Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee is required to examine bills, Acts and legislative instruments for compatibility with human rights, and report its findings to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[1] **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be justified under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationally connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A **statement of compatibility** for a measure limiting a right must provide a **detailed and evidence-based assessment** of the measure against the limitation criteria.

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or else draw the matter to the attention of the proponent on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in Guidance Note 1 (see **Appendix 4**).

1 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

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Chapter 1

New and continuing matters

1.1 This chapter provides assessments of the human rights compatibility of:

- bills introduced into the Parliament between 4 and 7 September (consideration of 5 bills from this period has been deferred);[1]
- legislative instruments received between 28 July and 10 August (consideration of 5 legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.

1.3 The committee has concluded its consideration of three instruments that were previously deferred.[3]

Instruments not raising human rights concerns

1.4 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[4] Instruments raising human rights concerns are identified in this chapter.

1.5 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

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1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

3 These are: Telecommunications (Integrated Public Number Database Scheme - Conditions for Authorisations) Determination 2017 [F2017L00941]; Telecommunications (Integrated Public Number Database Scheme - Criteria for Deciding Authorisation Applications) Instrument 2017 [F2017L00937]; and the Therapeutic Goods Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00853].

4 See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

Response required

1.6 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017

Purpose	Seeks to amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act) and the *Financial Transaction Reports Act 1988* to: expand the objects of the AML/CTF Act to reflect the domestic objectives of AML/CTF regulation; regulate digital currency exchange providers; amend industry regulation requirements relating to due diligence obligations for correspondent banking relationships; deregulate the cash-in-transit sector, insurance intermediaries and general insurance providers; qualify the term 'in the course of carrying on in a business'; allow the sharing of information between related bodies corporate; increase the investigation and enforcement powers of the Australian Transaction Reports and Analysis Centre (AUSTRAC); provide police and customs officers broader powers to search and seize physical currency and bearer negotiable instruments; provide police and customs officers broader powers to establish civil penalties for failing to comply with questioning and search powers; revise the definitions of 'investigating officer', 'signatory' and 'stored value card' in the AML/CTF Act; and clarify other regulatory matters relating to the powers of the AUSTRAC CEO
Portfolio	Justice
Introduced	House of Representatives, 17 August 2017
Rights	Criminal process rights; fair trial; right to be presumed innocent; not to be tried and punished twice; not to incriminate oneself (see **Appendix 2**)
Status	Seeking additional information

Civil penalty provisions

1.7 The Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 (the bill) proposes to make four provisions in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML Act) into civil penalty provisions. Section 175 of the AML Act states that the maximum pecuniary penalty payable by an individual for a civil penalty provision is 20,000 penalty units (or $4.2 million).

1.8 Specifically, the proposed amendments would mean that an individual could be liable to a civil penalty of up to $4.2 million for a failure to notify the AUSTRAC CEO of a change in circumstances that could materially affect the person's registration;[5] a failure to declare an amount of currency or a bearer negotiable instrument when leaving or entering Australia;[6] or providing a registrable digital currency exchange service if not registered.[7]

Compatibility of the measure with criminal process rights

1.9 Civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, if a civil penalty provision is in substance regarded as 'criminal' for the purposes of international human rights law, it will engage criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

1.10 It is settled that a penalty or sanction may be 'criminal' for the purposes of the ICCPR, even where it is classified as 'civil' under Australian domestic law. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to civil penalties. The classification of a penalty as 'criminal' under human rights law does not mean that the penalty is illegitimate, but rather that criminal process rights, such as the right to be presumed innocent and the right not to be tried and punished twice, apply.

1.11 The statement of compatibility does not identify that any rights are engaged by the civil penalty provisions and has not addressed whether they may be classified as 'criminal' for the purposes of international human rights law.

1.12 Applying the tests set out in the committee's *Guidance Note 2*, the first step in determining whether a penalty is 'criminal' is to look to its classification under domestic law. In this instance, the penalty is classified as 'civil' in the bill, however as stated above, this is not determinative of its status under international human rights law.

1.13 The second step is to consider the nature and purpose of the penalty. The penalty is likely to be considered to be criminal if the purpose of the penalty is to punish or deter, and the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context). In this instance, the purpose of the penalty is identified as to deter, however it appears to be restricted to the specific regulatory context of financial regulation.[8]

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5 See Schedule 1, item 20, proposed subsection 76P(3).

6 See Schedule 1, item 73, proposed subsection 199(13) and item 75, proposed subsection 200(16).

7 See Schedule 1, item 20, proposed subsection 76A(11).

8 Explanatory Memorandum (EM) 19.

1.14 The third step is to consider the severity of the penalty. It is here that potential concerns arise. A penalty is likely to be considered 'criminal' where it carries a penalty of a substantial pecuniary sanction. However, this must be assessed with due regard to regulatory context, including the nature of the industry or sector being regulated and the relative size of the pecuniary penalties being imposed. In this case, an individual could be exposed to a penalty of up to $4.2 million. These are very significant penalties and raise the concern that the provisions set out in [1.8] may be 'criminal' for the purposes of international human rights law.

1.15 As set out above, the consequence of this would be that the civil penalty provisions in the bill must be shown to be compatible with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. However, in this case the measure does not appear to be consistent with criminal process guarantees. For example, the application of a civil rather than a criminal standard of proof raises concerns in relation to the right to be presumed innocent. The right to be presumed innocent generally requires that the prosecution prove each element of the offence to the criminal standard of proof of beyond reasonable doubt. Accordingly, were the civil penalty provisions to be considered 'criminal' for the purpose of international human rights law, there would be serious questions about whether they are compatible with criminal process rights.

Committee comment

1.16 The preceding analysis raises questions as to the compatibility of the civil penalty with criminal process rights.

1.17 The committee draws the attention of the minister to its *Guidance Note 2* and seeks the advice of the minister as to whether:

- **the civil penalty provisions in the bill may be considered to be 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*); and**
- **if the penalties are considered 'criminal' for the purposes of international human rights law, whether the measures could be amended to accord with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1))).**

Further response required

1.18 The committee seeks a further response from the relevant minister or legislation proponent with respect to the following bills and instruments.

Migration Amendment (Validation of Decisions) Bill 2017

Purpose	Seeks to ensure that visa cancellations or refusals based on information gained from gazetted law enforcement officers under section 503A of the *Migration Act 1958* remain valid at law
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 21 June 2017
Rights	Prohibition on expulsion without due process; liberty; protection of the family; non-refoulement; freedom of movement; and effective remedy (see **Appendix 2**)
Previous report	8 of 2017
Status	Seeking further additional information

Background

1.19 The committee first reported on the Migration Amendment (Validation of Decisions) Bill 2017 (the bill) in its *Report 8 of 2017*, and requested a response from the Minister for Immigration and Border Protection by 28 August 2017.[1]

1.20 The bill passed in the House of Representatives on 16 August 2017 and in the Senate on 4 September 2017.

1.21 The minister's response to the committee's inquiries was received on 29 August 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Validation of decisions

1.22 Section 503A of the *Migration Act 1958* (the Migration Act) provides that information communicated to an authorised migration officer by a gazetted agency (such as law enforcement or intelligence agencies or a war crimes tribunal) for the purposes of making a decision to refuse or cancel a visa on character grounds, is protected from disclosure, not only to the person whose visa is refused or cancelled, but also to any court or tribunal reviewing that decision, and to parliament or a

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) 32-43.

parliamentary committee. The minister has the non-compellable discretion to allow the disclosure after consulting the gazetted agency.

1.23 Section 503A(2) was found to be invalid by the High Court on 6 September 2017.[2] Section 503A(2) was found to be invalid to the extent that it prevented the minister from being required to divulge or communicate information to the High Court and the Federal Court when those courts engaged in judicial review of the minister's exercise of power to cancel or refuse to grant a visa. This was considered to amount 'in practice to shield the purported exercise of power from judicial scrutiny'[3] and to a 'substantial curtailment of the capacity of a court exercising jurisdiction… to discern and declare whether or not the legal limits of power conferred on the Minister by the Act have been observed'.[4] The High Court therefore considered that the minister made the decisions on the erroneous understanding as to what the exercise of the statutory power entailed, and quashed the decisions.

1.24 The bill seeks to ensure that, notwithstanding their reliance upon or regard to confidential information purportedly protected by section 503A, the minister or delegate's decisions regarding visa refusal or cancellation will remain valid.

Compatibility of the measure with the prohibition on expulsion without due process

1.25 The right not to be expelled from a country without due process is protected by article 13 of the International Covenant on Civil and Political Rights (ICCPR). It provides:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

1.26 The article incorporates notions of due process also reflected in article 14 of the ICCPR,[5] which protects the right to a fair hearing.[6] As stated in the initial human

2 *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.

3 *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33 at [53]

4 *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33 at [64].

5 See UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial*, (2007), [17], [62].

rights analysis, to the extent that domestic law gives authority to courts or tribunals to decide on expulsion or deportation decisions, the guarantees of fairness and equality of arms apply.[7] These demand that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.[8] The Human Rights Committee has stated that the article requires that 'an alien […] be given full facilities for pursuing his remedy against expulsion so that this right will in all circumstances of his case be an effective one'.[9]

1.27 Under section 503A, both the person whose visa is refused or cancelled and any authority outside the department reviewing the decision are unable to require production of particular information on which the decision is based. The person is therefore prevented from effectively contesting or correcting potentially essential information and the reviewing authority is unable to scrutinise whether the decision was correct or reasonably made, thereby engaging and limiting the right of an alien to due process prior to expulsion.

