary conditions that can attach to Subclass 070 visas and the expansive cancellation powers under the Migration Act insufficient to manage any public safety risk posed by visa holders;

The existing discretionary conditions and cancellation powers are ordinarily sufficient to manage public safety risks of most visa holders. However, the result of the exercise of those powers is that non-citizens may then be placed in immigration detention for a breach of the conditions or a visa cancellation.

The purpose of the additional conditions is to enable the Minister to consider community alternatives to immigration detention for those individuals that may pose a heightened risk to the Australian community, with greater safeguards than currently available, and who would otherwise remain in immigration detention until the legitimate purpose of their detention no longer exists.

Visa conditions, including condition 8566, provide a strong and clear message to visa holders from the very outset about the behaviours that are expected while they live in the Australian community on a particular visa. They are intended to promote understanding and compliance with these expectations and provide a level of assurance to the Minister, the Government and the broader community that individuals are aware of these expectations, including abiding by Australian laws and assisting the Department resolve their immigration status.

The benefit of condition 8566 is that it requires the Subclass 070 visa holder to acknowledge and agree to a list of expectations relating to the visa holder's behaviour while living in the Australian community. By signing and agreeing to abide by the Code of Behaviour the Subclass 070 visa holder is actively acknowledging from the outset their agreement to abide by this list of community expectations. This condition complements the other additional discretionary visa conditions made available to the Minister by these amending regulations and may help increase a Minister's comfort level when considering whether to grant a Subclass 070 visa and release an individual from immigration detention.

(d) how is the measure, including each expectation contained in the code, rationally connected to the stated objective;

As previously noted, it is the Government's preference to manage individuals in the community where appropriate and that detention in an immigration detention centre continues to be an option of last resort for managing unlawful non-citizens who cannot be removed and present a risk to the community. These amending regulations, including the availability for condition 8566 to be imposed on a Subclass 070 visa, aligns with this objective by providing the Minister with a community alternative for those individuals that may pose a heightened risk to the Australian community, with greater safeguards than currently available,

and who would otherwise remain in immigration detention until the legitimate purpose of their detention no longer exists.

The introduction of the Code of Behaviour in 2013 was intended to ensure individuals whose Subclass 050 visas were granted through the personal intervention of the Minister under s 195A of the Migration Act be held to a suitable standard of behaviour. Each expectation listed in the Code reflects the Australian Government's commitment to protecting the community from non-citizens who pose a risk to our safety. It supports the objective of these changes by providing Portfolio Ministers, the Government and the wider community with confidence that there are appropriate community protection safeguards in place for individuals that have been released from immigration detention through the Minister's personal intervention power.

Adding condition 8566 to the list of conditions available for the Minister to impose on a Subclass 070 visa provides the Minister with confidence that the Subclass 070 visa holder is fully aware of and agrees to adhere to the standards of behaviour expected by the Australian community. It sends a strong message to the Subclass 070 visa holder, just as it does for Subclass 050 visa holders already subject to this condition, about these expectations and improves options for managing unlawful non-citizens in the community in a manner that would seek to protect the Australian community while addressing the risks associated with long-term detention. Requiring visa holders to sign the Code of Behaviour and acknowledge the conditions that are being imposed, means visa holders are agreeing to abide by the terms of their visa, with the understanding that non-compliance may result in the visa being cancelled. This improves the level satisfaction that the Minister has that the visa holder can be safely managed in the community, as an alternative to immigration detention.

The Committee may wish to note that the content of the Code of Behaviour is not altered by these amending regulations.

(e) what type of breach must occur for the minister to exercise their discretion to: reduce an individual's social security or cancel an individual's visa and re-detain them;

A reduction of income support by a Portfolio Minister would not be a potential consequence if a Subclass 070 visa holder breached the Code of Behaviour. This is because Subclass 070 visa holders, unlike some Subclass 050 visa holders, are not eligible to receive financial assistance under the Status Resolution Support Services (SRSS) Program administered by the Department. Subclass 070 visa holders may instead be eligible for Special Benefit payments administered by Services Australia. However, social security or income support payments administered by other Federal Government Agencies or Departments are not within the scope of the sanctions provided for by the Code of Behaviour for Subclass 070 visa holders subject to condition 8566.

Where an individual engages in behaviour contrary to the expectations articulated in the Code of Behaviour, the Minister, or their delegate, may elect to exercise discretion to cancel the Subclass 070 visa for non-compliance with condition 8566 after weighing up the available evidence, including any matters that weigh against the cancellation of the visa, including but not limited to the purpose of the visa held, past compliance with visa conditions, degree of hardship to the non-citizen and family members – such as best interests of the child and international *non-refoulement* considerations. The legitimate aim for these amendments is to maintain community safety while non-citizens remain on Subclass 070 visas in the community and the Code is tailored to this objective.

(f) if the minister decides to reduce a visa holder's social security income as a result of breaching the code, is this decision subject to independent review;

As noted at the answer to paragraph 1.147(e), a reduction of income support by a Portfolio Minister would not be a potential consequence if a Subclass 070 visa holder breached the Code of Behaviour.

