# Appendix 3

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# 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

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# 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
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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
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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
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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