Parliamentary Joint Committee on Human Rights

Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*

Bills introduced 1 – 4 September 2014

Legislative Instruments received

2 August – 5 September 2014

Twelfth Report of the 44th Parliament

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Functions of the committee

The Committee has the following functions:

a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

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Abbreviations

Abbreviation	Definition
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EM	Explanatory Memorandum
FRLI	Federal Register of Legislative Instruments
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
PJCHR	Parliamentary Joint Committee on Human Rights

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Executive Summary

This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* of bills introduced into the Parliament during the period 1 to 4 September 2014 and legislative instruments received during the period 2 August to 5 September 2014. The committee has also considered responses to the committee's comments made in previous reports.

Bills introduced 1 to 4 September 2014

The committee considered 12 bills, all of which were introduced with a statement of compatibility. Of these 12 bills, nine do not require further scrutiny as they do not appear to give rise to human rights concerns. The committee has decided to defer its consideration of one bill.

The committee has identified two bills that it considers require further examination and for which it will seek further information.

Of the bills considered, those which are scheduled for debate during the sitting week commencing 22 September 2014 include:

- Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014
- Customs Tariff Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014
- Infrastructure Australia Amendment (Cost Benefit Analysis and Other Measures Bill 2014
- Migration Amendment (Protection and Other Measures) Bill 2014
- Tax and Superannuation Laws Amendment (2014 Measures No. 5) Bill 2014

Legislative instruments received between 2 August and 5 September 2014

The committee considered 140 legislative instruments received between 2 August and 5 September 2014. All instruments tabled in this period are listed in the Journals of the Senate.[1]

Of these 140 instruments, 136 do not appear to raise any human rights concerns and all are accompanied by statements of compatibility that are adequate. A further one instrument does not appear to raise any human rights concerns but is not

1 Journals of the Senate, available at: http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate

accompanied by a statement of compatibility that fully meets the committee's expectations. As the instrument does not appear to raise human rights compatibility concerns, the committee has written to the relevant minister in a purely advisory capacity. The committee has decided to defer its consideration of three instruments.

Responses

The committee has considered six responses relating to matters raised in relation to bills and legislative instruments in previous reports. The committee has concluded its examination relating to three bills and two instruments.

Senator Dean Smith
Chair

Chapter 1 – New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 22 September 2014, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to the relevant proponent of the bill or instrument maker in relation to substantive matters seeking further information.

Matters which the committee draws to the attention of the proponent of the bill or instrument maker are raised on an advice-only basis and do not require a response.

This chapter includes the committee's consideration of eleven bills introduced between 1 and 4 September 2014, and legislative instruments received between 2 August and 5 September 2014.[1]

Australian Security Intelligence Organisation Amendment (Restoring Merits Review) Bill 2014

Sponsor: Mr Andrew Wilkie MP
Introduced: House of Representatives, 1 September 2014

Purpose

1.1 The Australian Security Intelligence Organisation Amendment (Restoring Merits Review) Bill 2014 (the bill) seeks to amend the *Australian Security Intelligence Organisation Act 1979* to restore access to the Administrative Appeals Tribunal for asylum seekers with adverse security assessments, and for related purposes.

Committee view on compatibility

1.2 **The committee considers that the bill promotes human rights and has therefore concluded its examination of the bill.**

1 All legislative instruments tabled in this period are listed in the *Journals of the Senate*, available at: http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate

Corporations Amendment (Financial Advice) Bill 2014

Sponsor: Senator Peter Whish-Wilson
Introduced: Senate, 2 September 2014

Purpose

1.3 The Corporations Amendment (Financial Advice) Bill 2014 (the bill) seeks to amend the *Corporations Act 2001* so that, in relation to financial product advice, the term 'advice' can be used only in reference to financial advice that takes into account the personal circumstances of the consumer.

Committee view on compatibility

1.4 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 19 March 2014

Purpose

1.5 The Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (the bill) seeks to amend the *Corporations Act 2001* to:

- remove the seventh step (the 'catch all') from the steps an advice provider may take in order to satisfy best-interest obligations;
- enable clients and providers to agree on the scope of advice to be provided;
- remove the renewal notice obligations for fee recipients;
- remove the requirement to provide yearly fee disclosure statements to certain clients;
- extend the time period within which fee disclosure statements must be provided to a client;
- provide for a general advice exemption to exempt benefits that relate to general advice from the ban on conflicted remuneration in certain circumstances;
- provide additional disclosure and information in the statement of advice in relation to existing rights of the client and obligation of the advice provider;
- ensure that any instructions for further or varied advice from clients are documented in writing, signed by the client, and acknowledged by the providing entity;
- require the statement of advice to be signed by both the advice provider and the client; and
- make consequential amendments.

Committee view on compatibility

1.6 **The committee has concluded its examination of the bill.**

Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 4 September 2014

Purpose

1.7 The Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014 (the bill) seeks to amend the *Customs Act 1901* (the Customs Act) to introduce new rules of origin for goods imported into Australia from Korea to give effect to the Korea-Australia Free Trade Agreement. This will enable goods that satisfy the rules of origin to enter Australia at preferential rates of customs duty.

1.8 The bill would also:

- make complementary amendments to the *Customs Tariff Act 1995* to provide for the preferential entry of goods that meet the rules; and
- impose obligations on exporters of Australian goods to Korea for which a preferential rate of duty will be claimed; and on people who produce such goods.

Committee view on compatibility

1.9 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Customs Tariff Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 4 September 2014

Purpose

1.10 The Customs Tariff Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014 (the bill) seeks to amend the *Customs Tariff Act 1995* (the Customs Tariff Act) to implement the Korea-Australia Free Trade Agreement by:

- providing free rates of customs duty for goods that are Korean originating goods in accordance with new Division 1J of Part VIII of the *Customs Act 1901* (the Customs Act). New Division 1J is proposed to be inserted in the Customs Act by the Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014;
- amending Schedule 4 to the Customs Tariff Act to maintain customs duty rates for certain Korean originating goods in accordance with the applicable concessional item;
- phasing the preferential rates of customs duty for certain goods (to be free by 2021); and
- inserting a new Schedule 10 to the Customs Tariff Act to accommodate the preferential and phasing rates of duty and to maintain excise-equivalent rates of duty on certain alcohol, tobacco and petroleum products (that is, equivalent to the rates of excise duty payable when locally manufactured).

Committee view on compatibility

1.11 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Fair Entitlements Guarantee Amendment Bill 2014

Portfolio: Employment
Introduced: House of Representatives, 4 September 2014

Purpose

1.12 The Fair Entitlements Guarantee Amendment Bill 2014 (the bill) seeks to amend the *Fair Entitlements Guarantee Act 2012* (the Act) to cap the maximum redundancy pay entitlement under the Fair Entitlements Guarantee scheme (the scheme) to a maximum of 16 weeks' pay.

1.13 The bill would also:

- amend the Act to allow that, where a claimant is eligible for an advance under the scheme, the claimant's initial entitlement under the Act will be calculated without reference to any amounts required to be withheld by law, such as pay as you go tax withholding;
- establish a funding source in the legislation for certain legal costs associated with applications to the Administrative Appeals Tribunal for review of decisions made by the department;
- establish that the death of a person does not prevent the person being eligible for an advance, to enable the next of kin or estate to pursue a claim;
- allow that when a debt owed by a claimant to his or her employee is greater than the employment entitlement to which it relates, it can be offset proportionally against any of the claimant's other employment entitlements under the scheme; and
- remove the eligibility requirement, which specifies that a person owed debts prior to the insolvency event happening to their employer must have taken reasonable steps to be paid those debts; and instead allow the secretary of the department to reduce a person's entitlement by the amount of any debts that he or she did not take reasonable steps to be paid.

Committee view on compatibility

1.14 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

1.15 The committee notes that the statement of compatibility for the bill provides an analysis of the bill's compatibility with the right to social security. It states:

> The scheme can be characterised as 'social insurance' because it provides a safety net for individuals by ensuring that certain unpaid entitlements are met when a person's employer becomes insolvent. It seeks to protect

individuals from lack of work-related income due to unemployment and, in this way, promotes the right to social security.[1]

1.16 In the committee's view, the bill may be seen as more significantly engaging the right to just and favourable conditions of work, given that redundancy payments to employees in the event that an employer goes into liquidation or bankruptcy relate to a person's condition of employment.

1.17 The committee notes that, while the capping of the maximum redundancy pay entitlement under the scheme at maximum of 16 weeks' pay may be regarded as a retrogressive measure for human rights purposes,[2] the assessment provided in relation to the right to social security may be applied to assessing the measure as compatible in relation to the right to just and favourable conditions of work.

1 Statement of compatibility 1.

2 In respect of economic, social and cultural rights there is a duty to realise rights progressively. As such, there is 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.

Higher Education and Research Reform Amendment Bill 2014

Portfolio: Education
Introduced: House of Representatives, 4 September 2014

Purpose

1.18 The Higher Education and Research Reform Amendment Bill 2014 (the bill) amends the *Higher Education Support Act 2003* (HESA).

1.19 Schedule 1 of the bill would:

- remove the cap on the number of Commonwealth funded places in sub-bachelor degree course, such as diplomas, advanced diplomas and associate degrees;
- introduce Government subsidies to bachelor and sub-bachelor courses at private universities and non-university higher education providers;
- reduce subsidies for new Commonwealth supported students at universities by an average of 20 per cent;
- remove the current maximum student contribution amounts;
- provide for the merging of the FEE-HELP and HECS-HELP loan schemes for all higher education students;
- remove the up-front payment discount for HECS-HELP loans and the voluntary repayment bonus for HELP loans; and
- removes the FEE-HELP lifetime limit and loan fee.

1.20 Schedule 2 of the bill would require higher education providers with 500 or more equivalent full-time Commonwealth supported students to direct up to 20 per cent of additional revenue received from the deregulation of student contributions to a new Commonwealth Scholarship Scheme.

1.21 Schedule 3 would change the indexation rate of HELP debts from the current Consumer Price Index (CPI) to the Treasury 10-year bond rate, up to a maximum of six per cent per annum.

1.22 Schedule 4 would reduce the minimum repayment income threshold for HELP debts to $50 638 in 2016-17 and introduce a new repayment rate of two per cent.

1.23 Schedule 5 of the bill would:

- allow universities to charge Research Training Scheme students a capped tuition fee which will be deferrable through HELP; and

- amend the *Australian Research Council Act 2001* to allow additional investment in research through the Future Fellowships scheme, apply indexation and add an additional forward estimate amount.

1.24 Schedule 6 of the bill would remove the current lifetime limits on VET FEE-HELP loans and the VET FEE-HELP loan fee.

1.25 Schedule 7 of the bill would discontinue the HECS-HELP benefit from 2015.

1.26 Schedule 8 of the bill would replace the current Higher Education Grants Index (HEGI) with the Consumer Price Index (CPI) from 1 January 2016.

1.27 Schedule 9 of the bill would would change the name of the University of Ballarat to Federation University Australia.

1.28 Schedule 10 of the bill would allow New Zealand citizens who are Special Category Visa holders to be eligible for HELP assistance from 1 January 2015.

Committee view on compatibility

Multiple rights

1.29 The measures in Schedules 1 to 8 of the bill engage a number of human rights, including:

- the right to education;[1]
- the right to social security and an adequate standard of living;[2]
- the right to privacy;[3] and
- the rights to equality and non-discrimination.[4]

Adequacy of statement of compatibility

1.30 The committee notes that the statement of compatibility for the bill generally provides a description of the measures in the bill and identifies a number of the human rights engaged. However, general descriptions of the effect of measures are insufficient for the committee to conduct assessments of the human rights compatibility of legislation. As many of the proposed measures in the bill may be considered to give rise to significant limitations on human rights, the committee will

1 Article 13, International Covenant on Economic, Social and Cultural Rights.

2 Article 9 and 11(2), International Covenant on Economic, Social and Cultural Rights.

3 Article 17, International Covenant on Civil and Political Rights.

4 Articles 2, 16 and 26 of the International Covenant on Civil and Political Rights. Also, article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 2 of the Convention on the Rights of the Child (CRC), articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and articles 3, 4, 5 and 12 of the Convention on the Rights of Persons with Disabilities (CRPD).

be unable, in the absence of further information, to conclude that the measures are compatible with human rights.