(g) is the right to social security and associated rights, including the right to an adequate standard of living, considered prior to the minister exercising their discretion to reduce a visa holder's social security income; and

As noted at the answer to paragraph 1.147(e), a reduction of income support by a Portfolio Minister would not be a potential consequence if a Subclass 070 visa holder breached the Code of Behaviour.

(h) what, if any, other safeguards exist to ensure that any limitation on rights is proportionate to the objectives being sought.

Before granting a visa using their personal powers under s 195A of the Migration Act, Ministers must be satisfied that the grant of the visa is in the public interest. For individuals in immigration detention considered high risk, the Minister needs to be satisfied that adequate measures are in place to ensure the safety of the Australian community. A high risk individual may be an unlawful non-citizen who, due to reasons such as criminal history, behavioural concerns or previous non-compliance (amongst other factors) presents a significant risk to themselves, the community or the migration program. It is not intended that these additional, discretionary conditions will be imposed on visas where the individual has a history of compliance with Australian laws and where no character concerns have been raised previously.

As previously noted in this response, the decision to cancel a visa for non-compliance with a visa condition, including for a breach of the Code of Behaviour, is discretionary. The decision to cancel will be based on the individual merits of a client's case, including the severity of the offence or conduct. There may be compelling grounds to not cancel a Subclass 050 or Subclass 070 visa.

Should a Subclass 070 visa holder have their visa cancelled and be re-detained, their detention would be subject to a range of existing internal assurance processes and external oversight by scrutiny bodies. In addition, the Minister has the ability at any time to consider granting the person a visa under their personal powers in s 195A of the Migration Act if they consider it is in the public interest to do so.

SENATOR THE HON LINDA REYNOLDS CSC
MINISTER FOR THE NATIONAL DISABILITY INSURANCE SCHEME
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MB21-000536

Dr Anne Webster MP
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Dear Dr Anne Webster

I refer to your email of 17 June 2021, requesting further information on human rights issues relating to the Parliamentary Joint Committee on Human Rights' consideration of the National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021 (the Bill).

I am pleased to provide the following information in response to the Committee's specific questions.

Compliance notices and the NDIS provider register

(a) The scope of the information about a compliance notice that would be published on the NDIS Provider Register, including whether the information would include the grounds on which a compliance notice was issued and whether that notice was subject to review

The amendment in item 38 of the Bill will address an inconsistency in the *National Disability Insurance Scheme Act 2013* (NDIS Act) between registered and unregistered providers in relation to the scope of information required to be published on the NDIS Provider Register (the Register).

In relation to NDIS providers who are ***not*** a registered NDIS provider, the NDIS Act currently enables the Register to include information about ***any*** compliance notice to which the unregistered NDIS provider is, or was, subject. Please refer to subsection 73ZS(4)(f).

In contrast, for ***registered*** NDIS providers, the NDIS Act currently requires the Register to include information about any compliance notice that is ***in force***. Please refer to paragraph 73ZS(3)(j).

This inconsistency is currently addressed by the NDIS Quality and Safety Commissioner (the Commissioner) exercising a discretion under subsection 73ZS(6), which allows additional information (i.e. additional to that specified at subsection 73ZS(6)) to be included on the Register if the Commissioner is satisfied that the information is relevant to the provision of supports or services to people with disability. The Commissioner currently relies on this discretion to include information pertaining to registered NDIS providers with compliance notices that are no longer in force. The amendment in item 38 of the Bill will address the inconsistency and eliminate the need to use discretion for this purpose.

Under the amended provisions the scope of information that would be published on the Register about compliance notices that were issued to registered NDIS providers but are no longer in force would be consistent with the information that is currently being published on the Register about such compliance notices in relation to NDIS providers who are not registered NDIS providers. The information comprises:

- the date on which the notice was issued;
- the fact that it required the provider to take certain action in order to address non- compliances with specified provisions of the NDIS Act or rules; and
- the fact that notice is no longer in force.

The information does not include personal identifiers or enable identification of any individual. The exception is where the notice was issued to an NDIS provider who is an individual, in which case the person would be identified.

To date, the information on the Register does not identify that decisions made to issue a notice are reviewable decisions (noting that a request for a review of a reviewable decision does not affect the operation of the decision or prevent the taking of action to implement the decision: subsection 100(7) of the NDIS Act). But if the notice had been varied, whether as a result of a review or otherwise, the variation of fact is information included on the Register.

The law allows all information on the Register to be published except for any part that the Commissioner considers would be contrary to the public interest, or to the interests of one or more persons with disability receiving supports or services, to publish. The Commissioner is precluded from publishing any part in those circumstances. Please refer to sections 17 and 18 of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules* 2018. Under the amendments proposed by the Bill, these rules would continue to apply to the publication of information about compliance notices that are no longer in force.

(b) Whether there are other less rights restrictive means to achieve the stated objective (for example allowing the NDIS Provider Register to be accessed on request).

Information that is readily available and easily accessible is a crucial component of supporting NDIS participants to exercise their right to choice and control, allowing them to make informed decisions in respect of the providers from whom they receive supports and services. Transparency and driving better performance is consistent with the expectation of good regulatory practice.

