

HIGHER EDUCATION SUPPORT ACT 2003

**OVERSEAS DEBTORS REPAYMENT
GUIDELINES 2017**

EXPLANATORY STATEMENT

OUTLINE

These Guidelines underpin the detailed administrative arrangements for recovery of overseas Higher Education Loan Programme (HELP) debt, including requirements relating to income assessment and notices to be given to the Commissioner of Taxation.

BACKGROUND

The *Education Legislation Amendment (Overseas Debt Recovery) Act 2015* (which made amendments to the *Higher Education Support Act 2003* [HESA]) and the *Student Loans (Overseas Debtor Repayment Levy) Act 2015* were passed by Parliament on 9 November 2015 and received the Royal Assent on 26 November 2015. These Acts create an obligation for HELP and Trade Support Loan (TSL) debtors to make repayments on their debts if they are non-residents of Australia for taxation purposes. Under the HELP scheme, eligible students can obtain income-contingent loans to assist them during their higher education studies. This Explanatory Statement relates to HELP debts only (there are separate Rules covering Trade Support Loans).

From 1 January 2016, people with HELP debts who leave Australia for 183 days or more are required to notify the Australian Taxation Office (ATO) of their absence from Australia and their new contact details within seven days of departing Australia.

People with HELP debts who have been living overseas on or before 1 January 2016 must notify the ATO of their absence from Australia and their new contact details. They have until 1 July 2017 to do this (see 'Part 2 – Application Provisions' of the *Education Legislation Amendment (Overseas Debt Recovery) Act 2015*).

In relation to HELP debtors who are foreign residents (overseas debtors), from 1 July 2017 they will be required to make income-contingent repayments on their HELP debt.

The introduction of repayment obligations for overseas debtors is part of the Government's broader agenda to improve the equity and sustainability of HELP.

SUMMARY OF GUIDELINES

The Guidelines explain how a person works out their foreign-sourced income for an income year under section 154-17 of the HESA. The process is designed to be as comparable to arrangements for domestic debtors as possible, while maximising simplicity for users.

Overseas debtors will have the option of choosing between three methods for working out their foreign-sourced income for each income year. The three methods are:

- the overseas assessed method, which relies on an income assessment in the person's country of residence;
- a simple self-assessment method; and

- a comprehensive tax-based assessment method.

These three methods of working out foreign-sourced income cater for circumstances where there is no foreign tax assessment or where an overseas debtor believes the application of Australian tax rules would better reflect their circumstances.

These Guidelines also:

- explain how to convert foreign-sourced currency to Australian dollars;
- cover the content of notifications to the Commissioner to support the operation of the relevant sections of the HESA. This includes the information that an overseas debtor must provide in notifications relating to: leaving Australia, absence from Australia, and in an overseas debtor's notification of income; and
- include exceptions to the requirement to provide notification in some circumstances, for example where an overseas debtor has already notified the ATO of their absence from Australia and returns for a family visit but remains a foreign resident.

PART 1 – PRELIMINARY

Section 1 of the Guidelines states that these are the *Overseas Debtors Repayment Guidelines 2017*.

Section 2 contains the commencement information – these Guidelines are in force from the day after this instrument is registered.

Section 3 includes information on the authority for these Guidelines. Section 238-10 of the HESA provides for the Minister to make legislative instruments, or Guidelines, for the purposes of the Act. These Guidelines are made under sections 148-3, 154-17 and 154-18 of the HESA.

Section 4 sets out defined terms used within the Guidelines and directs interpretation of the Guidelines. To ensure administrative consistency, a term used within these Guidelines that is also used in taxation legislation uses the existing definition provided by tax law.

PART 2 - ASSESSING FOREIGN-SOURCED INCOME

Section 5 outlines that the purpose of Part 2 of the Guidelines is to set out how to work out a person's foreign-sourced income for an income year. Foreign-sourced income is relevant to working out the person's assessed worldwide income for section 154-17 of the HESA.

