

Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at **Appendix 3**.

Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017

Purpose	Seeks to make a range of amendments to the <i>Australian Citizenship Act 2007</i> and other legislation including eligibility requirements, good character requirements and review of decisions
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 15 June 2017
Rights	Obligation to consider the best interests of the child; children's right to nationality; children to be heard in judicial and administrative proceedings; quality of law; fair hearing; to take part in public affairs; freedom of movement (see Appendix 2)
Previous report	8 of 2017
Status	Concluded examination

Background

2.3 The committee previously examined the Australian Citizenship and Other Legislation Amendment Bill 2014 (2014 bill) in its *Eighteenth Report of the 44th Parliament* and *Twenty-Fourth Report of the 44th Parliament*.¹ The 2014 bill lapsed at the prorogation of the 44th parliament.

2.4 The committee reported on the Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (2017 bill) in its *Report 8 of 2017*.²

1 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 4-30; *Twenty-fourth Report of the 44th Parliament* (23 June 2015) 25-73.

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) 2-31.

2.5 The 2017 bill contains a number of reintroduced measures that were previously contained within the 2014 bill, as well as a number of new measures. In relation to the reintroduced measures, the committee refers to its concluded consideration (in its *Report 8 of 2017*), which includes consideration of:

- the power to revoke Australian citizenship due to fraud or misrepresentation – removal of court finding (the obligation to consider the best interests of the child, the child's right to nationality, the right of the child to be heard in judicial and administrative proceedings, the right to a fair trial and a fair hearing and the right to freedom of movement);
- extending the good character requirement to include applicants for Australian citizenship under 18 years of age (the obligation to consider the best interests of the child);
- citizenship to a child found abandoned in Australia (the obligation to consider the best interests of the child and a child's right to nationality);
- limiting automatic citizenship at 10 years of age (obligation to consider the best interests of the child and a child's right to nationality);
- personal ministerial decisions not subject to merits review (right to a fair hearing);
- ministerial power to set aside decisions of the AAT if in the public interest (right to a fair hearing); and
- extension of bars to citizenship where a person is subject to a court order (right to equality and non-discrimination).³

2.6 The committee also requested a response from the Minister for Immigration and Border Protection by 28 August 2017 in relation to two new measures.⁴

2.7 The minister's response to the committee's inquiries was received on 30 August 2017. The response is discussed below and is reproduced in full at Appendix 3.

Requirement to provide evidence of English language proficiency

2.8 The bill proposes to amend the general eligibility criteria under section 21(2) of the *Australian Citizenship Act 2007* (Citizenship Act), to require that applicants have 'competent English'. This is a new measure not previously introduced. The current provision requires applicants to possess 'basic English', demonstrated via the

3 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) 2-31.

4 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) 2-31.

existing citizenship test.⁵ Proposed section 23(9)(a) provides that the minister may, by legislative instrument, determine the circumstances in which a person has competent English.

Compatibility of the measure with the right to equality and non-discrimination

2.9 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR), article 2 of the International Convention on Economic, Social and Cultural Rights (ICESCR), article 2 of the Convention on the Rights of the Child (CRC), article 5 of the Convention on the Rights of Persons with Disabilities (CRPD), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

2.10 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).⁶ The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute (for example race, national origin, language, social origin or disability).⁷

2.11 Whilst states enjoy some discretion in differentiating between nationals and non-nationals, they still remain bound by non-discrimination obligations where

5 The current citizenship test is designed to assess whether an applicant has 'adequate knowledge of Australia and the responsibilities and privileges of Australian citizenship' and 'basic knowledge of the English language'. It consists of 20 questions derived from content in the resource book *Australian Citizenship: Our Common Bond*. There is no separate English language test, but applicants need basic knowledge of English to pass the test. A sample question from a practice test is: 'Which arm of government has the power to interpret and apply laws? A) Legislative B) Executive C) Judicial'. See, Department of Immigration and Border Protection, *Citizenship Test*, <https://www.border.gov.au/Trav/Citi/pathways-processes/Citizenship-test>.

6 The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

7 See, e.g., *Althammer v Austria*, Human Rights Committee, 8 August 2003, [10.2].

differentiating between non-nationals in requests for naturalisation and citizenship.⁸ The UN Committee on the Elimination of Racial Discrimination has stated that states are obliged to:

Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents;

Recognize that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States Parties' obligations to ensure non-discriminatory enjoyment of the right to nationality...⁹

2.12 Differential treatment will not constitute unlawful discrimination if based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.¹⁰

2.13 The measure differentiates between non-nationals in requests for citizenship on the basis of their language competency. As the previous human rights analysis stated, it therefore engages the right to equality and non-discrimination on the basis of language, and may also indirectly discriminate on the basis of national origin, in causing a disproportionate impact on individuals from countries where English is not the national language or widely spoken.¹¹ Raising the level of English required from

8 See, e.g., UN Human Rights Committee, Concluding Observations on Estonia, UN Doc CCPR/C/79/Add.59 (1995), [12] ['The Committee expresses its concern that a significantly large segment of the population, particularly members of the Russian speaking minority, are unable to enjoy Estonian citizenship due to the plethora of criteria established by law, and the stringency of language criterion, and that no remedy is available against an administrative decision rejecting the request for naturalization under the Citizenship law.']; ICERD, art 1(3) ['Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality'.]

9 UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against non-citizens*, (2004), [13]-[15] [Paragraph 15 additionally provides: 'Take into consideration that in some cases denial of citizenship for long-term or permanent residents could result in creating disadvantage for them in access to employment and social benefits, in violation of the Convention's anti-discrimination principles'].

10 See, e.g., UN Human Rights Committee, *General Comment 18: Non-Discrimination*, (1989), [13]; *Althammer v Austria*, Human Rights Committee, 8 August 2003, [10.2].

11 See Department of Immigration and Border Protection, *Australian Citizenship Test Snapshot Report*, 30 June 2015, 3 [although fail rates were all quite low amongst the top ten countries of birth listed, the highest were Vietnam (4%), China (1.84%), and Sri Lanka (1.84%)]; R Van Oers, *Deserving Citizenship*, 2014, 182-184 [analysis of UK test], 179 [analysis of Netherlands test].

basic to competent may also increase the disproportionate impact on those with disabilities that do not rise to 'mental incapacity', those who have not benefited from regular education, and/or those whose education was interrupted by war, trauma or other events.

2.14 The previous analysis stated that the concern that the measure would have a disproportionately negative effect on particular groups finds some support in data on the current test, which indirectly tests basic English. The top ten countries of birth for the offshore humanitarian programme are all countries where English is not an official language.¹² Humanitarian migrants are also more likely to have experienced traumatic events and interrupted schooling prior to migration.¹³ From 2014-2015, 98.6% of those who sat the current citizenship test passed, and 1,635 people failed. Humanitarian Programme applicants fail the current test at higher rates than other migration streams, with 8.8% failing the test compared to 0.03% of Skill Stream applicants, and 2% of the Family Stream.¹⁴ Humanitarian Programme applicants also sat the test 2.4 times on average, compared to 1.1 for the Skill Stream. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.¹⁵

2.15 The statement of compatibility acknowledges that the right to non-discrimination is engaged, stating:

This measure also engages Articles 2(1) and 26 of the ICCPR, described above. These Articles are engaged on the basis that the measure may be

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- 12 Department of Immigration and Border Protection, *Fact sheet – Australia's Refugee and Humanitarian Programme*, <https://www.border.gov.au/about/corporate/information/fact-sheets/60refugee#c> [listing 2015-2016 Offshore Visa Grants by Top Ten Countries of Birth]. For the onshore humanitarian programme see Department of Immigration and Border Protection, *Onshore Humanitarian Programme 2015-2016*, Table 4 – Grant and grant rates by last known country of citizenship, at <https://www.border.gov.au/ReportsandPublications/Documents/statistics/ohp-april-16.pdf>.
- 13 See R Jenkison et al., *Building a New Life in Australia: Settlement experiences of recently arrived humanitarian migrants*, Australian Institute of Family Studies at <https://aifs.gov.au/sites/default/files/publication-documents/bnla-fs1-settlement-experiences.pdf>, 1 & 3-5. [Longitudinal study of 1,500 individuals and their families who had been granted permanent humanitarian visas. 89% reported that they or their immediate family had experienced at least one type of traumatic event before arriving in Australia, including war and persecution. 15% of adult respondents reported having never attended school prior to arrival in Australia. Three quarters reported that they understood English 'not well' or 'not at all' prior to arrival].
- 14 Department of Immigration and Border Protection, *Australian Citizenship Test Snapshot Report*, 30 June 2015, <https://www.border.gov.au/Citizenship/Documents/2014-15-snapshot-report.pdf>, 2-3.
- 15 See, *D.H. and Others v the Czech Republic* European Court of Human Rights (ECHR) Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v the Netherlands*, ECHR, Application no. 58641/00 (6 January 2005).

seen to discriminate on the basis of national origin by treating those applicants with lower levels of English language proficiency differently to applicants who are more proficient in the English language. However, this is not dissimilar to the current legislation which requires applicants to possess a basic knowledge of the English language; this is presently assessed through the existing citizenship test. Further, this measure emphasises the importance of having competent English language and ensures that aspiring citizens can integrate into and contribute to the Australian community, including by obtaining employment, and/or undertaking vocational/ tertiary education. Insofar as the measure may limit this right, any such limitation is thus a reasonable and proportionate response to the objective of promoting social participation and encouraging new citizens to fully participate in Australian life.

The proposed amendments increase the level of English language required to be held by applicants for citizenship by conferral. This requirement ties in with the new four-year residence requirement to provide aspiring citizens sufficient time to reach a competent level of English. This is important because English language proficiency is essential for economic participation, social cohesion and integration into the Australian community. Those who are currently entitled to the Adult Migrant English Program will still be able to access this program to improve their English language skills.¹⁶

2.16 The previous analysis stated that it is accepted that 'promoting social participation and encouraging new citizens to fully participate in Australian life' can be a legitimate objective for the purposes of human rights law. However, it must also be demonstrated that the limitation imposed is effective in achieving (that is, rationally connected to) that objective. It is unclear from the statement of compatibility as to whether the measure will be effective in achieving its stated objective. The statement of compatibility states that 'English language proficiency is essential for economic participation, social cohesion and integration into the Australian community', indicating that 'emphasis[ing] the importance of having competent English language' will promote full participation in Australian life.¹⁷ However, the measure itself excludes permanent residents if the minister is not satisfied that they meet the new 'competent English' standard from participating in Australian life as citizens. This raises questions as to whether the measure undermines its apparent objective of promoting social participation.