Having the Register available only on request would have a significant and detrimental impact on timely and easy access to information that is directly relevant to choosing providers with full awareness of any past behaviour that may pose a risk to their safety.

Sections 17 and 18 of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules* 2018 constitute a strong safeguard against inappropriate publication of information on the Register (see (a) above). Importantly, as Category D Rules, these cannot be amended without consultation with States and Territories, with any amendment subject to a disallowance period before Parliament.

(c) What safeguards, if any, are in place to ensure that an individual's right to privacy are adequately protected, particularly where a compliance notice is issued on a lower evidentiary threshold and/or subject to review?

For compliance action taken against a provider or worker to be listed on the Register the provider will have had to meet the evidentiary threshold necessary for the Commissioner to take regulatory action. All regulatory action taken by the Commissioner is a reviewable decision providing natural justice to providers and workers. The Register is adjusted to reflect any outcomes of a review. These processes take into consideration the privacy of a provider or worker which is balanced against the right of people with disability to be protected from the risk of harm.

Protecting people with disability is paramount and providing transparency around compliance action taken to inform choice and control is critical for a safe NDIS market.

Banning orders

(a) The breadth of conditions that may be imposed on a banning order, and why it is not considered necessary to include legislative guidance as to the kinds of conditions that may be imposed on a banning order.

The purpose of making a banning order is to remove a provider or worker entirely from the NDIS market or to restrict their involvement in that market. The order is made because the continued involvement of that provider or person would pose a risk to NDIS participants which cannot be averted in any other way. Making a banning order is one of the most serious compliance actions the Commission can take in response to conduct by a provider or worker. Banning orders are only contemplated after other possible compliance responses such as education, warning letters or infringement notices are considered but found to be inappropriate in the circumstances.

The current banning order provisions empower the Commissioner to prevent or restrict a provider or person who is or was employed or engaged by a provider (worker) from engaging in specified activities either permanently or for a specified period.

Most banning orders are made for specified periods. They mostly state that a provider or worker is banned from providing or being involved in the provision of disability support services, both directly and indirectly. This is to ensure that banned persons also do not work in a clerical or administrative role with a provider, which does not involve direct support work and contact with participants.

The current provisions are a 'blunt instrument' and do not allow the Commissioner to refine the banning order to address specific concerns in particular cases. The ability to impose conditions allows a more fine-tuned regulatory response to enhance participant safeguarding.

A broad discretion to impose conditions on a banning order enables the Commissioner to be flexible and tailor banning orders to the specific circumstances of each case. The Commissioner would be guided by paragraph 181D(4)(b) of the NDIS Act in deciding what conditions should be imposed. Paragraph 181D(4)(b) provides that the Commissioner must use best endeavours to conduct compliance and enforcement activities in a risk responsive and proportionate manner. In practice this would mean that when determining conditions on a banning order, the Commissioner would consider matters such as the risk to participants, the nature of the conduct which led to banning order being made, previous work, conduct history of the banned person, expressions or actions of remorse/ commitment to rehabilitation/ co-operation of the banned person, support for the banned person from NDIS participants or their families based on past experience of service provision by that person.
In some cases, it would be beneficial if the Commissioner could require the subject of the banning order to undertake action to remedy identified deficits in the way they have provided supports or services to people with a disability. This could be skill development or training in a particular area, such as medication management.

The Commissioner routinely reviews banning orders which are near the end of their term and can decide to extend them for a further period. Where a banning order is for a specified time, the Commissioner can consider the person's compliance with a condition (e.g. if a person was banned until such time that they had successfully completed particular training) in deciding whether to vary the banning order to extend it. Compliance with the condition could demonstrate to the Commissioner that the banning order subject has addressed the concerns which led to the order being made.

The imposition of conditions can also provide greater safeguards where a banning order restricts a person from providing direct disability support services but not from providing indirect disability support services, such as working in an administrative or clerical role which involves no direct contact with people with disability. The condition might be that the worker provides a copy of the banning order with this restriction to each prospective employer. This ensures the employer knows not to employ the person in a direct service role. Without the power to impose this condition on the banned worker, the Commission relies on the honesty of the worker to inform the new employer of the restrictions in the banning order and to comply with it themselves, although the worker screening system provides some protections in this regard.

In this context, it is important to note that the Commissioner's practice is to notify worker screening units of banning orders which may then affect the worker's NDIS worker screening check. Registered providers must only engage or employ workers who have an NDIS clearance in a risk assessed role. However an unregistered provider is not subject to this requirement and may choose to employ workers without an NDIS worker screening check. It may therefore be appropriate in some cases to impose a condition that the banned worker gives a copy of the banning order to any employer who is an NDIS provider to ensure the employer has knowledge of any restriction on their work duties.

Due to the nature of NDIS services there is no finite list of the types of conditions that can be imposed on providers or workers. Any attempt to include legislative guidance around conditions that can be imposed, such as including examples or types of conditions, introduces the risk of limiting the conditions the NDIS Commission can apply to those examples or types listed. This may inadvertently reduce protections to NDIS participants.