1.28 The previous analysis noted that article 13 does contain an exception to the requirement to afford due process where 'compelling reasons of national security' exist. However, section 503A is broader than this exception. It does not require the minister to be satisfied that compelling national security reasons exist, but merely that the information relied upon is communicated to an authorised migration officer by a gazetted agency on the condition that it be treated as confidential. Indeed, there is no requirement to assess whether confidentiality is necessary against any standard. This raises serious questions as to whether section 503A is compatible with article 13.

1.29 In seeking to validate decisions which relied upon section 503A information, which has been found to be constitutionally invalid on the grounds and to the extent

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6 The UN Human Rights Committee has held that immigration and deportation proceedings are excluded from the ambit of article 14. See, for example, *Omo-Amenaghawon v. Denmark* (2288/2013), 23 July 2015, [6.4]; *Chadzjian et al. v. Netherlands* (1494/2006), 22 July 2008, [8.4]; and *K. v. Canada* (1234/2003), 20 March 2007, [7.4]-[7.5].

7 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [62] ['the procedural guarantees of article 13 incorporate notions of due process also reflected in article 14 and thus should be interpreted in light of this latter provision. Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals, as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable'].

8 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [13], citing *Jansen-Gielen v. The Netherlands* (846/1999) Human Rights Committee, 3 April 2001 [8.2] and *Äärelä and Näkkäläjärvi v. Finland* (779/1997) Human Rights Committee, 24 October 2001 [7.4].

9 UN Human Rights Committee, *General Comment No. 15: The position of aliens under the covenant* (1986) [10].

set out in 1.23, the measure further limits the right to due process prior to expulsion under article 13.

1.30 The initial analysis stated that the right to due process prior to expulsion was not addressed in the statement of compatibility, and accordingly no assessment was provided as to whether the limitation was permissible. In the context of other rights, considered below, the statement of compatibility stated that the measure is a reasonable response to a legitimate objective. As discussed below at [1.55] to [1.56], there are serious questions as to whether the measure is effective to achieve, and proportionate to, the stated objectives.

1.31 The committee therefore requested the advice of the minister as to the compatibility of the measure with the right to due process prior to expulsion under article 13 of the ICCPR, particularly regarding the inability of affected individuals to contest or correct information on which the refusal or cancellation is based, and the absence of any standard against which the need for confidentiality of section 503A information is independently assessed or reviewed.

Minister's response

1.32 The minister's response addresses each of the questions asked by the committee.

1.33 In relation to the compatibility of the measure with the right to due process prior to expulsion under article 13 of the ICCPR, the minister's response emphasises that the bill only applies to visa cancelation or refusal decisions that have already been made, and that the bill 'does not affect the ability to contest information or the assessment of the confidentiality of information, nor does it seek to limit review or due process prior to expulsion'. The minister's response further states:

> The High Court of Australia is considering the validity of section 503A in *Graham* and *Te Puia*. The construction of section 503A, including the ability of individuals to contest information on which a refusal or cancellation decision is based and the standard against which the need for confidentiality of information is independently assessed, is outside the scope of this Bill. Should the High Court determine that all or part of section 503A is invalid, the Department of Immigration and Border Protection (the Department) will consider the Court's findings in the context of future decision-making. In any event, persons who have had their visa cancelled, or visa application refused, on the basis of section 503A protected information will remain able to seek judicial review of their visa decision following the commencement of this amendment. This amendment does not prevent these individuals' access to judicial review should they decide to seek it. Nor does this amendment affect a person's right to seek merits review of a relevant decision to the extent that such review is provided for under existing law. The amendments seek only to validate the visa cancellation or visa application refusal decision, rather than the construction of section 503A or the ability for section 503A to protect certain sensitive information.

> The amendments will maintain the status quo for individuals who have already had their case thoroughly assessed and considered under migration legislation and affected individuals will continue to have review rights prior to expulsion. At the time of consideration, these persons failed the character test in accordance with Australian law and had no lawful right to hold a visa allowing them to enter or remain in Australia. They have had, and continue to have, access to judicial review of this decision and some of these individuals have challenged their cancellation or refusal decisions.

1.34 While the right to judicial review (and, in some circumstances, merits review) remains, the bill appears to preclude an affected individual from being able to challenge the lawfulness of the visa cancellation or refusal decision on the basis that the decision was made in reliance on information protected by section 503A. This issue seems to be acknowledged in the explanatory memorandum which notes that the bill does 'not affect a person's ability to seek judicial review of a decision described in paragraph 9 *on any other ground*, that is, on a ground *not mentioned* in paragraphs 10 and 11'.[10] Paragraphs 9, 10 and 11 of the explanatory memorandum summarise the content and operation of section 503E(1) and provide:

> New subsection 503E(1) applies to decisions made by the Minister under section 501, 501A, 501B, 501BA, 501C or 501CA before this item commences.
>
> Such a decision made by the Minister is not invalid, and is taken never to have been invalid merely because the Minister:
>
> - relied on; or
> - had regard to; or
> - failed to disclose in accordance with any applicable common law or statutory obligation;
>
> information that was protected, or purportedly protected, by subsection 503A(1) or (2) of the Act.
>
> Further, such a decision is not invalid, and is taken never to have been invalid merely because the Minister made the decision based on an erroneous understanding of section 503A or the protection that section would provide against an obligation to disclose information.

1.35 Furthermore, the effect of the measure is to prevent an affected individual from effectively contesting or correcting potentially essential information, and a Court or reviewing authority is unable to scrutinise whether the decision was correct or reasonably made. This limits the right to due process prior to expulsion under article 13 of the ICCPR, as set out in the initial analysis.

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10 Explanatory Memorandum 4 (emphasis added).

1.36 In relation to the committee's request for information regarding the absence of any standard against which the need for confidentiality of section 503A information is independently assessed or reviewed, the minister's response stated:

> The High Court's deliberations in the cases of *Graham* and *Te Puia* centre on whether the ability to protect information under section 503A is invalid in that it allows information to be withheld from judicial proceedings based on criteria that are not evaluative. The construction of section 503A and the nature of determining which information requires protection is outside the scope of this Bill.
>
> Section 503A was introduced by the *Migration Legislation Amendment (Strengthening of Provisions Related to Character and Conduct) Act 1998* to facilitate law enforcement and intelligence agencies providing relevant information to the Department while ensuring that the content and sources will be protected. This includes protecting the information from disclosure to a court, tribunal, a parliament or parliamentary committee or any other body or person.
>
> In practice, law enforcement and intelligence agencies provide information to the Department, on the basis it can be protected from disclosure to any other person or body.
>
> The High Court is considering whether this protective power impairs the independence and impartiality of a court. Should the High Court determine that all or part of section 503A is invalid, the Department will consider the Court's findings in the context of future decision-making.

1.37 While, as the minister states, the construction of section 503A and the nature of determining which information requires protection is outside the scope of the bill, affected individuals whose visas have been cancelled or refused relying on information protected under section 503A will have their decisions retrospectively validated with no apparent assessment of whether confidentiality of matters that were kept from them pursuant to section 503A is necessary against any standard. The absence of any standard against which the need for confidentiality is independently assessed or reviewed further limits the right to due process prior to expulsion.

1.38 As the minister has not acknowledged this limitation, the minister has not undertaken an assessment of whether that limitation was permissible. In the context of other rights, considered below, the statement of compatibility stated that the measure is a reasonable response to a legitimate objective. As discussed below at [1.57] to [1.58], whilst the safety of the community and the integrity of the migration system are capable of constituting legitimate objectives under international human rights law, it cannot be concluded based on the evidence available that the measures are effective to achieve, and proportionate to, those objectives.

Committee comment

1.39 The committee thanks the minister for his response.

1.40 The preceding analysis raises serious concerns that the measure is likely to be incompatible with the right to due process prior to expulsion.

1.41 The committee seeks the minister's further advice as to the compatibility of the measure with the right to due process prior to expulsion in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.

Compatibility of the measure with the right to liberty

1.42 The right to liberty, contained in Article 9 of the ICCPR, prohibits the arbitrary and unlawful deprivation of liberty. This prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law, but the concept of arbitrariness also extends beyond the apparent 'lawfulness' of detention to include elements of injustice, lack of predictability and lack of due process.[11] The right to liberty applies to all forms of deprivations of liberty, including immigration detention, although what is considered as arbitrary may vary depending on context.

1.43 Under the Migration Act, the cancellation of the visa of a non-citizen living in Australia results in that person being classified as an unlawful non-citizen, and subject to mandatory immigration detention prior to removal or deportation.[12] The previous analysis stated that by validating decisions to cancel a visa which may otherwise be invalid, the measure engages and limits the right to liberty.

1.44 However, the statement of compatibility argues that the bill does not limit the right to liberty as it:

> introduces a legislative amendment that preserves the grounds upon which certain non-citizen's visas were cancelled, or their applications refused, the result of which may be subsequent detention, supporting existing laws that are well-established, generally applicable and predictable.[13]

1.45 The initial analysis noted that the concept of 'non-arbitrariness' under international law is not limited to general applicability and predictability, although it includes both those concepts. The detention of a non-citizen on cancellation of their visa will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation. Detention may however become arbitrary in the context of mandatory detention, where individual circumstances are not taken into account, and a person may be subject to a

11 See, for example, Human Rights Committee, *General Comment 35: Liberty and security of person* (2014) [11]-[12].

12 See *Migration Act 1958*, sections 189, 198.

13 Statement of compatibility (SOC) 6.

significant length of detention without knowing or being able to contest the information on which their detention is based before an independent body.[14]

1.46 In relation to section 503A, arbitrariness may arise because a person is prevented from accessing and addressing evidence upon which the visa cancellation, and therefore detention pending removal, is based. In seeking to broadly validate decisions which had regard to section 503A information, the bill would perpetuate the existing serious concerns in relation to section 503A.