2.17 Should a measure be rationally connected to a legitimate objective, it must be demonstrated that the measure is a proportionate means to achieve the stated objective. Under human rights law, this requires the measure to be the least rights restrictive means of achieving the stated objective.

16 Statement of compatibility (SOC) 78-79.

17 SOC 78-79.

2.18 The statement of compatibility mentions a number of exemptions to the English language requirement.¹⁸ These exemptions include: persons who have a permanent or enduring physical or mental incapacity that means that the person is not capable of understanding the application, demonstrating competent English, or demonstrating an adequate knowledge of Australia and citizenship; persons over 60 or below 16 years of age; persons suffering a permanent loss or substantial impairment of hearing, speech or sight at the time that the application is made; persons born outside Australia to former Australian citizens; and persons born in Australia who have never been a national or citizen of any country, and are not entitled to acquire the nationality or citizenship of any foreign country. These exemptions do not address all those who may be indirectly discriminated against by the measure, but do lessen the rights-restrictive nature of the measure.

2.19 The proposed legislation does not specify what is meant by the new standard of 'competent English' and how the standard will differ from 'basic English'. Rather, details regarding the definition of 'competent English', the means of testing, and any further exemptions have been left to delegated legislation. Some information regarding the intended delegated legislation was provided in the statement of compatibility:

It is intended that the instrument will be similar, where relevant, to the *Language Tests, Score and Passports 2015 (IMMI 15/005)* prescribed in the *Migration Regulations 1994*. The instrument will specify the English language test providers, scores, and exemptions to meet the English language requirement prior to applying for citizenship by conferral. It will also determine the situations where people are not required to undertake English language testing, for example, if they are a passport holder of the United Kingdom, the Republic of Ireland, Canada, the United States of America or New Zealand or have undertaken specified English language studies at a recognised Australian education provider.¹⁹

2.20 The *Language Tests, Score and Passports 2015 (IMMI 15/005)* prescribe a range of potential tests and measures, with scores ranging from the International English Language Test System (IELTS) five to eight, using the General Training exam. Under the IELTS scale, band score six is the lowest level classified as a 'competent user', defined as 'the test taker has an effective command of language despite some inaccuracies, inappropriate usage and misunderstandings. They can use and understand fairly complex language, particularly in familiar situations.'²⁰ Band six of the IELTS, using the Academic test, is the requisite standard for tertiary study in

18 SOC 71.

19 SOC 71.

20 IELTS, *How IELTS is scored*, <https://www.ielts.org/about-the-test/how-ielts-is-scored>.

Australian universities.²¹ The description of the level of English remains the same for both the Academic and General Training tests.

2.21 The previous analysis stated that the prospect of the measure defining 'competent English' as level six IELTS raises serious concerns as to whether it is a rationally connected and proportionate method of achieving the objective of 'promoting social cohesion and encouraging new citizens to fully participate in Australian life.'

2.22 The statement of compatibility refers to the Adult Migrant English Program (AMEP) remaining available for certain migrants to improve their English skills. AMEP is funded by the Australian government and provides up to 510 hours of free English language lessons to eligible migrants and humanitarian entrants, who speak little to no English. On acquiring 'functional English', or approximately IELTS 4 to 5, clients must exit the program.²² This indicates that this program is not in fact capable of bringing adult migrants to the standard of 'competent English' as it exists under the IELTS. In any event, a recent review found that only 7% of AMEP clients achieve functional English after 500 hours of tuition.²³ The preceding analysis stated that it was therefore difficult to accept that migrants will be supported to acquire the requisite level of testable English on the information provided in the statement of compatibility, exacerbating the disproportionate impact on those who, due to the personal attributes outlined above, require support to reach that level.

2.23 Finally, the indication in the explanatory memorandum that a person will not be required to undertake language testing to the 'competent English' standard if they are a passport holder of the United Kingdom, Republic of Ireland, Canada, the United States of America or New Zealand, raised the prospect of further impermissible discrimination between non-nationals in requests for citizenship. It is not apparent that passport holders from these countries can be automatically assumed to have

21 See, for example, Flinders University, English language requirements, <http://www.flinders.edu.au/international-students/study-at-flinders/entry--and-english-requirements/english-language-requirements.cfm>; Australian National University, English language admission requirements for students, https://policies.anu.edu.au/pp/document/ANUP_000408.

22 Questions taken on notice, Supplementary Budget Estimates Hearing, 30 October 2006, Q.236 [stating ISLPR 2=IELTS 4 to 5]; ACIL Allen Consulting, *Final Report to Department of Education and Training: AMEP Evaluation*, 22 May 2015, 6-7 & 68.

23 ACIL Allen Consulting, *Final Report to Department of Education and Training: AMEP Evaluation*, 22 May 2015, 65 ['The AMEP defines 'functional English' as a score of 2 or higher on all four of the ISLPR macro skills. Around 7 per cent of AMEP clients achieve this level of English language skills after 500 hours. Consultations indicated that the vast majority of AMEP clients are committed and value the programme highly. Despite this commitment, in many cases a very low level of English language skill on programme entry means social proficiency is unlikely to be obtained through the current AMEP. This is recognised in the programme's design and objectives as discussed...'].]

'competent English', particularly if that standard is aligned to the standard currently required to study at a university level.

2.24 The committee therefore sought further advice from the Minister for Immigration and Border Protection as to:

- how the measure itself, rather than the goal of the measure, is effective to achieve (that is, rationally connected to) the objective of 'promoting social cohesion and encouraging new citizens to fully participate in Australian life'; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective, including:
 - further information as to the intended definition and means of demonstrating competent English;
 - any further exemptions to the means chosen;
 - any relevant safeguards in relation to the measure to protect against the exclusion of persons from citizenship;
 - whether government funded English education will be provided to the proposed higher standard of competent English, and if so, how it is proposed to ensure that this education will be effective to ensure that permanent residents are not excluded from citizenship; and
 - the compatibility of exemptions for passport holders of certain countries from English language testing with the right to non-discrimination on the grounds of nationality in requests for citizenship.

Minister's response

2.25 In relation to how the measure is effective to achieve the objective of 'promoting social cohesion and encouraging new citizens to fully participate in Australian life', the minister's response states:

Various contemporary researchers have identified lack of language skills as a key barrier to settlement:

- The ability of newcomers to settle in a country with an unfamiliar language is dramatically impacted if the individuals do not have the skills and knowledge to participate in simple daily interactions and to communicate socially (Merrifield 2012);
- Low level English is clearly a significant barrier to finding employment in Australia (AMES 2015);
- Lack of confidence is strongly exacerbated by limited English skills (AMES 2015);
- Family stream immigrants, and the partners of skilled immigrants from non-English speaking countries, find it harder to gain employment. (Productivity Commission Inquiry Report 2016);

- Wage assimilation occurs slowly for all groups, but is slowest for those from non-English speaking backgrounds and English language proficiency plays an important role in wage differences in country of origin. (Crawford School of Public Policy, Migration and Productivity in Australia 2015);
- Humanitarian migrants with good English are 70% more likely to have a job than those with poor English after 18 months in Australia. (Boston Consulting Group 2017);
- 85% of humanitarian migrants who speak English very well participate in the labour market compared to just 15% who cannot speak English. (Boston Consulting Group 2017);
- There are a number of barriers to humanitarian arrivals in entering the labour market, with English language skills of vital importance (Hugo 2012).

Contemporary literature supports the view that proficiency in English plays a vital role in integrating into society. Policies that support an ongoing commitment to improving English language skills are consistent with international trends and research. Many countries are introducing or formalising linguistic requirements for the purposes of citizenship and they often require language tests or other formal assessment procedures.

English language skills are recognised as having the potential to influence indicators of successful settlement such as:

- social participation and connection to the community
- economic participation
- personal wellbeing and life satisfaction
- independence

The Government wants all migrants and aspiring citizens to take an ongoing approach to improving their English language, from arrival through to permanent residency and subsequently to citizenship. This will contribute to stronger settlement outcomes — feelings of belonging and value, greater economic opportunities and social cohesion.

2.26 The further information indicates that, in an English-speaking country such as Australia, English language skills are important for full participation in a range of activities and may even contribute to feelings of belonging. However, beyond pointing to the potential role of English in social inclusion, the response does not clearly articulate exactly how barring individuals who do not possess 'competent English' from citizenship will advance their social inclusion.

2.27 It is perhaps implied in the minister's response that he considers that a requirement of 'competent English' may incentivise learning English. However, the information provided does not demonstrate that a significant reason for lower levels of English language ability amongst certain migrants is the absence of sufficient

incentives to improve their English, as opposed to the difficulties that they may face in improving their English (in fact, the minister's response indicates that employment and wage opportunities already provide important incentives to improve English). The response more generally does not provide specific evidence or reasoning about the effectiveness of the English language requirement as a means of advancing the stated objectives of the measure. Nor does it engage with the issue that excluding permanent residents who do not meet the 'competent English' standard from voting, serving on a jury and otherwise participating as citizens of the Australian community could itself be adverse to social cohesion. Accordingly, concerns remain that the measure may not be rationally connected to its stated objective.

2.28 The minister's response also provides a range of information as to the proportionality of the limitation. In relation to the level of English language proficiency required under the measure, the minister's response confirms that 'competent English' will be equivalent to IELTS 6 and explains this standard:

Competent English in the migration framework is equivalent to an IELTS 6 and is already required for certain visas.

The Government's position is that a competent level of English language is important for all migrants' ability to integrate successfully into the Australian community and that the appropriate level of language ability for the modern Australian context is 'competent' or 'independent user', which equates to IELTS 6.

Competent English can be equated to an 'independent user' on the Common European Framework of Languages (CEFR), which is an international standard to describe language ability. CEFR describes an independent user at the lower end of the scale (CERF B1) as someone who can:

- understand the main points of clear standard input on familiar matters regularly encountered in work, school, leisure
- deal with most situations likely to arise whilst travelling in areas where the language is spoken
- produce simple connected text on topics which are familiar or of personal interest
- describe experiences and events, dreams, hopes and ambitions and briefly give reasons and explanations for opinions and plans.