In addition, it is also envisaged that the inclusion of conditions like requiring workers to make any new NDIS employer aware of the banning order will promote awareness of the existence of such orders. At present, subsection 73ZN(9) of the NDIS Act makes it a requirement that the Commissioner notify an NDIS provider of a banning order where one is made against one of the provider's workers. If that worker changes employment there is currently no guarantee that the new employer will be made aware of the banning order.

(b) How the conditions would likely operate in practice in relation to a banning order against a person who has ceased to be a member of the key personnel of an NDIS provider. For example, would a former member be required to comply with banning order conditions, such as a requirement to undertake training or provide a copy of the banning order to prospective employers, if they are no longer engaged or involved in the disability service sector?

At present, a banning order can only prohibit or restrict a provider or worker from engaging in specified activities, without providing a clear avenue by which the provider or worker could seek to address the matters of concern that led to the ban. The capacity to make a banning order subject to specified conditions will allow the Commissioner greater flexibility to tailor banning orders to the specific circumstances of each case, increasing protections to NDIS participants.

In practice, where a person is subject to a banning order and is no longer involved in providing services under the NDIS, the banning order will remain in force. If a person wishes to return to the disability sector, they will need to have complied with the conditions in the banning order, such as completed training. Where a person is no longer involved in providing services and is not wishing to return to the disability sector, the Commissioner's remit does not allow further compliance and enforcement action to be taken.

A banning order is the most serious regulatory action that the Commission can apply to a person involved in the delivery of NDIS services. Any condition to notify prospective employers of the existence of the banning order would be limited to employers in the disability services sector, generally NDIS providers.

(c) Whether there are other less rights restrictive means to achieve the stated objective

The Commissioner considers that the NDIS Act does not currently provide another means to achieve the stated objective. The NDIS Act allows the Commissioner to apply a banning order against a provider or worker to restrict or prohibit them from operating under the NDIS. A banning order is proportionate to the severity of the offence.The imposition of conditions provides a clearer way forward for banning order recipients to address the safeguarding issues that underpinned the making of the order and for prospective employers to manage risk.

This amendment provides the necessary means to improve protections for NDIS participants and promotes the rights of persons with disability to be free from exploitation, violence and abuse.

(d) What safeguards, if any, are in place to ensure that an individual's rights to privacy and work are adequately protected?

The imposition of conditions on banning orders would not affect or impact an individual's right to privacy and work, any more than section 73ZN as currently in force might affect those same rights. Specifically in relation to privacy, the imposition of conditions would not materially change what is currently published on the NDIS Provider Register.

Protecting people with disability is paramount and providing transparency around compliance action taken to inform participant choice and provide assurance and control is critical for a safe NDIS market.

I trust this information clarifies the matters raised and assists you with your deliberations.

Yours sincerely

Linda Reynolds

The Hon Stuart Robert MP
Minister for Employment, Workforce, Skills, Small and Family Business

Reference: MC21-004047

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your correspondence of 17 June 2021 regarding the Parliamentary Joint Committee on Human Rights' consideration of the Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021 (the Bill).

The Committee has asked for additional information on a range of issues related to the Bill, and employment services more broadly, which I have enclosed at Attachment A.

I trust this information is of assistance.

Yours sincerely

Stuart Robert

Encl.

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Attachment A

Additional information to support consideration of the Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021

(a) how, and based on what criteria, the Employment Secretary would determine that although a person was meeting their employment pathway plan requirements pursuant to proposed section 40G, they had not satisfied the Secretary as to their genuine willingness to actively seek, accept and undertake paid work in Australia;

The requirement for a person to satisfy the Employment Secretary they are willing to actively seek and to accept and undertake paid work in Australia, except unsuitable paid work, is equivalent to the current and longstanding "activity test" requirement that a person must satisfy the Secretary that they are actively seeking and willing to undertake paid work in Australia except unsuitable work. Usually a person could satisfy the Employment Secretary of this by entering an employment pathway plan and meeting their employment pathway plan requirements or only failing to do so for good reason, or simply making a statement as to their willingness if a delegate asked them, in the absence of any contrary evidence.

In practice, a person would only fail to comply with the requirement in egregious cases where the person actively states that they would be unwilling to accept suitable work if it were offered, or in other rare cases where the person has such a major focus on volunteer work, unprofitable self-employment or some other project that it is incompatible with being willing to actively seek or to accept or undertake paid work.

(b) how, and based on what criteria, a person subject to an exemption could satisfy the Employment Secretary that (but for the exemption) they would otherwise be willing to actively seek and to accept and undertake paid work in Australia;

As with the answer to part (a), provisions ensuring that a person must be willing to look for and accept work replicate elements of the activity test that are still needed, reflecting that a person must be unemployed to qualify for unemployment payments. An exemption does not remove this requirement, although the provisions in Schedule 1 are clear that a person would only be required to be willing to look for and accept work if it were not for the exemption from requirements.

In practice, these provisions would only apply in very egregious cases where a person actively states that they would be unwilling to accept suitable work if it were offered.