An overseas debtor's repayment obligation is based on their assessed worldwide income. This is pursuant to section 154-16 of the HESA. Assessed worldwide income (defined in section 154-17) comprises a person's repayment income plus their foreign-sourced income. That is:

$$\begin{array}{l} \text{Assessed worldwide} \\ \text{income} \end{array} = \begin{array}{l} \text{Repayment income} \\ \text{(154-5 of the HESA)} \end{array} + \begin{array}{l} \text{Foreign-sourced income} \\ \text{(Part 2 of these Guidelines)} \end{array}$$

An overseas debtor must report their income, including their foreign-sourced income, to the ATO to determine their repayment amount. Income earned in a foreign currency is to be converted into Australian currency (see subsection 154-17(2) of the HESA).

Section 6 provides that an overseas debtor may choose one of the following three approaches for working out their foreign income:

- the simple self-assessment method;
- the overseas assessed method;
- the comprehensive tax-based assessment method.

Subsection 6(4) states that a person can only choose one method to assess foreign income for the income year. Their choice of method in one year does not restrict their choice of method in a subsequent year. For example, if a person uses the overseas assessed method one income year, the next income year they may choose any one of the three available methods.

For the purpose of the Guidelines, the term *income year* refers to the Australian income year (1 July-30 June).

SIMPLE SELF-ASSESSMENT METHOD

Section 7 of the Guidelines provides information on this method of assessing foreign-sourced income.

Under the simple self-assessment method, to assess their foreign-sourced income an overseas debtor must report:

- the occupation from which they derived the most foreign income for an income year; and
- their total (pre-tax) foreign income earned.

Their foreign-sourced income is the difference between their total (pre-tax) foreign income and the standard deduction that applies to that person's occupation.

The applicable standard deduction, as determined by the Minister, will then be applied by the Commissioner to the pre-tax amount of income earned. This will be based on the occupation provided by an overseas debtor. See Example One.

Subsection 7(2) states that the Minister may determine in a legislative instrument the descriptions of occupations, and the standard deduction, or how to work out this deduction for an income year. Occupation codes and standard deductions may change from year to year. This is why the Guidelines allow the Minister to determine this for an income year.

OVERSEAS ASSESSED METHOD

Subsection 8(1) of the Guidelines provides information on this method of assessing foreign-sourced income.

Under the overseas assessed method, a person's foreign-sourced income is the amount equal to their taxable income according to the most recent tax assessment completed by a taxation authority of a foreign country. The assessment must cover a 12 month period, even if income was not earned for the whole 12 months.

Subsection 8(2) includes limitations on the use of this method. An overseas debtor cannot use this method of assessment if any of the following apply:

- the period for which their income was assessed does not overlap with the relevant income year (Australian financial year) that the notice of income relates to. This is to ensure that overseas debtors are reporting their income for a period of time as closely aligned as possible with the income year;
- multiple assessments of that person's income have been made by different foreign countries during the income year;
- that assessment has already been used to work out the person's foreign-sourced income for a previous income year.

If no tax was payable because the foreign income is below the foreign country's tax threshold, this option is still available provided there is an income assessment.

Regardless of the 12 month period the foreign tax assessment covers (for example whether it is from April to March or January to December), it is taken to be the overseas debtor's income for the Australian income year (1 July-30 June). This method allows the overseas debtor to use their income for a 12 month period as assessed by a foreign tax authority as a proxy for their income for the Australian income year with which it overlaps. See Examples One and Two.

EXAMPLE ONE

Anica has been living in New Zealand for two years, working as an occupational therapist. She has two New Zealand tax assessments. One covers 1 April 2015 to 31 March 2016, and the other covers 1 April 2016 to 31 March 2017.

Anica will need to choose her method of assessing foreign-sourced income. She must also determine if she has any repayment income as outlined in section 154-5 of HESA (which is essentially any income she has earned in or from Australia). This will determine her worldwide income which will be used to work out how much of her HELP debt she will need to repay.

Overseas assessed method

In working out her foreign-sourced income for the 2016-17 income year, Anica chooses the overseas assessed method. For this, she must use the most recent foreign tax assessment that overlaps with the Australian income year 1 July 2016 to 30 June 2017. This assessment must cover a 12 month period and must not have been used by her before in working out her worldwide income.

As the earlier assessment (1 April 2015 to 31 March 2016) does not overlap with the relevant Australian income year (1 July 2016 to 30 June 2017), Anica must use her most recent assessment covering 1 April 2016 to 31 March 2017.