A CEFR independent user at the higher end of the scale (CERF B2) which equates to IELTS 6 can:

- understand the main ideas of complex text on both concrete and abstract topics, including technical discussions in his/her field of specialisation

- interact with a degree of fluency and spontaneity that makes regular interaction with native speakers quite possible without strain for either party
- can explain his or her viewpoint on a topical issue
- write clear, detailed text on a wide range of topical subject[s]
- express his or her views and opinions in writing
- understand most TV news, current affairs programmes and the majority of films in a standard dialect and identify the speakers' feelings and attitudes
- skim read a magazine or newspaper and decide what to read
- recognise the writer's implied views and feelings in a text
- produce clear, detailed text on a wide range of subjects and explain a viewpoint on a topical issue giving the advantages and disadvantages of various options.

IELTS also have their own general definitions for a Level 6:

- The test taker has an effective command of the language despite some inaccuracies, inappropriate usage and misunderstandings. They can use and understand fairly complex language, particularly in familiar situations.

2.29 However, beyond describing what this level of English entails no specific information is provided as to why this is considered to be necessary to successfully integrate into the Australian community. Further, as set out in the initial analysis, the achievement of this level of English may, when balanced with work and/or caring duties, be unachievable for many permanent residents from countries where English is not widely spoken, who have a disability that does not rise to physical or mental incapacity, whose education was interrupted by war or trauma, or who are otherwise inexperienced in formal education settings.

2.30 The minister's response does not address whether the measure could lead to a large group of permanent residents being unable to vote, serve on a jury, access certain benefits and employment opportunities, or otherwise participate in the Australian community as citizens until they reach the age of 60. As non-citizens, they may also be more vulnerable to visa cancellation and deportation. Those who were not born in Australia, and do not hold citizenship or nationality of a foreign country, could be rendered stateless. This raises concerns as to the proportionality of the measure. It also indicates that there may not be sufficient support to ensure that classes of permanent residents are not excluded from citizenship.

2.31 In relation to the committee's inquiries as to available exemptions under the measure, the minister's response states:

Exemptions to the English language test will apply for those applicants who:

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- have a permanent or enduring physical or mental incapacity; or
 - are aged 60 or over or have a hearing, speech or sight impairment; or
 - are aged under 16 years of age; or
 - applied under the born in Papua, born to a former Australian citizen or statelessness provisions; or
 - are citizens of the United Kingdom, the United States of America, Canada, New Zealand or the Republic of Ireland.

Limited exemptions will also apply for applicants who have undertaken specified English language studies at a recognised Australian education institution, which will be set out in a legislative instrument.

Exemptions based on permanent or enduring physical or mental incapacity:

- Applicants for conferral aged over 18 can apply for Australian citizenship under the incapacity provisions where they have a permanent or enduring physical or mental incapacity.
- Applicants for conferral who apply on the grounds of incapacity are required to provide a report from a qualified specialist, which provides a link between the type of claimed incapacity and the applicant's personal circumstances.

This means the specialist must determine whether the person:

- cannot demonstrate that they understand the nature of the application or
- are not capable of having competent English or
- cannot demonstrate that they have an adequate knowledge of Australia or
- Australian values or the responsibilities and privileges of Australian citizenship.

Exemptions relevant to refugees:

- An applicant who may have suffered torture and or trauma prior to arrival in Australia may be eligible to be assessed under the incapacity provisions for conferral of Australian citizenship, if they have a specialist report that links their inability to meet requirements to their incapacity.

Limited exemptions will also apply for applicants who have undertaken specified English language studies at a recognised Australian education institution, which will be set out in a legislative instrument.

2.32 Some of these exemptions may assist with the proportionality of the limitation as they will allow persons, who may otherwise fail to meet the 'competent English' requirements, to become Australian citizens. The minister's response provides useful information as to how the permanent physical or mental incapacity

provisions will be likely to operate, including in relation to the situation of refugees, who are a particularly vulnerable group.

2.33 However, it appears that there may be many who suffer from issues that may prevent them from demonstrating 'competent English' but their personal circumstances may not be considered to rise to the level of an 'enduring physical or mental incapacity'. For example, it is unclear the extent to which a common learning disability such as dyslexia or an inability to perform in exam conditions without reasonable adjustment would be able to be covered by the 'mental incapacity' exemption. Further, it is noted that there are no exemptions for other groups that may struggle to meet the competent English language requirements such as those with caring responsibilities or those with disrupted education.

2.34 In relation to whether government funded English education will be provided to the proposed higher standard of competent English, the minister's response states:

There is no proposal to extend the level of funding under AMEP to the competent level. The Government's policy is that eligible applicants can access 510 hours of language training through the AMEP program to assist them to successfully settle and confidently participate socially and economically in Australia. If an applicant wishes to undertake further study they may do so. These changes are aimed at encouraging aspiring citizens to become independent users of the English language in order to promote citizenship.

2.35 As noted above, AMEP is funded by the Australian government and provides up to 510 hours of free English language lessons to eligible migrants and humanitarian entrants, who speak little to no English. However, on acquiring 'functional English', or approximately IELTS 4 to 5, clients must exit the program. Given that the minister's response states that there is no intention to expand this program, it appears that AMEP, in its current form, is not capable of bringing adult migrants to the standard of 'competent English'. There are accordingly serious questions about whether there is adequate support to bring adults up to the standard of competent English. This absence of support makes it more likely that the measure is disproportionate to its objective of promoting social cohesion.

2.36 The minister's response confirms that an individual will not be required to undertake language testing to the 'competent English' standard if they are a passport holder of the United Kingdom, Republic of Ireland, Canada, the United States of America or New Zealand:

Under the Migration Regulations 1994, Instrument IMMI 07/055 was made on 28 August 2007 to specify English language tests and level of English ability for General Skilled Migration (GSM).

- That instrument included passports from the United Kingdom, the United States of America, Canada, New Zealand or Ireland

- Consultation was undertaken before the Instrument was made with key industry bodies, professional organisations, educational institutions and State and Territory Governments.
- In July 2011, Instrument IMMI 11/036 was made to specify the Republic of Ireland.

The introduction of a power for the Minister in the citizenship context, to specify in a legislative instrument the types of passports whose holders are taken to have 'competent English' will allow flexibility in responding to changing language requirements and certainty for applicants. The proposed instrument mirrors the GSM requirements to promote consistency across the migration and citizenship programmes.

2.37 The minister's response provides no substantive explanation of this differential treatment. Matters of consistency alone are generally not accepted to be a sufficient basis for permissibly limiting a human right. As noted above, it is not apparent that passport holders from these countries can be automatically assumed to have 'competent English'. This raises further concerns regarding differential treatment of non-nationals which was not addressed in the minister's response. This is a further reason why the measure does not appear to be a proportionate limitation on human rights.

Committee response

2.38 The committee thanks the minister for his response and has concluded its examination of this issue.

2.39 Noting the preceding analysis, the measure appears likely to be incompatible with the right to equality and non-discrimination.

Integration into the community requirement

2.40 Proposed section 21(2)(fa) requires the minister to be satisfied that a person 'has integrated into the Australian community' in order for that person to be eligible for citizenship by conferral. The matters which the minister may or must have regard to have been left to the minister to determine via legislative instrument. This is a new measure not previously introduced.

2.41 The explanatory memorandum provides examples of the type of matters the minister may determine that he or she may have regard to in deciding whether a person has integrated into the Australian community:

a person's employment status, study being undertaken by the person, the person's involvement with community groups, the school participation of the person's children, or, adversely, the person's criminality or conduct that is inconsistent with the Australian values to which they committed throughout their application process.²⁴

24 Explanatory memorandum (EM) 27.

2.42 In relation to 'conduct inconsistent with the Australian values to which they have committed', the bill proposes that applicants for citizenship by conferral be tested on Australian values via the citizenship test, and be required to sign an Australian Values Statement. Proposed subsection 46(5) provides for the minister to determine, by legislative instrument, the content of an Australian Values Statement.

2.43 Additionally, proposed subsection 52(4) excludes merits review for decisions made personally by the minister in relation to citizenship by conferral, where the minister issues a notice under section 47 stating that he is satisfied that the decision was made in the public interest.

Compatibility of the measure with multiple rights

2.44 The previous analysis noted that 'integration into the community' is a broad term that may raise different views as to its meaning. The intended consideration of 'conduct inconsistent with the Australian values to which they committed throughout their application process' is similarly imprecise, particularly where those values are yet to be determined by the minister in a legislative instrument.

2.45 Such broad discretion under proposed section 21(2)(fa) potentially raises serious concerns of incompatibility with the right to equality and non-discrimination. The previous analysis stated that, without safeguards, it is possible that the minister could exercise this power in such a way as to have a disproportionate effect on people on the basis of disability, nationality, religion, race or sex. There is nothing on the face of the legislation which appears to limit his or her discretion. The examples of matters the minister may take into account cited in the explanatory memorandum are concerning. Many Australians may experience unemployment, or may not complete study, or may face difficulties with their children's school participation. It is not evident why it is necessary to exclude permanent residents from Australian citizenship on these grounds.

2.46 Depending on what matters are considered relevant to assessing 'integration into the Australian community', the previous analysis identified that the measure may also engage and limit a range of other human rights. For example, the measure may also limit the right to freedom of expression, should it be construed to include statements considered by the minister to contravene Australian values.

2.47 As discussed in the previous human rights assessment, the bill also provides for the minister to exclude merits review of his decision to refuse a citizenship application, where he issues a notice that the decision is in the public interest. This raises the prospect that a person may be denied citizenship, and the important rights and protection that citizenship entails, without being able to effectively challenge the minister's determination or test the information that it is based upon. While judicial review would remain available, it is likely to be an inadequate safeguard due to the breadth of the power conferred on the minister by the terms of the proposed bill.

2.48 The committee therefore sought the advice of the minister as to:

- whether the measure is compatible with the right to equality and non-discrimination and other human rights;
- whether the basis on which a person will be considered to have integrated into the Australian community could be made clear and defined in the legislation;
- why it is not possible to allow merits review for all assessments made under proposed section 21(2)(fa).