(**c) what is the objective behind making engagement in an employment pathway plan a compulsory condition on a person's qualification for a social welfare payment, and whether and how that objective constitutes a legitimate objective for the purposes of international human rights law;**

Currently under social security law, entry into employment pathway plans is compulsory where a person is required by the Secretary or delegate to enter a plan and this would not change following passage of the Bill.

The legitimate objective behind compulsory employment pathway plans is to ensure that those receiving unemployment payments do all that they are able to support themselves through paid work. The employment pathway plan sets out job seekers' mutual obligation

requirements. There is strong evidence that these requirements increase the chances of and speed the rate at which job seekers find work (see answer to part (d) for a summary of this evidence).

Protections within the current employment pathway plan provisions, and those proposed in the Bill, ensure that job seekers' circumstances and capacity to comply with their requirements need to be taken into consideration when a person enters into an employment pathway plan with the Secretary, or if a person seeks review of a plan that they have chosen to enter into.

The Bill makes it very clear that a delegate cannot require a person to comply with an employment pathway plan requirement which is not suitable for them – see proposed subsection 40D(5): "The Employment Secretary must not approve requirements which are not suitable for a person" and that in determining what is suitable the person's circumstances must be considered by the delegate – see proposed subsection 40D(5) and 40F. The Bill also makes clear that plans cannot contain a requirement to seek, accept or undertake unsuitable paid work – see proposed section 40H.

In addition, administrative arrangements under the targeted compliance framework ensure that job seekers will not face a financial penalty for not complying with a term of their employment pathway plan until the appropriateness of their employment pathway plans has been assessed twice – once by their provider (or the Digital Services Contact Centre) and once by Services Australia. In addition, job seekers also will not face financial penalties if they have a reasonable excuse for not meeting a requirement.

The compulsory nature of employment pathway plans therefore promote the right to work, and to the extent that there is any restriction on the right to social security and adequate standard of living, this is minimised, reasonable and proportionate to achieve a legitimate objective.

(d) whether, how, and based on what evidence is making the requirement that a person engage in an employment pathway plan in order to continue to qualify for a social welfare payment rationally connected (that is, effective to achieve) a legitimate objective;

Requiring a person to engage in an employment pathway plan is rationally connected to the legitimate objective of job seekers finding employment and reducing their reliance on income support.

There is a strong evidence base that mutual obligation requirements increase the speed and likelihood of job seekers finding work. For example, the OECD has highlighted the effectiveness of job seeker participation in targeted programs that include job search monitoring and participation in activities that promote motivation and employability[1] (referred to internationally as active labour market programs). One meta-analysis of 207 studies looking at 857 active labour market programs found participation in these programs effective in the short and long term.[2]

[1] OECD (2015). *Employment Outlook 2015 – Activation policies for more inclusive labour markets,* OECD Publishing.
[2] Card, D., Kluve, J.,Weber, A., (2018). What Works? A Meta Analysis of Recent Active Labour Market Program Evaluations. Journal of the European Economic Association, 16(3).

There is also strong evidence that making these requirements compulsory, with consequences applying for not complying with requirements, increases employment[3] and engagement with requirements.[4]

In addition, while mutual obligation requirements have existed for many years, requirements have more recently been introduced for some groups of parents. In 2006 and 2007, activity requirements for parents receiving payment were introduced for those with a youngest child aged 6 or over. Administrative data was analysed for the sub-group of parents with a youngest child aged 6 and 7, as this group was given activity requirements but experienced no change in payment rates or other settings. The analysis shows this led to an increase in the average proportion of parents reporting earnings in the years following the changes compared to previously:

- from 30 per cent to 37 per cent for parents of youngest children aged 6;
- from 32 per cent to 45 per cent for parents of youngest children aged 7.

A 2013 study also found that parent job seekers were more likely to exit income support after the introduction of mutual obligation requirements. Parents of youngest children aged seven were 48 per cent more likely to exit payment in the year after introduction[5].

As mentioned in the answer to part (c), the employment pathway plan is the method of setting out job seekers' mutual obligation requirements.

(e) in relation to the Employment Secretary's discretion to suspend, reduce or cancel a person's welfare payments because of a mutual obligation failure:

(i) on what basis, and in accordance with what guidelines and criteria, is it likely that the Employment Secretary would determine that a person's welfare payments should be suspended, reduced or cancelled;

Current provisions in the *Social Security (Administration) Act 1999* specify that failures to comply with mutual obligation requirements 'must' result in a payment suspension, regardless of whether the person has a good reason for missing their requirement. In practice, this means that in cases where a person has a valid reason for missing a requirement, their payment suspension is ended at the same time it begins – with no practical effect on the payment.