1.31 For example, the statement of compatibility provides a brief description of a number of measures said to engage the right to education. In relation to the proposed changes to the indexation of HELP debts the statement of compatibility states :

> Schedule 3 replaces the current CPI indexation of HELP loans with the 10 year Government bond rate, capped at six per cent per annum in order to ensure the sustainability of the HELP scheme. This measure reflects the borrowing cost to the Government, and removes the indirect subsidy that all taxpayers contribute to those higher education students.
>
> • Students' access to higher education will not be impeded by this measure as students will only be required to pay back their HELP debt once they start earning over the minimum repayment threshold. There will be no increase to the amount that graduates are required to pay back each year as a result of this measure.[5]

1.32 This proposed change to indexation may be regarded as a potential limitation on the right to education, insofar as they increase the cost of higher education. However, the statement of compatibility for the bill provides no assessment of this potential limitation on human rights.

1.33 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary and proportionate to achieving a legitimate objective. To demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why a measure is necessary in pursuit of a legitimate objective.

1.34 In this respect, the committee notes the Attorney-General's Department's advice on how to prepare statements of compatibility where rights are limited:

> Where rights are limited, explain why it is thought that there is no incompatibility with the right engaged:
>
> a) Legitimate objective: Identify clearly the reasons which are relied upon to justify the limitation on the right. Where possible, provide empirical data that demonstrates that the objectives being sought are important.
>
> b) Reasonable, necessary and proportionate: Explain why it is considered that the limitation on the right is (i) necessary and (ii) within the range of reasonable means to achieve the objectives of the Bill/Legislative Instrument.

5 Explanatory memorandum (EM) 9.

- Cite the evidence that has been taken into account in making this assessment.[6]

1.35 The committee further notes the requirement, as set out in Practice Note 1, that statements of compatibility should be prepared as standalone documents.[7] In this respect, the committee notes that the bill is accompanied by a detailed explanatory memorandum (EM) and regulatory impact statement. While much of the information and analysis in these documents appears to be relevant to a human rights assessment of the bill, this has not been included in the statement of compatibility.

1.36 Accordingly, a detailed and separate analysis for each measure listed in paragraphs 1.19 to 1.28 above is required.

1.37 **The committee therefore seeks the advice of the Minister for Education on whether each of the measures in Schedules 1, 2, 3, 4, 5, 6, 7 and 8 of the bill are compatible with Australia's international human rights obligations and for each individual measure:**

- **whether the measure achieves a legitimate objective;**
- **there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Right to equality and non-discrimination

1.38 The rights to equality and non-discrimination are protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR). These are fundamental human rights that are essential to the protection and respect of all human rights. They 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 without discrimination to the equal protection of the law.

1.39 For human rights purposes 'discrimination' is impermissible differential treatment among persons or groups that results in a person or a group being treated

6 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx [accessed 8 July 2014].

7 Parliamentary Joint Committee on Human Rights, Practice Note 1.

less favourably than others, based on one of the prohibited grounds for discrimination.[8]

1.40 Discrimination may be either direct or indirect. Indirect discrimination may occur when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups. Articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) further describes the content of these rights, describing the specific elements that States parties are required to take into account to ensure the rights to equality for women.

Disproportionate impact of measures on women

1.41 The committee notes that the measures in Schedules 1, 3 and 4, while neutral on their face, may have a disproportionate impact on women. These measure would:

- remove the cap on university fees (Schedule 1);
- change the indexation rate of HELP debts from CPI to the Treasury 10-year bond rate, up to a maximum of six per cent per annum (Schedule 3); and
- reduce the minimum repayment income threshold for HELP debts to $50 638 in 2016-17 (Schedule 4).

1.42 According to the Australian Bureau of Statistics (ABS), women are more likely to be out of the workforce caring for children; and women with children are more likely to be in part-time work than men with children.[9] Specifically, the ABS reports that over 84 per cent of women who started or returned to work following the birth of their child worked part-time.[10] Therefore, while women are out of the workforce or working part-time, and earning below the repayment threshold for HELP, their higher education debt is likely to grow faster than inflation if indexed at the bond rate as a result of the change in Schedule 3. Accordingly, women are more likely to take longer to pay off their debts and, consequently, to pay more for their education than men.

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8 The prohibited grounds 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.

9 Australian Bureau of Statistics website, '4102.0 - Australian Social Trends, Nov 2013: Employed Mothers(a), Selected Main Reason Returned To Work, November 2011', http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4102.0Main+Features10Nov+2013 (accessed 8 September 2014).

10 Australian Bureau of Statistics, '4102.0 - Australian Social Trends, Nov 2013: Employed Mothers(a), Selected Main Reason Returned To Work, November 2011', http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4102.0Main+Features10Nov+2013 (accessed 8 September 2014).

1.43 To the extent that course fees rise as a result of removing the cap on university fees under Schedule 1, the total interest rate cost of higher education debts will also rise in absolute terms. This will compound any disadvantage that women may face in the total repayment cost of their degree as a consequence of taking time out to have children.

1.44 In addition, reducing the minimum repayment income threshold for HELP debts to $50 638 in 2016-17 may have a disproportionate impact on women, given that they are more likely to earn less than men (and therefore to be required to commence repaying HELP due to the reduction in the repayment threshold).[11]

1.45 While the statement of compatibility for the bill provides some discussion of the right to equality and non-discrimination in respect of certain New Zealand citizens, it provides no assessment of the potentially indirect discriminatory effects of the measures on women.

1.46 **Accordingly, the committee requests the advice of the Minister for Education as to whether the measures in Schedules 1, 3 and 4 are compatible with the rights to equality and non-discrimination on the grounds of gender.**

11 Workplace Gender Equality Agency, *Gender pay gap statistics, March 2014*, https://www.wgea.gov.au/sites/default/files/2014-03-04-Gender_Pay_Gap_factsheet_website.pdf (accessed 8 September 2014).

Infrastructure Australia Amendment (Cost Benefit Analysis and Other Measures) Bill 2014

Portfolio: Infrastructure and Regional Development
Introduced: House of Representatives, 4 September 2014

Purpose

1.47 The Infrastructure Australia Amendment (Cost Benefit Analysis and Other Measures) Bill 2014 (the bill) seeks to amend the *Infrastructure Australia Act 2008* (IA Act) to clarify the legislative and administrative arrangements for Infrastructure Australia after commencement of the *Infrastructure Australia Amendment Act 2014*. It is also intended to rectify the currently incorrect placement of provisions pertaining to cost benefit analyses of infrastructure proposals in the *Infrastructure Australia Act 2008*.

1.48 The bill would also amend the Act to include in the functions provision the requirement that Infrastructure Australia undertake evaluations of proposals that involve Commonwealth funding of at least $100 million. This figure is to be established as a benchmark based on 2014 dollars and indexed at least every five years to ensure relativity is maintained in future years.

Committee view on compatibility

1.49 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Minerals Resource Rent Tax Repeal and Other Measures Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 1 September 2014

Purpose

1.50 The Minerals Resource Rent Tax Repeal and Other Measures Bill 2014 (the bill) would repeal the mineral resources rent tax (MRRT) by repealing a number of acts (Schedule 1).[1] It would also make consequential amendments to other legislation,[2] required as a result of the repeal of the MRRT (Schedules 2 - 9).

1.51 The bill also seeks to repeal the following MRRT-related measures:

- loss-carry back (Schedule 2);
- geothermal expenditure deduction (Schedule 5);
- low-income superannuation contribution (Schedule 7);
- income support bonus (Schedule 8); and
- schoolkids bonus (Schedule 9).

1.52 The bill would also revise the following MRRT-related measures:

- capital allowances for small business entities (Schedules 3 and 4); and
- the superannuation guarantee charge percentage increase (Schedule 6).

Background

1.53 The bill is a reintroduction of the Minerals Resource Rent Tax Repeal and Other Measures Bill 2013, which the committee considered in its *First Report of the 44th Parliament*,[3] and subsequently in its *Eighth Report of the 44th Parliament*.[4]

1.54 The measures were then reintroduced as the Minerals Resource Rent Tax Repeal and Other Measures Bill 2013 [No. 2], which the committee reported on in its *Ninth Report of the 44th Parliament*.[5]

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1 *Minerals Resource Rent Tax Act 2012; Minerals Resource Rent Tax (Imposition—Customs) Act2012; Minerals Resource Rent Tax (Imposition—Excise) Act 2012;* and *Minerals Resource RentTax (Imposition—General) Act 2012.*

2 Including the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953*.

3 Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 35-40.

4 Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014) 51-53.

5 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, (15 July 2014) 56-62.

1.55 The bill was passed by both Houses of Parliament and received Royal Assent on 5 September 2014.

Committee view on compatibility

Right to social security

1.56 The right to social security is guaranteed by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right 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, particularly the right to an adequate standard of living and the right to health.

1.57 Access to social security is required when a person has no other income and has insufficient means to 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; and
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent; and
- affordable (where contributions are required).

1.58 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to social security. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

1.59 Specific situations which are recognised as engaging a person's right to social security, include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support.

Right to an adequate standard of living

1.60 The right to an adequate standard is guaranteed by article 11(1) of the ICESCR, and requires States parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

1.61 The obligations of article 2(1) of the ICESCR also apply in relation to the right to an adequate standard of living, as described above in relation to the right to social security.

Deferral of proposed increase in compulsory superannuation contribution

1.62 Schedule 6 of the bill defers by ten years the proposed gradual increase in the compulsory employer superannuation contribution to 12 per cent.

1.63 The statement of compatibility concludes that Schedule 6 does not engage any human rights, noting that the deferral of the proposed increase in the compulsory superannuation contribution:

> …does not affect an individual's eligibility for the social security safety net of the Age Pension (funded from Government revenue), which continues to be a fundamental part of Australia's retirement income system to ensure people unable to support themselves can have an adequate standard of living.[6]

1.64 However, in the committee's view, the provision of superannuation engages both the right to an adequate standard of living and the right to social security.[7]

1.65 Accordingly, the previously legislated increase in the compulsory superannuation contribution may be viewed as a measure to promote both of these rights. The deferral of the introduction of that measure may therefore be viewed as a limitation on those rights.

1.66 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.67 **The committee therefore seeks the Treasurer's advice as to whether the deferral of the proposed increase to the compulsory superannuation contribution by ten years is compatible with the right to social security and the right to an adequate standard of living and particularly:**

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

6 Explanatory memorandum (EM) 81.

7 Articles 11 and 9, respectively, of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Repeal of low-income superannuation contribution

1.68 Schedule 7 of the bill proposes to repeal the low-income superannuation contribution (LISC) for contributions made for financial years starting on or after 1 July 2017. The statement of compatibility concludes that Schedule 7 does not engage any human rights, noting that the LISC:

> …was funded with the expected revenue from the MRRT, which is being repealed. In order to ensure that the concessions in the superannuation system are sustainable for present and future generations, the LISC is also being repealed.[8]

1.69 As discussed above, the committee considers that the provision of superannuation engages both the right to an adequate standard of living,[9] and the right to social security.[10]

1.70 The proposed reduction of the amount paid to low-income earners to compensate them for the tax paid on their superannuation contributions therefore may be viewed as a limitation on these rights.

1.71 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective.

1.72 **The committee therefore seeks the Treasurer's advice as to whether the repeal of the LISC is compatible with the right to social security and the right to an adequate standard of living, and particularly:**

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Repeal of the low-income support bonus (Schedule 8)

1.73 Schedule 8 proposes to repeal the low-income support bonus (ISB).[11] The ISB was intended to provide payments to eligible recipients to help them plan expenditure and provide a buffer against unexpected costs.[12]

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8 EM 82.

9 Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

10 Article 9 of the ICESCR.

11 By amendments made to the *Social Security Act 1991*; *Social Security (Administration) Act 1999*; *Farm Household Support Act 1992*; and *Income Tax Assessment Act 1997*.

