Responses from legislation proponents — Report 2 of 2019

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: SB19-000467

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

Dear Chair Ian.

I write in response to the Parliamentary Joint Committee on Human Rights' request for further information in relation to the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (the Bill). Thank you for the extension to 8 March 2019 in which to provide a response.

I note the Committee has sought further information on the Bill's compatibility with various human rights, including the right to freedom of movement, right to liberty and right to protection of the family.

The purpose of the Bill is twofold: firstly, to ensure the power of the Minister to cease Australian citizenship remains an adaptable and accessible tool to protect the Australian community in the evolving threat environment; and secondly, to maintain the integrity of Australian citizenship and the privileges that attach to it.

One of the key amendments in the Bill is the removal of the requirement for an individual to be sentenced to a minimum of six years' imprisonment for one or more relevant terrorism offences. By replacing this with a requirement for an individual to be convicted of a relevant terrorism offence, the Bill broadens the cohort of offenders who may be eligible to have their Australian citizenship ceased.

Sentences imposed for terrorism offences in Australia have ranged from 44 days to 44 years' imprisonment. This is reflective of the wide variety of matters that the court must take into account during sentencing, such as the degree to which the person has shown contrition for the offence, whether or not they pleaded guilty, and prospects for rehabilitation.

The removal of the sentencing requirement recognises that there are a number of offenders who have served, or will serve, sentences of less than 6 years' imprisonment (or less than 10 years' imprisonment, for those convicted prior to 12 December 2015) for relevant terrorism offences. While these offenders may be subject to intervention and rehabilitation initiatives while in custody, there is no guarantee that this will result in their complete disengagement from a violent extremist ideology. Recidivism remains a risk where offenders re-adopt or re-engage in violent extremist ideologies following their release into the community. Some of these offenders will continue to pose a threat to the community at the end of their sentence.

As such, it is important to ensure there are a range of flexible and proportionate measures available to manage the risks posed by these offenders. Cessation of Australian citizenship is one such measure, which may be considered during or after a convicted terrorist offender's prison sentence. The measures in this Bill will clearly enhance the safety of the Australian community by enabling the revocation of Australian citizenship in circumstances where such a person poses a threat to the community and has repudiated their allegiance to Australia.

Less restrictive approaches are not available to meet this policy outcome and as far as possible, amendments to the *Australian Citizenship Act 2007* (the Act) have been appropriately constrained. For instance, the list of offences included in the Bill's definitions of 'relevant terrorism conviction' and 'relevant other conviction' are those already listed in section 35A of the Act.

In order to cease a person's citizenship, the Act already requires that the Minister be satisfied that it is not in the public interest for the person to remain an Australian citizen, having regard to the following factors:

- the severity of the conduct that was the basis of the conviction or convictions and the sentence or sentences;
- the degree of threat posed by the person to the Australian community;
- the age of the person;
- if the person is aged under 18—the best interests of the child as a primary consideration;
- the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
- Australia's international relations;
- any other matters of public interest.

In considering the person's connection to the other country and any other matters of public interest, the Minister may consider the person's connection with Australia, including potential impacts on family members.

The requirement to consider and balance the various factors is intended to ensure that any interference with the family, the right to re-enter one's own country, or to the right to freedom of movement, is not arbitrary, since cessation will occur where the national security risks and threats to the Australian community are such that it is not in the public interest for the person to remain a citizen. The Minister must take into account the individual circumstances of the case in determining whether to exercise the power to cease a person's citizenship.

I note the Committee's assertion that the application of the measures in this Bill may result in an individual, who has had their Australian citizenship ceased, being subject to immigration detention on an indefinite basis. The loss of Australian citizenship does not automatically result in a person being placed in immigration detention or being removed from Australia. A person who is in Australia is granted an ex-citizen visa by operation of law upon cessation of their citizenship. That visa may then be subject to cancellation. As the Committee has noted, where the person fails the character test on the basis of a substantial criminal record and is serving a prison sentence at the time, then cancellation is mandatory. However, a discretionary power to revoke that cancellation is available, which allows full consideration of the person's individual circumstances.

The Government's position is that people who have no legal authority to remain in Australia, including if a person's ex-citizen visa is cancelled following the revocation of Australian citizenship, are expected to depart. Any immigration detention pending removal, if the person does not voluntarily depart, and/or consideration of other options, involves a risk-based approach to the consideration of the appropriate placement and management of an individual while their status is being resolved. Placement in an immigration detention facility is based on the assessment of a person's risk to the community and level of engagement in the status resolution process. Such placements are regularly reviewed.