The amendments proposed by the Bill would mean the requirement for this suspension would cease, and instead provide flexibility on whether or not a payment suspension should apply. For example, the amendments more clearly support the current practice of

[3] See for example:

- Arni, P., Lalive, R. and Van Ours, J. (2013) 'How Effective Are Unemployment Benefit Sanctions? Looking Beyond Unemployment Exit', Journal of Applied Econometrics, 28, 1153–1178.
- Abbring, J., Van den Berg, G. and Van Ours, J. (2005) 'The Effect of Unemployment Insurance Sanctions on the Transition Rate from Unemployment to Employment', The Economic Journal, 115, 505, 602–630.
- Van den Berg, G., Van der Klaauw, B. and Van Ours, J. (2004) 'Punitive Sanctions and the Transition Rate from Welfare to Work' Journal of Labor Economics, 22, 1, 211–241.
- Van der Klaauw, B. and Van Ours, J. (2013) 'Carrot and stick: How re-employment bonuses and benefit sanctions affect exit rates from welfare' Journal of Applied Econometrics, 28, 2, 275–296

[4] See for example:

- Wright, A., Dollery, B, Kortt, M., Leu, S., (forthcoming) "The Effect of Varying Sanction Values on Future Compliance with Unemployment Benefit Requirements: An Empirical Analysis Using Australian Administrative Data". Public Administration Quarterly
- Wright, A. and Dollery, B. (2020) 'The impact of sanctions on compliance with unemployment payment requirements: An analysis using 2015/16 Australian national data'. Australian Journal of Labour Economics, 23, 1-20

[5] Fok and McVicar (2013). Did the 2007 welfare reforms for low income parents in Australia increase welfare exits?, IZA Journal of Labor Policy.

appropriate compliance response to failures by recipients of participation payments to meet requirements, by making clear that sanctions need not be imposed where doing so would not further the objectives of the Targeted Compliance Framework.

The purpose of payment suspension is to motivate a person to reconnect with their employment services provider after a mutual obligation failure. However, the Secretary is currently obliged to suspend a person's participation payment even if the person has a reasonable excuse for the mutual obligation failure, and even if the person has already reconnected with their provider by the time the mutual obligation failure comes to the Secretary's attention or before the Secretary has had time to issue a reconnection requirement.

For example, a job seeker might miss an appointment with their provider scheduled for 10am on a day, with or without a reasonable excuse, but of their own volition attend their provider soon after on the same day, before being issued with a reconnection requirement.

In these cases, currently the Secretary suspends the person's participation payment, but the period of suspension immediately ends, with no practical consequence. Suspension therefore serves no material purpose, so it is appropriate to amend the law as is being done by this Schedule.

As explained in the Explanatory Memorandum, the proposed amendments would more clearly support, not alter, existing practice by not requiring a participant's payment to be suspended if the participant has a good reason for missing a requirement or if they have already re-engaged with their provider.

Further detail on the operation of the targeted compliance framework is available at:

- https://guides.dss.gov.au/guide-social-security-law/3/11/13; and
- https://docs.employment.gov.au/system/files/doc/other/targeted_compliance_framework_1.pdf.

The provisions in the Bill will not result in any changes to the processes contained in these documents.

(ii) who will make this decision (noting the Employment Secretary may delegate their powers and functions);

As is currently the case, delegations regarding suspensions will be made to employment services providers and delegations regarding application of penalties will be made to Services Australia. The only changes in delegations will be updated references to powers in social security law as a result of changes in the Bill. No change will be made to the current processes that these delegates are required to follow.

(iii) whether, in exercising their discretion to suspend or not suspend a person's social welfare payments, the Employment Secretary would make enquiries as to how the individual would meet their basic needs if their payment were to be suspended, and whether a person's disclosing their inability to meet their basic needs if their payment were suspended would be a factor influencing the Secretary's decision about whether or not to suspend the payment;

When a person's payment is suspended they must be notified of how to re-engage with their requirements and end their payment suspension (a reconnection requirement). In practice, reconnection requirements are to meet the requirement that was missed, or

supply a valid reason for not being able to. As outlined in the answer to part (c), requirements need to be achievable and take into account job seekers' circumstances and capacity to comply.

In December 2020, the Government introduced "resolution time" which allows job seekers two business days to re-engage with their requirements before their payments are suspended. If job seekers are unable to re-engage with their requirements within two business days, their payment suspension is ended.

These arrangements mean that job seekers' suspensions are within their control and can be ended either through re-engaging with requirements, providing a valid reason for their initial failure to meet their requirement or explaining why they cannot re-engage within two business days.

(f) if a person failed to meet a series of their employment plan requirements, would this trigger an inquiry into that person's welfare, and consideration as to whether their circumstances warrant an exemption from the requirements, and if so how such inquiries would occur;

Current processes and safeguards will remain in place, including two separate and rigorous job seeker capability assessments before a person faces financial penalties for not meeting their requirements.

The first assessment, a Capability Interview, is undertaken by the job seeker's employment services provider (or the Digital Services Contact Centre for those in online employment services) generally following a third failure without a valid reason. At this assessment, the appropriateness of job seekers' requirements is examined, and the assessment is designed to prompt job seekers to disclose any circumstances that may affecting their ability to meet their requirements. This may result in job seekers being referred to further assessment or referred to Services Australia for consideration of whether an exemption from requirements is appropriate.

A second similar assessment is undertaken by Services Australia (generally following a fifth failure without a valid reason).

In addition, following a missed requirement, employment services providers are generally required to try to contact the job seeker.