1.74 The statement of compatibility notes that the proposed removal of the ISB engages the rights to social security and to an adequate standard of living. It notes:

> [T]he right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage. Any removal of entitlements must be justified in line with Article 4 [of the ICESCR] in the context of the full use of the maximum available resources of the State party.[13]

1.75 The statement of compatibility further notes that this was a measure that was to be funded from the revenue to be raised by the MRRT and that, with the removal of that tax, MRRT-related measures are being removed. It states that the repeal of the ISB 'is a non-arbitrary measure that is reasonable, necessary and proportionate' in view of the modest sum involved, [and] the range of existing social support programs, indexation and other factors to ensure that persons affected will continue to enjoy the right to social security and to an adequate standard of living.[14]

1.76 The committee notes that the removal of the ISB may be viewed, in human rights terms, as either a limitation or retrogressive measure.[15] While the committee acknowledges that the sums involved by the removal of the ISB are relatively modest, the statement of compatibility provides no evidence to support the claim that the package of existing payments and assistance available to individuals and families will be adequate to meet their needs, consistent with requirements under articles 9 and 11 of the ICESCR.

1.77 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective.

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12 The eligible recipients are those receiving ABSTUDY Living Allowance, Austudy, Newstart Allowance, Parenting Payment, Sickness Allowance, Special Benefit, Youth Allowance, Transitional Farm Family Payment, and Exceptional Circumstances Relief Payment. ISB is also paid to eligible recipients under the Veterans' Children Education Scheme (Prepared under Part VII of the *Veteran's Entitlement Act 1986*), and the Military Rehabilitation and Compensation Act Education and Training Scheme (Determined under the *Military Rehabilitation and Compensation Act 2004*). People on any of these payments receiving more than the basic amount of Pension Supplement are not eligible for the ISB.

13 EM 84.

14 EM para 4.66.

15 In respect of economic, social and cultural rights there is a duty to realise rights progressively. As such, there is 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.

1.78 **The committee therefore seeks the Treasurer's advice as to whether the measure to repeal the ISB is compatible with the right to social security and the right to an adequate standard of living, and particularly:**

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Stop Dumping on the Great Barrier Reef Bill 2014

Sponsor: Senator Larissa Waters
Introduced: Senate, 4 September 2014

Purpose

1.79 The Stop Dumping on the Great Barrier Reef Bill 2014 (the bill) seeks to amend the *Environment Protection (Sea Dumping) Act 1981* to prohibit the dumping of dredge spoil within the Great Barrier Reef World Heritage Area.

Committee view on compatibility

1.80 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

1.81 However, the bill would introduce a strict liability offence, relating to dumping dredged material in the Great Barrier Reef World Heritage Area (proposed new section 10AA). The committee notes that strict liability offences engage and limit the presumption of innocence. This is because such offences allow for the imposition of criminal liability without the need to prove fault. Article 14(2) of the International Covenant on Civil and Political Rights protects the right to be presumed innocent until proven guilty according to law.

1.82 The committee notes that, to demonstrate that a limitation of human rights is permissible, proponents of legislation must provide reasoned and evidence-based assessment of whether a measure is reasonable, necessary and proportionate in pursuit of a legitimate objective. In this case, an analysis of the proposed strict liability offence in the statement of compatibility would have assisted the committee in its assessment of the bill.

Tax and Superannuation Laws Amendment (2014 Measures No. 5) Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 4 September 2014

Purpose

1.83 The Tax and Superannuation Laws Amendment (2014 Measures No. 5) Bill 2014 (the bill) seeks to amend the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* to:

- abolish the mature age worker tax offset;
- abolish the seafarer tax offset;
- reduce the rates of the tax offset available under the research and development tax incentive by 1.5 per cent; and
- update the list of specifically listed deductible gift recipients.

Committee view on compatibility

1.84 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

CASA EX77/14 - Exemption — take-offs from Lady Elliott Island aerodrome [F2014L01055]

Portfolio: Infrastructure and Regional Development
Authorising legislation: Civil Aviation Safety Regulations 1998
Last day to disallow: 25 September 2014

Purpose

1.85 *The Civil Aviation Regulations 1988* (*CAR 1988*) require a pilot in command of an aircraft in the vicinity of an uncontrolled aerodrome to maintain the same track from take-off until the aircraft is 500 feet above the terrain. In a take-off from the Lady Elliot Island aerodrome, if the pilot has to maintain the same track until the aircraft is 500 feet above the terrain, the likelihood of a return to the aerodrome or the shallow waters of the reef, in case of an engine failure, is greatly reduced.

1.86 CASA EX77/14 - Exemption — take-offs from Lady Elliott Island aerodrome [F2014L01055] (the instrument) exempts pilots in command of an aircraft in the vicinity of Lady Elliot Island aerodrome from this regulation. This allows a pilot to undertake a turn after passing a minimum of 300 feet above the terrain, which enhances safety in the event of engine failure where the aircraft is required to undertake an emergency landing on the runway.

Committee view on compatibility

1.87 **The committee notes that the statement of compatibility for the instrument appears to relate to a previous instrument. However, taking into account the nature and effect of the instrument, the committee considers the instrument to be compatible with human rights.**

Migration Amendment (Protection and Other Measures) Bill 2014

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 25 June 2014

Purpose

1.88 The Migration Amendment (Protection and Other Measures) Bill 2014 (the bill) seeks to amend the *Migration Act 1958* (the Migration Act) to:

- establish a requirement that asylum seekers specify the particulars of their claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish their claim;
- require the Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to the credibility of claims or evidence raised by a protection visa applicant at the review stage for the first time, if the applicant has no reasonable explanation why those claims and evidence were not raised before a primary decision was made;
- permit the refusal of a protection visa application when an applicant refuses or fails to establish their identity, nationality or citizenship, and does not have a reasonable explanation for doing so;
- limit the opportunity to apply for a protection visa on the grounds of family status to circumstances where the primary applicant has not yet received a protection visa;
- redefine the risk threshold for assessing Australia's protection obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- amend the legal framework relating to unauthorised maritime arrivals and transitory persons who can make a valid application for a visa; and
- amend the processing and administrative duties of the Migration Review Tribunal (MRT).

Background

1.89 The committee reported on the bill in its *Ninth Report of the 44th Parliament.*

Committee view on compatibility

Non-refoulement obligations

Responsibility of asylum seeker to provide evidence of claims

1.90 The committee requested the advice of the Minister for Immigration and Border Protection on the compatibility of the proposed section 5AAA with Australia's non-refoulement obligations under the ICCPR.

Minister's response

> The Committee acknowledges 'it is a general principle of international law' that the 'burden of proof rests with the asylum seeker'. Consistent with the UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, the government accepts there are certain cases, such as vulnerable applicants, where the 'burden of proof' rests with the applicant in principle, but the duty to evaluate and ascertain all relevant facts is shared between the applicant and examiner (para 196, p. 38, December 2011). The UNHCR states that these cases may occur "often" but the same guidelines later reinforce the rule that the applicant should "assist the examiner in full in establishing the facts of his case" and "supply all pertinent information ... in as much detail as is necessary" to enable relevant facts to be established (para 205, p. 40, December 2011).
>
> The proposed section 5AAA and 423A of the Migration Act (the Act) articulates a responsibility on non-citizens who seek protection in Australia to present all claims and supporting evidence as soon as possible. An express legislative provision puts that responsibility beyond doubt and clearly communicates expectations to all people seeking protection in Australia. Section 5AAA supports the integrity of protection determination processes in Australia. Early and full presentation of claims allows refugees to be recognised at the earliest opportunity and the amendment therefore assists Australia to observe and determine its non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR). In addition to merits review, people seeking protection in Australia have access to Australian courts.
>
> The proposed section 5AAA makes it clear that the role of the departmental decision maker or Refugee Review Tribunal (RRT) member is not to advocate on behalf of a person seeking protection, but to decide whether there is an obligation to provide protection. At no point does this provision negate the decision-maker's own obligation to appropriately investigate a claim for protection. The duty to evaluate and ascertain all relevant facts is shared between the applicant and decision maker, consistent with the UNHCR guidelines. Decision-makers must evaluate each case on its individual merits with regard to circumstances in the home country or countries. Applicants have repeated opportunities to present or clarify claims and evidence as their application is processed.

> People seeking protection in Australia will be advised of their responsibilities under the proposed section 5AAA through the departmental website, including the Protection Application Information and Guides (PAIG), and through initial, written communication with Protection visa applicants.
>
> Proposed section 5AAA is consistent with Australia's non refoulement obligations under the ICCPR. Procedural guidance and training is provided to decision makers to ensure the dignity and rights of vulnerable people, including unaccompanied minors, are respected. The proposed section 5AAA does not affect the government's obligations to conduct an effective and thorough assessment of claims for protection. The Government considers that sufficient safeguards exist to ensure the claims of vulnerable people are fully assessed and that they will not be removed in contravention of Australia's non-refoulement obligations. The Government considers section SAAA to be compatible with Australia's non-refoulement obligations under the ICCPR.[1]

Committee response

1.91 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.92 However, the committee does not consider that the minister's response fully addresses the committee's concerns in relation to proposed section 5AAA and its introduction of a burden of proof requirement. The committee notes that the minister's response states that section 5AAA does not negate the decision-maker's own obligation to appropriately investigate a claim for protection consistent with the UNHCR guidelines. However, the committee considers that new section 5AAA does not acknowledge the shared duty to ascertain and evaluate all the relevant facts as articulated in these UNHCR guidelines in a context where an evidential burden is being introduced. Given the difficult evidentiary context in relation to claims for protection and the special vulnerabilities of asylum seekers, the committee remains concerned that proposed section 5AAA may hamper the effective and thorough assessment of claims to protection as required in respect of Australia's obligations against non-refoulement. The committee notes that the obligation of non-refoulement requires the provision of procedural and substantive safeguards to ensure that a person is not removed in contravention of non-refoulement obligations (along with the general obligation to provide effective remedies for breaches of human rights under article 2 of the ICCPR).[2]

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1 See Appendix 1, Letter from Senator the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 1.

2 ICCPR, article 2 and 7 CAT, Article 3. See, also, for example, See, for example, Concluding Observations of the Human Rights Committee, Portugal, UN Doc. CCPR/CO/78/PRT (2003), at para 12.

1.93 **The committee therefore considers that proposed section 5AAA is likely to be incompatible with Australia's obligations of non-refoulement under the ICCPR and the CAT and has concluded its consideration of this aspect of the matter.**

Altering the test for determining Australia's protection obligations

1.94 The committee considered the proposed amendments in Schedule 2 of the bill to be incompatible with Australia's non-refoulement obligations under the ICCPR and CAT.

Minister's response

> The Government notes the Committee's comments and, noting that international jurisprudence can be persuasive but is not binding, remains of the view that Schedule 2 of the Bill represents an interpretation which is open as a matter of international law and is compatible with Australia's *non-refoulement* obligations under the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The reasons supporting this view have been set out in the Statement of Compatibility with Human Rights, attached to the Explanatory Memorandum for the Bill and the Government reiterates those reasons.[3]

Committee response

1.95 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.96 The committee notes that it had previously concluded its examination of this aspect of the proposed legislation and considered that the measure was incompatible with Australia's human rights obligations. The committee notes that the minister has chosen to provide further information in response to this conclusion.

1.97 In respect of this further information, the committee acknowledges the Australian Government's position that international jurisprudence is persuasive but nevertheless not binding on Australia with respect to its obligations under international law. However, the committee also notes that the Australian Government has not previously argued that Australia's non-refoulement obligations under the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) could be met by a 'more likely than not test'. The committee notes that, as a principle of international law, it is not open for a State party to a treaty to unilaterally reinterpret its obligations.

3 See Appendix 1, Letter from Senator the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 2.

Requirement for Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to evidence or claims raised at the review stage

1.98 The committee concluded that proposed section 423A is incompatible with Australia's obligations of non-refoulement under the ICCPR and CAT.