Minister's response

2.49 The minister provided the following explanation as to why 'integration' is considered generally to be important:

Integration is important because the outcomes for each person, and for the nation as a whole, depend on everyone reaching their potential and being able and willing to work together to the benefit of all. This requires the sort of connection and opportunity that integration implies, and that social cohesion and national advancement require.

2.50 The minister provided the following information in relation to the basis on which a person will be considered to have integrated in the Australian community:

In order to achieve this outcome the assessment of an aspiring citizens' integration will be based on a range of factors, across self-sufficiency, social, cultural and civic domains.

The indicators may include: employment records/efforts to gain employment, involvement with community organisations (including the spectrum of organisations found across a multicultural society), interest and participation in civic issues and causes, appropriate care of children including their education and health, promotion of acceptance of diversity and of own culture, and knowledge of other cultures. The assessment about participation in and contributions to Australia's democratic, multicultural society.

2.51 However, as noted above, the range of possible factors that might be assessed as a basis for 'integration' raise concerns as to whether these factors may operate to disproportionately negatively affect particular groups or otherwise engage and limit human rights. In relation to the compatibility of the measure with the right to equality and non-discrimination, the minister's response states:

The measure is compatible with the right to equality and non-discrimination, noting that the right, at international law, to liberty of movement and freedom to choose a residence is subject to any proportionate and legitimate restrictions which are necessary to protect national security, public order, public health or the rights or freedoms of others. The amendment proposed here falls within such permitted restrictions.

2.52 A particular concern in relation to the operation of the measure is that there is nothing on the face of the legislation which appears to limit the minister's discretion in determining the basis on which a person will be considered to have integrated into the Australian community. In relation to whether this could be made clear and defined in the legislation, the minister's response states:

The integration framework, under which a citizenship applicant will be assessed, will:

- be defined as clearly, objectively and transparently as possible, to assist decision-makers to make fair and consistent assessments, regardless of applicants' culture, ethnicity or linguistic background,
- not include assessment of aspects of integration that are beyond the applicant's control, such as sense of belonging, or periods of unemployment where the applicant has made appropriate efforts,
- allow for different circumstances and preferences of applicants in the pathway they take towards integration—for example, some may legitimately prioritise working above making social links, and others may make contributions to an ethnic or religious community rather than mainstream community organisations,
- be inclusive of the sort of diversity that typifies multicultural Australian society, and
- be applied by well-trained staff in cultural and diversity awareness.

It is proposed that this detail will be clarified and defined in a legislative instrument, in order to provide certainty for applicants and flexibility for the Minister.

As factors and indicators relating to integration may change over time and may require urgent updating, an instrument provides the most flexibility and is a reasonable means of providing certainty for applicants.

2.53 Defining the basis on which a person will be found to have integrated into the Australian community by legislative instrument may address the concern that the exercise of the power, as presently proposed, is broad and unconstrained. However, it is noted that the scope of the power in the bill would currently permit the legislative instrument to contain matters regardless of whether or not they raise human rights concerns. This legislative instrument will need to ensure that the integration into the community criterion is applied in a manner compatible with human rights, including ensuring that it is not indirectly discriminatory, bearing in mind the significant consequences of denying a permanent resident the citizenship to which they are otherwise entitled. Should the bill be passed, the committee will assess the legislative instrument for compatibility with human rights.

2.54 In relation to the provision to exclude merits review of the minister's personal decision to refuse a citizenship application, the minister's response states:

An application may be made to the Administrative Appeals Tribunal (AAT) for review of a decision to refuse to approve a person becoming a citizen. Where the decision-maker is not satisfied that the person has integrated into the Australian community and the decision-maker refuses to approve the person becoming a citizen, the question of whether the person has integrated into the Australian community would form part of a review conducted by the AAT.

A decision made personally by the Minister, where the Minister is satisfied that the decision was made 'in the public interest', would be excluded from review by the AAT. The exclusion from merits review of public interest decisions made personally by the Minister is consistent with similar provisions involving personal decisions of the Minister under the Migration Act 1958. As a matter of practice, it is expected that only appropriate cases will be brought to the Minister's personal attention so that merits review is not excluded as a matter of course.

Further if an integration question was so significant that it was brought to the Minister's personal attention, then there is probably a serious question of the applicant's character, and the applicant would more likely be refused on character grounds in these circumstances.

2.55 Matters of consistency are generally insufficient for a measure to be a permissible limitation on human rights. Not only does this measure raise concerns in relation to the right to a fair hearing, it also raises concerns in relation to whether the measure could be a proportionate limitation on other human rights. In particular it raises concerns about whether there are adequate and effective safeguards in relation to the operation of the measure.

Committee response

2.56 The committee thanks the minister for his response and has concluded its examination of this issue.

2.57 The preceding analysis indicates that, noting the broad scope of the proposed power, there may be human rights concerns in relation to its operation. This is because its scope is such that it could be used in ways that may risk being incompatible with human rights. However, setting out criteria for the exercise of this power by legislative instrument may be capable of addressing some of these concerns. If the bill is passed, the committee will consider the human rights implications of the legislative instrument once it is received.

Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017

Purpose	Amends the <i>Australian Passports Act 2005</i> and <i>Foreign Passports (Law Enforcement and Security) Act 2005</i> to require the minister to deny a passport or demand the surrender of a foreign travel document when an Australian citizen is on a state or territory child sex offender register with reporting obligations; and the <i>Criminal Code Act 1995</i> to create an offence for a registered child sex offender with reporting obligations to travel, or attempt to travel, overseas without permission from a relevant authority
Portfolio	Foreign Affairs and Trade
Introduced	House of Representatives, 14 July 2017
Right	Freedom of movement (see Appendix 2)
Previous report	7 of 2017
Status	Concluded examination

Background

2.58 The committee first reported on the Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017 (the bill) in its *Report 7 of 2017* and requested a response from the Minister for Foreign Affairs by 22 August 2017.¹

2.59 The bill passed both houses of parliament on 20 July 2017 and received royal assent on 26 July 2017.

2.60 The minister's response to the committee's inquiries was received on 30 August 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Denial or cancellation of passport and criminal offence to travel overseas

2.61 Section 22AA of the bill provides that a passport must not be issued and must be cancelled where a 'competent authority' makes a refusal or cancellation request.

2.62 Such a request may be made in relation to a 'reportable offender', which means an Australian citizen whose name is entered on a child protection register of a state or territory and who has reporting obligations in connection with that entry on the register.

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) 7-16.

2.63 A 'competent authority' is defined in the *Australian Passports Act 2005* as a person with responsibility for, or powers, functions or duties in relation to, reportable offenders or a person specified in a minister's determination as a competent authority.²

2.64 Section 271A.1(1) further makes it an offence for an Australian citizen, if their name is entered on a child protection offender register and the person has reporting obligations in connection with that entry on the register, to leave Australia.

2.65 Section 271A.1(3) provides an exception (an offence-specific defence) to this offence, stating that the offence does not apply if a competent authority has given permission for the person to leave Australia or the reporting obligations of the person are suspended at the time the person leaves Australia. The offence carries a maximum penalty of five years imprisonment.

Compatibility of the measures with the right to freedom of movement

2.66 The right to freedom of movement includes the right to leave and return to Australia. As international travel requires the use of passports, the right to freedom of movement encompasses the right to obtain necessary travel documents, such as a passport.

2.67 The initial human rights analysis stated that, by providing for the denial or cancellation of a reportable offender's passport and creating a criminal offence for a reportable offender to leave Australia, the measure engages and limits freedom of movement. The statement of compatibility acknowledges the limitation on the right but argues that this limitation is permissible.³

2.68 The right to freedom of movement may be permissibly limited where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.69 The explanatory memorandum states that the purpose of the measures are to ensure reportable offenders are prevented from travelling overseas 'to sexually exploit or sexually abuse vulnerable children in overseas countries where the law enforcement framework is weaker and their activities are not monitored'.⁴ The statement of compatibility identifies the objective of the measures as protecting the rights and freedoms of others and particularly the rights of children to be protected from all forms of sexual exploitation and abuse.⁵ The explanatory memorandum also provides evidence of the importance of this objective.⁶ As noted in the previous

2 *Australian Passports Act 2005* section 12(3).

3 Statement of Compatibility (SOC) 4, 5.

4 Explanatory Memorandum (EM) 2.

5 SOC 3.

6 EM 2.

analysis, preventing the abuse of children is clearly a legitimate objective for the purpose of international human rights law.

2.70 However, the statement of compatibility does not provide any specific information, or any evidence, about how the measure will be effective to achieve this objective (that is, rationally connected to the legitimate objective).

2.71 In relation to the proportionality of the measures, the statement of compatibility argues that:

The measure is proportionate and reasonable because it only captures those who have been convicted in a court of law for child sex offences and/or who have been placed by a court on a register with reporting obligations due to the seriousness of their offences and/or risk of reoffending. The passport measures will be legislated, are not arbitrary and will cease to take effect once the person's reporting obligations end.⁷

2.72 The statement of compatibility identifies one relevant safeguard in relation to the measures, stating:

if there are good reasons for making an exception, a competent authority will be able to permit a reportable offender to travel on a case by case basis.⁸

2.73 The statement of compatibility provides no further information on the operation of safeguards.

2.74 It appears from the explanatory materials that it is not intended that a competent authority will make a case-by-case assessment of each reportable offender before requesting that their passport be cancelled or not issued. The explanatory memorandum notes that commonwealth legislation already provides that a child sex offender's passport may be refused, cancelled or surrendered on the basis of a competent authority's assessment of the offender's likelihood to cause harm.⁹ However, the explanatory memorandum states that:

This process is resource intensive, being done on a case-by-case basis, and is subject to review by the Administrative Appeals Tribunal. As a result, States and Territories do not use these provisions at all. The measures in the Bill address these constraints to protect vulnerable overseas children.¹⁰

2.75 The initial analysis stated that, while the current process may be more resource intensive than the absence of a risk-based assessment, the statement of

7 SOC 5.

8 SOC 5.

9 This would appear to be provided for in existing section 14 of the *Australian Passports Act 2005*.

10 EM 2.

compatibility does not explain why better resourcing the current process would be insufficient to address the legitimate objective of protecting children. This would appear to be a more tailored approach, allowing for restriction of movement in those cases where an offender is likely to cause harm. The statement of compatibility does not identify any problems with the current legal test for the refusal, cancellation or surrender of a passport in terms of targeting appropriate offenders.