The Committee also queried whether the retrospective application of the measures in the Bill amounted to a 'double punishment' for individuals who have already served their sentence for terrorism offences. Rather than being a punitive measure, the retrospective application of the measures in the Bill are designed to give further administrative options to manage offenders who continue to pose a threat to the community.

Further, it must be emphasised that section 35A does not create a new criminal offence; rather, it allows for the imposition of an administrative consequence at the Minister's discretion. When doing so, as noted above, the Minister must be satisfied it is not in the public interest for the individual to remain an Australian citizen, having regard to a number of factors including the seriousness of their conduct and the threat they pose to the Australian community.

The Committee has also expressed concerns that the measures in this Bill are incompatible with Australia's non-refoulement obligations. As outlined above, loss of Australian citizenship does not automatically result in removal. Any such removal would occur in line with well-established practices that accord with Australia's international obligations.

I note the Committee's comment that any differential treatment between single and dual citizens does not amount to unlawful discrimination if based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that criteria and is a proportionate means of achieving that objective. The measures in this Bill seek to meet the legitimate objective of promoting Australia's national security by enhancing the Minister's ability to cease the Australian citizenship of convicted terrorist offenders. It is appropriate that this power is constrained by Australia's international obligations not to render an individual stateless, such that the Minister may only cease the Australian citizenship of individuals who would not be rendered stateless. The measures in this Bill are reasonable and necessary to protect the Australian community and carefully balanced with Australia's broader international obligations.

I note the Committee sought further information on the compatibility of the Bill with Australia's obligations under the Convention of the Rights of the Child. Where a child poses a threat to the Australian community by being involved in terrorist activities and has been held criminally responsible for doing so, the Australian Government may balance their best interests with the protection of their Australian community. Australia is required to take into account the best interests of the child as a primary consideration, not the only primary consideration.

I thank the Committee for its thorough consideration of the Bill, and trust that this information is of assistance.

Yours sincerely

PETER DUTTON 05/03/19

THE HON DAVID COLEMAN MP
MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: SB19-000468

Mr Ian Goodenough MP
Chair
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Dear Mr Goodenough

Thank you for your letters dated 13 February 2019 requesting further information in relation to the human rights compatibility of the Migration Amendment (Streamlining Visa Processing) Bill 2018 and of the Migration Amendment (Seamless Traveller) Regulations 2018 which the Committee considered in its *Report 1 of 2019*. Thank you for the extension to 8 March 2019 in which to respond.

My responses for the Committee's consideration are attached.

Yours sincerely

David Coleman

8 / 3 / 2019

Migration Amendment (Streamlining Visa Processing) Bill 2018

The Migration Amendment (Streamlining Visa Processing) Bill 2018 (the Bill) enables the Department of Home Affairs (the Department) to require personal identifiers from applicants as an application validity requirement. The amendments will allow the Department to conduct identity, security, law enforcement and immigration checks immediately following lodgment of a visa application, which will improve the integrity of our visa application process, while reducing the time taken to process visa applications.

The purpose of the Bill is not to expand or impact the nature or type of personal identifiers that can be required, or amend the purposes for which they can be collected. The Department already has broad powers under section 257A of the *Migration Act 1958* (the Migration Act), to require any visa applicant to provide personal identifiers *after* they have lodged a valid visa application. This process is well established and operates in Australia and in 46 countries overseas.

The limitations on the right to privacy contained in the Bill is aimed at the legitimate goal of ensuring the integrity of Australia's visa system. The Department perceives this as necessary, reasonable and proportionate to the objective of ensuring that the identity of visa applicants is verified and Australia has a well-managed visa program.

Safeguards in relation to the collection, use, disclosure and retention of personal identifiers

The collection of personal identifiers is supported by a number of adequate safeguards to protect the individual's right to privacy, humanity and respect for human dignity. The Bill provides adequate safeguards in relation to the collection, use, disclosure and retention of personal identifiers. The Bill fully retains existing protections associated with the collection of personal identifiers in the Migration Act such as those relating to privacy, humanity and dignity.