Minister's response

The Committee's consideration that the proposed section 423A is not compatible with Australia's *non-refoulement* obligations under ICCPR and CAT is based upon the Committee's understanding that this provision "would limit the RRT to facts and claims provided in the original application" (para 1.197) and the Committee's view that section 423A is incompatible with the fundamental and typical nature of merits review. However, the proposed section 423A does not prevent new claims and evidence being presented at the review stage. Applicants will continue to be able to introduce new claims and evidence to support their applications at the review stage. What the provision does require is that if the RRT is satisfied that there is not a reasonable explanation for not providing the information at the primary stage, the Tribunal will draw an inference unfavourable to the credibility of the new claims or evidence raised.

Section 423A does not allow or require the RRT to disregard new claims or evidence. All claims and evidence presented must be considered and evaluated. It is only once all claims have been considered that a Tribunal member can determine whether an applicant's explanation for presenting new claims or evidence is reasonable.

Where a reasonable explanation has not already been provided by the applicant, it is open to the RRT to seek such an explanation. The manner in which that explanation is sought is a matter for the Tribunal.

It is open to the Tribunal to determine whether or not a reasonable explanation is implicit in the new claims or evidence. For instance, there may have been a significant change in the home country after the primary decision was made, so it may not have been possible for the applicant to make the new claims or provide relevant evidence earlier. An applicant may also experience a direct and obvious change to their circumstances, for instance, the birth of a child who may have protection claims in their own right. In such cases, the Tribunal member may consider a reasonable explanation to be self-evident.

Clear notice will be given to applicants about the consequences of section 423A, in order to ensure a fair hearing. Non-citizens claiming protection in Australia will be advised of their responsibility to provide all claims and evidence as soon as possible through general public information, including that available on the departmental website and in the Protection Application Information and Guides (PAIG), as well as through initial written communication between the department and applicants. It is in the interests of the applicant and the process as a whole that there be consistent and clear messaging about the provisions in question.

> The RRT may reinforce this advice to applicants in any way it deems appropriate. For instance, applicants may be reminded of the requirements of section 423A through the tribunal website, in general information available to applicants (eg. the RRT form *Information on making an Application for review to the Refugee Review Tribunal*).
>
> Application assistance is not required in order to apply for, or be granted a Protection visa in Australia, however, it is open to all protection visa applicants to arrange application assistance from a registered migration agent privately, at their own expense. Publicly funded application assistance is not available at the review stage; however, those who arrive lawfully and are disadvantaged or face financial hardship may be eligible for assistance with their primary application for a Protection visa through the Immigration Advice and Application Assistance Scheme (IAAAS). A limited amount of support will also be available to illegal arrivals who are considered vulnerable, including unaccompanied minors. The government is currently considering the most effective and efficient way to provide this support.
>
> This measure is intended to encourage applicants to present all relevant claims and evidence at the earliest opportunity and, if necessary, to support the RRT in making adverse credibility findings with regard to new claims and evidence in those cases where the RRT is not satisfied that there is a reasonable explanation for their delayed presentation.
>
> Given the above, the government is of the view that the proposed section 423A does not preclude the full consideration of applicants' claims in the assessment process and is therefore compatible with Australia's obligations of non-refoulement under the ICCPR and CAT.[4]

Committee response

1.99 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.100 The committee notes that it had previously concluded its examination of this aspect of the proposed legislation and considered that the measure was incompatible with Australia's human rights obligations. The committee notes that the minister has chosen to provide further information in response to this conclusion.

1.101 In respect of this further information, the committee notes that the further information does not address the committee's serious concerns in relation to proposed section 423A and its departure from the typical character of merits review tribunals in Australia. It is at the core of a tribunal's independent merits review

4 See Appendix 1, Letter from Senator the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 2-3.

function to be able to determine what weight should be given to evidence and what determinations it should reach in relation to credibility.

1.102 In particular, the minister's response explains that proposed section 423A does not prevent new claims or evidence being presented. However, the proposed measure would nevertheless require the tribunal to draw an inference unfavourable to the credibility of the new claims or evidence raised in the absence of a 'reasonable excuse'. Such an adverse inference may be required to be drawn even where the tribunal considers that the evidence is relevant, reliable or credible. This inability of the tribunal to be able to freely assess the credibility of evidence may in turn result in denial of protection visas in circumstances where Australia has non-refoulement obligations.

1.103 As noted in its previous comments, the committee considers that the provision of 'independent, effective and impartial' review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT.[5] The committee considers that the requirement to draw an unfavourable inference in relation to the credibility of a claim or evidence raised at the review stage is inconsistent with the effectiveness of the tribunal in seeking to arrive at the 'correct and preferable' decision.

1.104 **The committee therefore considers that proposed section 423A is incompatible with Australia's obligations of non-refoulement under the ICCPR and the CAT and has concluded its consideration of this aspect of the bill.**

Requirement for Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to evidence or claims raised at the review stage – quality of law test

1.105 The committee requested the advice of the Minister for Immigration and Border Protection on whether proposed section 423A, as currently drafted, meets the standards of the quality of law test for human rights purposes.

Minister's response

> In paragraph 1.201 the Committee expresses the view that "what constitutes a 'reasonable explanation' for the purpose of the unfavourable inference not being drawn by the RRT is not well defined''. This leads to the Committee questioning whether this provision meets the "quality of law" test. The Government's view is that there is no interference with human rights, the quality of law test does not arise.

5 International Covenant on Civil and Political Rights, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (February 2014) 45, at 49-51, paras 1.188-1.199 (committee comments on Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013), and *Fourth Report of the 44th Parliament* (March 2014) 51, at 55-57, paras 513.41-3.47 (comments on minister's response to committee views on Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013).

A "reasonable explanation" has not been defined within the proposed section 423A because the general principles of administrative law and reasonable decision-making apply. A "reasonable explanation" is one that satisfies a Tribunal member that the new claims and evidence could not be presented earlier because the applicant was unable to do so. It is an explanation which is legitimate and appropriate. If required, the Tribunal may seek evidence to verify that the applicant's explanation is reasonable.

A reasonable explanation may include, but is not limited to:

- no reasonable opportunity to present the claim, eg. interpreting or translating error made in the primary stage of the application;
- a change in country situation affecting human rights after the primary decision was made;
- new information relevant to the purposes of the application not known earlier, eg. New documentary evidence of identity has been provided;
- a change in personal circumstances allowing presentation of new claims, eg. a new relationship (spouse or child) with a person who has protection claims in their own right;
- being a survivor of torture and trauma, where the ill-treatment has affected an applicant's ability to recall or articulate protection claims;
- language or cultural barriers with a material bearing on the applicant's ability to present their case for protection; or
- the applicant is considered most vulnerable, eg. a minor, mentally or physically disadvantaged person, who has a restricted ability to participate in the protection process.

The Explanatory Memorandum states the purpose of this measure is "encouraging asylum seekers to provide all claims and supporting evidence as soon as possible" (p. 2). As outlined in the Second Reading Speech this provision intends to ensure that "any claim that can be presented at the initial application stage is presented at that stage." This provision is appropriate to the seriousness of an application for a Protection visa. That application rests on the need for international protection due to a well-founded fear of persecution or risk of suffering significant harm, possibly including torture. Under those circumstances it is reasonable to expect that claims and supporting evidence be provided by an applicant as quickly as possible, and that a reasonable explanation is provided when claims and evidence are unduly delayed. The proposed section 423A does not prevent

new claims and evidence being presented or evaluated, but clarifies the manner in which that should be done.[6]

Committee response

1.106 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.107 **The committee considers that, based on the information provided, section 423A is compatible with the quality of law test for human rights purposes. The committee has concluded its consideration of this aspect of the bill.**

Power to refuse visa application for failure to establish identity, nationality or citizenship

1.108 The committee concluded that the proposed amendments to section 91W and new section 91WA are likely to be incompatible with Australia's obligations of non-refoulement under the ICCPR and CAT.

Minister's response

The Committee has expressed concern that the refusal powers in these measures may be inconsistent with effective and thorough assessment of claims for protection, particularly where a person may have genuine claims but fails to establish identity. To assist the Committee in considering whether sections 91W and 91WA are compatible with non-refoulement obligations, and explain why the Government maintains proposed sections 91W and 91WA are compatible with non-refoulement obligations under ICCPR and CAT, a brief explanation of the process for assessing identity and protection claims follows.

Where protection claims are made in a Protection visa application, those claims will be assessed by a decision maker before any decision to refuse under sections 91W or 91WA is made. Refusal under sections 91 W or 91 WA will not short-circuit the assessment of any protection claim. The primary assessment of a Protection visa application is subject to independent merits review.

It is possible for a person to be assessed as engaging Australia's protection obligations and then be refused a Protection visa under section 91W or 91WA. In these circumstances, non-refoulement obligations prevail and the person engaging those obligations will not be returned to their receiving country. Should the necessary documentary evidence of identity, nationality or citizenship become available subsequent to the refusal of a Protection visa, the Minister may consider the exercise of his non-compellable power under section 48A of the Migration Act 1958 (the Act) to allow a further Protection visa application to be made. It is also open to

6 See Appendix 1, Letter from Senator the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 3-4.

> the Minister to exercise his non- compellable powers under sections 417 (following RRT review) or 195A of the Act to grant any type of visa. The combination of legislation, policy and practices will ensure that non-refoulement obligations are met.[7]

Committee response

1.109 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.110 The committee notes that it had previously concluded its examination of this aspect of the proposed legislation and considered that the measure was incompatible with Australia's human rights obligations. The committee notes that the minister has chosen to provide further information in response to this conclusion.

1.111 In respect of this further information, the committee notes the explanation of the minister that, under the proposed amendments, claims for protection will be assessed by a decision maker before any decision to refuse under sections 91W or 91WA is made. However, the grant of a protection visa is a key method by which Australia complies with its international obligations in relation to those whom Australia owes protection. Given this, the committee considers that the refusal of a protection visa for failure to provide proof of identity without a reasonable excuse represents a serious risk that Australia will not comply with its international obligations.

1.112 The committee notes the minister's assurances that non-refoulement obligations prevail irrespective of proof of identity, that a person to whom those obligations apply will not be refouled in breach of Australia's obligations, and that the primary assessment of a protection visa application remains subject to independent merits review. Notwithstanding these assurances, the committee remains concerned that there may be insufficient safeguards or formal processes to ensure that a person is not removed in contravention of Australia's non-refoulement obligations in circumstances where they are refused a protection visa due to being unable to prove their identity.

1.113 The committee further notes that, even if there were sufficient safeguards to ensure that non-refoulement obligations prevail irrespective of proof of identity, the measure may lead to a person being assessed as entitled to protection obligations but not entitled to a visa. It will then be subject to ministerial discretion as to whether or not a visa is granted. The committee notes if this discretion is not exercised this may leave individuals in indefinite immigration detention. The committee considers that such indefinite detention would breach Australia's

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7 See Appendix 1, Letter from Senator the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 4-5.

obligations under article 9 of the ICCPR in relation to the right to freedom from arbitrary detention.