1.47 In relation to the risk of indefinite detention, the statement of compatibility states that '[t]he determining factor [in whether detention is arbitrary] is not the length of detention, but whether the grounds for the detention are justifiable'.[15] However, as stated by the United Nations Human Rights Committee (UNHRC) '[t]he inability of a state to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention'.[16] The risk of arbitrariness in this situation is exacerbated where a person is deprived of legal safeguards to effectively challenge the basis of their detention, such as access to information relied upon in refusing or cancelling a visa.[17]

1.48 A measure may permissibly limit the right to liberty where it supports a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

1.49 The statement of compatibility identifies the objectives of the measure as being:

> …[to ensure] the safety of the Australian community and integrity of the migration programme — as it seeks to uphold certain character refusal or cancellation decisions in the event of a High Court ruling on the validity of section 503A. These non-citizens pose an unacceptable risk to the Australian community if their cancellation decisions are overturned and

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14 See *F.K.A.G v. Australia* (2094/2011) Human Rights Committee, 20 August 2013 [9.5]; *M.M.M et al v Australia* (2136/2012) Human Rights Committee, 25 July 2013 [10.4] ['the authors are kept in detention in circumstances where they are not informed of the specific risk attributed to each of them… They are also deprived of legal safeguards allowing them to challenge their indefinite detention'].

15 SOC 6.

16 Human Rights Committee, *General Comment 35: Liberty and security of person* (2014), [18].

17 *F.K.A.G v. Australia* (2094/2011) Human Rights Committee, 20 August 2013 [9.5] [The authors of the communication were detained in Australia as they were refused visas to stay following adverse security assessments from ASIO, but were unable to be returned to their country of origin due to their refugee status. The Committee held in relation to five of the authors: 'Given the vague and too general justification provided by the State party as to reasons for not providing the authors with specific information about the basis for the negative security assessments, the Committee concludes that, for these five authors, there has been a violation of article 9, paragraph 2 of the Covenant'].

> they are required to be released from immigration detention into the community.[18]

1.50 The statement of compatibility indicates that the measures are reasonable as:

> This Bill will not prevent the affected non-citizens from individually challenging their decisions in a court. The detention of a non-citizen under these circumstances is considered neither unlawful nor arbitrary under international law.[19]

1.51 However, as the previous analysis noted, it is unclear upon what basis an affected non-citizen would be able to challenge their visa cancellation or refusal in a court. Indeed, the intent of the measure appears to be to preclude affected persons from successfully challenging visa cancellations or refusals made in reliance on information that was not disclosed pursuant to section 503A, notwithstanding the invalidity of section 503A(2).

1.52 With particular reference to the risk that a person may be arbitrarily detained, the statement of compatibility states:

> The Government has processes in place to mitigate any risk of a non-citizen's detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister's personal intervention powers to grant a visa or residence determination where it is considered in the public interest.[20]

1.53 As considered in a previous human rights assessment of visa cancellation powers,[21] ensuring the safety of Australians and the integrity of the immigration system are capable of constituting legitimate objectives for the purposes of international human rights law.

1.54 However, the measure seeks to validate administrative decisions made with regard to information which was not disclosed to the affected person, and could not be effectively tested in a court for reliability, relevance or accuracy. The effectiveness of the measure to ensure the safety of Australians and the integrity of the immigration system is therefore questionable.

1.55 Moreover, in order for a measure to be a proportionate limitation on a right, it must be the least rights restrictive means of achieving the legitimate objective of the measure. The previous analysis stated that it is difficult to see how validating

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18 SOC 6.

19 SOC 6.

20 SOC 6.

21 Parliamentary Joint Committee on Human Rights, *Nineteenth report of the 44th Parliament* (3 March 2015) 18.

decisions to cancel visas based on information that is kept from the person affected, broadly as a class, is the least rights restrictive means of achieving the stated objectives. It would appear to be possible for the minister to make a renewed decision to refuse or cancel the visa of an affected person on an individual basis. Insofar as information is sought to be kept from the affected person for reasons of national security, the statement of compatibility does not address alternative means that may be available that would protect such information only to the extent required for national security or alternative processes that would still allow such information to be tested in some way before a court or tribunal. More broadly, it is not clear from the statement of compatibility why existing criminal justice or national security mechanisms are insufficient to counter any risk a person may pose should the cancellation of their visa be invalid as a consequence of the High Court's decision.

1.56 No detail was provided regarding the functioning or effectiveness of internal review processes, or the oversight processes referred to in the statement of compatibility. While the administrative and discretionary processes identified may in some circumstances mitigate the risk of arbitrary or indefinite detention, they are unlikely to constitute sufficient safeguards under international law, due to their discretionary nature.[22]

1.57 The committee therefore requested the advice of the Minister for Immigration and Border Protection as to the compatibility of the measure in relation to the right to liberty, particularly regarding:

- why the broad legislative validation of a class of decisions is required, when it appears that the minister could make a renewed decision to refuse or cancel the visa of an affected person on an individual basis;
- any alternative means that may be available that would protect such information only to the extent required for national security or alternative processes that would still allow such information to be tested in some way before a court or tribunal; and
- the availability of less rights restrictive criminal justice or national security mechanisms to address any risk posed by affected individuals.

Minister's response

1.58 In relation to the compatibility of the measure with the right to liberty, the minister's response stated:

> **Broad legislative validation**
>
> These measures ensure that non-citizens affected will not have their visas reinstated as a result of the High Court decision in the cases of *Graham* or

22 For example, the Commonwealth Ombudsman cannot override the decisions of agencies it deals with, but tries to resolve disputes through consultation and negotiation.

Te Puia. Reinstatement of such visas could result in either release from immigration detention or the ability to return to Australia. These non-citizens have had their cases thoroughly assessed and considered under migration legislation. At the time of this consideration, these persons failed the character test due to them being of serious character concern, and range from being members of outlawed motorcycle gangs to those with serious criminal records. The safety of the Australian community has been integral to these considerations. As a result of the cancellation or refusal decision, they have no lawful right to hold a visa allowing them to enter or remain in Australia.

In the event that the High Court finds that all or part of section 503A is invalid, the resultant release of affected individuals from immigration detention, or their ability to enter Australia, while their cases are being reconsidered puts the Australian community at an unacceptable risk and would understandably undermine public confidence in the integrity of Australia's migration framework. The broad application of this Bill is appropriate given the high risk to the Australian community if these measures are not taken and is effective and proportionate to the legitimate objective of protecting the Australian community.

Alternative means to protect information

The need for an alternative means to protect information may be considered should the High Court find all or part of section 503A invalid. However, possible amendments to s503A are outside the scope of this Bill.

Alternative mechanisms to address risks posed by affected individuals

The availability of less rights restrictive criminal justice or national security mechanisms to address the risk posed by affected individuals is outside the scope of this Bill. Individuals affected by the measures in this Bill have been assessed as being a risk to the Australian community and do not meet the migration programme's character requirements. As such, these individuals have no lawful right to hold a visa allowing them to enter or remain in Australia, and if they are in Australia this means they must be detained under the Migration Act. The use of protected information under section 503A in cancellation decisions does not alter the risk to the community posed by persons who have failed the character test.

If this measure is not passed by the parliament, there is a risk that following the High Court's decision those affected individuals will have visas reinstated or granted, which means those who are onshore may be released back into the Australian community, and those who are offshore will be able to return to Australia. The Australian Government cannot detain persons who have a valid visa, and therefore there are no currently available alternative mechanisms to address the risks posed by the affected individuals.

1.59 As noted in the previous human rights analysis, ensuring the safety of Australians and the integrity of the immigration system are capable of constituting

legitimate objectives for the purposes of international human rights law. However, the minister's statement that these individuals have 'failed the character test' and thereby pose a risk to the Australian community such as to warrant their detention must be understood in the context that the legislation at the time allowed these administrative decisions to be made without the person knowing, or a court being able to test, information disclosed pursuant to section 503A for reliability, relevance or accuracy. The minister's response therefore does not address the serious concerns identified in the initial analysis as to the effectiveness of the measure to ensure the safety of Australians and the integrity of the immigration system.

1.60 As the minister considered that the committee's questions as to whether there are any alternative means available to protect the information, or whether any less restrictive measures are available to address the risks posed by the affected individuals, were outside the scope of the bill, the minister's response does not substantively address these concerns. However, as the effect of the bill is to retrospectively validate the minister's decisions based on information provided pursuant to section 503A, the bill in effect upholds the process facilitated by section 503A, notwithstanding the constitutional invalidity of section 503A(2). The concerns raised in the previous human rights analysis as to whether there are alternative and less restrictive means available to protect information and to protect the community against risk, which arise as a consequence of validating the minister's reliance on section 503A, therefore remain. Even if it were to be accepted that detention is an appropriate response to the risk posed by particular individuals, it is not possible to conclude that validating decisions that result in mandatory detention, of a class of persons rather than on an individual basis, on information that is kept from each person, is the least restrictive means of achieving the stated objectives.

1.61 Based on the information provided and the previous human rights analysis, the measure may give rise to arbitrariness and there are serious concerns that the measure is likely to be incompatible with the right to liberty.

Committee comment

1.62 The committee thanks the minister for his response.

1.63 The preceding analysis raises serious concerns that the measure is likely to be incompatible with the right to liberty.

1.64 The committee seeks the minister's further advice as to the compatibility of the measure with the right to liberty in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33

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

1.65 The right to protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another. This right may be engaged where a person is expelled from a country without due process and is

thereby separated from their family life.[23] The initial human rights analysis stated that the measure engages and limits the right to protection of the family as the validation of a visa cancellation could operate to separate family members.