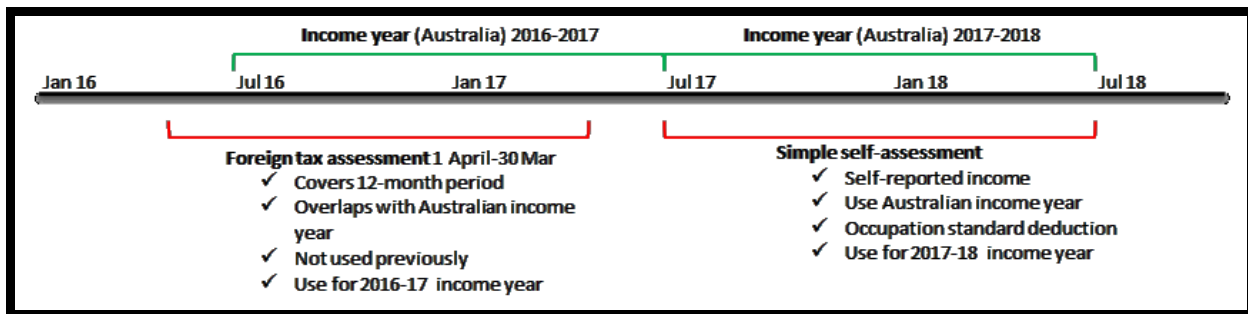
Anica reports the income she earned in New Zealand as recorded on that assessment as a proxy for her income over the relevant Australian income year. This is taken to be her foreign-sourced income for the period 1 July 2016 to 30 June 2017.

She must also report her repayment income, which is added to her foreign-sourced income, to calculate her worldwide income and therefore her repayment amount.

Simple self-assessed method

The next year, Anica chooses the simple self-assessment method to work out her foreign-sourced income for the 2017-18 income year.

Anica enters her total (pre-tax) foreign income from 1 July 2017 to 30 June 2018, and reports her occupation. The occupation standard deduction is subtracted from her foreign income by the Commissioner to determine Anica's foreign-sourced income. She also reports her repayment income she earned in Australia for the 2017-18 income year. The total forms her worldwide income and from this her repayment amount for the 2017-18 income year will be determined by the Commissioner.



EXAMPLE TWO

Lee is living in Germany and working as a lawyer. He owns a property in Australia that he rents out.

In working out his foreign-sourced income for the 2016-17 income year, Lee chooses the overseas assessed method. Lee has a German tax assessment for the period 1 October 2016 to 30 September 2017.

When using the overseas assessed method he reports the income he has earned in Germany (as shown in his foreign tax assessment), as a proxy for his income over the income year. This forms the foreign-sourced income component of his worldwide income.

As a foreign resident, Lee must also report all income earned from the rental property by lodging an income tax return in Australia. Rental income falls within the definition of repayment income in section 154-5 of the HESA. The income from his rental property in Australia forms the repayment income component of his worldwide income.

If Lee paid a compulsory repayment amount on his Australian taxable income it will be accounted for when calculating his total repayment amount based on his worldwide income.

COMPREHENSIVE TAX-BASED ASSESSMENT METHOD

Section 9 of the Guidelines provides information on this method of assessing foreign-sourced income.

Under the comprehensive tax-based assessment method, an overseas debtor assesses their total foreign income using Australian taxation rules. A person's foreign-sourced income is the difference between their total (pre-tax) foreign income and the deductions that would be allowable under the Australian taxation system.

This method is available to ensure that no overseas debtors are unfairly disadvantaged by the income assessment methods when compared to debtors living in Australia. See Example Three.

EXAMPLE THREE

Nadiah is a small business owner in Canada. She primarily works by herself on contracts with other businesses. Because of differences in tax rules, Nadiah believes it would be better for her to use the comprehensive assessment method when working out her foreign-sourced income for the 2016-17 income year.

Under Australian taxation rules Nadiah is earning Personal Services Income. She can then report the business income as her own income and make deductions derived from business expenses that would be allowable under the Australian tax system. She reports this as her foreign-sourced income for the income year.