As discussed in the Statement of Compatibility, the Department's collection of personal identifiers is lawful and complies with the Australian Privacy Principles as set out in the *Privacy Act 1988* (Cth). Additionally, the collection of personal identifiers is also subject to the requirements in Part 4A of the Migration Act, '*Obligations relating to identifying information*', which provides for a range of rules covering the access, disclosure, modification, destruction and retention of identifying information, as well as offences relating to unauthorised access and disclosure of identifying information. These provisions will apply to the personal identifiers collected as a consequence of any instruments made under new sections 46(2A) and 46(2B). Further, in relation to the collection of personal identifiers, currently regulation 3.20 of Part 3 of the *Migration Regulations 1994* (Cth) provides particular

matters that a person must be informed of prior to the time they are collected namely:

- the reason why a personal identifier is to be provided;
- how the personal identifier may be collected and used;
- notification that a personal identifier may be produced in evidence in a court or tribunal in relation to the person who provided the personal identifier;
- notification that the *Privacy Act 1988* applies to a personal identifier;
- that the person has a right to make a complaint to the Australian Information Commissioner about the handling of personal information; and
- if the person is a minor or incapable person – information concerning how a personal identifier is to be obtained from a minor or incapable person.

Further Regulation 3.20 provides that if a form is given to a person of the above information in compliance with section 258B(3), it must be given to the person at a time that gives the person enough time to read and understand the form before the identification test is conducted. Section 258B(3) also requires the information to be in a language (including braille) in which the person is able to communicate with reasonable fluency.

Further, the Bill retains the existing protections associated with the collection of personal identifiers under section 258E and 258F of the Migration Act relating to privacy, humanity and respect for human dignity (Items 5, 6 and 7 of Schedule 1 of the Bill ensure that the amendments made by the Bill through new section 46(2B) are covered by the operation of sections 258E and 258F). Under subsection 46(2B), there is no power to compel the provision of personal identifiers. If a person decides not to provide a personal identifier/identifiers it will not result in force. Rather it is an individual's choice.

The Bill's collection of fingerprints primarily uses scanning technology, which involves placing fingers and thumbs on a scanning and capture device. Placing fingers on a flat surface scanner is non-invasive and requires no physical contact with a departmental officer or authorised person. The collection process only takes a matter of minutes.

To facilitate the collection of personal identifiers, the Department has engaged service delivery partners to collect biometrics offshore on its behalf since 2010. The long standing arrangements with service delivery partners are contract based and service delivery partners are required to meet high integrity standards for the management of the personal information of clients set by the Department under contract.

Facial images and fingerprints will continue to be stored on secure Department databases that comply with the Australian Government Protective Security Framework.

Safeguards for minors and people incapable of understanding and consenting to the collection of personal identifiers

As per the Department's current biometric collection program, people who are incapable of providing a particular biometric will be exempt from the requirement.

The amendments will potentially require individuals incapable of understanding and consenting to the collection of personal identifiers, including children, to provide personal identifiers, should they be specified in the legislative instrument.

In practice, individuals incapable of understanding and consenting to the collection of personal identifiers are also incapable of making a visa application themselves. Instead, these people have a visa application made on their behalf by their legal guardian. The legal guardian will also need to make arrangements for the incapable persons' personal identifiers to be collected, usually when the legal guardian provides their personal identifiers. Hence, it is the legal guardian of a person incapable of understanding and consenting to the collection of personal identifiers, who will understand the information provided prior to collection of personal identifiers (including how personal identifiers are obtained from minors and incapable persons), who gives consent of the incapable person.

The Bill's compatibility with the right to equality and non-discrimination and the proportionality of the measures

At this stage, there are no specific cohorts who will be specified in the legislative instrument. However, it is intended that some applicants for General Skilled Migration visas will be the focus of the instrument in 2019. Applicants who will be required to provide specified personal identifiers in order to lodge a valid visa application will be set out in a non-disallowable legislative instrument.

As discussed in the Statement of Compatibility, decisions on which cohorts will be included in the instrument (i.e. to which classes of visa applicants the new provisions will apply) will be determined on an objective basis, namely, in line with operational priorities, intelligence, identifiable fraud risks and other factors informed by objective information such as the Department's collection and analysis of statistics and intelligence information. Whilst the determination of classes of visa applicants may coincide with certain characteristics like national origin, the characteristic itself is not the basis of the determination but rather the risk from that cohort of people which has been identified through analysis of statistical and intelligence information.