2.76 It was noted that reducing the administrative inconvenience of undertaking case-by-case assessments of offenders before depriving them of their freedom of movement after they have served their criminal sentence is not a legitimate objective for limiting a fundamental human right. Nor is reducing any inconvenience to the government caused by the availability of rights of review before the Administrative Appeals Tribunal (AAT).

2.77 The explanatory memorandum further states that following the changes introduced by the bill, the number of competent authority requests 'will rise substantially to capture the existing 20,000 registered child sex offenders and additional 2,500 offenders added to the registers each year'.¹¹ Based on this information, it appears that the bill would permit competent authorities to make requests in relation to all reportable offenders without any consideration of the risk each individual poses or their individual circumstances or whether it is necessary to restrict travel entirely rather than to specific countries 'where the law enforcement framework is weaker'.¹² Further, the criminal offence of leaving Australia under section 271A.1(1) would apply to all those on a child protection offender register who have reporting obligations unless an exception applies.

2.78 The existence of effective safeguards and exemptions is relevant to whether the measures are a proportionate limitation on human rights. A competent authority will be able to permit a reportable offender to travel overseas on a case by case basis where there are 'good reasons' (such as visiting a dying family member).¹³ However, no information was provided as to the processes by which a person could apply to the competent authority to seek permission to be able to travel overseas or whether there is any process for merits review of any decision that the competent authority makes. It appears that the criminal offence of leaving Australia could apply unless a competent authority has given permission for the person to leave Australia or the reporting obligations of the person are suspended at the time the person leaves Australia. Permitting travel in particular circumstances also does not address the concern about the potential blanket application of the measures to all reportable offenders regardless of individually assessed risk.

11 EM 12.

12 EM 2.

13 EM 9-10.

2.79 In this respect, it was also unclear from the bill, the statement of compatibility and the explanatory memorandum which offenders will be included as subject to having their passport cancelled or not issued. The explanatory memorandum provides no detail of which offenders are put on a state or territory child protection register, other than to say that the bill applies to 'registered child sex offenders'.¹⁴ However, the bill provides that a reportable offender is one whose name is entered on a state or territory 'child protection offender register', however described. It appears that this may include those who have been convicted of harmful, but not sexual, offences against children and offences not involving children. For example, it appears that in the Northern Territory, Queensland, Tasmania and Victoria, a person convicted of incest (which could apply in relation to adults) could be included on a child protection register.¹⁵ It therefore appears that the range of offences for which a person could be included on a child protection offender register may be broader than child sex offences. As such, the measures appear to be overly broad with respect to achieving the objective of preventing the abuse of children overseas. It is noted in this respect that the obligation to ensure that legislation operates in compatibility with Australia's international obligations rests with the commonwealth, irrespective of whether the relevant legislation or processes operate at the federal, state or territory level.¹⁶

2.80 It was noted in the initial analysis that the measures are stated to pursue the legitimate objective of preventing the exploitation and abuse of children overseas. However, the preceding analysis raises questions as to whether the limitation placed on the right to freedom of movement is proportionate and permissible.

2.81 The statement of compatibility has provided insufficient information to justify this limitation. The committee accordingly sought the advice of the minister as to:

- how the measures, in altering the existing system for the refusal of a travel document, are effective to achieve (that is, rationally connected to) its legitimate objective; and
- whether the limitation is reasonable and proportionate to achieve its stated objective, including:

14 EM 2.

15 See *Child Protection (Offender Reporting and Registration) Act 2004* (Northern Territory); *Child Protection (Offender Reporting) Act 2004* (Queensland); *Community Protection (Offender Reporting) Act 2005* (Tasmania); *Sex Offenders Registration Act 2004* (Victoria). For a summary of offender registration legislation in each Australian state or territory, see also: <https://aifs.gov.au/cfca/offender-registration-legislation-each-australian-state-and-territory>.

16 See, for example, Vienna Convention on the Law of Treaties, 1969, article 27; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, articles 1-3, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

- why existing section 14 of the *Australian Passports Act 2005*, which provides that a travel document may be refused if a competent authority reasonably suspects a person would engage in harmful conduct, is not sufficient to address the legitimate objective of the measures;
- whether other less rights restrictive approaches are reasonably available, including approaches which are tailored to the risk posed by an individual;
- how the measures are sufficiently circumscribed (including whether a person whose name is entered on a child protection offender register could include offenders who have not committed sexual offences against children and, if so, what is the justification for doing so; whether the competent authority will be required to consider individual risk factors before making a request); and
- whether there are adequate and effective safeguards (including the extent to which a reportable offender could seek review of a refusal/cancellation request or a decision to refuse a reportable offender's case-by-case request to travel 'for good reasons').

Minister's response

2.82 The minister's response does not directly address a number of the committee's questions and instead provides information of a more general nature. It does not provide any information on how the measures are effective to achieve the legitimate objective of the measure.

2.83 For the reasons set out in the initial analysis, the measure imposes a serious limitation on freedom of movement by providing for the blanket denial or cancellation of a reportable offender's passport and creating a criminal offence for a reportable offender to leave Australia, after the offender has fully served any criminal sentence and without requiring any individual assessment of the risk the person poses to children overseas. Accordingly, it is likely to be disproportionate to its legitimate objective of preventing the abuse of children.

2.84 The information provided by the minister in relation to the proportionality of the measures, while helpful, does not indicate that the measure is likely to be proportionate.

2.85 In relation to why the existing law (section 14 of the *Australian Passports Act 2005*) was not sufficient to address the legitimate objective of the measures, the minister's response states:

As noted in the Explanatory Memorandum accompanying the legislation, the current scheme, which does provide for case by case assessment of such child sex offenders, has proved inadequate to address the sexual abuse of children overseas. The inconsistency of decisions on review, and

the resulting uncertainty as to the level of risk an offender must pose before they will be denied a passport, has rendered section 14 requests ineffective. The Government is not prepared to allow these factors to have the perverse effect of helping to perpetuate the sexual abuse of children overseas.

2.86 This statement does not substantially explain why this case-by-case system has been ineffective. While the minister's response points generally to inconsistencies and uncertainties in decisions on review, it does not explain the scope of such uncertainties and the extent to which these may, or may not, have been addressed by less rights restrictive alternatives. For example, to the extent that the concern is uncertainty in the level of risk that an offender must pose, having a clearer definition of the level of risk in the legislation would appear to be an available method to address this concern. This would still provide for a tailored approach to the restrictions on movement, namely, restriction only in those cases where an offender is likely to cause harm.

2.87 The minister's response also has not addressed the committee's question as to whether the measure is sufficiently circumscribed. In this respect, as noted above, it is unclear from the bill, the statement of compatibility and the explanatory memorandum which offenders will be included as subject to having their passport cancelled or not issued. Of particular concern is the question of whether a person whose name is entered on a child protection offender register could include offenders who have not committed sexual offences against children.

2.88 In relation to whether there are adequate and effective safeguards in relation to the operation of the measure, the minister's response relies on the discretion to provide permission for travel, which was discussed in the initial analysis, and explains:

In deciding whether or not to grant such permission, it is open to a competent authority to have regard to any considerations that may be relevant, such as the nature and severity of the offence, the length of time the person has been on a child sex offender register, the reason for travel, and the person's behaviour since being sentenced.

2.89 While the existence of this exception is relevant to the proportionality of the measure, permitting travel in particular circumstances also does not address the concern about the potential blanket application of the measures to all reportable offenders regardless of individually assessed risk.

2.90 Additionally, it is unclear what process will be in place in relation to the competent authority's exercise of this discretion. In this respect, the minister's response notes that '[d]ecisions made by state or Territory competent authorities will be subject to relevant State and Territory administrative law. Decisions made at Commonwealth or State and Territory level may be subject to judicial review'. However, while administrative review may be a relevant safeguard, it is not set out

which state and territory administrative law in fact provides scope to review a decision declining to grant permission to travel.

2.91 In relation to the availability of judicial review, the minister's response states:

The new passport measures may be judicially reviewable in the Federal Court. A person whose passport is cancelled or refused under the new laws may be able to seek review of the legality of the decision to cancel or refuse them a passport. This safeguard adequately protects a child sex offender from having their passport wrongfully refused or cancelled and provides such persons with legal remedies. Additionally, decisions by State and Territory competent authorities, which are responsible for granting permission for child sex offenders to travel, are subject to State and Territory administrative law.

2.92 However, federal judicial review is only a limited safeguard, as it is restricted to considering the legality of the decision by the minister on the enumerated grounds of judicial review. The nature of the measure requires the minister to refuse to issue or to cancel a passport in response to a request by a competent authority. This means that there is no requirement for the minister to consider underlying matters of risk but only that the request has been made. Accordingly, there would appear to be only limited matters that could possibly be subject to federal judicial review.

2.93 The minister's response further explains in relation to the operation of the measure that:

Ultimately, decisions about a child sex offender's ability to travel will be made by a competent authority. In denying the child sex offender a passport, the Minister will only be acting on the advice of a competent authority. This is appropriate, given the competent authority's expertise, its familiarity with the circumstances of the offender and the fact it is better placed to assess the risk they pose to children overseas than the Minister.

2.94 While it may be appropriate to draw on the competent authority's expertise and experience in assessing questions of risk, the concern remains that there is no requirement that the authority be satisfied that the person in fact poses a risk to children overseas, let alone any requirement of a particular level of risk, unlike other regimes that place restrictions on high risk sex offenders or violent offenders.

Committee response

2.95 The committee thanks the minister for her response and has concluded its examination of this issue.

2.96 In light of the information provided, the preceding analysis indicates that the measure is likely to be incompatible with the right to freedom of movement.

Compatibility of the measure with the right to a fair hearing

2.97 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR) and applies to both criminal and civil proceedings, including where rights and obligations are determined. The initial analysis stated that the measures may engage and limit this right due to the restricted scope that is provided for review of the denial or cancellation of an individual's passport and other decisions in this process. The decision to deny or cancel an Australian passport will not be subject to merits review. The statement of compatibility argues that:

The decision to cancel an Australian passport following a competent authority request on the grounds that a person is a reportable offender should not be subject to administrative review as the Minister's decision will be a mandatory decision. The Minister is required to deny a passport following a request by a competent authority, which has appropriate expertise and full understanding of the circumstances of the offender.¹⁷

2.98 In the previous analysis, it was acknowledged that, given the mandatory nature of the minister's decision to cancel or deny a passport, merits review of the exercise of this power would potentially provide substantively no further grounds of review than judicial review. It was noted in this respect that an individual would continue to have access to judicial review.