Nadiah must also report on any repayment income earned, which is added to her foreign-sourced income, to calculate her worldwide income and therefore her repayment amount.

CURRENCY CONVERSION

Section 10 of the Guidelines outlines how to convert foreign currency to Australian dollars. The rate of conversion is the average exchange rate for the Australian income year to which the assessment relates.

For example, if an individual is submitting an assessment for the 2016-17 income year and uses the overseas assessed method, the rate of exchange will be the average rate between 1 July 2016 and 30 June 2017 regardless of any differences in financial years.

The notification of income form approved by the Commissioner will include a currency conversion calculator to assist debtors.

For those overseas debtors who earn currencies not included in the conversion calculator, the Commissioner will allow them to use any reasonable externally sourced exchange rate for that currency, such as a bank. The ATO's current and ongoing policy in relation to externally sourced exchange rates can be found on the ATO website.

PART 3 - CONTENT OF NOTICES

Under section 154-18 of the HESA, people are required to provide notice to the Commissioner relating to leaving Australia for at least 183 days, absence from Australia for more than 183 days, and worldwide income.

Section 11 outlines that the purpose of Part 3 of the Guidelines is to set out the details of these notices.

NOTICES RELATING TO LEAVING AUSTRALIA

Under subsection 154-18(1) of the HESA, debtors who leave Australia with the intention of remaining outside Australia for at least 183 days must notify the Commissioner in the approved form no later than 7 days after leaving Australia.

Section 12 of the Guidelines requires these debtors to notify the Commissioner of the following information in the approved form:

- their name; and
- their date of birth; and
- if known:
 - their intended or current country of residence; and
 - their contact details, including email address and telephone number.

Under subsection 12(2) of the Guidelines, a debtor is not required to notify the Commissioner that they are leaving Australia if:

- they have already notified the Commissioner in relation to a previous departure and their details have not changed; and
- they have not been an Australian resident for taxation purposes since notifying the Commissioner.

The exceptions are to prevent debtors who previously notified the Commissioner they left Australia from being required to re-notify if they return for a short period of time, for example a family visit. See Example Four.

EXAMPLE FOUR

Nick moved to South Africa in March 2016 and notified the Commissioner of his overseas address when he moved. In July 2017 Nick flew back to Australia for ten days to attend his sister's wedding. As he remained a foreign resident for tax purposes and had previously told the Commissioner he was living overseas, he did not need to re-notify the Commissioner when he flew back to South Africa after his sister's wedding.

As noted in section 15 of these Guidelines, under section 388-50 in Schedule 1 to the *Taxation Administration Act 1953*, the Commissioner may request additional content to be included in the approved form of these notices.

NOTICES RELATING TO ABSENCE FROM AUSTRALIA

Under subsection 154-18(2) of the HESA, debtors who have been outside Australia for at least 183 days in any 12 month period are required to notify the ATO of their absence no later than 7 days after the end of the 183 days in the approved form.

Section 13 of the Guidelines requires debtors to notify the Commissioner of the following information in the approved form:

- their name; and
- their date of birth; and
- their country of residence; and
- if known, their contact details including email address and telephone number.

This requirement would cater for individuals whose plans may change after they leave Australia, for example a debtor may be offered a job opportunity while on an intended visit of less than six months and choose to extend their stay overseas.

A debtor is not required to re-notify the Commissioner that they are absent from Australia under subsection 154-18(2) of the HESA if they have already notified the Commissioner under subsection 154-18(2) and they have not been an Australian resident for taxation purposes since notifying the Commissioner.

This is to prevent debtors who previously notified the Commissioner of their absence from Australia from being required to re-notify if they have remained living overseas, or have returned to Australia only for a short period of time (e.g. for a family visit and without becoming an Australian resident again).

As noted in section 15 of these Guidelines, under section 388-50 in Schedule 1 to the *Taxation Administration Act 1953*, the Commissioner may request additional content to be included in the approved form of these notices.

NOTICES RELATING TO INCOME

Under subsection 154-18(3) of the HESA, debtors are required to assess and report their worldwide income (including foreign-sourced income) to the Commissioner in the approved form.