Further, given the measures will specifically target classes of visa applicants where objective information has identified emerging fraud or national security risks (rather than all categories of visa applicants) it would be a proprotionate measure in the sense that it addresses the risk specifically arising from that class of visa applicant.

Rights of the Child; the obligation to consider the best interests of the child and the child's right to privacy

The Statement of Compatibility discussed how the measures engage the obligation under Article 3 of the Convention on the Rights of the Child and concluded that requiring personal identifiers to be provided by children in order to address the risks of people trafficking and smuggling and the abduction of children squarely considers the best interests of the child.

In relation to the child's right to privacy, the discussion above of the protections and safeguards and the proportionality of the measures are equally applicable in the context of obtaining personal identifiers from children.

Migration Amendment (Seamless Traveller) Regulations 2018 [F2018L01538]

Travellers entering Australia must be identified upon arrival and these regulations allow for another way to comply with existing border clearance requirements for entry. This new option is designed to be more convenient and faster for travellers as compared to existing manual processing. It is also beneficial to the Department in that electronic identity matching is generally considered to be faster and more accurate than a comparable manual matching process done by an officer. Even so, travellers to Australia will have the option to use the existing SmartGates (where available) or be processed manually by an officer.

The new process does not limit or impose any new conditions on the ability of persons to enter Australia. Instead it removes the requirement for travellers to present a travel document, such as a passport, for identity purposes, unless requested to do so by a clearance officer or a SmartGate.

The notifications in place are clearly worded and visible. Where a traveller is uncertain as to their meaning, they have the option of asking an officer for further information. Where there is a language barrier, officers can assist where they have the relevant language skills but if not, the officer can access translation services for the traveller. It also remains an option for the traveller to be processed manually and not use the new SmartGates with contactless processing.

Where the traveller chooses to use the SmartGates, with or without contactless processing, the Department collects images for the lawful purpose of border clearance processing. The Department, in conjunction with other agencies, has a critical role in protecting Australia's borders and national security efforts to combat terrorism, trans-national crime and irregular migration.

The ability to accurately collect, store, use and disclose biometric identification of all persons increases the integrity of identity, security, and immigration checks of people entering Australia. The primary purpose of the collection of an image of a person's face and shoulders is to identify individuals at the border and to verify their identity for border clearance and control.

The ability to collect, store, use and disclose biometric identification already exists under the *Migration Act 1958* (Migration Act) and is subject to existing safeguards. The collection, storage, use and disclosure of personal information by the Department is undertaken in accordance with the Australian Privacy Principles contained in the *Privacy Act 1988* (Privacy Act) and is subject to requirements in Part 4A of the Migration Act, "Obligations relating to identifying information", which provides for a range of rules and offences relating to the access, disclosure and use of identifying information. This is consistent with the United Nations Human Rights Committee General Comment 16 in which the Human Rights Committee stated that the gathering and holding of personal information on computers, databanks and

other devices (that is, the use of information technology) must be regulated by law and that effective measures must be taken to ensure that the information collected is not accessed by persons who are not authorised by law to receive, process or use it.

Under the Privacy Act, biometric information is considered 'sensitive' information. Sensitive information is afforded a higher level of protection than other types of personal information. Sensitive information must only be collected with the consent of the individual unless one of the listed exceptions applies. Those exceptions include where the collection is authorised or required by law. Existing mechanisms in the Migration Act and Migration Regulations (sections 5A, 166, 170, 175, 257A, 258A-G, 336A-L) provide legislative authority for identity assessment, collection, storage and disclosure of personal identifiers (which includes biometric information). The ability to retain identifiers is set out in Part 4A, Division 5 of the Migration Act.

Collection of personal identifiers is permitted under the Migration Act for a range of reasons including:

- Identification and authentication of identity.
- Improving the integrity of Australia's entry programs, including passenger processing at Australia's border.
- Enhancing the Department's ability to identify non-Australian citizens who have a criminal history or who are of national security or character concern.
- To assist in determining whether a person is an unlawful non-citizen or a lawful non-citizen.

Disclosure of information is permitted under the Migration Act for specified purposes such as to assist in identifying and authenticating the identity of a person who may be of national security concern. The Migration Act and the *Australian Border Force Act 2015* also contain offences for using and disclosing certain information if it is not a permitted or authorised disclosure.

The Department takes steps to store personal information securely, prevent its unauthorised use and maintain its accuracy.