2.99 However, it is not addressed in the statement of compatibility whether the decision by the competent authority to make a refusal or a cancellation request would be subject to merits review. Nor does the statement of compatibility address whether a decision by a competent authority in relation to whether a registrable offender is to be granted permission to travel overseas would be subject to merits review.

2.100 Accordingly, the committee requested the advice of the minister as to whether decisions of the competent authority will be subject to merits review. If not, the committee requested the advice of the minister as to whether the measure is compatible with the right to a fair hearing.

Minister's response

2.101 In relation to whether the decisions of the competent authority will be subject to merits review, the minister's response states:

As noted in the preceding paragraphs, child sex offenders will have the ability to apply to competent authorities for permission to travel. Decisions made by state or Territory competent authorities will be subject to relevant State and Territory administrative law. Decisions made at

Commonwealth or State and Territory level may be subject to judicial review.

As such, under the measures, child sex offenders not only have the right to have their travel restrictions reconsidered by competent authorities but also relevant remedies under relevant Commonwealth, State and Territory law. Accordingly, any limitation to the right to a fair hearing, to the extent that it applies to a right to seek administrative review of a decision, is reasonable and necessary to protect children overseas from sexual exploitation and sexual abuse.

2.102 It is a relevant safeguard that state and territory competent authorities will be subject to state and territory administrative law and that judicial review may also be available. However, it is noted that each jurisdiction varies as to whether particular decisions may be subject to merits review under state and territory administrative law. This means that it is unclear from the information provided the exact scope of merits and judicial review that will be provided. Access to merits and judicial review may be an important aspect of the right to a fair hearing under international human rights law.

Committee comment

2.103 The preceding analysis indicates that access to merits and judicial review may be important aspects of the right to a fair hearing under international human rights law. However, it is unclear from the information provided by the minister what scope is afforded to merits and judicial review in each state and territory.

Compatibility of the measure with criminal process rights

2.104 Article 14(7) of the ICCPR protects the right not to be tried and punished twice (the prohibition against double jeopardy). Article 15 of the ICCPR provides that a heavier penalty shall not be imposed than the one which was applicable at the time a particular criminal offence was committed. These rights apply in relation to criminal offences. As set out in the committee's *Guidance Note 2*, even if a penalty is classified as civil under domestic law it may nevertheless be considered 'criminal' under international human rights law.¹⁸

2.105 The statement of compatibility acknowledges that the measures may engage these rights as they impose a new restriction on reportable offenders following their conviction.¹⁹ However, the statement of compatibility argues that the measures are compatible with these rights as 'they are not penal in nature and support the existing requirements for reportable offenders to report their intention to travel' and 'attach

18 See, also, *Fardon v Australia*, UN Human Rights Committee (1629/2007) (18 March 2010).

19 SOC 7.

a civil consequence... to individuals who have been proven to engage in particular criminal conduct'.²⁰

2.106 The committee sought the advice of the minister as to the compatibility of the measures with the right not to be tried and punished twice and the right not to be subject to retroactive harsher penalties (having regard to the committee's *Guidance Note 2*), addressing in particular:

- whether the prohibition on travel may be considered a 'penalty';
- whether the nature and purpose of the measures is such that the prohibition on travel may be considered 'criminal';
- whether the severity of the prohibition on travel that may be imposed on individuals is such that the penalties may be considered 'criminal'; and
- if the prohibition on travel is considered 'criminal' for the purposes of international human rights law, whether the measure accords with criminal process rights (including the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retroactive application of harsher penalties (article 15).

Minister's response

2.107 As to whether the measure is compatible with the right not to be tried and punished twice and whether the penalties may be considered criminal under international human rights law, the minister's response states:

The measures in the Act do not constitute a 'double punishment'. They are not penal in nature, and they support current reporting obligations, which require child sex offenders to report an intention to travel overseas to a relevant authority.

The measures are not 'criminal' but rather attach a civil consequence (the loss of the ability to travel overseas) to individuals who have been assessed to pose an ongoing risk to children. The civil consequences are necessary to protect vulnerable children overseas, because the existing requirements imposed on the individual are insufficient to effectively ensure the child sex offender cannot cause further harm to children overseas.

The measures are proportionate and reasonable because they only capture those who have been convicted in a court of law for child sex offences and/or who have been placed by a court on a State or Territory child sex offender register due to the seriousness of their offences and risk of reoffending. The measures are legislated, are not arbitrary and will cease to have effect once an offender's reporting obligations cease.

The new provision in the Criminal Code makes it an offence for a child sex offender to travel overseas without permission from a competent authority. A person who is accused of committing an offence against this section will be afforded the same rights and procedural fairness as any person convicted of any other offence against Commonwealth law.

2.108 Noting the information provided and the nature of passport cancellation in this particular context, it appears that the measure may not constitute a double punishment for the purposes of international human rights law.

Committee response

2.109 The committee thanks the minister for her response and has concluded its examination of this issue.

2.110 The information provided by the minister and the preceding analysis indicate that the measure is likely to be compatible with the obligation not to be tried and punished twice.

Compatibility of the measure with the right to be presumed innocent

2.111 Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

2.112 An offence provision which requires the defendant to carry an evidential or legal burden of proof (commonly referred to as 'a reverse burden') with regard to the existence of some fact engages and limits the presumption of innocence. Where a statutory exception, defence or excuse to an offence is provided in legislation, these defences or exceptions may also effectively reverse the burden of proof.

2.113 As set out above, section 271A.1(1) makes it an offence for an Australian citizen, if their name is entered on a child protection offender register and the person has reporting obligations in connection with that entry on the register, to leave Australia. Section 271A.1(3) provides an exception (an offence-specific defence) to this offence, stating that the offence does not apply if a competent authority has given permission for the person to leave Australia or the reporting obligations of the person are suspended at the time the person leaves Australia. Section 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

2.114 Reverse burdens will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means of achieving that objective.

2.115 As noted in the previous analysis, the statement of compatibility states that any limitation on the right to be presumed innocent is justified on the basis that it is reasonable that the burden of proving relevant circumstances falls to the defendant as these 'will be particularly within the knowledge of the person concerned and easily evidenced by a reportable offender'.²¹ The statement of compatibility further states that 'it is clearly more practical for the defendant to prove that they satisfy the requirements of the defence'.²²

2.116 However, in this case, the previous analysis stated that it was unclear matters such as whether a competent authority has given permission for the person to leave Australia or the reporting obligations being suspended at the time the person leaves Australia, are particularly within the defendant's knowledge. Further, it was unclear why it is 'clearly more practical for the defendant to prove that they satisfy the requirements of the defence' or whether this provides a necessary justification for the reverse burden.

2.117 The committee drew to the attention of the minister its *Guidance Note 2* which sets out information specific to reverse burden offences.

2.118 The committee requested the minister to provide further information as to:

- whether the reverse burden offence is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the reverse burden offence is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and
- whether the offence provision may be modified such that the fact that a competent authority has not given permission for the person to leave Australia, or the reporting obligations of the person are not suspended at the time the person leaves Australia, is one of the elements of the offence, to be proved by the prosecution in the ordinary way.

Minister's response

2.119 The minister provided the following information in relation to the objective of the reverse burden offence:

The reverse burden offence is aimed at achieving a legitimate objective for the purposes of human rights law, namely to promote several rights contained in the Convention on the Rights of the Child [1991] ATS 4 including (but not limited to) the best interests of the child (Article 3) and

21 SOC 6.

22 SOC 6.

the right of the child to be protected from all forms of sexual exploitation and sexual abuse (Article 34).

When child sex offenders are in Australia, they are monitored and subject to the rigorous legal framework Australia has in place for child sex offenders. If allowed to travel overseas, these offenders may evade their reporting obligations and supervision. There is a higher risk of such offenders reoffending in countries where the legal framework is weaker, their activities are not monitored and child sexual exploitation is rampant. Accordingly, the legislation appropriately puts the right of a child not to be sexually exploited or abused above the right of a child sex offender to travel internationally. The new offence appropriately criminalises such travel, thereby achieving the objectives of the Convention on the Rights of the Child.

The offence legitimately balances the need to protect children from the ongoing risk posed by child sex offenders. The prohibition on a child sex offender travelling only applies so long as the offender has reporting obligations under a child protection register. It does not amount to a permanent travel ban.

2.120 It is clear from the information provided that the reverse burden offence pursues a legitimate objective for the purposes of international human rights law.

2.121 In relation to the proportionality of the reverse burden, the minister's response states:

To the extent that this evidential burden limits a person's right to be presumed innocent, the limitation is justified as the circumstances that must be proven are particularly within the knowledge of the person concerned and easily evidenced by such offenders. As a child sex offender must apply for and be granted permission to travel it is reasonable that the burden of proving that they have permission to travel overseas falls to the defendant. Similarly, as a child sex offender must apply to a relevant authority to have their reporting requirement suspended, it is reasonable that the burden of proving that their reporting requirements have been suspended falls to the defendant.

2.122 However, under the right to be presumed innocent it is ordinarily the duty of the prosecution to prove all elements of an offence. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, engage and limit this right. While the minister's response argues that this is permissible, in this instance, it is not clear that the question of whether a competent authority, usually a state or territory government, has given permission to travel would be peculiarly within the defendant's knowledge. Rather, it appears to be evidence in respect of which both the prosecution and defendant would be able to obtain.

2.123 The fact that the reverse burden is an evidential rather than a legal burden assists with the proportionality of the measure. On this basis, the measure may be compatible with the right to be presumed innocent.

Committee response

2.124 The committee thanks the minister for her response and has concluded its examination of this issue.

2.125 The preceding analysis indicates that the measure may be compatible with the right to be presumed innocent.

Compatibility of the measure with the right to protection of the family

2.126 The right to the protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another. The initial analysis noted that, if the reportable offender has family members residing overseas the measures may engage and limit this right. The statement of compatibility acknowledges that this right is engaged but notes that a competent authority will be able to approve travel to visit family members.²³ As set out above, there are a number of questions about whether the measures are rationally connected to and a proportionate means of achieving their legitimate objective.