Section 14 of the Guidelines requires debtors to notify the Commissioner of the following information:

- their name; and
- their date of birth; and
- their country of residence; and
- their occupation; and
- the amount of their foreign-sourced income; and
- the amount of their Australian repayment income (even if it is a nil amount); and
- the method the debtor chose to work out their foreign-sourced income; and
- if the overseas assessed method was used – the debtor's identification number that was used by a foreign taxation authority to make an assessment of the debtors' income.

As stated in subsection 154-18(2) of the HESA, the Commissioner will specify the lodgement period for the notice relating to income in the approved form. It is envisaged this will correspond with the Australian financial year and tax assessments onshore, meaning individuals will need to lodge the notice by 31 October following the end of the income year. The Commissioner also has the power to defer the lodgement date for individuals in section 388-55 of Schedule 1 of the *Taxation Administration Act 1953*.

Situations where overseas debtors can lodge a simplified notice of income

As noted in subsection 14(2) of the Guidelines, the Commissioner may allow low income earners to declare, in the approved form, that their income is less than 25 per cent of the minimum repayment income (reporting threshold).

This is not an exception from the requirement to submit a notice in the approved form, but a simplified notice intended to make it easier for low income earners to comply. These simplified notices will only require a debtor to provide their name, date of birth, country of residence and the declaration that their income does not exceed the published amount. See Example Five.

Under current legislation, in 2016-17 the reporting threshold will be A\$13,717. This amount will be published annually by the ATO on their website.

EXAMPLE FIVE

Harriet, who has a HELP debt from her undergraduate studies, moved to the United Kingdom in June 2016 to undertake a postgraduate degree.

She notified the Commissioner of her overseas address within seven days of leaving Australia.

On 1 July 2017 she is now required to submit a notice relating to income via *myGov*. Harriet has been studying full time and working casually as a tutor in her field of study to support herself while she finishes her degree.

She has earned the equivalent of A\$10,500 for her work as a tutor. Because Harriet received income below the 25 per cent threshold, she is able to declare her income is under the reporting threshold of A\$13,717. She is only required to give her name, date of birth and to declare she is living in the United Kingdom in order to submit a simplified notice.

Additional content in the approved form

Section 15 of the Guidelines outlines that Part 3 does not affect the Commissioner's power under section 388-50 of Schedule 1 of the *Taxation Administration Act 1953* to request additional content to be included in the approved form of these notices.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Overseas Debtors Repayment Guidelines 2017

The Guidelines are compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Guidelines explain how a person works out their foreign-sourced income for an income year under section 154-17 of the *Higher Education Support Act 2003* (HESA). The process is designed to be as comparable to arrangements for domestic debtors as possible, while maximising simplicity for users.

To simplify processes for overseas debtors they will have the option of choosing between three methods for working out their foreign-sourced income for each income year. The three methods of working out foreign-sourced income allow for simplicity, as well as catering for circumstances where there is no such tax assessment or where an overseas debtor feels that the application of Australian tax rules would be to their advantage.

These Guidelines also:

- explain how to convert foreign-sourced currency to Australian dollars;
- cover the content of notifications to the Commissioner of Taxation to support the operation of the relevant sections of the HESA. This includes the information that an overseas debtor must provide in notifications relating to leaving Australia, absence from Australia, and in an overseas debtor's notification of income; and
- include exceptions to the requirement to provide notification in some circumstances, for example where an overseas debtor has already notified the Australian Taxation Office (ATO) of their absence from Australia and returns for a family visit but remains a foreign resident.

The Bill engages the following human rights:

- *the right to education* – Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- *the right to freedom of movement* – Article 12 of the International Covenant of on Civil and Political Rights (ICCPR)
- *the right to privacy* – Article 17 of the ICCPR

- *the right to an adequate standard of living, including food, water and housing*
– Article 11 of ICESCR

Right to Education

The Guidelines promote the right to education set out in Article 13 of the ICESCR. Article 13 recognises the right of everyone to education, stating that “higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education”.

The Guidelines use the same repayment thresholds and repayment rates for overseas debtors as for those who remain onshore. This protects low-income earners by preserving the income-contingent nature of the HELP repayment arrangements. In providing for the repayment of student loans by collecting debt from overseas residents, it will contribute to a reduction in debt not expected to be repaid and will ensure the integrity and accessibility of funding for students to pursue tertiary education.