(g) how the demerit aspect of the Targeted Compliance Framework would operate pursuant to these amendments, and whether a person who had accrued demerits in accordance with the current framework would still be liable to having their payments suspended, reduced or cancelled in the existing manner;

This Bill makes no changes to processes regarding demerits or to the operation of the Targeted Compliance Framework more generally. As explained in the Explanatory Memorandum, the Bill would better support, not alter, existing practice.

(h) in relation to the use of 'technological processes':

(i) what does arranging for the use of 'technological processes' in relation to persons entering or varying employment pathway plans mean in practice (for example, will this require a person to engage with an app, a website, a phoneline, or a combination of these or other processes);

The provisions in the Bill deliberately do not specify the types of technological processes that may be used so as to allow flexibility to develop the best service for job seekers as technology and service offerings develop. Currently, it is envisaged that job seekers will use online processes to enter or vary their employment pathway plans.

(ii) to what extent would the use of a technological process require regular access to a computer or smart phone, and a viable internet and/or mobile telephone signal;

No job seeker will be required to enter an employment pathway plan through technological processes if they do not have access to, or cannot use, or do not wish to use, relevant technology.

Some technological processes would require access to one or more of the above services or devices. For this reason, before a job seeker is offered the opportunity of entering a plan via the new technological processes, they will have their circumstances assessed. Job seekers who are assessed as job-ready and able to use and access digital services will be able to choose to manage their requirements online.

However, human oversight and assistance also remain an integral part of all employment services and will continue to do so. At any time, job seekers will be able to contact a person in the Digital Services Contact Centre who is trained to answer their questions and assist them with any difficulties.

The amendments also require that all job seekers will have the option of entering an employment pathway plan with a human delegate – see proposed subsection 40A(3).

(iii) whether a person's practical capacity to access the devices necessary to use a digital platform regularly is part of the assessment of a person's suitability for the use of technological processes;

Yes, assessment of digital literacy and access is part of the process of determining whether somebody is able to enter into an employment pathway plan through technological processes. Proposed paragraph 40A(3)(b) says that a person may be given the option to enter a plan through technological processes, taking account of their circumstances. Whether or not a person has digital literacy and access is part of their circumstances.

(iv) what information would be given to individuals to ensure they are aware of their ability to select either online servicing or a job services provider in entering into and administering an employment pathway plan, and what safeguards would ensure persons are not disadvantaged by being inappropriately directed to an online servicing mechanism;

Before a job seeker is offered the opportunity to enter into an employment pathway plan using technological processes, they will have their circumstances assessed. Job seekers who are assessed as job-ready and able to use and access Digital Services will be able to choose to manage their requirements online. These job-ready job seekers can also choose to be referred to a provider. Job seekers who are not assessed as job-ready will be referred to a provider to manage their requirements.

Again, the Bill also ensures that a person must be given the option of entering into an employment pathway plan with a human delegate when being given the requirement to enter into an employment pathway plan – see proposed subsection 40A(3).

Safeguards built into the Digital Employment Services Platform will ensure people do not get left behind, including a Digital Services Contact Centre to provide advice and extra support via phone or email. In addition, existing safeguards built into compliance arrangements will ensure that before anybody faces any financial penalty for not meeting their requirements they will have the appropriateness of their requirements for their individual circumstances assessed twice, at a Capability Interview and a Capability Assessment with human delegates. Further, job seekers are able to move to a provider of their choice at any time if they feel the online service is not meeting their needs.

(**v) how the proposed amendments in Schedule 8 relating to the start date of a person's social welfare payment would be exercised in practice, and whether a person who intended to accept their job plan online, but had technical difficulties, and who could have telephoned a support line for assistance but failed to, would be found to have not made efforts to address their technical difficulties;**

Schedule 8 sets out that a job seeker's payment start date will not be delayed when the delay in completing their job plan is for a reason beyond their control. The specific notification processes for the measure are yet to be developed and will be finalised ahead of the 1 July 2022 implementation date.

(i) what safeguards are in place to ensure that people are not required to agree to an employment pathway plan that effectively requires them to apply for work that may be unsuitable (noting, for example that some plans may require a certain number of job applications per month and noting also that job opportunities may be more limited in regional and remote areas of Australia);

There are a range of legislative criteria in the Bill that prevent job seekers being compelled to apply for unsuitable work. An employment pathway cannot contain a requirement to look for, accept, or undertake unsuitable paid work – see proposed section 40H which applies in relation to both traditional plans and plans entered through technological processes. Further, due to proposed subsection 40D(5) and 40F, when a job seeker enters an employment pathway plan with the Employment Secretary (in practice a delegate), the delegate must consider a range of matters in determining requirements, including requirements about the number of job searches. The matters which must be considered include the person's capacity to comply;

- the state of the local labour market;
- the participation and transport options available to the person;
- the length of travel time to comply with those requirements.

These legal protections are supplemented by administrative protections. For example, if a person considers that their requirements are unsuitable, they may contact their provider or the Digital Services Contact Centre in order to reduce their requirements. Further, if for some reason, a person's employment pathway plan does contain requirements above their capacity, two assessments of the appropriateness of their employment pathway plan will be undertaken before they face financial penalties for not meeting those requirements (see answer to part (f)).