1.66 The statement of compatibility reasons that the amendments cannot be said to give rise to arbitrary interference with family life as they do not 'expand visa cancellation powers or impact the grounds upon which a person may have had their visa cancelled'.[24]

1.67 However, the bill seeks to validate decisions to cancel or refuse a visa which had regard to information protected under section 503A, that may now be affected by the invalidity of section 503A(2). In each such individual case, the measure has potential for arbitrary interference with family life, due to a lack of due process provided to the affected person.

1.68 As noted in the previous analysis, of relevance in this respect is the case of *Leghaei v Australia*, in which the author of the communication to the UNHRC was denied a permanent visa to remain in Australia on the basis that the author had been assessed by the Australian Security Intelligence Organisation (ASIO) as being a threat to national security. His wife and four children were either Australian citizens or permanent residents. The UNHRC found a violation of article 17 of the ICCPR read in conjunction with article 23:

> While his legal representatives were provided with information on evidence held against him, they were prevented, by a decision by the judge, from communicating to the author any information that would permit him to instruct them in return and to refute the threat that he allegedly posed to national security.
>
> In light of the author's 16 years of lawful residence and long-settled family life in Australia and absence of any explanation from the State party as to the reasons for terminating his right to remain, except for the general assertion that it was done for 'compelling reasons of national security', the Committee finds that the State party's procedure lacked due process of law… the Committee considers that the State Party has violated the author's rights under article 17, read in conjunction with article 23…[25]

1.69 Section 503A goes further than the provision at issue in *Leghaei v Australia* in withholding the information from not only the person, but also their lawyer and the court. There is therefore a serious risk that decisions based on information protected by section 503A limit the right to freedom from arbitrary interference in family life. The statement of compatibility did not address the matters raised in *Leghaei v Australia*.

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23 *Leghaei v Australia* (1937/2010) Human Rights Committee, 26 March 2015.

24 SOC 7.

25 *Leghaei v Australia* (1937/2010) Human Rights Committee, 26 March 2015 [10.4]-[10.5].

1.70 The committee therefore requested the advice of the minister as to:

- any safeguards in relation to the particular circumstances of families; and
- the concerns outlined in *Leghaei v Australia*, including the inability of affected individuals to contest or correct information on which the refusal or cancellation is based.

Minister's response

1.71 In relation to the compatibility of the measure with the right to protection of the family, the minister's response states:

> Australia acknowledges its obligations under the ICCPR not to subject individuals to arbitrary or unlawful interference with the family, and accordingly the Department takes all matters concerning interference with families seriously. It is important to note that all visa cancellation and visa application refusal decisions affected by this Bill were made prior to the Bill's commencement.
>
> The rights relating to protection from arbitrary interference with family are taken into account as part of any request for visa revocation where the visa is mandatorily cancelled without notice, or where a decision to cancel or refuse a visa on character grounds is made. In both circumstances the impact on family members affected by the decision is a consideration, which will be weighed against factors such as the risk the person presents to the Australian community.
>
> This Bill introduces no new decision-making capability or power, seeking only to uphold decisions already made. The considerations relating to family remain unchanged in the cancellation of visas or refusal of visa application on character grounds.
>
> **The concerns outlined in *Leghaei* v *Australia***
>
> The Australian Government respectfully disagreed with the views of the Human Rights Committee in *Leghaei* v *Australia*, that Australia's procedures lacked due process of law and that Dr Leghaei's rights were violated under article 17, read in conjunction with article 23, of the ICCPR. The Australian Government did not accept that there was a lack of due process leading up to Dr Leghaei's removal and considers that interference with the family was not arbitrary, given that his removal was on the basis that he was lawfully assessed as being a direct risk to Australia's national security.
>
> The concerns of the Parliamentary Joint Committee on Human Rights highlighted at 1.199 of the Report, relate to the ability of affected individuals to contest information on which refusal or cancellation is based. As discussed above, this concerns the construction of section 503A, which is currently being considered by the High Court. The amendment does not change considerations relating to interference with family in the cancellation or refusal of visas on character grounds. As such, the inquiry

into due process and the resulting impact on article 17 is outside the scope of this Bill.

1.72 The effect of the bill is to validate decisions made based on information provided pursuant to section 503A. In this respect, the construction and effect of section 503A is directly relevant to the individuals affected by the measure. An effect of the bill is that those individuals may be precluded from successfully challenging visa cancellations or refusals made in reliance on information that was not disclosed pursuant to that section, notwithstanding that section 503A(2) is invalid.

1.73 The minister's response does not identify any safeguards beyond the indication that a person's family circumstances are a consideration when deciding whether or not to cancel or refuse a visa. However, at the time the visa cancellation or refusal decisions were made, the consideration of any other factors would potentially have been informed by information protected by section 503A. In light of the concerns earlier expressed as to the lack of due process provided to the affected person through the operation of section 503A, the minister's response does not adequately address the serious concerns raised in the initial analysis as to the adequacy of any safeguards to protect against the arbitrary interference with family life.

1.74 As to the minister's response to the committee's question concerning *Leghaei v Australia,* the UNHRC's views are not binding on Australia as a matter of international law. Nevertheless, as the UN body responsible for interpreting the ICCPR, the UNHRC's views are highly authoritative interpretations of binding obligations under the ICCPR and should be given considerable weight by the government in its interpretation of Australia's obligations. Moreover, these statements of the UNHRC are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties.[26] In this respect, as a principle of international law, it is not open for a state party to a treaty to unilaterally interpret its treaty obligations.[27]

Committee comment

1.75 The committee thanks the minister for his response.

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26 Australia is a party to this treaty and has voluntarily accepted obligations under it. Article 31 of the treaty provides that treaties are to be interpreted in good faith, according to ordinary meaning, in context, in light of object and purpose. Subsequent practice in the application and interpretation of the treaties is to be taken together with context in the interpretation of treaty provisions. The views of human rights treaty monitoring bodies may be considered an important form of subsequent practice for the interpretation of Australia's treaty obligations. More generally, statements by human rights treaty monitoring bodies are generally seen as authoritative and persuasive for the interpretation of international human rights law.

27 Articles 26, 27 31(1) of the Vienna Convention on the Law of Treaties.

1.76 The preceding analysis and the previous human rights analysis raise serious concerns that the measure is likely to be incompatible with the right to family life.

1.77 The committee seeks the minister's further advice as to the compatibility of the measure with the right to family life in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.

Compatibility of the measure with the right to non-refoulement in conjunction with the right to an effective remedy

1.78 Australia has non-refoulement obligations under the Refugee Convention, the ICCPR and the Convention Against Torture (CAT). This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[28] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.79 As the committee has previously stated on numerous occasions, effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to giving effect to non-refoulement obligations.[29]

1.80 The statement of compatibility acknowledges that the bill may 'engage [the right to non-refoulement] because one eventual consequence of confirming the validity of decisions to refuse or cancel a visa may be removal from Australia'. However, it goes on to state that the amendments do not set out that the automatic consequence of validating the decision will be removal from Australia and that consideration of non-refoulement obligations is undertaken 'before a non-citizen is considered to be available for removal from Australia. Any removal from Australia is conducted in accordance with Australia's non-refoulement obligations'.[30]

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28 See Refugee Convention, article 33. The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

29 ICCPR, article 2; *Alzery v Sweden* (1416/2005), UN Human Rights Committee, 25 October 2006. See, for example, Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 45; and *Fourth Report of the 44th Parliament* (18 March 2014) 51; *Report 2 of 2017* (21 March 2017) 10.

30 SOC 7-8.

1.81 Under section 501E of the Migration Act, a person whose visa is refused or cancelled on character grounds is prohibited from applying for another visa.[31] Section 198 of the Migration Act requires an immigration officer to remove an unlawful non-citizen in a number of circumstances as soon as reasonably practicable. Section 197C of the Migration Act also provides that, for the purposes of exercising removal powers under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. There is no statutory protection ensuring that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia, nor is there any statutory provision granting access to effective and impartial review of the decision as to whether removal is consistent with Australia's non-refoulement obligations. As stated in previous human rights assessments, ministerial discretion not to remove a person is not a sufficient safeguard under international law.[32] Therefore concerns remain that the measure may engage and limit the right to non-refoulement in conjunction with the right to an effective remedy.

1.82 The committee notes that the obligation of non-refoulement is absolute and may not be subject to any limitations.

1.83 The committee notes that the measure does not provide a non-discretionary bar to refoulement, nor merits review of decisions relating to the validation of visa cancellation or refusal decisions, and is therefore likely to be incompatible with Australia's obligations under the ICCPR and the Convention Against Torture.

Minister's response

1.84 In relation to these concerns, the minister's response states:

> The Department recognises that non-refoulement obligations are absolute and does not seek to resile from or limit Australia's obligations. *Non-refoulement* obligations are considered as part of a decision to cancel or refuse a visa under character grounds. Anyone who is found to engage Australia's non-refoulement obligations will not be removed in breach of those obligations. As noted above, this amendment upholds the validity of visa cancellation or visa application refusal decisions made with regard to information protected by section 503A. It does not affect the consideration of visa cancellations or visa refusals under character grounds

31 A person may apply for a protection visa or, if formally invited by the minister to do so, a Bridging R (Class WR) Visa. However, if the visa that was cancelled was a protection visa, the person will be prevented from applying for another protection visa unless the minister exercises a personable, non-compellable power to do so. The Bridging R (Class WR) Visa is temporary and applies so long as the minister is satisfied that the person's removal is not reasonably practicable.

32 See for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 77-78.

> generally, and *non-refoulement* obligations will continue to be considered as part of this process.
>
> There are mechanisms within the Migration Act which provide the Government with the ability to address *non-refoulement* obligations before consideration of removal. For example, Australia's *non-refoulement* obligations are met through the protection visa application process or the use of the Minister's personal powers in the Migration Act. The form of administrative arrangements in place to support Australia meeting its *non-refoulement* obligations is a matter for the Government. This consideration is separate from the duty established by the removal power. The revalidation of decisions that used information protected by section 503A will not affect Australia continuing to uphold its *non-refoulement* obligations.
>
> As previously stated, this Bill introduces no new decision-making capability or power, seeking only to uphold decisions already made. The considerations relating to *non-refoulement* remains unchanged in the cancellation of visas or refusal of visa application on character grounds.