The Guidelines are compatible with the right to education.

Right to Freedom of Movement

The Guidelines engage the right to freedom of movement found in Article 12 of the ICCPR. Article 12 provides, among other things, that everyone shall be free to leave any country including his own, and shall not be subject to any restrictions except those provided by law, those necessary to protect national security, public order, public health or morals or the rights and freedoms of others and which are consistent with the other rights recognised in the present Covenant.

The Guidelines create an obligation on persons with a Higher Education Loan Programme (HELP) debt, who leave Australia for 183 days or more, or persons living overseas on or before 1 January 2016, to notify the ATO of their absence from Australia and to advise of their new contact details. The obligation extends to requiring debtors to make repayments towards their HELP debt while they are living overseas.

The universal application of the Australian repayment threshold could be seen as placing a limitation on a person’s freedom of movement, namely where a person is moving to a country with high costs of living. However, the restriction is provided for by law in the *Higher Education Support Act 2003* and the *Student Loans (Overseas Debtor Repayment Levy) Act 2015*. Further, it is not considered to place a practical limitation on the right to the freedom of movement as any financial imposition would only affect those earning more than the Australian minimum repayment income, which is below A\$54,859 in the 2016-17 financial year. This threshold is significantly above the minimum Australian wage, and remains high when compared to thresholds for repayment of income-contingent student loans worldwide. Low income earners or those without incomes would not be adversely affected. Additionally, the benefit of this measure is that it enhances the sustainability of all people’s access to education in Australia.

The Guidelines are compatible with the right to freedom of movement.

Right to Privacy

The Guidelines also engage the right to privacy outlined in Article 17 of the ICCPR. Article 17 provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

The Guidelines create a requirement for persons leaving Australia or persons who are absent from Australia and who have a HELP debt, to provide certain personal information to the ATO including the person's name, date of birth, intended country of residence and contact details. Information about a person's occupation and income is also required. The collection of such information could be seen as limiting a person's right to privacy and reputation.

However, this information is collected for the legitimate purpose of recovering HELP debt. All parties with access to this data are required to use appropriate safeguards to ensure the confidentiality of this information.

Personal information collected by the ATO is considered taxation information, and governed by strict privacy legislation. Taxation information is held on a classified server, and access is limited only to individuals who require the information in the course of their employment. The safeguards for information collected as a result of these Guidelines will be the same as for other taxation information which ensure that any lawful interference is not arbitrary or at risk of abuse.

The cohort from whom the ATO will collect personal information is limited to HELP debtors who are living, or intend to live overseas. The ATO will only request information that is necessary for administration of overseas HELP debts and ensuring compliance. By collecting repayments from overseas debtors, the sustainability and integrity of HELP, and thus access to higher education, will be protected.

The Guidelines are compatible with the right to privacy.

Right to an adequate standard of living, including food, water and housing

The Guidelines also engage the right to an adequate standard of living, including food, water and housing outlined in Article 11 of the ICESCR.

Article 11 recognises everyone be entitled to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The Guidelines may be seen to impact this right, as the universal application of the Australian repayment threshold may be seen to disproportionately affect individuals in countries with higher costs of living. However, it is not considered a practical limitation, as any financial imposition would only affect those earning more than the Australian minimum repayment income, which is above A\$54,859 in the 2016-17 financial year based on current legislation.

This threshold is significantly above the minimum Australian wage, and remains high when compared to thresholds for repayment of income-contingent student loans worldwide. Low income earners or those without incomes who are below this threshold would not be adversely affected, as they would not need to make repayments.

The Guidelines are compatible with the right to an adequate standard of living, including food, water and housing.

Consultation

As these arrangements are machinery in nature, and simply implement aspects of the *Education Legislation Amendment (Overseas Debt Recovery) Act 2015*, passed by Parliament in November 2015, public consultation was not undertaken.

The Department of Education and Training worked extensively with the Australian Taxation Office to develop these Guidelines.

Conclusion

The Guidelines are compatible with human rights because, to the extent that it may limit human rights, the limitations are reasonable, necessary and proportionate.