2.127 The statement of compatibility provided insufficient information to justify this limitation.

2.128 The committee accordingly sought the advice of the minister as to:

- how the measures are effective to achieve (that is, rationally connected to) the legitimate objective; and
- whether the limitation is reasonable and proportionate to achieve the stated objective (including the existence of relevant safeguards in relation to the right to the protection of the family).

Minister's response

2.129 The minister's response emphasises the importance of the measure and reiterates that existing laws have been inadequate by noting that hundreds of child sex offenders have travelled overseas to countries where the legal framework is not sufficient to either detect or deter conduct. As recognised in the initial analysis, the measure clearly pursues a legitimate objective for the purposes of international human rights law.

2.130 In relation to the proportionality of the limitation on the right to protection of the family, the minister's response states:

As noted in the preceding paragraphs, the measure allows for exceptions for travel by child sex offenders where appropriate circumstances exist. In

this regard it is worth noting that the right to the protection of the family will already be prescribed where such offenders are prohibited from accessing children including their own. In such circumstances it is appropriate to extend those protections to other children, whether they are family members or not, given the risks posed by child sex offenders.

2.131 It is true that in some cases a registrable offender's access to their own children may already be limited, however, the measure prohibits travel for a broader group of offenders, and places restrictions much more broadly than restricting access to children. As set out above, the new system facilitates passport refusal or cancellation without individually assessed risk. It could operate to prohibit travel to countries with well-developed legal systems and in circumstances where the travel is to visit adult family members.

2.132 The availability of an exception permitting an individual to travel is relevant to the proportionality of the limitation. However, as set out above there are uncertainties about how this exception will operate.

2.133 In relation to whether the measures are the least rights restrictive alternative which is reasonably available, the minister's response states:

The measures introduced by the Government directly address the risks posed to vulnerable children by child sex offenders and represent the only workable and effective way to protect the human rights of vulnerable children from abuse at the hands of registered child sex offenders with reporting obligations.

2.134 However, the minister provides no further information or analysis to support this statement. For the reasons set out above in relation to freedom of movement, there are serious concerns that the measures may not be the least rights restrictive approach as required to be a proportionate limit on the right to protection of family. This includes that the measure appears to be insufficiently circumscribed in its application to all reportable offenders, its blanket application in the absence of a requirement of individually assessed risk, questions about how the measure will be applied by competent authorities and the inadequacy of safeguards. On this basis, it cannot be concluded that the measure will operate in a manner compatible with the right to protection of the family.

Committee response

2.135 The committee thanks the minister for her response and has concluded its examination of this issue.

2.136 The preceding analysis indicates that it cannot be concluded that the measure is compatible with the right to the protection of the family.

Social Services Legislation Amendment (Better Targeting Student Payments) Bill 2017

Purpose	Seeks to amend the <i>Social Security Act 1991</i> to restrict access to the relocation scholarship to students relocating within Australia and students studying in Australia
Portfolio	Social Services
Introduced	House of Representatives, 21 June 2017
Right	Social security (see Appendix 2)
Previous report	8 of 2017
Status	Concluded examination

Background

2.137 The committee first reported on the Social Services Legislation Amendment (Better Targeting Student Payments) Bill 2017 (the bill) in its *Report 8 of 2017*, and requested a response from the Minister for Social Services by 28 August 2017.¹

2.138 The minister's response to the committee's inquiries was received on 25 August 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Restricting access to the relocation scholarship

2.139 The relocation scholarship provides supplementary payments to recipients of Youth Allowance or ABSTUDY who relocate for tertiary study.²

2.140 The bill seeks to remove access to the relocation scholarship for:

- students whose parental home or usual place of residence is outside of Australia and who relocate to attend university in Australia; and
- students studying in Australia who relocate to undertake part of their Australian courses outside of Australia.³

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) 44-45.

2 Explanatory Memorandum (EM) 4. Department of Social Services, *Guide to Social Security Law*, Version 1.234, 3.8.15.10 Qualification for Relocation Scholarship Qualification, <http://guides.dss.gov.au/guide-social-security-law/3/8/15/10>.

3 EM 4-5.

Compatibility of the measure with the right to social security

2.141 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other rights.

2.142 Under international human rights law, Australia has obligations to progressively realise the right to social security using the maximum of resources available. Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of this right. The previous analysis stated that restricting access to the relocation scholarship would appear to be a backwards step in relation to social security and accordingly this limitation on the level of attainment needs to be justified. It was noted that for an individual student the loss of the relocation scholarship is significant as it currently pays \$4,376 in the first year and between \$2,189 and \$1,094 in subsequent years in addition to regular Youth Allowance or ABSTUDY social security payments.⁴

2.143 Limitations on the right to social security may be permissible providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective. The initial human rights analysis noted that the statement of compatibility acknowledges that the measure engages the right to social security and identifies the purpose of the measure as to 'simplify and streamline the delivery of the Relocation Scholarship to better reflect the policy intent of the Scholarship'.⁵ However, 'simplifying' and 'streamlining' do not constitute legitimate objectives for the purposes of international human rights law and do not acknowledge the extent of the payment reduction. Rather, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

2.144 It was noted in the initial analysis that the statement of compatibility identifies some safeguards that may go to the proportionality of the limitation, and therefore its compatibility with human rights. However, in order to assess whether the measure is a proportionate limitation, it is first necessary to identify a legitimate objective.

2.145 Accordingly, the committee sought the advice of the minister as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of human rights law;

4 Department of Human Services, *Relocation Scholarship*, <https://www.humanservices.gov.au/customer/services/centrelink/relocation-scholarship>.

5 Statement of Compatibility (SOC) 24.

- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

2.146 The minister explained the objective of the measure by reference to the objective of the underlying relocation scholarship scheme:

Consistent with human rights law, the objective of the Relocation Scholarship is to remove financial barriers to the educational participation of students from low socio-economic status (SES) backgrounds, particularly those from regional and remote areas and Indigenous students. This is in recognition that regional and remote and Indigenous students face additional costs in pursuing education and have much lower participation rates in higher education than students from major city areas of Australia. These students may not have access to a local university, or their local university may not offer the course of their choice.

Changes to the Relocation Scholarship were made on 1 January 2015, to limit the Scholarship to students relocating from or to regional areas to study. Students relocating within or between major city areas were no longer eligible for the Scholarship. This recognised that students from major cities are more likely than students from regional areas to have a suitable higher education institution accessible to their parental home.

These 2015 changes to the Relocation Scholarship failed to fully implement the intent of the policy and students with a parental home or usual place of residence overseas, and students who study overseas remained eligible for the Relocation Scholarship. This is also inconsistent with the objective of the Relocation Scholarship. Students whose parental home or usual place of residence is overseas, or who study overseas, do not face the same financial barriers to education as those in regional and remote areas of Australia.

From 1 January 2018, schedule 1 of the Bill restricts the Relocation Scholarship to students relocating within and studying in Australia. This will meet the stated objective to better reflect the policy intent [of] the Relocation Scholarship.

2.147 The objective of the relocation scholarship of removing financial barriers to educational participation for students from low socio-economic backgrounds is undoubtedly a legitimate objective for the purpose of international human rights law.

2.148 While it is not stated in these terms in the minister's response, ensuring that laws give priority to the right to social security of the least well-off members of society, in the context of the government having limited financial resources, is likely to be a legitimate objective under international human rights law. The minister refers

to the greater financial difficulties facing students in regional and remote areas when accessing education when compared to students from major cities. Insofar as the measures seek to ensure that the relocation scholarship is targeted at those who face the greatest financial barriers to educational participation in the context of limited government resources, it is likely to pursue a legitimate objective for the purposes of international human rights law.

2.149 Limiting the scholarship to those in regional and remote areas, who are considered to have the greatest need due to their geographical location, appears in broad terms to be rationally connected to this objective. However, it is noted that no information is provided to support the statement in the minister's response that students whose parental home or usual place of residence is overseas, or who study overseas, do not face the same financial barriers to education as those in regional and remote areas.

2.150 As to the proportionality of the measure, the minister's response states:

The limitation placed on access to the relocation scholarship as a result of Schedule 1 is a reasonable and proportionate response to achieving the objective to better reflect the policy intent of the measure, as only those for who the payment was not intended will be affected.

The measure will not affect access to Youth Allowance, which assists with the living costs associated with study, for those students moving to Australia or moving overseas to study. Students undertaking study overseas as part of their full-time Australian course may continue to receive Youth Allowance for the entire period of their overseas study as long as the study can be credited towards their Australian course.

In addition, Commonwealth supported students who undertake part of their Australian course overseas often relocate for short periods of time – for example, a semester or a year – and may be able to access OS-HELP loans to assist with airfares, accommodation or other travel or study expenses.

2.151 The fact that students affected by the bill remain eligible for Youth Allowance and in some circumstances OS-HELP appears to provide a safeguard such that affected individuals could afford the basic necessities to maintain an adequate standard of living in circumstances of financial hardship. This supports an assessment the measure is proportionate to the objective of ensuring that the relocation scholarship is targeted at those who face the greatest financial barriers to educational participation in the context of limited government resources. On this basis, the measure is likely to be compatible with the right to social security. It is noted, however, that information in support of the minister's statement as to the financial barriers facing students whose parental home or usual place of residence is overseas, or who study overseas, would have been of assistance to assessing whether the measure was a permissible limitation on human rights.