1.85 While the bill introduces no new decision-making capability or power, the effect of upholding decisions already made is that the concerns relating to non-refoulement that arise from the operation of section 503A are upheld and perpetuated. As stated in previous human rights assessments, ministerial discretion not to remove a person is not a sufficient safeguard under international law.[33]

Committee comment

1.86 The committee thanks the minister for his response.

1.87 The preceding analysis and the previous human rights analysis raise serious concerns that the measure is likely to be incompatible with the obligation of non-refoulement in conjunction with the right to an effective remedy.

1.88 The committee seeks the minister's further advice as to the compatibility of the measure with the obligation of non-refoulement in conjunction with the right to an effective remedy in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.

33 See for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 77-78.

Compatibility of the measure with freedom of movement (right to enter one's own country)

1.89 The right to freedom of movement is protected under article 12 of the ICCPR and includes a right to leave Australia as well as the right to enter, remain, or return to one's 'own country'.[34]

1.90 The reference to a person's 'own country' is not restricted to the formal status of citizenship. It includes a country to which a person has very strong ties, such as the country in which they had resided for a substantial period of time and established their home.[35]

1.91 The previous analysis stated that the right to freedom of movement is engaged by this measure, as an eventual consequence of validating visa cancellation decisions is the deportation and re-entry ban of a person who may, despite not holding formal citizenship, have such strong ties to Australia that they consider Australia to be their 'own country'.

1.92 The statement of compatibility does not acknowledge that the right to enter one's own country is engaged and limited, however in the context of other rights, states that the measure is a reasonable response to a legitimate objective. As discussed above at [1.55] to [1.56], whilst the safety of the community and the integrity of the migration system are capable of constituting legitimate objectives under international human rights law, there are serious questions as to whether the measure is effective to achieve, and proportionate to, those objectives.

1.93 The preceding analysis raises questions as to the compatibility of the measure with the right to freedom of movement (the right to enter one's own country).

1.94 The committee therefore sought further information from the minister as to the proportionality of the measure, in particular regarding any safeguards applicable to individuals for whom Australia is their 'own country', such as ensuring their visa is only cancelled as a last resort where other mechanisms to protect the safety of the Australian community are unavailable.

Minister's response

1.95 In relation to the compatibility of the measure with the right to freedom of movement and the existence of applicable safeguards, the minister's response states:

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34 Article 12 of the ICCPR.

35 See, for example, *Nystrom v Australia* (2011), UN Human Rights Committee, CCPR/C/102/D/1557/2007 [explaining that a person may have stronger ties with a country of which they are not a national, than a country of which they hold citizenship]; Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th parliament* (23 February 2016) 46-50.

> It is important to note that all visa cancellation and visa application refusal decisions affected by this Bill were made prior to the Bill's commencement.
>
> An individual's ties to Australia are taken into account as part of any request for visa revocation where the visa is mandatorily cancelled without notice, or where a decision to cancel or refuse a visa on character grounds is made. In both circumstances the individual's ties to Australia are not a primary consideration, whereas factors such as the risk the person presents to the Australian community does constitute a primary consideration. Delegates making a decision on character grounds are bound by a relevant Ministerial Direction, which requires a balancing of these countervailing considerations. While an individual's ties to Australia can be considered, there will be circumstances where this will be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record or past behaviour or associations.
>
> Decisions by the Minister to refuse to grant or to cancel a visa under subsection 501(3) of the Act (the power to cancel without notice) are not subject to the rules of natural justice. However, under these parts of the Act, the Minister may only refuse to grant or cancel a visa where he or she is satisfied that it is in the national interest to do so. In circumstances where natural justice does not apply, any information about a person's personal circumstances that is before the Minister at the time of consideration must be taken into account in the making of the decision.
>
> This Bill introduces no new decision-making capability or power, seeking only to uphold decisions already made, which have already considered ties to Australia as detailed above. As set out above, decisions to cancel or refuse a visa on character grounds takes into account a person's ties to the Australian community and weighs them against other relevant considerations.

1.96 While the bill introduces no new decision-making capability or power, the effect of upholding decisions already made is that the concerns relating to freedom of movement that arise from the operation of section 503A are upheld and perpetuated. An eventual consequence of validating visa cancellation or refusal decisions is the deportation and re-entry ban of a person who may, despite not holding formal citizenship, have such strong ties to Australia that they consider Australia to be their 'own country'. As such, the bill engages and limits freedom of movement. While the minister's response outlines the existing processes for taking into account a person's ties to the Australian community when deciding whether to cancel or refuse a visa on character grounds, to the extent that those processes may have been informed by information provided pursuant to section 503A, the minister's response does not adequately address the concerns raised in the previous human rights analysis as to whether the measure is compatible with the right of a person to remain in their 'own country'. In this respect, it is further noted that the

committee has previously concluded that visa cancellation powers may be incompatible with the right to return to and remain in one's own country in relation to Australian permanent residents with longstanding or otherwise strong ties to Australia.[36]

Committee comment

1.97 The committee thanks the minister for his response.

1.98 The preceding analysis raises serious concerns that the measure is likely to be incompatible with the right to freedom of movement.

1.99 The committee seeks the minister's further advice as to the compatibility of the measure with the right to freedom of movement in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.

Compatibility of the measure with the right to an effective remedy

1.100 Should section 503A impermissibly limit a human right, those affected have the right to an effective remedy. The right to an effective remedy is protected by article 2 of the ICCPR, and may include restitution, guarantees of non-repetition of the original violation, or satisfaction. The right to an effective remedy may take many forms, however it is not able to be limited according to the usual proportionality framework.

1.101 As stated in the initial analysis, in relation to the human rights implications of section 503A, the right to an effective remedy would likely include a fresh review of the expulsion decision, where the person affected is entitled to access and challenge adverse evidence, including section 503A protected information.

1.102 It is unclear whether the bill would allow affected persons to challenge the decision anew and access the information previously protected by section 503A in those proceedings in light of the invalidity of section 503A(2).

1.103 The statement of compatibility does not acknowledge that the right to an effective remedy was engaged by the measure.

1.104 The committee therefore sought the advice of the minister as to whether in the event that section 503A is held to be invalid, a person whose decision is validated under the amendments will be able to challenge the refusal or cancellation decision anew and access information previously protected under section 503A, in those proceedings.

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36 See Parliamentary Joint Committee on Human Rights, *Thirty-Fourth Report of the 44th Parliament* (23 February 2016) 50; *Thirty-Six Report of the 44th Parliament* (16 March 2016) 195-217.

Minister's response

1.105 In relation to the compatibility of the measure with the right to an effective remedy, the minister's response states:

> The ability to challenge visa cancellation or visa application review decisions anew and access information previously protected under section 503A is outside the scope of this Bill. While affected individuals have had, and will continue to have, review rights for their visa cancellation or application refusal decisions, how this might change following the decision of the High Court will be dependent on the Court's findings.

1.106 As stated at [1.34], the explanatory memorandum notes the bill does not affect a person's ability to seek judicial review of a decision on a ground '*not mentioned*' in section 503E(1).[37] The bill therefore appears to potentially preclude an affected individual from being able to challenge the lawfulness of the visa cancellation or refusal decision on the basis that the decision was made in reliance on information protected by section 503A. It is therefore not clear the basis upon which the minister considers that the ability to challenge visa cancellation or visa application review decisions anew and access information previously protected under section 503A is outside the scope of the bill. It is noted that there has been no explanation of how this review might operate and the scope of the review.

Committee comment

1.107 The committee thanks the minister for his response.

1.108 The preceding analysis raises serious concerns that the measure is incompatible with the right to an effective remedy.

1.109 The committee seeks the minister's further advice as to the compatibility of the measure with the right to an effective remedy in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.

37 EM 4 (emphasis added).

Advice only

1.110 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Autonomous Sanctions Amendment (Democratic People's Republic of Korea) Regulations 2017 [F2017L00880]

Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 [F2017L00637]

Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 [F2017L00675]

Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00878]

Purpose	To amend the Autonomous Sanctions Regulations 2011 by imposing additional sanctions in respect of the Democratic People's Republic of Korea; and apply the operation of the sanctions regime under the Autonomous Sanctions Regulations 2011 and the *Charter of the United Nations Act 1945* by designating or declaring that a person is subject to the sanctions regime and by giving effect to decisions of the United Nations Security Council
Portfolio	Foreign Affairs
Authorising legislation	*Autonomous Sanctions Act 2011* and *Charter of the United Nations Act 1945*
Last day to disallow	15 sitting days after tabling ([F2017L00880] and [F2017L00878] tabled 8 August 2017; [F2017L00637] tabled 13 June 2017; [F2017L00675] tabled House of Representatives 19 June 2017 and Senate 20 June 2017)
Rights	Privacy; fair hearing; protection of the family; equality and non-discrimination; adequate standard of living; freedom of movement; non-refoulement (see **Appendix 2**)
Status	Advice only

Background

1.111 The Autonomous Sanctions Amendment (Democratic People's Republic of Korea) Regulations 2017 [F2017L00880], Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 [F2017L00637] and Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 [F2017L00675] are made under the *Autonomous Sanctions Act 2011*. This Act (in conjunction with the Autonomous Sanctions Regulations 2011 and various instruments made under those regulations) provides the power for the government to impose broad sanctions to facilitate the conduct of Australia's external affairs (the autonomous sanctions regime). The Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00878] is made under the *Charter of the United Nations Act 1945.* This Act (in conjunction with various instruments made under that Act)[1] gives the Australian government the power to apply sanctions to give effect to decisions of the United Nations Security Council by Australia (the UN Charter sanctions regime).[2]

1.112 An initial human rights analysis of various instruments made under both sanctions regimes is contained in the *Sixth report of 2013* and *Tenth report of 2013*.[3] A further detailed analysis of various instruments made under both sanctions regimes is contained in the *Twenty-eighth report of the 44th Parliament* and *Thirty-third report of the 44th Parliament.*[4] This analysis stated that, as the instruments under consideration expanded or applied the operation of the sanctions regime by designating or declaring that a person is subject to the sanctions regime, or by amending the regime itself, it was necessary to assess the human rights compatibility of the autonomous sanctions regime and aspects of the UN Charter sanctions regime as a whole when considering instruments which expand the operation of the sanctions regime. A further response was therefore sought from the minister, which was considered in the committee's *Report 9 of 2016*.[5] The committee concluded its

1 See in particular the Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2014C00689].

2 Note, together the autonomous sanctions regime and the UN Charter sanctions regime are referred to as the 'sanctions regimes'.