1.114 **The committee therefore considers, based on the information provided, that the proposed amendments to section 91W and new section 91WA are likely to be incompatible with the right to freedom from arbitrary detention.**

1.115 **The committee considers that the proposed amendments to section 91W and new section 91WA are likely to be incompatible with Australia's obligations of non-refoulement under the ICCPR and CAT and has concluded its consideration of this aspect of the bill.**

Obligation to consider the best interests of the child

Responsibility of asylum seeker to provide evidence of claims

1.116 The committee requested the further advice of the Minister for Immigration and Border Protection on the compatibility of proposed section 5AAA with the best interests of the child, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> A legislative body is required to consider the best interests of the child as a primary consideration. The Australian Government is also required to determine if these interests are outweighed by other primary considerations such as the integrity of the migration programme and the effective and efficient use of government resources.
>
> The reality is that all actions taken by the Government will affect children in some way. Where decisions have major impact on children, a greater level of protection may be required. Compatibility with the obligation to treat the best interests of the child as a primary consideration does not necessarily require a full or formal process of assessing and determining the best interests of the child or to act in those interests after taking into account other primary considerations. The Government has provided comments regarding its approach to the treatment of the best interests of the child in the statement of compatibility for the Bill when I stated the following:
>
> > 'Treating the best interests of the child as a primary consideration will take place on a case-by-case basis. Other considerations may also be primary considerations such as the integrity of the migration programme. The obligation in the CRC in relation to the best interests of the child does not amount to a right to remain in

> Australia if a person has no other lawful authority to stay, but should be taken into account when arranging removal.
>
> The Government has policies and procedures to give effect to this obligation and is committed to acting in a manner consistent with the CRC.'
>
> As noted in the Statement of Compatibility, the Department will ensure that vulnerable persons, including children, will be given a meaningful opportunity and appropriate assistance to present their claims. The committee has noted at 1.216, that to demonstrate that a limitation is permissible, proponents of legislation must provide why the measures are necessary in pursuit of a legitimate objective. The government is of the view that section SAAA does not limit the obligation to treat the best interests of children as a primary consideration.[8]

Committee response

1.117 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.118 However, the committee does not consider that the minister's response effectively or adequately addresses the concerns identified in relation to proposed section 5AAA and the requirement to provide evidence of claims. As stated by the minister, where decisions have a major impact on children, a greater level of protection may be required. In this respect, the committee notes that the measure will directly and seriously affect the assessment of claims for protection by child asylum seekers.

1.119 Further, the committee notes that it is recognised in both international and domestic law that children have different capacities to adults. The committee therefore remains concerned that it may be particularly difficult for children (including unaccompanied minors) to provide evidence in accordance with the requirements of proposed section 5AAA, due to their age, vulnerabilities and capacity.

1.120 Last, while the minister states that the obligation to consider the best interests of the child may be 'outweighed' by ensuring the 'integrity of the migration programme' and the 'effective and efficient use of government resources', the committee notes that the minister's response does not provide a reasoned and evidence-based assessment of how the proposed limitation on the rights of children is rationally connected to its stated aims, and does not adequately assess whether the measure is a necessary and proportionate limitation with respect to the rights of children.

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8 See Appendix 1, Letter from Senator the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 5.

1.121 **The committee therefore considers that, based on the information provided, proposed section 5AAA is likely to be incompatible with the obligation to consider the best interests of the child.**

Requirement for Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to evidence or claims raised at the review stage

1.122 The committee requested the advice of the Minister for Immigration and Border Protection as to the compatibility of proposed section 423A with Australia's obligations in relation to the best interests of the child, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> Section 423A does not prevent claims being assessed and the RRT will determine the most appropriate way of eliciting an explanation for new claims from applicants, including children.
>
> The government is of the view that section 423A does not limit the obligation to treat the best interests of children as a primary consideration.[9]

Committee response

1.123 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.124 The committee notes the minister's view that proposed section 423A does not prevent claims being assessed and raised. However, the proposed measure would require the tribunal to draw an inference unfavourable to the credibility of the new claims or evidence raised in the absence of a 'reasonable excuse', including in relation to children and their special vulnerability.

1.125 The committee further notes the minister's view that proposed section 423A does not limit the obligation to treat the best interests of children as a primary consideration. However, in the committee's view, the measure may negatively impact on the merits review of a child's application for protection because it would restrict the tribunal's ability to freely and comprehensively assess the credibility of evidence in relation to review of that application. Consequently, the measure is

9 See Appendix 1, Letter from Senator the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 6.

properly regarded as limiting the obligation for the best interests of the child to be the primary consideration.

1.126 As previously noted, children have special vulnerabilities as compared to adults because, for example, they may be more likely to fail to understand what information is important to their claim and may have limited capacity to present it. The committee notes that neither the statement of compatibility nor the minister's response provided a substantive assessment of whether this limitation on human rights may be regarded as reasonable, necessary and proportionate in pursuit of a legitimate objective.

1.127 **The committee therefore considers that, based on the information provided, proposed section 423A is incompatible with the obligation to treat the best interests of the child as the primary consideration.**

Power to refuse visa application for failure to establish identity, nationality or citizenship

1.128 The committee requested the further advice of the Minister for Immigration and Border Protection on the compatibility of proposed section 91W and section 91WA with Australia's obligation in relation to the best interests of the child, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> As noted above, claims for protection will still be fully assessed, including in cases where the sections 91W and 91WA permit refusal of the protection visa application.
>
> The government is of the view that section 91W and section 91WA do not limit the obligation to treat the best interests of children as a primary consideration.[10]

Committee response

1.129 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.130 The committee notes the minister's view that section 91W and section 91WA do not limit the obligation to treat the best interests of children as a primary

10 See Appendix 1, Letter from Senator the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 6.

consideration. However, the committee is of the view that the refusal of a protection visa to a child in circumstances where Australia owes that child protection obligations is a limitation on the obligation to treat the best interests of the child as a primary consideration. The minister's response does not address whether the limitation is reasonable, necessary and proportionate in pursuit of a legitimate objective.

1.131 **The committee therefore considers that, based on the information provided, the section 91W and section 91WA are likely to be incompatible with the obligation to treat the best interests of the child as the primary consideration.**

Restrictions on applications for protection visa by member of same family unit

1.132 The committee requested the Minister for Immigration and Border Protection's advice as to the compatibility of Schedule 1 of the bill with the obligation to consider the best interests of the child as a primary consideration and, particularly, how the measures are:

- aimed at achieving a legitimate objective;
- there is a rational connection between the measures and the objective; and
- the measures are proportionate to that objective.

Minister's response

> The government is of the view that Schedule 1 of the Bill is compatible with the obligation to treat the best interests of children as a primary consideration.
>
> This measure is intended to prevent and discourage the use of the onshore component of Australia's Humanitarian Programme as a means of family migration. It puts beyond doubt that when a family migration outcome is sought, the Protection visa process is not the appropriate stream. An applicant who is a member of the same family unit as a Protection visa holder retains the right to seek the grant of a Protection visa on the basis of their own, specific protection claims.
>
> As the Committee acknowledges in paragraph 1.231, there is no right to family reunification for recognised refugees under international law. Nor is there any prescribed mechanism for family reunification. This measure does not, therefore, limit existing rights of the child.
>
> Consistent with the reasons already set out, section 91 WB does not affect the rights of a permanent Protection visa holder to sponsor migration of members of their family unit under the appropriate family migration programmes. Family members outside Australia may also continue to apply for migration to Australia under the offshore Humanitarian Programme.
>
> The Committee is concerned "that the Migration Act currently provides a number of measures that seek to preserve, where appropriate and reasonable, the family unity of those seeking protection in Australia" and

that this bill "seeks to limit those rights" (Para 1.231). However, this measure upholds the principle of family unity for Protection visa applicants. Proposed section 91WB does not affect the definition of a member of the same family unit, and continues to allow family members to be included in a Protection visa application, or for members of the same family unit to combine separate applications. The purpose of section 91WB is not to change existing provisions regarding family unity within the Protection visa process, but to put their interpretation beyond doubt.

Furthermore, proposed section 91WB does not affect children born to Protection visa holders. These children are eligible for the grant of a Protection visa under section 78 of the Act. In addition, section 12 of the *Australian Citizenship Act 2007* continues to apply and allows for automatic acquisition of Australian citizenship for children born in Australia to a permanent visa holder. Current provisions of the Citizenship Act, and the Migration Act, maintain the principle of family unity, where appropriate and reasonable, for those seeking protection in Australia.

This measure also protects the rights of the child by discouraging family members of Protection visa holders from making dangerous boat voyages to Australia, or otherwise arriving in Australia illegally, in the expectation of being granted a Protection visa, on the basis of being a member of the same family unit of a Protection visa holder.[11]

Committee response

1.133 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.134 The committee notes that the response confirms that the intention of the amendments is to ensure that the protection visa process is not used 'when a family migration outcome is sought'. The rationale for the amendments is that the measure would protect children from dangerous voyages at sea.

1.135 The committee notes that, while there is no universal right to family reunification, article 10 of the CRC nevertheless obliges Australia to deal with applications for family reunifications by minors or their parents in a positive, humane and expeditious manner. The committee notes that Australia also has an obligation under article 9(1) to ensure that a child is not separated from their parents against their will (unless necessary for the best interests of child), and that Australia has obligations of tracing and re-establishing contact for a separated child under articles 22(2), 9(3) and 10(2). In the committee's view, the measures engage these rights.

1.136 Currently, there is no restriction on the time when an applicant of the same family unit of a person holding a protection visa can apply for a protection visa on

11 See Appendix 1, Letter from Senator the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 6-7.

the grounds of family status. This measure would operate to establish a limit so that an application for a protection visa on the grounds of family status may only be made before the primary applicant is granted a protection visa.

1.137 While protecting children from dangerous voyages at sea is a legitimate objective, the committee considers that the response does not detail how the measure is rationally connected to that objective nor how it may be regarded as reasonable, necessary and proportionate in pursuit of that objective.

1.138 **The committee therefore considers that, based on the information provided, the amendments in Schedule 1 are incompatible with the obligation to consider the best interests of the child as a primary consideration.**

Further barriers to permanent protection

1.139 The committee requested the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the obligation to consider the best interests of the child and, particularly, how the measures are:

- aimed at achieving a legitimate objective;
- there is a rational connection between the measures and the objective; and
- the measures are proportionate to that objective.

Minister's response

A legislative body is required to consider the best interests of the child as a primary consideration. The Australian Government is also required to determine if these interests are outweighed by other primary considerations such as the integrity of the migration programme and the effective and efficient use of government resources.

The changes to the bars do not represent a policy shift. The expanded operation of the section 46A bar makes section 91K redundant for the purpose of managing unauthorised maritime arrivals in the community, and the amendments will ensure section 91K no longer applies to unauthorised maritime arrivals.

The government is of the view that Schedule 3 of the Bill is compatible with the obligation to treat the best interests of children as a primary consideration, as, for the reasons already set out, the Government has considered those interests and has concluded that they are outweighed by the policy objectives of preserving the integrity of the migration programme and encouraging lawful migration pathways.[12]

12 See Appendix 1, Letter from Senator the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 7-8.

Committee response

1.140 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.141 However, the committee notes that the obligation to consider the best interests of the child as a primary consideration may only be limited if the measure is:

- aimed at achieving a legitimate objective;
- there is a rational connection between the measure and the objective; and
- the measures are proportionate to that objective.

1.142 The minister's response does not provide an assessment of the measure in these terms. Consequently, the minister has not established that the right of children to have their best interests considered a primary objective is outweighed by the policy objectives of preserving the integrity of the migration program and encouraging lawful migration pathways.

1.143 **The committee therefore considers that, based on the information provided, the measures in Schedule 3 are incompatible with the obligation to consider the best interests of a child as a primary consideration.**

Right to equality and non-discrimination

Responsibility of asylum seeker to provide evidence of claims

1.144 The committee requested the further advice of the Minister for Immigration and Border Protection on the compatibility of Section 5AAA with the rights to equality and non-discrimination.

Minister's response

> As previously stated, section 5AAA does not impose new responsibilities on non-citizens seeking protection in Australia, but rather, expressly states it is the responsibility of the person seeking protection to establish their claims.
>
> The Committee is concerned about possible discrimination under this provision, which may compromise equality before the law or rights to equal protection of the law. Specific concerns are raised regarding possible discrimination on the basis of disability and gender, particularly the difficulty for women to obtain documentary evidence of harm experienced. However, proposed section 5AAA does not insist on the provision of documentary evidence. It calls for a person seeking protection in Australia to state "all particulars of his or her claim" and provide "sufficient evidence to establish the claim". The role of the decision maker, as previously discussed in response to 1.178, is to evaluate that claim. In that process, a decision maker may ask questions, seek clarification and check that the person's claims for protection are consistent with generally known facts and the specific country situation in question. Where relevant,

> country information assists the consideration of whether the availability of documentation is gender specific. The department's *Procedures Advice Manual - Gender Guidelines* and *Refugee Law Guidelines* assist in assessing claims from vulnerable applicants, including women and applicants with an intellectual disability. Greater details regarding claims will, therefore, be sought and the veracity of claims will be established further during the process of evaluation.
>
> Various forms of application assistance are available to people seeking Australia's international protection. People living with a disability may be entitled to publicly funded application assistance, depending on the nature of their disability.[13]

Committee response

1.145 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.146 However, the committee remains concerned, based on the information provided, that proposed section 5AAA may lead to indirect discrimination against women and persons with a disability.