(j) why other less rights restrictive alternatives to requiring immediate entry into an employment pathway plan would not be as effective to achieve the same objective;

The measure implemented by schedule 8 of the Bill builds on alternative approaches.

For example, currently job seekers in online employment services may not receive their payment until they sign an employment pathway plan. However, job seekers' payment is back-dated to claim once they sign their employment pathway plan. These arrangements are referred to as 'RapidConnect' and evidence in the Evaluation of jobactive Interim Report shows that these processes speed the time to engagement with employment services.

However, in July 2018 provisions equivalent in effect to those contained in Schedule 8 were introduced for provider-managed job seekers. Introduction of these measures further reduced the time to commencement in employment services by two days on average.

The measure at schedule 8 would address the current inequity whereby the start date for job seekers' income support payments depends on whether they are referred to online employment services or referred to an employment services provider.

Protections will also remain for job seekers who are unable to connect for a reason outside of their control – and the provisions in the Bill explicitly provide that payment will not be delayed in these circumstances. This could occur, for example, when a job seeker experiences illness, an accident, or inability to access IT services.

Some job seekers may also be exempt from the measure, consistent with existing arrangements that apply to provider-managed job seekers. This means they will receive their payment immediately after their claim has been processed. These exemptions cover, for example:

- Job seekers who are transferring from another payment.
- Job seekers who have an exemption from mutual obligations.
- Job seekers who are referred for further assessment at the time they lodge their claim.

Job seekers self-managing using online employment services can also contact the Digital Services Contact Centre if they need assistance or have any questions, for example in relation to agreeing to their Job Plan or meeting their requirements.

(k) in determining the circumstances in which work may be deemed 'unsuitable', what evidence would a potential employee need to adduce if they believed the workplace may be unsafe because of conduct relating to sexism, racism, homophobia or other bullying or harassment;

There are no specified evidence requirements needed to satisfy providers or delegates in Services Australia that work was unsuitable. However, it would also be open to a delegate to accept evidence from a jobseeker, if it were available, and to conclude on that basis that particular work is unsuitable for the jobseeker.

(l) whether an individual could seek an exemption from their employment pathway plan requirements on the basis that they are residing in a rural area and are unable to secure employment because of a depressed local labour market, or whether such a person would be required to apply for jobs further from their home;

Job seekers requirements are adjusted to ensure their requirements are appropriate and achievable – including if they live in a rural area or live in a depressed labour market. However, job seekers are not usually completely exempted from requirements merely due to living in a rural area. The Bill will not change this situation.

There are existing safeguards relating to the extent to which a person can be expected to seek, accept or undertake jobs some distance from their home. The Bill will not change this

– see for example proposed paragraphs 40X(1)(f) and (h) regarding unreasonably difficult commutes and work which requires a person to move from home.

Recognising the unique social and labour market conditions in remote Australia, a different employment service exists in remote Australia. The Community Development Program (CDP) is the Government's remote employment and community development service. CDP supports job seekers in remote Australia to build skills, address barriers to employment and contribute to their communities through a range of flexible activities.

(m) whether and how the differential treatment in proposed subsection 40L(4) (relating to misuse of drugs and alcohol) is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that objective and is a proportionate means of achieving it; and

The provisions in subsection 40L(4) replicate existing provisions in social security law, and arrangements would not alter following passage of the Bill.

A fundamental principle of mutual obligation requirements is that job seekers must do all that they are able to in order to support themselves through paid work – including addressing drug or alcohol misuse. Participation in drug and alcohol treatment may count towards other mutual obligation requirements, and if job seekers cannot meet a requirement due to a circumstance wholly or predominantly due to drug or alcohol misuse, this may be a reasonable excuse (however, there are restrictions on repeatedly using drug and alcohol as a reasonable excuse if a person has refused appropriate and available treatment).

Further explanation of the objective, legitimate and proportionate nature of subsection 40L(4) is contained in the Statement of Compatibility with Human Rights for Schedule 13 of the *Social Services Legislation Amendment (Welfare Reform) Act 2018* at https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5927.

(n) whether 'circumstances wholly or predominantly attributable to' misuse of drugs and alcohol in proposed subsection 40L(4) would encompass ongoing drug and alcohol misuse and diseases that may result from past misuse such as Alcoholic Liver Disease or brain damage, or injuries resulting from accidents when intoxicated where the relevant misuse occurred in the past.

The provisions in subsection 40L(4) replicate existing provisions in social security law, and arrangements would not alter following passage of the Bill.

Exemptions are intended for circumstances where a person is temporarily unable to meet their requirements. For this reason, a person would generally not be eligible for an exemption solely due to the impact of a permanent condition. In these cases, a person would be assessed for a partial capacity to work, or potentially have their eligibility assessed for other payments such as Disability Support Pension.

Where a person has a disability or illness, regardless of the cause, this must be considered in setting the person's mutual obligation requirements.

A job seeker may also be eligible for a temporary medical incapacity exemption if they experience a temporary exacerbation of a permanent condition, which would be considered a result of the medical condition – not the circumstances which caused the medical condition.