3 See Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) 135-137; and *Tenth report of 2013* (26 June 2013) 13-19 and 20-22.

4 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 15-38; and *Thirty-third report of the 44th Parliament* (2 February 2016) 17-25.

5 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 41-55.

examination of various instruments and made a number of recommendations to ensure the compatibility of the sanctions regimes with human rights.[6]

'Freezing' of designated person's assets and prohibition on travel

1.113 The Autonomous Sanctions Amendment (Democratic People's Republic of Korea) Regulations 2017 [F2017L00880] amends the Autonomous Sanctions Regulations 2011 to expand the grounds upon which the Minister for Foreign Affairs can designate persons or entities for targeted financial sanctions and travel bans in respect of the Democratic People's Republic of Korea (DPRK). The expanded grounds are that the person or entity is:

- associated, or has been associated, with the DPRK's weapons of mass-destruction program or missiles program; or
- assisting, or has assisted, in the violation, or evasion, by the DPRK of certain United Nations Security Council Resolutions that relate to the DPRK.

1.114 The Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 [F2017L00637] and Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 [F2017L00675] designate persons and entities for the purposes of the Autonomous Sanctions Regulations 2011 on the basis that the minister is satisfied that a person or entity is:

- associated with the DPRK's weapons of mass-destruction program or missiles program; or
- responsible for, or complicit in, the threat to the sovereignty and territorial integrity of Ukraine.

The designation has the effect that this person or entity is subject to financial sanctions, and cannot travel to, enter, or remain in Australia[7] (or their designation or declaration is continued).[8] In addition, the Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00878] gives effect to certain United Nations

6 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 41-55 at 53.

7 Section 6(1) of the Autonomous Sanctions Regulations 2011 provides that for the purposes of paragraph 10(1)(a) of the *Autonomous Sanctions Act 2011*, which empowers the minister to make regulations for the purpose of imposing sanctions, the minister may, by legislative instrument: (a) designate a person or entity mentioned in an item of the table as a designated person or entity for the country mentioned in the item; (b) declare a person mentioned in an item of the table for the purpose of preventing the person from travelling to, entering or remaining in Australia.

8 See Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 [F2017L00675].

Security Council Resolutions imposing further sanctions on the DPRK, including the prohibition of certain imports, procurement, and scientific and technical cooperation involving persons or groups officially sponsored by or representing the DPRK.[9] This instrument expands the definition of 'designated person' (that is, a person who is designated as subject to the UN Charter sanctions regime) in section 4 of the Charter of the United Nations (Sanctions — Democratic People's Republic of Korea) Regulations 2008 to include persons or entities to whom the measures mentioned in paragraph 8(d) of UN Security Council Resolution 1718 apply under a decision of the United Nations Security Council or the Committee.[10]

Compatibility of the measure with multiple human rights

1.115 As set out in the committee's previous consideration of the sanctions regimes, the measures in these instruments engage and limit multiple human rights. The statements of compatibility for these instruments do not identify the relevant human rights engaged or provide any analysis in relation to the issues identified in the committee's previous reports.

1.116 The committee has previously recognised that applying pressure to regimes and individuals with a view to ending the repression of human rights internationally is a legitimate objective that may support limitations on human rights. However, in relation to the decision to designate or declare a person under the sanctions regimes, the committee's *Report 9 of 2016* set out in detail how each of the identified safeguards in the sanctions regimes are insufficient, and why the sanctions regimes are thereby not proportionate limitations on human rights.[11]

1.117 The committee therefore made a number of recommendations to the minister in respect of the sanctions regimes.[12]

Committee comment

1.118 The committee refers to its previous consideration of the sanctions regimes, and in particular, the recommendations made by the committee in its *Report 9 of 2016.*

9 See item 55 of the Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00878].

10 This definition previously included only persons or entities that: (a) the Minister has designated under regulation 4A; or (b) the Committee established by paragraph 12 of UN Security Council Resolution 1718 or the UN Security Council designates for paragraph 8(d) of Resolution 1718.

11 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 15-38.

12 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 53.

Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017 [F2017L00843]

Purpose	Provides for process for legal representation for young people in respect of control orders
Portfolio	Attorney-General
Authorising legislation	*Criminal Code Act 1995*
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives and the Senate 8 August 2017)
Rights	Multiple (see **Appendix 2**)
Status	Advice only

Background

1.119 The committee previously considered amendments to the control orders regime which allowed for control orders to be imposed on children aged 14 or 15 years of age under Division 104 of the *Criminal Code Act 1995* (Criminal Code) in *Report 7 of 2016*.[1]

1.120 The committee has also previously considered the control orders regime as more broadly part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014;[2] and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.[3]

Young person's right to legal representation in control order proceedings

1.121 Section 104.28(4) of the Criminal Code requires an issuing court to appoint a lawyer for a young person aged 14 to 17 years in relation to control order proceedings, where the young person does not have legal representation, except in limited circumstances.

1.122 The Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017 [F2017L00843] (the regulations) operationalises this provision by providing that the court may request the legal aid commission to

1 See, Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 64.

2 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 3.

3 See Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 7.

arrange representation and the Australian Federal Police are to inform relevant persons.[4]

Compatibility of the measure with the right of the child to be heard

1.123 As previously noted by the committee, providing for a child to have access to legal representation is compatible with the right to a child to be heard in judicial and administrative proceedings. Accordingly, the operationalisation of this measure through the regulations is also compatible with this right. However, notwithstanding this safeguard, concerns remain more generally as to the human rights compatibility of applying the control orders regime to children. These are set out in full in the committee's *Report 7 of 2016.*[5]

Committee comment

1.124 The committee draws the human rights implications of the regulations to the attention of parliament.

4 See, sections 3A-3C.

5 See, Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 70-73.

Bills not raising human rights concerns

1.125 Of the bills introduced into the Parliament between 4 and 7 September, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Aged Care Amendment (Ratio of Skilled Staff to Care Recipients) Bill 2017;
- A New Tax System (Goods and Services Tax) Amendment (Make Electricity GST Free) Bill 2017;
- ASIC Supervisory Cost Recovery Levy Amendment Bill 2017;
- Australian Grape and Wine Authority Amendment (Wine Australia) Bill 2017;
- Customs Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Bill 2017;
- First Home Super Saver Tax Bill 2017;
- High Speed Rail Planning Authority Bill 2017;
- Regional Forest Agreements Legislation (Repeal) Bill 2017;
- Renewable Energy (Electricity) Amendment (Continuing the Energy Transition) Bill 2017;
- Telecommunications Amendment (Guaranteeing Mobile Phone Service in Bushfire Zones) Bill 2017; and
- Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Bill 2017.

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 *Australian Citizenship Act 2007* 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

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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

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.

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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

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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/ppl/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:

- 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 *Australian Passports Act 2005* and *Foreign Passports (Law Enforcement and Security) Act 2005* 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 *Criminal Code Act 1995* 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

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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.

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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:

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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

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> 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).

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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.

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> 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.

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> 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

23 SOC 7.

> 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 *Social Security Act 1991* 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 pursing 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 *Social Security Act 1991* 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 *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to cease payment of the pension supplement after six weeks temporary absence overseas and immediately for permanent departures; and amend *A New Tax System (Family Assistance) Act 1999* 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 minster'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

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Advance to the Finance Minister Determination (No. 1 of 2017-2018) [F2017L01005];
- AusCheck Regulations 2017 [F2017L00971];
- Census and Statistics (Statistical Information) Direction 2017 [F2017L01006];
- Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2017 (No. 2) [F2017L00991];
- Commission of Inquiry (Coal Seam Gas) Bill 2017;
- Customs Tariff Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Bill 2017;
- Electoral and Referendum Amendment (ASADA) Regulations 2017 [F2017L00967];
- Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bill 2017;
- Treasury Laws Amendment (Housing Tax Integrity) Bill 2017; and
- Treasury Laws Amendment (2017 Measures No. 5) Bill 2017.

Appendix 2

Short guide to human rights

4.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.[1]

4.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).[2]

Right to life

*Article 6 of the International Covenant on Civil and Political Rights (**ICCPR**); and article 1 of the Second Optional Protocol to the ICCPR*

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [4.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, Guide to Human Rights (June 2015).

2 Parliamentary Joint Committee on Human Rights, Guidance Note 1 (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

*Article 7 of the ICCPR; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)*

4.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [4.9] to [4.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [4.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

4.9 Non-refoulement obligations are absolute and may not be subject to any limitations.

4.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

4.11 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Prohibition against slavery and forced labour

Article 8 of the ICCPR

4.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

4.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

4.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

4.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

4.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

4.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [4.6] to [4.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

4.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

4.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

4.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note* 2 provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

4.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [4.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [4.6] to [4.8]);
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

4.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

4.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

4.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);

- respect for family life (prohibiting interference with personal family relationships);
- respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
- the right to reputation.