Committee response

2.152 The committee thanks the minister for his response and has concluded its examination of this issue.

2.153 The preceding analysis indicates that the measure is likely to be compatible with the right to social security.

Social Services Legislation Amendment (Payment Integrity) Bill 2017

Purpose	Seeks to amend the <i>Social Security Act 1991</i> to change the residency requirements for the age pension and the disability support pension by changing certain timeframes which need to be met before claims will be deemed payable to eligible recipients; increase the maximum liquid assets waiting period for Youth Allowance, Austudy, Newstart Allowance and Sickness Allowance from 13 weeks to 26 weeks; amend the <i>Social Security Act 1991</i> and the <i>Veterans' Entitlements Act 1986</i> to cease payment of the pension supplement after six weeks temporary absence overseas and immediately for permanent departures; and amend <i>A New Tax System (Family Assistance) Act 1999</i> to align the income test taper rates so that all income above the higher income free area is treated equally when calculating an individual's rate of family tax benefit Part A
Portfolio	Social Services
Introduced	House of Representatives, 21 June 2017
Rights	Social security; adequate standard of living; equality and non-discrimination (see Appendix 2)
Previous report	7 of 2017
Status	Concluded examination

Background

2.154 The committee first reported on the Social Services Legislation Amendment (Payment Integrity) Bill 2017 (the bill) in its *Report 7 of 2017*, and requested a response from the Minister for Social Services by 22 August 2017.¹

2.155 The minister's response to the committee's inquiries was received on 23 August 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Residency requirement for disability support pension and age pensions

2.156 The age pension and the disability support pension have a 10-year qualifying residence requirement before a person can access these social security payments. Currently, under the residency requirements a person must either have been an Australian resident for a continuous period of at least 10 years or, alternatively, for

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) 17-20.

an aggregate period (comprising separate periods of residency) in excess of 10 years but including a continuous period of at least 5 years within that aggregate.²

2.157 Schedule 1 of the bill proposes to amend the *Social Security Act 1991* to tighten the residency requirements in order to qualify for the age pension or the disability pension and will introduce a 'self-sufficiency' test. It is proposed that in order to meet residency requirements, at least 5 years of the 10 years of continuous Australian residency period must be during a person's working life.³

2.158 Alternatively, where that 5 years working life test is not met, a person must demonstrate 'self-sufficiency' by having 10 years continuous Australian residency with greater than 5 years (in aggregate) relating to periods in which a person has not been in receipt of an activity tested income support payment (currently Austudy, Newstart, Youth Allowance and Special Benefit).⁴

2.159 If a person does not meet the 10 years continuous Australian residency period, with 5 years during that person's working life, or has not demonstrated 'self-sufficiency', then at least 15 years of continuous Australian residency will be required to satisfy residency requirements.⁵

Compatibility of the measure with the right to social security and the right to an adequate standard of living

2.160 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other rights. The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing. Australia has obligations in relation to these rights for *all* people in Australia.

2.161 The initial human rights analysis stated that the proposed tightening of the residency waiting requirements in order to qualify for the age pension or disability support pension engages the right to social security and an adequate standard of living because it reduces access to social security and may impact on a person's ability to afford the necessities to maintain an adequate standard of living.

2.162 Under international human rights law, Australia has obligations to progressively realise the right to social security and the right to an adequate standard of living using the maximum of resources available. Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. The initial analysis stated that the

2 Explanatory memorandum (EM) 5.

3 See proposed sections 43A, 95A; Schedule 1, items 4, 10.

4 See proposed sections 43A, 95A; Schedule 1, items 4, 10.

5 See proposed sections 43A, 95A; Schedule 1, items 4, 10.

tightening of the residency waiting requirements would appear to be a backwards step in the realisation of these rights and accordingly this limitation on the level of attainment needs to be justified. Such limitations may be permissible providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

2.163 While acknowledging that the measure engages the right to social security, the statement of compatibility states that 'the schedule does not place limitations on human rights'.⁶ The previous analysis noted that, as such, the short statement of compatibility provides no substantive assessment of whether the measure constitutes a justifiable limitation on the right to social security and the right to an adequate standard of living for the purposes of international human rights law.

2.164 The committee therefore sought the advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective;
- whether there are safeguards available (such as access to Special Benefit or exemptions);
- whether alternatives to reducing access to social security have been fully considered; and
- how the measure complies with Australia's obligation to use the maximum of its available resources to progressively realise the right to social security and the right to an adequate standard of living.

Compatibility of the measure with the right to equality and non-discrimination

2.165 'Discrimination' under the International Covenant on Civil and Political Rights (ICCPR) encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).⁷ The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', which nonetheless exclusively or disproportionately affects

6 Statement of compatibility, schedule 1.

7 The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

people with a particular personal attribute (for example race, national or social origin, age or disability).⁸

2.166 The previous human rights analysis stated that, as the measure relates to social security payments for older people and people with a disability, the restrictions on access to such payments may have a disproportionate negative effect on some members of these groups on the basis of protected attributes (such as age, disability, national origin or race). In this case, it appears that the measure may have a disproportionate impact on, for example, persons with disabilities and older people from non-Australian national origins.

2.167 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.⁹ Differential treatment (including the differential effect of a measure that is neutral on its face)¹⁰ will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

2.168 However, this right was not addressed in the statement of compatibility so no assessment was provided as to the compatibility of the measure with the right to equality and non-discrimination.

2.169 The preceding analysis raises questions about the compatibility of the measure with the right to equality and non-discrimination, noting that it appears the measure may have a disproportionate negative effect on particular groups. This right was not addressed in the statement of compatibility.

2.170 Accordingly, the committee sought the advice of the minister as to whether the measure is compatible with the right to equality and non-discrimination.

Minister's response

2.171 In relation to whether the measure is aimed at achieving a legitimate objective for the purposes of international law, the minister's response states:

This measure achieves a range of legitimate objectives, including ensuring a sustainable and well-targeted payments system into the future, given the ongoing Budget constraints.

Budget repair remains a key focus for this Government as outlined in the Treasurer's Budget speech, and reiterated in the 2017-18 Budget papers. The Government has made, and continues to make necessary and sensible

8 See, e.g., *Althammer v Austria*, Human Rights Committee, 8 August 2003, [10.2].

9 See, *D.H. and Others v the Czech Republic* ECHR Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v the Netherlands* ECHR, Application no. 58641/00 (6 January 2005).

10 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

decisions to keep spending under control in order to return the Budget to surplus. This measure is similarly designed to ensure welfare payment expenditure is sustainable into the future.

The measure also encourages people who migrate to Australia to be more self-supporting and ensures that people have some reasonable connection to the Australian economy and society before being granted the Age Pension or Disability Support Pension (DSP). The Australian income support system differs from those of most other developed countries, in that it is funded from general tax revenue, rather than from direct contributions by individuals and employers. Despite this, many OECD countries require greater than 10 years contributions in order to receive even a part pension, such as Spain (15 years), Poland (20 years) and Japan (25 years).

This measure strengthens the notion that the retirement costs of a person should be fairly distributed between countries where the person has lived and worked during their working life. The Age Pension and DSP are payments made for the long-term and once granted are generally paid for the remainder of a person's life. This measure ensures that these long-term payments are linked to a period of ongoing connection to Australia through residence.

The measure addresses concerns raised by the Productivity Commission (No. 77, 13 April 2016, Migrant Intake into Australia) regarding the cost of parent migrants who have not resided in Australia during any part of their working lives and who subsequently receive Australian social security payments to financially support themselves in their retirement.

2.172 It is acknowledged that budgetary constraints and ensuring sustainability are likely to be legitimate objectives for the purposes of international human rights law. In this respect, the minister's response has provided a range of information in support of the importance of these objectives in the particular circumstances of the measure. It is further noted that such reductions in access to social security are likely to be rationally connected to these objectives.

2.173 In relation to the proportionality of the limitation, the minister's response notes 'that 98 per cent of Age Pension and DSP claimants will be unaffected by this measure'. The minister's response also points to a number of safeguards which mean that some people who have spent time overseas may still qualify for the DSP or the age pension:

Australia also has 30 International Social Security Agreements that allow people from these agreement countries to apply for and receive their foreign pension contributions in Australia. These International Social Security Agreements also commonly allow people to combine periods of residence in those countries with Australian residence for the purpose of meeting the Age Pension or DSP residence requirements.

Further, the measure contains provisions to ensure migrants subject to an Assurance of Support can access the Age Pension or DSP. An Assurance of Support is given for migrants who enter Australia under certain visa types. It is a commitment by an Australian resident to repay certain social security payments that have been paid to migrants during their Assurance of Support period. Under this measure, where an individual receives an income support payment while under an Assurance of Support, the time spent in receipt of that payment will not be included as time in receipt of an income tested income support program.

2.174 The minister's response identifies access to Special Benefit social security payments as a further relevant safeguard:

Importantly, there is a safeguard to ensure individuals can maintain an adequate standard of living by providing access to Special Benefit. Special Benefit is an income support payment that provides financial assistance to people who, due to reasons beyond their control, are in financial hardship and unable to earn a sufficient livelihood for themselves and their dependants. The rate of Special Benefit is the same as Newstart Allowance. Recipients of Special Benefit may also be entitled to supplementary payments such as Rent Assistance and the Pension Supplement, if over age pension age.

2.175 As such, the Special Benefit appears to provide a safeguard such that these individuals could afford the basic necessities to maintain an adequate standard of living in circumstances of financial hardship. However, at the same time, as Special Benefit is paid at a lower rate than either the DSP or the age pension, there is a question about whether it would, in all such cases, be sufficient to address sometimes complex needs.

2.176 The minister's response further notes that there are also other forms of social security payments that individuals may be able to access:

Australian residents with dependent children who are serving the Age Pension or DSP residence qualifying period will still have immediate access to Family Assistance payment, such as Family Tax Benefit, where eligible to assist with the cost of raising children in Australia.

2.177 The minister's response identifies a further safeguard in relation to persons who incur a disability after their arrival in Australia:

The measure also contains safeguards for individuals who incur a continuing inability to work after arrival in Australia, by not applying the residency requirements for the purposes of DSP in such instances.

2.178 This is a relevant safeguard as it will assist to ensure that individuals who incur an inability to work while in Australia will be able to access the DSP on an equal basis.

2.179 Finally, the minister's response states that the measure also maintains age pension and DSP residency exemptions for humanitarian and refugee entrants.

2.180 The kinds of safeguards identified in the minister's response are relevant to the question of proportionality. In this case, the safeguards appear to be designed to assist to ensure that the most vulnerable will continue to have access to social security payments to meet basic necessities and to avoid destitution in a range of circumstances. This supports an assessment that the measure overall is likely to be a proportionate limitation on the right to social security and the right to an adequate standard of living. Accordingly, the measure appears likely to be compatible with the right to social security and the right to an adequate standard of living.

Committee response

2.181 The committee thanks the minister for his response and has concluded its examination of this issue.

2.182 In light of the safeguards identified in the minister's response, the committee notes that the measure appears likely to be compatible with the right to social security and the right to an adequate standard of living. However, it recommends that the measure be monitored by government to ensure that individuals are able to maintain an adequate standard of living in circumstances of financial hardship.

Mr Ian Goodenough MP

Chair