1.147 As previously noted, a person with particular disabilities may be less easily able to comply with the requirement to 'specify all particulars or his or her claim' and 'to provide sufficient evidence to establish the claim'. While the response provided states that persons with a disability may be entitled to publicly funded applications assistance, no further details are provided in respect of this potential safeguard. The committee considers that the mere possibility of legal assistance in some cases is unlikely to be sufficient to satisfy Australia's obligations in relation to the rights of persons with disabilities. The committee notes that the Australian Government has an obligation to ensure that persons with a disability are not disadvantaged in the assessment of their claims for protection. This will often involve taking positive steps to ensure that persons with disabilities are not disadvantaged.

1.148 With respect to the impact of proposed section 5AAA on women in particular, the committee notes the advice of the minister that proposed section 5AAA does not insist on the provision of documentary evidence. However, the committee is nevertheless concerned that the introduction of a proposed provision which provides that asylum seekers have responsibility to 'specify all particulars or his or her claim' and 'to provide sufficient evidence to establish the claim' may, in practice, indirectly discriminate against women. As previously noted, women may be more likely than men to have claims based on persecution suffered in the home or private sphere. Due to the nature of these harms, it may be more difficult for women in these circumstances 'to provide sufficient evidence to establish

13 See Appendix 1, Letter from Senator the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 8.

the claim'. Given that proposed section 5AAA does not acknowledge the shared duty between the applicant and the examiner to ascertain and evaluate all the relevant facts as set out in the *UNHCR Handbook*, the committee considers that section 5AAA appears likely to exacerbate such issues.

1.149 The committee notes the minister's advice that the department's manual, *Procedures Advice Manual - Gender Guidelines* and *Refugee Law Guidelines*, assists in assessing claims from vulnerable applicants, including women. While appropriate guidelines may be an important safeguard in thoroughly assessing claims for protection in respect of vulnerable groups, the minister's response provides no substantive details about the operation of such guidelines in light of section 5AAA, and whether they would address potential indirect discrimination in relation to the proposed measure.

1.150 **The committee therefore requests the further advice of the minister as to the particulars of any safeguards or policies in place to ensure women and persons with disabilities are not disadvantaged by proposed section 5AAA.**

Requirement for Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to evidence or claims raised at the review stage

1.151 The committee requested the further advice of the Minister for Immigration and Border Protection on the compatibility of section 423A with the rights to equality and non-discrimination.

Minister's response

> The Committee is concerned that the proposed section 423A may have a disproportionate or unintended negative impact on persons with a disability and notes that a person experiencing particular disabilities may be less able to accurately provide evidence or repeat evidence. Accordingly, the Committee suggests that some people with disabilities who seek protection in Australia may not provide their claims fully and in a timely manner due to circumstances beyond their control.
>
> This situation has been taken into account in the proposed section 423A. The RRT will draw an inference unfavourable to the credibility of new claims or evidence only if the Tribunal is not satisfied that the applicant has a reasonable explanation to justify why they were not presented during the primary application stage. Where an applicant is unable to present all their claims and supporting evidence because of a proven disability, it is open to the RRT to determine whether a "reasonable explanation" is implicit.[14]

14 See Appendix 1, Letter from Senator the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 8-9.

Committee response

1.152 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.153 However, the committee remains concerned that section 423A may have a disproportionate or unintended negative impact on persons with a disability. While it may be open to the RRT to determine that a particular disability constitutes a 'reasonable explanation' as to why a new claim or evidence is raised at the review stage, there is no specific guidance provided to the RRT as to what may constitute a 'reasonable explanation'. The committee notes that persons with disabilities may face particular challenges in advancing claims for protection, and that it is incumbent on the Australian Government to ensure, in accordance with its international obligations, that persons with a disability are not disadvantaged in these processes.

1.154 **The committee therefore requests the Minister for Immigration and Border Protection's advice as to whether there are measures or safeguards in place to ensure that section 423A does not have a disproportionate or negative impact on persons with a disability.**

Right to a fair trial and fair hearing rights

RRT power to dismiss an application for failure to appear

1.155 The committee sought the advice of the Minister for Immigration and Border Protection as to whether the proposed power for the RTT to dismiss an application is compatible with the right to a fair hearing in article 14 of the ICCPR, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The purpose of this amendment is to clarify that if a review applicant fails to appear before the Migration Review Tribunal (MRT), in response to an invitation under section 360 of the Act, the MRT has the option of dismissing the application or making a decision on the review, as is the case under current subsection 362B(l). Proposed section 426A(1A) mirrors this amendment for the RRT.
>
> The Government is committed to ensuring that MRT and RRT review applicants remain entitled to a fair hearing. The power to dismiss a review application for non-attendance is not intended to impact on procedural fairness already codified in the Act. It is intended to increase tribunal efficiency by providing for a quick resolution of a case where, following the usual accordance of procedural fairness, the applicant for review has not attended the hearing. Dismissal for failure to attend a hearing is one of

three possible options the tribunals may consider for non-attendance by an applicant at a hearing. The other options are either to proceed to a decision on the review or reschedule the hearing.

If dismissal is chosen, the tribunals will have a power to reinstate an application where the applicant applies within a certain time period and the relevant tribunal considers it appropriate to reinstate the application.

Review applicants will be made aware in the invitation to hearing letter that, if they do not attend a hearing after being invited to do so, their application may be dismissed for failing to appear. The tribunals will be required to notify the applicant of the decision to dismiss the application for failure to appear. The notice will also include information that sets out how the review applicant can seek reinstatement of their review application within a specified timeframe. Where the tribunals reinstate a review application, the applicant will be notified that their application is taken never to have been dismissed and the review will continue.

The tribunals are required to afford procedural fairness in accordance with the Act. The Government notes that, in the migration and refugee context, there is a high incentive for merits review to be used by unsuccessful visa applicants and asylum seekers with unmeritorious claims to delay their removal from Australia. The Government therefore considers that a power enabling review applications at the MRT and RRT to be dismissed for non-attendance at a scheduled hearing would allow the tribunals to focus resources away from matters that are not actively being pursued by the

Committee response review applicant.

This proposed measure applies to all individuals within the MRT's and RRT's jurisdiction and will achieve the Government's legitimate objective of strengthening the administrative efficiency and processes of the tribunals to support the integrity of the merits review process. Proposed sections 362B{1A) and 426B(1A) do not limit a person's right to equality before the tribunals or the right to a fair hearing by a competent, independent and impartial tribunal established by law.

In light of the above and articulated previously in the statement of compatibility, the Government is of the view that ability for the MRT and RRT to dismiss an application in the above circumstances does not limit any rights.[15]

1.156 **The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this aspect of the bill.**

15 See Appendix 1, Letter from Senator the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 9-10.

Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [F2014L00622]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 17 July 2014 (Senate)

Purpose

1.157 The Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [F2014L00622] (the regulation) amends Part 1 and Schedules 1 and 2 to the Migration Regulations 1994 to provide for the repeal of the following classes of visa from 2 June 2014:

- the Aged Dependent Relative visa classes and subclasses (for a person who is single, meets the aged requirements and both is, and has for a reasonable period been, financially dependent on their Australian relative);
- the Remaining Relative visa classes and subclasses (for a person whose only near relatives are those usually resident in Australia);
- the Carer visa classes and subclasses (for a person to care for a relative in Australia with a long-term or permanent medical condition or for a person to assist a relative providing care to a member of their family unit with a long-term or permanent medical condition); and
- the Parent and Aged Parent visa classes and subclasses (for a person who is the parent of an Australian citizen, Australian permanent resident or eligible New Zealand citizen, and where the parent does not pay a significant financial contribution towards their own future health, welfare and other costs in Australia).

Background

1.158 The committee reported on the instrument in its *Ninth Report of the 44th Parliament*.

Committee view on compatibility

Right to protection of the family

Repeal of visa classes for relatives

1.159 The committee requested the Minister for Immigration and Border Protection's advice on the compatibility of the repeal of the specified visa classes with the protection of the family, and particularly:

- whether the measure is aimed at achieving a legitimate objective;
- whether there is a rational connection between the measure and that objective; and

- whether the measure is proportionate to that objective.

Minister's response

> Noting the Committee's comments at 1.541 that it accepts the non-citizens do not have a standalone right to family reunification under international rights law', the decision to migrate to Australia involves the often very difficult decision to leave family and friends behind, however this is a matter of individual choice and brings with it no unfettered right to extended family reunification.[1]

Committee response

1.160 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.161 However, the committee considers that an important element of the right to protection of the family is to ensure family members are not involuntarily separated from one another. The committee further notes that article 10 of the CRC requires the Government to deal with applications for family reunifications by minors or their parents in a positive, humane and expeditious manner. As previously noted, while non-citizens do not have a stand-alone right to family reunification under international human rights law in all circumstances, the repealed visa classes operated to affect the interests not only of the visa applicant but also their relatives in Australia. To this extent, the visa classes in question may be seen as having provided avenues to protect, where appropriate and reasonable, the family unity of persons usually resident in Australia with relatives who are overseas. The committee notes that this included persons who are Australian citizens.

1.162 The committee notes that the Minister's brief analysis asserts that 'individual choice' to migrate to Australia does not bring with it 'an unfettered right to extended family reunification'. The committee acknowledges that the right to the protection of the family is not 'unfettered' and may be subject to limitations provided they are reasonable, necessary and proportionate in pursuit of a legitimate objective. The committee notes, by way of clarification, that in terms of the scope of the measures, the Minister's analysis does not apply in respect to every potential class of person who may be affected by the repeal of the visas. That is, the repeal of the visa classes affects people ordinarily resident in Australia who have family members overseas including those who may not have 'chosen' to migrate to Australia.

1.163 The committee notes that the Minister's response does not engage substantially with how the proposed changes may limit the right to the protection of the family for those ordinarily resident in Australia nor does it provide a substantive

1 See Appendix 1, Letter from the Hon. Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 11.

analysis of whether any limitation is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1.164 **The committee therefore requests the Minister for Immigration and Border Protection's further advice on the compatibility of the repeal of the specified visa classes with the protection of the family, and particularly:**

- **whether the measure is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the measure and that objective; and**
- **whether the measure is proportionate to that objective.**

Right to health and a healthy environment

Repeal of certain classes of carer visas

1.165 The committee requested the Minister for Immigration and Border Protection's advice on the compatibility of the repeal of certain carer visa classes with the right to health, and particularly:

- whether the measure is aimed at achieving a legitimate objective;
- whether there is a rational connection between the measure and that objective; and
- whether the measure is proportionate to that objective.

Minister's response

Is the measure aimed at achieving a legitimate objective?

The measure achieves a legitimate objective of removing visa subclasses that are not providing their intended objectives due to the long wait times for a decision on their application.

Is there a rational connection between the measure and that objective?

The Carer visa was only to be used when other forms of care cannot reasonably be provided by any other relative or obtained from welfare, hospital, nursing or community services in Australia. Yet it is expected that applicants currently wait up to six years for their carer to obtain a visa, while still requiring this same high level of care.

In addition, the majority of Carer visa places are granted to dependent applicants (spouse or de facto partner, minor children and adult dependent relatives). In the 2013-14 programme year 62.5% of visa grants were given to dependent applicants. This meant that only 37 .5% of the available Carer visa places were used to provide an outcome that provided care for an Australian citizen, permanent resident or eligible New Zealand citizen.

Is the measure proportionate to that objective?