Right to protection of the family

*Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)*

4.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

4.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

4.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

4.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

4.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

*Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (**CRPD**)*

4.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

4.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

4.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

4.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

4.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

4.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

4.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

4.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

*Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**); CRPD; and article 2 of the Convention on the Rights of the Child (**CRC**)*

4.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

4.43 '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).[3] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[4]

4.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

4.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

4.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

3 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'.

4 Althammer v Austria HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [4.29]).

Right of the child to be heard in judicial and administrative proceedings

Article 12 of the CRC

4.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

4.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

4.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

4.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

4.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

4.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

4.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

4.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

4.56 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 economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.

4.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

- accessible (providing universal coverage without discrimination; and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

Right to an adequate standard of living

Article 11 of the ICESCR

4.58 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.

Right to health

Article 12 of the ICESCR

4.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

4.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

4.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

4.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

4.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

4.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

Correspondence

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MC17-015850

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Ian,
Dear ~~Mr~~ Goodenough

Thank you for your letter of 16 August 2017 in which further information was requested on the *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017*.

I have attached the *Proposed response to Parliamentary Joint Committee on Human Rights' Report 8 of 2017* as requested in your letter. I trust the information provided is helpful.

Yours sincerely

30/08/17.
PETER DUTTON

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

Proposed Response to Parliamentary Joint Committee on Human Rights' Report 8 of 2017

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

1. The proposed response to Question 1.28, on pages 9 and 10 of the Report, in relation to requiring citizenship applicants to provide evidence of English language proficiency is:

    - ***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.***

    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 employment4. (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.

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
- 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.

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

- 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.

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.

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. <u>The proposed response to Question 1.39, on page 11 of the Report, in relation to integration into the Australian community, is:</u>

    - ***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)?***

    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.

    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.

    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.

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.

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.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS17-003082

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Migration Amendment (Validation of Decisions) Bill 2017

Thank you for your letter of 16 August 2017 in which further information was requested on the *Migration Amendment (Validation of Decisions) Bill 2017*.

I have attached the *Proposed response to Parliamentary Joint Committee on Human Rights' Report 8 of 2017* as requested in your letter. I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 29/8/17

Response to the Parliamentary Joint Committee on Human Rights Report 8 of 2017

Migration Amendment (Validation of Decisions) Bill 2017

The *Migration Amendment (Validation of Decisions) Bill 2017* (the Bill) supports the Australian Government's commitment to protect the Australian community from people who have had their visa cancelled or their visa application refused because they are of serious character concern. The amendments in this Bill proactively address the risk to the safety of Australians and reflect the Government's and the Australian community's low tolerance for criminal behaviour by those who are given the privilege of holding a visa to enter into and stay in Australia.

Committee's question:

The committee requests the advice of the Minister as to the compatibility of the measure with the right to due process prior to expulsion under article 13 of the ICCPR, particularly regarding the inability of affected individuals to contest or correct information on which the refusal or cancellation is based, and the absence of any standard against which the need for confidentiality of section 503A information is independently assessed or reviewed.

Compatibility with article 13 of the ICCPR

For lawful non-citizens within Australia, article 13 of the ICCPR provides that procedural rights must be available before they can be expelled from Australia. This includes a right to submit reasons against their expulsion and the right to a review of their case.

The amendments seek to validate visa cancelation or refusal decisions that have already been made. The Bill does not affect the ability to contest information or the assessment of the confidentiality of information, nor does it seek to limit review or due process prior to expulsion.

The High Court of Australia is considering the validity of section 503A in *Graham* and *Te Puia*.[1] The construction of section 503A, including the ability of individuals to contest information on which a refusal or cancellation decision is based and the

[1] M97/2016 - *Graham v Minister for Immigration and Border Protection;* P58/2016 – *Te Puia v Minister for Immigration and Border Protection*

standard against which the need for confidentiality of information is independently assessed, is outside the scope of this Bill. Should the High Court determine that all or part of section 503A is invalid, the Department of Immigration and Border Protection (the Department) will consider the Court's findings in the context of future decision-making. In any event, persons who have had their visa cancelled, or visa application refused, on the basis of section 503A protected information will remain able to seek judicial review of their visa decision following the commencement of this amendment. This amendment does not prevent these individuals' access to judicial review should they decide to seek it. Nor does this amendment affect a person's right to seek merits review of a relevant decision to the extent that such review is provided for under existing law. The amendments seek only to validate the visa cancellation or visa application refusal decision, rather than the construction of section 503A or the ability for section 503A to protect certain sensitive information.

The amendments will maintain the status quo for individuals who have already had their case thoroughly assessed and considered under migration legislation and affected individuals will continue to have review rights prior to expulsion. At the time of consideration, these persons failed the character test in accordance with Australian law and had no lawful right to hold a visa allowing them to enter or remain in Australia. They have had, and continue to have, access to judicial review of this decision and some of these individuals have challenged their cancellation or refusal decisions.

Standards for the need for confidentiality of section 503A

The High Court's deliberations in the cases of *Graham* and *Te Puia* centre on whether the ability to protect information under section 503A is invalid in that it allows information to be withheld from judicial proceedings based on criteria that are not evaluative. The construction of section 503A and the nature of determining which information requires protection is outside the scope of this Bill.

Section 503A was introduced by the *Migration Legislation Amendment (Strengthening of Provisions Related to Character and Conduct) Act 1998* to facilitate law enforcement and intelligence agencies providing relevant information to the Department while ensuring that the content and sources will be protected. This

includes protecting the information from disclosure to a court, tribunal, a parliament or parliamentary committee or any other body or person.

In practice, law enforcement and intelligence agencies provide information to the Department, on the basis it can be protected from disclosure to any other person or body.

The High Court is considering whether this protective power impairs the independence and impartiality of a court. Should the High Court determine that all or part of section 503A is invalid, the Department will consider the Court's findings in the context of future decision-making.

Committee's question:

The committee requests the advice of the Minister as to the compatibility of the measure in relation to the right to liberty, particularly regarding:

- **why the broad legislative validation of a class of decisions is required, when it appears that the Minister could make a renewed decision to refuse or cancel the visa of an affected person on an individual basis;**
- **any alternative means that may be available that would protect such information only to the extent required for national security or alternative processes that would still allow such information to be tested in some way before a court or tribunal; and**
- **the availability of less rights restrictive criminal justice or national security mechanisms to address any risk posed by affected individuals.**

As noted above, persons who have had their visa cancelled, or visa application refused, on the basis of section 503A protected information will remain able to seek judicial review of their visa decision following the commencement of this amendment. This amendment does not prevent these individuals' access to judicial review should they decide to seek it. Rather, the aim of these amendments is to uphold the validity of the visa cancellation or visa application refusal decisions made with regard to information protected by section 503A, with no amendments to section 503A itself. Nor does this amendment affect a person's right to seek merits review of a relevant decision to the extent that such review is provided for under existing law.

Broad legislative validation

These measures ensure that non-citizens affected will not have their visas re-instated as a result of the High Court decision in the cases of *Graham* or *Te Puia*. Reinstatement of such visas could result in either release from immigration detention or the ability to return to Australia. These non-citizens have had their cases thoroughly assessed and considered under migration legislation. At the time of this consideration, these persons failed the character test due to them being of serious character concern, and range from being members of outlawed motorcycle gangs to those with serious criminal records. The safety of the Australian community has been integral to these considerations. As a result of the cancellation or refusal decision, they have no lawful right to hold a visa allowing them to enter or remain in Australia.

In the event that the High Court finds that all or part of section 503A is invalid, the resultant release of affected individuals from immigration detention, or their ability to enter Australia, while their cases are being reconsidered puts the Australian community at an unacceptable risk and would understandably undermine public confidence in the integrity of Australia's migration framework. The broad application of this Bill is appropriate given the high risk to the Australian community if these measures are not taken and is effective and proportionate to the legitimate objective of protecting the Australian community.

Alternative means to protect information

The need for an alternative means to protect information may be considered should the High Court find all or part of section 503A invalid. However, possible amendments to s503A are outside the scope of this Bill.

Alternative mechanisms to address risks posed by affected individuals

The availability of less rights restrictive criminal justice or national security mechanisms to address the risk posed by affected individuals is outside the scope of this Bill. Individuals affected by the measures in this Bill have been assessed as being a risk to the Australian community and do not meet the migration programme's character requirements. As such, these individuals have no lawful right to hold a visa allowing them to enter or remain in Australia, and if they are in Australia this means they must be detained under the Migration Act. The use of protected

information under section 503A in cancellation decisions does not alter the risk to the community posed by persons who have failed the character test.

If this measure is not passed by the parliament, there is a risk that following the High Court's decision those affected individuals will have visas reinstated or granted, which means those who are onshore may be released back into the Australian community, and those who are offshore will be able to return to Australia. The Australian Government cannot detain persons who have a valid visa, and therefore there are no currently available alternative mechanisms to address the risks posed by the affected individuals.

Committee's question:

The committee requests the advice of the Minister as to:

- **any safeguards in relation to the particular circumstances of families; and**
- **the concerns outlined in *Leghaei v. Australia*, including the inability of affected individuals to contest or correct information on which the refusal or cancellation is based.**

Safeguards for families

Australia acknowledges its obligations under the ICCPR not to subject individuals to arbitrary or unlawful interference with the family, and accordingly the Department takes all matters concerning interference with families seriously. It is important to note that all visa cancellation and visa application refusal decisions affected by this Bill were made prior to the Bill's commencement.