In addition to the legal protections on use, access and disclosure of personal information described above, the following security measures will protect the personal information from loss, unauthorised access, use, modification, disclosure or other misuse (including for contracted service providers):

- The environment for the new SmartGates consists of a set of gates that are a tamper resistant, physical device composed of entry and exit barriers, passport reader, sensors, biometric capture cameras, lights and display devices.
- Information collected by the new SmartGates from travellers is passed through the system that is located within the Australian Border Force (ABF)-only airport server room and into Passenger Analysis Clearance and Evaluation (PACE) for evaluation. PACE is a movement and alert system operated by ABF and is a primary border control system.

- All infrastructure, ICT servers and desktops, operating systems and databases (excluding the departure gate hardware) are standard operation environment builds using standard ABF security patterns. The gate infrastructure is physically located within Departmental systems, and the small public facing aspects of the gate system (the physical gate) are located within security controlled areas at airports and are physically tamper resistant.

Records of a traveller's personal information are retained until they are disposed of according to the latest Disposal Authority approved by the National Archives of Australia under the *Archives Act 1983*.

These Regulations provide an additional way of complying with existing entry clearance requirements, a way that is aimed at benefitting travellers and which is subject to existing safeguards. No additional information is collected compared to the existing SmartGates but rather allows clearance without the presentation of a physical passport.

Any interference with a person's privacy if a traveller chooses to self-process through the new SmartGates with contactless processing is for a lawful border protection objective and is proportionate to the outcome sought, which is to mitigate the threat posed by persons seeking to enter Australia undetected as impostors or using fraudulent documents to conduct criminal or terrorist activities and this interference is the same as where a traveller is processed via the existing SmartGates. The ability to lawfully collect, store and disclose information collected through Australia's entry clearance processes, including by the new SmartGates with contactless processing, is necessary, reasonable and proportionate in order to enhance national security and improve traveller facilitation through Australia's border clearance processes.

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield

Minister for Families and Social Services

MC19-001071

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
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Dear Mr Goodenough Ian

Thank you for your email dated 13 February 2019 concerning the Joint Parliamentary Committee on Human Rights' (the Committee's) consideration of the *Social Security (Pension Valuation Factor) Determination 2018* (the Determination).

In the Committee's *Report 1 of 2019*, the Committee requested my advice as to whether the Determination is compatible with Australia's obligations not to take any backward steps in relation to the right to social security. In particular, you sought my advice on whether the measure may restrict a person's eligibility to receive a social security benefit, or reduce the benefits to which a person may be entitled.

The Determination updates the pension valuation factors that are used when determining the asset value of defined benefit income streams established on or after 20 September 1998 for social security purposes. Defined benefit income streams established before 20 September 1998 are exempt under the social security assets test.

There are currently no pension or allowance recipients who will be affected by the change, as there have been no defined benefit schemes established on or after 20 September 1998 to which these new pension valuation factors would apply. The Determination is required because it is possible that schemes will be created in the future to which the pension valuation factors outlined in the Determination will apply. Up-to-date pension valuation factors are therefore needed to make sure the asset value of defined benefit schemes assessed for social security purposes is fair and accurate.

Previously, the pension valuation factors were outlined in the *Social Security (Pension Valuation Factor) Determination 1998*. The updated pension valuation factors in the new Determination have been calculated by the Australian Government Actuary, using up-to-date economic and mortality assumptions. The Department of Treasury was also consulted on the updated figures.

The new Determination means that any new defined benefit schemes created in the future will have their asset value determined using current factors, as opposed to factors that were calculated using assumptions from 1998. An accurate and fair assessment of the value of defined benefit income streams helps make sure that assets assessed under the *Social Security Act 1991* are assessed equitably between recipients of social security payments, regardless of how a person holds their wealth.

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Continuing to use the old factors would have meant that a recipients' defined benefit income stream would not have been accurately or fairly assessed under the social security assets test. Therefore on balance, the Determination is compatible with the right to social security.

The Determination therefore does not represent a backwards step in relation to the right to social security. Rather, the Determination helps make sure that Australia's social security system is fair and properly targeted to those most in need. By reviewing and updating the assumptions around the valuation of recipients' assets, the social security system remains sustainable for future generations.

Should you wish to discuss this matter further, the contact officer in my Department is Mary McLarty, on 02 6146 2404.

I hope the information in this letter is of some help.

Yours sincerely

Paul Fletcher

23/ 2/ 2019