> The repeal of the Carer visa does not prejudice access to health and welfare services that every Australian has. The repeal does not change the availability to family members outside Australia to apply for a visitor visa where they can show that the purpose of their visit is to assist with the short-term care needs of a seriously ill relative who is an Australian citizen or permanent resident.[2]

Committee response

1.166 **The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this aspect of the matter.**

2 See Appendix 1, Letter from the Hon. Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 11.

Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00726]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 26 June 2014 (Senate)

Purpose

1.167 The Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] (the regulation) amends the Migration Regulations 1994 and the Australian Citizenship Regulations 2007 in relation to visa evidence charges, members of the family unit for student visas, skills assessment validity, foreign currencies and places, substitution of AusAID references, Australian citizenship fees and other measures, and infringement notices.

Background

1.168 The committee reported on the instrument in its *Ninth Report of the 44th Parliament*.

Committee view on compatibility

Right to privacy

Releasing information concerning a person's change of name

1.169 The committee sought the advice of the Minister for Immigration and Border Protection as to whether the ability to release information concerning a person's previous changes of name is compatible with the right to privacy.

Minister's response

> Section 37 of the *Australian Citizenship Act 2007* provides that a person may make an application for evidence of the person's Australian citizenship. When given, that evidence must be in a form prescribed by the *Australian Citizenship Regulations 2007* (the Citizenship Regulations) and contain any other matter prescribed by the Citizenship Regulations.
>
> Since 1 July 2011, the Citizenship Regulations have provided that the following information, among other matters, may be included on the back of a notice of evidence of citizenship:
>
> - the applicant's legal name at time of acquisition of Australian citizenship, if different to the applicant's current legal name;
> - any other name in which a notice of evidence has previously been given;
> - any other dates of birth in which a notice of evidence has previously been given.

Schedule 6 of the Regulation amends Schedule 2 of the Citizenship Regulations by expanding the range of information that may be included on the back of a notice to include the date of any notice of evidence of Australian citizenship previously given to the person.

The provision of details of previous notice of evidence on the back of a notice of evidence assists in maintaining the integrity of Australia's identity framework. Identity integrity is essential in maintaining Australia's national security, law enforcement and economic interests. It is essential that the identities of persons accessing government or commercial services, benefits, official documents and positions of trust can be verified. False or multiple identities can and do underpin terrorist activities; impact on border and citizenship controls; finance crimes; and facilitate fraud.

The Attorney-General's National Identity Security Strategy states that 'if identity security risk is negligible to all parties, an individual should be able to remain anonymous or use a pseudonym if they choose. However, if risks to one of the parties are unacceptable, the identity of the other party must be confirmed. For government agencies, unacceptable risks include those that may lead to identity fraud'. Identity fraud has a significant impact on Australia's people and economy. According to the *Australian Bureau of Statistics Personal Fraud Survey 2010-11*, Australians lost $1.4 billion due to personal fraud (which includes credit card fraud, identity theft and scams). The survey estimated a total of 1.2 million Australians aged 15 years and over were victim of at least one incident of identity fraud in the 12 months prior to the survey interview.

Notices of evidence of citizenship are treated as a foundation identity document by many Australians and recording the particulars of previous notices of evidence on the back of a notice of evidence helps prevent misuse of identity. For example, where a person has multiple identities and only one is recorded on the evidence of citizenship, the following risks may present where the evidence of citizenship is presented as a primary form of identification:

- National police checks (including working with vulnerable people checks) may not include all identities, resulting in criminal charges not being detected and increasing risk to the Australian public, government, business and care facilities -for example, a person with child sex convictions under one identity may gain a position in a child care centre under another identity.
- Security vetting for government positions of trust may not include all identities, increasing risk to national security- for example, a person who would be considered a national security risk under one identity receives a clearance under another identity and gains access to sensitive information, restricted areas or high risk jobs, such as at an Australian port of entry.

- A person may fraudulently collect benefits under multiple identities from state and federal government - for example, a person could collect Centrelink benefits under multiple identities.
- Credit checks may be incomplete, presenting a risk to financial institutions and business - for example, a person with a bad credit history under one identity may present a clear credit check and procure finance under another identity.

The provisions in Schedule 2 of the Citizenship Regulations aid in the mitigation of these risks, preventing and deterring identity crime and misuse (objective one of the National Identity Security Strategy) and offering increased confidence in the verification of identity of Australians born overseas, for government, business and the Australian public.

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with, among other matters, an individual's privacy. However, the right to privacy is not an absolute right. This means it does not apply in an unlimited or absolute manner and Australia can limit the extent of these rights, as long as it limits the right consistent with the principle of non-discrimination which outlines the test for legitimate differential treatment under international law. Limitations that are reasonable, necessary and proportionate in achieving a legitimate objective are permissible.

Schedule 2 of the Citizenship Regulations engages the right to privacy in that it allows for the inclusion on the back of a notice of evidence of citizenship information about when and in what identity a person has previously been issued with such a notice.

The legitimate objective of the recording of details of previous notices of evidence on the back of a notice of evidence is enhancing the integrity of the identity framework. The potential limitations on the right to privacy are:

- reasonable as they seek to reduce the opportunity for identity fraud and the consequent impact on the community;
- necessary as there is no other practical way to associate the details of previous notices of evidence with a current notice of evidence; and
- proportionate as they do not make the person's identity details available to the general public. Rather, notices of evidence are generally used when individuals are dealing with government or other bodies that have a need to establish the person's identity and citizenship status, therefore the extent of the limitation on privacy and need to disclose this information is limited. Persons holding a notice of evidence maintain control over who or what organisation they disclose the notice to and for what purpose In addition, the Australian Citizenship Instructions provide that officers have the discretion not to include previous names and/or dates of birth if

> they are satisfied that the inclusion of a particular name will endanger the client or another person connected to them.[1]

Committee response

1.170 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.171 The committee notes the importance of identity security in protecting Australian's from crime and protecting government revenue from fraud. The committee accordingly appreciates the importance of the Attorney-General's National Identity Security Strategy.

1.172 The committee notes, however, that a passport is also a foundational identity document. The regulation requires information to be included on the back of citizenship documents that is not included on passports. Given that these documents have the same value in proving identity, the committee considers the requirements in relation to citizenship certificates to be more intrusive on an individual's privacy.

1.173 **Accordingly, the committee seeks the Minister for Immigration and Border Protection's further advice on whether Schedule 2 to the regulation is a proportional measure, with regard to the requirements for identity documents of the same value.**

Rights to equality and non-discrimination

Impact of release for persons who have undergone sex or gender reassignment procedures

1.174 The committee sought the advice of the Minister for Immigration and Border Protection as to whether the ability to release information concerning a person's change of name is compatible with the right to equality and non-discrimination.

Minister's response

> The committee has stated that Schedule 2 of the Citizenship Regulations indirectly engages the rights of equality and non-discrimination in that it allows for the inclusion on the back of a notice of evidence of citizenship information about when and in what identity a person has previously been issued with such a notice, and that information may disclose that the person has undergone sex or gender reassignment.
>
> The rights to equality and non-discrimination in articles article 2, 16, and 26 of the ICCPR are not absolute rights.
>
> As noted above, the legitimate objective of the recording of details of previous notices of evidence on the back of a notice of evidence is

1 See Appendix 1, Letter from the Hon. Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 12-14.

enhancing the integrity of the identity framework. The potential limitations on the right to equality and non-discrimination are:

- reasonable as they seek to reduce the opportunity for identity fraud and the consequent impact on the community;
- necessary as there is no other practical way to associate the details of previous notices of evidence with a current notice of evidence; and
- proportionate as they do not make the person's identity details available to the general public. The person has control of the notice of evidence and over the disclosure of the information. Notices of evidence are generally used when individuals are dealing with government or other bodies and used as primary evidence to establish the person's identity and citizenship status, therefore while importance of the notice of evidence, the extent of the limitation on privacy and need to disclose this information is limited. Persons holding a notice of evidence maintain control over who or what organisation they disclose the notice to and for what purpose. In addition, the Australian Citizenship Instructions provide that officers have the discretion not to include previous names and/or dates of birth if they are satisfied inclusion of a particular name will endanger the client or another person connected to them.[2]

Committee response

1.175 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.176 The committee notes that, in July 2013, the government introduced *Australian Government Guidelines on the Recognition of Sex and Gender* in order to better protect individuals who identify as sex and or gender diverse from discrimination in their interactions with government, and to give those individuals greater control over the recording of their sex and or gender in government documents.

1.177 The committee notes that these guidelines support the Attorney-General's National Identity Security Strategy.

1.178 **As the guidelines are an important measure in protecting against discrimination, the committee seeks the minister's further advice on whether the regulations are consistent with the *Australian Government Guidelines on the Recognition of Sex and Gender.***

2 See Appendix 1, Letter from the Hon. Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 2 September 2014) 14.

Social Services and Other Legislation Amendment (2014 Budget Measures No 1) Bill 2014

Portfolio: Social Services
Introduced: House of Representatives, 18 June 2014

Purpose

1.179 The Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 (the bill) seeks to amend various Acts relating to social security, family assistance, veterans' entitlements, military rehabilitation and compensation and farm household support. The bill would:

- cease payment of the seniors supplement for holders of the Commonwealth Seniors Health Card or the Veterans' Affairs Gold Card from 20 June 2014;
- rename the clean energy supplement as the energy supplement, and permanently cease indexation of the payment from 1 July 2014;
- implement the following changes to Australian Government payments:
- pause indexation for three years of the income-free areas and assets-value limits for all working age allowances (other than student payments), and the income test free area and assets value limit for parenting payment single from 1 July 2014;
- index parenting payment single to the Consumer Price Index only, by removing benchmarking to Male Total Average Weekly Earnings from 20 September 2014;
- pause indexation for three years of several family tax benefit free areas from 1 July 2014;
- review disability support pension recipients under age 35 against revised impairment tables and apply the Program of Support requirements from 1 July 2014;
- limit the six-week overseas portability period for student payments from 1 October 2014;
- extend and simplify the ordinary waiting period for all working age payments from 1 October 2014; and
- pause indexation for two years of the family tax benefit Part A and family tax benefit Part B standard payment rates from 1 July 2014.

1.180 The bill would also add the Western Australian Industrial Relations Commission decision of 29 August 2013 as a pay equity decision under the *Social and Community Services Pay Equity Special Account Act 2012*, to allow payment of Commonwealth supplementation to service providers affected by that decision.

Background

1.181 The committee reported on the bill in its *Ninth Report of the 44th Parliament.*

Committee view on compatibility

Right to equality and non-discrimination

Potential indirect discrimination against women

1.182 The committee requested the Minister for Social Services' advice on the compatibility of each schedule in the bill with the rights to equality and non-discrimination and, in particular, whether these measures are:

- aimed at achieving a legitimate objective;
- there is a rational connection between the measures and the objective; and
- the measures are proportionate to that objective.

Minister's response

> The proposed changes affect all recipients, regardless of their gender and are aimed at ensuring that social security is targeted, sustainable and consistent over the long term.
>
> The measures will help ensure ongoing assistance is targeted to those who need it most, and the impacts are sufficiently small as to be proportionate to the objective of preserving access to payments system over the long term.
>
> Furthermore a per child single parent supplement will become available for single parent families on the maximum rate of FTB Part A when their children are aged between six and 12, as part of the Social Services and other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014, to provide additional assistance to this group.[1]

Committee response

1.183 **The committee thanks the Minister for Social Services for his response.**

1.184 The committee notes that non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights. In particular, article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires each State party:

> …to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

1 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment A 1.

1.185 The Committee on Economic, Social And Cultural Rights notes:

> Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2(2) requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights. It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.[2]

1.186 Discrimination may be either direct or indirect. Indirect discrimination may occur when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups.

1.187 The committee notes the minister's advice that the measures affect all recipients, regardless of their gender. While the measures therefore appear neutral on their face, the committee remains concerned that they may have a greater impact on women than men, as women are more likely to be recipients of social security and, particularly payments provided to the primary caregiver of children.