The rights relating to protection from arbitrary interference with family are taken into account as part of any request for visa revocation where the visa is mandatorily cancelled without notice, or where a decision to cancel or refuse a visa on character grounds is made. In both circumstances the impact on family members affected by the decision is a consideration, which will be weighed against factors such as the risk the person presents to the Australian community.

This Bill introduces no new decision-making capability or power, seeking only to uphold decisions already made. The considerations relating to family remain

unchanged in the cancellation of visas or refusal of visa application on character grounds.

The concerns outlined in *Leghaei v. Australia*

The Australian Government respectfully disagreed with the views of the Human Rights Committee in *Leghaei v Australia,* that Australia's procedures lacked due process of law and that Dr Leghaei's rights were violated under article 17, read in conjunction with article 23, of the ICCPR. The Australian Government did not accept that there was a lack of due process leading up to Dr Leghaei's removal and considers that interference with the family was not arbitrary, given that his removal was on the basis that he was lawfully assessed as being a direct risk to Australia's national security.

The concerns of the Parliamentary Joint Committee on Human Rights highlighted at 1.199 of the Report, relate to the ability of affected individuals to contest information on which refusal or cancellation is based. As discussed above, this concerns the construction of section 503A, which is currently being considered by the High Court. The amendment does not change considerations relating to interference with family in the cancellation or refusal of visas on character grounds. As such, the inquiry into due process and the resulting impact on article 17 is outside the scope of this Bill.

Committee's comment:

The committee notes that the measure does not provide a non-discretionary bar to refoulement, nor merits review of decisions relating to the validation of visa cancellation or refusal decisions, and is therefore likely to be incompatible with Australia's obligations under the ICCPR and the Convention Against Torture.

The Department recognises that *non-refoulement* obligations are absolute and does not seek to resile from or limit Australia's obligations. *Non-refoulement* obligations are considered as part of a decision to cancel or refuse a visa under character grounds. Anyone who is found to engage Australia's *non-refoulement* obligations will not be removed in breach of those obligations. As noted above, this amendment upholds the validity of visa cancellation or visa application refusal decisions made with regard to information protected by section 503A. It does not affect the

consideration of visa cancellations or visa refusals under character grounds generally, and *non-refoulement* obligations will continue to be considered as part of this process.

There are mechanisms within the Migration Act which provide the Government with the ability to address *non-refoulement* obligations before consideration of removal. For example, Australia's *non-refoulement* obligations are met through the protection visa application process or the use of the Minister's personal powers in the Migration Act. The form of administrative arrangements in place to support Australia meeting its *non-refoulement* obligations is a matter for the Government. This consideration is separate from the duty established by the removal power. The revalidation of decisions that used information protected by section 503A will not affect Australia continuing to uphold its *non-refoulement* obligations.

As previously stated, this Bill introduces no new decision-making capability or power, seeking only to uphold decisions already made. The considerations relating to *non-refoulement* remains unchanged in the cancellation of visas or refusal of visa application on character grounds.

Committee's question:

The committee seeks further information from the Minister as to the proportionality of the measure, in particular regarding any safeguards applicable to individuals for whom Australia is their 'own country', such as ensuring their visa is only cancelled as a last resort where other mechanisms to protect the safety of the Australian community are unavailable.

It is important to note that all visa cancellation and visa application refusal decisions affected by this Bill were made prior to the Bill's commencement.

An individual's ties to Australia are taken into account as part of any request for visa revocation where the visa is mandatorily cancelled without notice, or where a decision to cancel or refuse a visa on character grounds is made. In both circumstances the individual's ties to Australia are not a primary consideration, whereas factors such as the risk the person presents to the Australian community does constitute a primary consideration. Delegates making a decision on character grounds are bound by a relevant Ministerial Direction, which requires a balancing of

these countervailing considerations. While an individual's ties to Australia can be considered, there will be circumstances where this will be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record or past behaviour or associations.

Decisions by the Minister to refuse to grant or to cancel a visa under subsection 501(3) of the Act (the power to cancel without notice) are not subject to the rules of natural justice. However, under these parts of the Act, the Minister may only refuse to grant or cancel a visa where he or she is satisfied that it is in the national interest to do so. In circumstances where natural justice does not apply, any information about a person's personal circumstances that is before the Minister at the time of consideration must be taken into account in the making of the decision.

This Bill introduces no new decision-making capability or power, seeking only to uphold decisions already made, which have already considered ties to Australia as detailed above. As set out above, decisions to cancel or refuse a visa on character grounds takes into account a person's ties to the Australian community and weighs them against other relevant considerations.

Committee's question:

The committee seeks the advice of the Minister as to whether, in the event that section 503A is held to be invalid, a person whose decision is validated under the amendments will be able to challenge the refusal or cancellation decision anew and access information previously protected under section 503A, in those proceedings.

The ability to challenge visa cancellation or visa application review decisions anew and access information previously protected under section 503A is outside the scope of this Bill. While affected individuals have had, and will continue to have, review rights for their visa cancellation or application refusal decisions, how this might change following the decision of the High Court will be dependent on the Court's findings.

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 9 August 2017 regarding the human rights compatibility of the *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017.*

I attach a response to the request for information from the Parliamentary Joint Committee on Human Rights, as set out in the Committee's *Report 7 of 2017.*

I trust this information is of assistance.

Yours sincerely

Julie Bishop

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Responses to questions from the Parliamentary Joint Committee on Human Rights in its *Report 7 of 2017* in relation to the *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017*

The Committee asked 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:**
    - **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').**

1. As noted in the statement of compatibility accompanying the *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017* (Act), the right to freedom of movement is not an unfettered right. Article 12(3) of the *International Covenant on Civil and Political Rights [1976]* ATS 5 provides that this right may be limited where the limitation: is for a legitimate objective; is lawful; and is necessary to protect national security and the rights and freedom of others.

2. It is those rights, namely the rights of vulnerable children to be protected from abuse by Australians listed on a State or Territory child sex offender register with reporting obligations (child sex offender), which the legislation directly protects. That children should be protected from such abuse is reasonable, and the measures taken are proportional to address and prevent their abuse. In particular, the measures 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 register with reporting obligations due to the seriousness of their offences against children and their risk of reoffending.

3. There are adequate and effective safeguards in place to ensure that the new passport measures are appropriately applied. In particular, discretion exists for competent authorities to provide permission for child sex offenders to travel, notwithstanding their registration on a child sex offender register. 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.

4. 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.

5. 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.

6. 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.

The Committee asked the advice of the Minister as to:

- **whether decisions of the competent authority will be subject to merits review, and, if not, whether the measure is compatible with the right to a fair hearing.**
- **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 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).**

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

The Committee asked 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.**

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

14. 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.

15. 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.

16. 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.

The Committee asked 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).**

17. 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.

18. The existing system of case by case assessment of registered child sex offenders has proved inadequate to protect the rights of children to be free from abuse. Under existing laws, hundreds of child sex offenders have been travelling overseas each year to countries where the legal framework is not sufficient to either detect or deter their conduct.

19. 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.

The Hon Christian Porter MP
Minister for Social Services

MC17-010170

25 AUG 2017

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 16 August 2017 regarding the Parliamentary Joint Committee on Human Rights' request for a response in relation to the human rights compatibility of the Social Services Legislation Amendment (Better Targeting Student Payments) Bill 2017.

Please find enclosed a response to the Committee in relation to those matters raised by the Committee in sections 1.226 and 1.227 of the Human Rights Scrutiny Report: Report 8 of 2017.

Thank you for raising these matters and allowing me to provide additional information.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

Attachment A

SOCIAL SECURITY LEGISLATION AMENDMENT (BETTER TARGETING STUDENT PAYMENTS) BILL 2017

Schedule 1: Restricting access to the relocation scholarship

Committee comment

1.226 The preceding analysis raises questions as to whether the measure is a permissible limitation on the right to social security.

1.227 The committee therefore seeks 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;
- 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.

The Relocation Scholarship became a payment under the *Social Security Act 1991* from 1 April 2010 to assist students who have to live away from home to study, with the cost of establishing new accommodation in order to attend university.

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 pursing 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 the Relocation Scholarship.

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.

This 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.

The Hon Christian Porter MP
Minister for Social Services

MC17-010032

23 AUG 2017

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
PO BOX 6100
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 9 August 2017 regarding the Joint Committee's Report 7 of 2017 on the *Social Services Legislation Amendment (Payment Integrity) Bill 2017*. I appreciate the time you have taken to bring this matter to my attention.

In your letter you sought additional information on the *Enhanced residency requirements for pensioners* measure, based on the Committee's Report. Specifically, the Committee sought information on how the measure is compatible with the right to social security, the right to an adequate standard of living, and to the right to equality and non-discrimination.

With respect to these rights, I note the comments in the Committee's Report that measures may be compatible with these rights provided that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

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 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.

It is important to note that 98 per cent of Age Pension and DSP claimants will be unaffected by this measure.

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.

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.

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.

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.

Additionally, the measure also maintains Age Pension and DSP residency exemptions for humanitarian and refugee entrants.

This measure is compatible with the right to social security, the right to an adequate standard of living, and to the right to equality and non-discrimination. This is because any limitation is proportionate to the policy objective of ensuring a payments system that is well-targeted and sustainable in the context of broader, necessary Budget repair, and ensuring permanent pension recipients have an ongoing connection to Australia.

Thank you again for writing. I trust this information is of assistance.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Appendix 4

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia’s jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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1 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

2 For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

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[3] The Attorney-General's Department guidance may be found at https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx.

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on a human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

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.

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1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011 edition, available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf.

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. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

[4] See, for example, A v Australia (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the civil penalty provision carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that 'civil; penalties may be 'criminal' for the purpose of human rights law, see, for example, *Osiyuk v Belarus* (1311/04); Sayadi and *Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out the articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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