1.188 **Accordingly, the committee seeks the further advice of the minister as to whether the measures in the bill are compatible with the rights to equality and non-discrimination on the basis of gender and family responsibilities.**

Right to social security and an adequate standard of living

Abolition of seniors supplement

1.189 The committee sought the Minister for Social Services' advice as to whether the removal of the seniors supplement is compatible with the right to social security, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The proposed abolition of the seniors supplement is aimed at ensuring that social security assistance to self-funded retirees remains sustainable over the longer term and is consistent with a well-targeted means tested

2 Committee on Economic, Social And Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights* (art. 2, para. 2), 10 June 2009.

income support system, which provides financial assistance to those most in need.

It should also be noted that the value of assistance to self-funded retirees has grown considerably over time. The original intention of the Commonwealth Seniors Healthcare Card (CSHC), which was introduced in 1994, was to provide concessions to low-income retired aged persons who were not eligible for the age pension (or service pension).

The Government's election commitment to index the CSHC income limits by the CPI from 20 September 2014 will increase the number of people qualifying for the card by 27,000 people by 2017-18. This will support their efforts to be independent.

The limitation is both reasonable and proportionate. Self-funded retirees who are not entitled to the Age Pension will continue to be entitled to the CSHC and Energy Supplement (currently $361.40 p.a. for singles and $273.00 p.a. for each member of a couple). These benefits are not available to Australians of workforce age with similar means.

Holders of a CHSC will remain entitled to the concessions attached to the CSHC such as the provision of Pharmaceutical Benefits Scheme (PBS) medicines at the concessional co-payment amount of $6.00 ($36.90 for non-concession card holders) and access the lower Medicare Safety net, which is currently $624.10 per year for concession card holders and $1,248. 70 for non-concession card holders.[3]

Committee response

1.190 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

Ceasing indexation of the (clean) energy supplement

1.191 The committee sought the Minister for Social Services' advice as to whether ceasing indexation of the energy supplement is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

2 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment A 2.

Minister's response

> The proposed cessation of indexation of the (clean) energy supplement is aimed at returning savings to the Budget, while at the same time continuing to provide a benefit to families and income support recipients even though the original purpose of this compensation payment no longer exists i.e. the price impacts of the carbon tax have been removed due to its abolition. The renamed Energy Supplement will provide ongoing assistance to families and income support recipients with household expenses, including energy costs.
>
> Price pressures due to the introduction of the carbon tax will be removed now that the carbon tax has been abolished and families and income support recipients will have greater disposable income. The ceasing of indexation of the Energy Supplement limits the payment to a rate that is current at the time this legislation is passed. The original purpose of this payment and the need to continue it in its entirety will have been extinguished with the repeal of the carbon tax, however, people will continue to receive a non-indexed Energy Supplement meaning their standard of living will be enhanced.
>
> The limitation effect of ceasing indexation is very reasonable when accounted for in conjunction with the Repeal of the Carbon Tax legislation and proportionally people will be better off and the government will still achieve its savings objective.[4]

Committee response

1.192 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

Pausing indexation of income and asset thresholds for a range of benefits

1.193 The committee sought the Minister for Social Services' advice as to whether the measures in Schedule 3 of the bill are compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

3 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment A 2-3.

Minister's response

> The proposed pauses to indexation of income and asset thresholds for a range of payments are aimed at slowing growth in social security expenditure. The changes will help ensure Australia has a well-targeted means tested income support system that provides financial assistance to those most in need, while encouraging self-provision whenever possible.
>
> The changes to the value of income and assets test free areas and thresholds for certain Australian Government payments assist in limiting growth in overall social security expenditure in the context of targeting payments according to need. This measure applies irrespective of gender.
>
> The limitation is both reasonable and proportionate. Specific impacts for people depend on payment type and people's circumstances and will be experienced by people with sufficient private income/assets to be assessed under the relevant means test. Payments will not be reduced unless customers' circumstances change, such as their income or assets increasing in value.[5]

Committee response

1.194 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

Pausing indexation of the parenting payment single

1.195 The committee sought the Minister for Social Services' advice as to whether changing the indexation of the parenting payment single from benchmarking against Male Total Average Weekly Earnings to the Consumer Price Index is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The proposed pause of indexation of parenting payment single is aimed at standardising indexation arrangements across all social security payments and putting the income support system on a more sustainable footing by slowing down the growth of the Government's expenditure on social security. This measure applies irrespective of gender.

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4 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment A 3.

> The measure is designed to reduce fiscal pressures on future budgets in the context of constrained budgetary circumstances. The measure does this by slowing down the growth in Government expenditure on social security.
>
> The limitation is both reasonable and proportionate. The measure does not affect eligibility or qualification requirements for the payment and therefore access to social security support remains unchanged. At the same time, the measure achieves legitimate objectives of helping to constrain growth in social security expenditure, to assist the system to remain sustainable.
>
> Pensions will continue to be indexed twice a year and purchasing power will be maintained through indexation to movements in prices.[6]

Committee response

1.196 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

Restrictions on eligibility for immediate social welfare payments

1.197 The committee sought the Minister for Social Services' advice as to whether changing the eligibility for immediate social welfare payments is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The proposed restrictions on eligibility for immediate social welfare payments are aimed at ensuring access to income support is consistent across similar payments. The [ordinary waiting period (OWP)]…that currently applies to Newstart Allowance and Sickness Allowance is designed to enforce a period of self-support and has existed since the first iteration of these payments commenced in 1945.
>
> There are currently a number of income support payments available for working age people with full or partial capacity to support themselves through paid employment, or who are temporarily incapacitated. Eligibility for these working age payments, such as Youth Allowance (other),

5 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment A 3-4.

Parenting Payment (Partnered and Single) and Widow Allowance, has gradually changed in recognition that recipients of these payments generally have some capacity for self-support and often take advantage of the increased opportunities for flexible, part-time and casual workforce participation.

Therefore in order to meet the objective of consistency, this measure will extend the application of the OWP to new claimants of Youth Allowance (other), Parenting Payment (Partnered and Single) and Widow Allowance. This limitation is reasonable as it ensures more consistent access to similar working age payments while maintaining the longstanding principle of self-support. Claimants without the means to support themselves will have access to exemptions and waivers.

The proposed changes are also aimed at ensuring a sustainable and well-targeted payment system. Exclusion periods, such as the Income Maintenance Period and Liquid Assets Waiting Period, apply to certain working age income support payments to enforce self-support for a period which is based on the person's level of resources.

The changes to the concurrency rules in this measure ensure that income support payments are directed towards those in need. The tightening of the severe financial hardship waiver also acts as a discouragement for people to spend their resources on non-essential items in order to obtain income support payments. These limitations are reasonable as they ensure claimants use their own resources first, while still enabling those who are in hardship due to extenuating circumstances to access payments immediately.[7]

Committee response

1.198 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

Restrictions on eligibility for immediate social welfare payments – quality of law test

1.199 The committee requested the Minister for Social Security's advice on whether the measure, as currently drafted, meets the standards of the quality of law test for human rights purposes.

Minister's response

As the individual circumstances of people are many and sometimes complex, it is not possible to envisage or legislate specifically in the primary legislation to cover all circumstances. The use of legislative instruments provides the Secretary or the Minister with the flexibility to

6 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment A 4-5.

refine policy settings to ensure that the rules operate efficiently and fairly without unintended consequences.

The measure in Schedule 6 allows the Secretary (under the current Administrative Arrangements Order, this means the Secretary of the Department of Social Services) to prescribe, by legislative instrument, the circumstances which constitute a 'personal financial crisis' for the purposes of waiving, the Ordinary Waiting Period. Such circumstances may include where a person has experienced domestic violence or has incurred reasonable or unavoidable expenditure.

This provision provides the Secretary with the flexibility to consider other unforeseeable or extreme circumstances which may be identified in the future where it would be appropriate for a person to have immediate access to income support. Using an instrument will enable this to occur in a timely manner without having to amend the primary legislation. This power can only be used beneficially and any instrument issued by the Secretary would be subject to Parliamentary scrutiny and disallowance.[8]

Committee response

1.200 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

Pausing indexation of Family Tax Benefits

1.201 The committee sought the Minister for Social Services' advice as to whether pausing the indexation of family tax benefit payments is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

The proposed pause of indexation of FTB is aimed at ensuring that the family payments system remains sustainable in the long term and is better targeted to support those who need it most. As noted in the Statement of Compatibility, the United Nations Committee on Economic, Cultural and Social Rights has stated that a social security scheme should be sustainable. Ensuring the sustainability of the family payments system helps preserve the right to social security over the long term.

7 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment A 5.

> Only a small number of higher income families will lose access to the payment altogether as a result of income growth and the pause to standard payment rates. These families would only be receiving a nominal amount of payment, and would not rely on FTB to achieve an adequate standard of living.
>
> Therefore the limitations on the right to social security imposed by this measure are reasonable and proportionate as they contribute to the sustainability of the family payments system.[9]

Committee response

1.202 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

8 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment A 5-6.

Deferred bills and instruments

The committee has deferred its consideration of the following bills and instruments:

National Security Legislation Amendment Bill (No. 1) 2014

Autonomous Sanctions (Designated and Declared Persons - Former Federal Republic of Yugoslavia) Amendment List 2014 (No. 2) [F2014L00970]

Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Ukraine) Amendment List 2014 [F2014L01184]

Criminal Code (Terrorist Organisation—Islamic State) Regulation 2014 [F2014L00979]

Chapter 2 - Concluded matters

This chapter list matters previously raised by the committee and considered at its meeting on 22 September 2014. The committee has concluded its examination of these matters on the basis of responses received by the proponents of the bill or relevant instrument makers.

Social Services and Other Legislation Amendment (2014 Budget Measures No 2) Bill 2014

Portfolio: Social Services
Introduced: House of Representatives, 18 June 2014

Purpose

2.1 The Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 (the bill) seeks to amend various Acts relating to social security, family assistance, veterans' entitlements and farm household support to make the following changes to certain Australian Government payments:

- pause indexation for three years of the income free areas and assets value limits for student payments, including the student income bank limits from 1 January 2015;
- pause indexation for three years of the income and assets test free areas for all pensioners (other than parenting payment single) and the deeming thresholds for all income support payments from 1 July 2017;
- provide that all pensions are indexed to the Consumer Price Index only by removing from 20 September 2017:
- benchmarking to Male Total Average Weekly Earnings; and
- indexation to the Pensioner and Beneficiary Living Cost Index.

Background

2.2 The committee reported on the bill in its *Ninth Report of the 44th Parliament.*

Committee view on compatibility

Right to social security

Changes to indexation of pensions

2.3 The committee sought the Minister for Social Services' advice as to whether the changes to indexation of pensions are compatible with the right to social security, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;

- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The proposed changes to indexation of pensions are aimed at standardising indexation arrangements across all social security payments and putting the income support system on a more sustainable footing by slowing down the growth of the Government's expenditure on social security.
>
> The measure is designed to reduce fiscal pressures on future budgets in the context of demographic changes associated with an ageing population. The measure does this by slowing down the growth in Government expenditure on social security.
>
> The limitation is both reasonable and proportionate. The measure does not affect eligibility or qualification requirements for the payment and therefore access to social security support remains unchanged. At the same time, the measure achieves legitimate objectives of helping to constrain growth in social security expenditure, to assist the system to remain sustainable.
>
> Pensions will continue to be indexed twice a year and purchasing power will be maintained through indexation to movements in prices.[1]

Committee response

2.4 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

Pausing indexation of income and asset test thresholds for a range of benefits

2.5 The committee sought the Minister for Social Services' advice as to whether the measures in Schedule 1 of the bill are compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

1 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment B 1.

Minister's response

> The proposed pause of indexation of income and asset test thresholds for a range of benefits is aimed at slowing the growth in social security expenditure. The changes will help ensure Australia has a well-targeted means tested income support system that provides financial assistance to those most in need, while encouraging self-provision whenever possible.
>
> The changes to the value of income and assets test free areas and thresholds for certain Australian Government payments assist in limiting growth in overall social security expenditure in the context of targeting payments according to need.
>
> The measure is reasonable and proportionate for the achievement of the above objectives. Specific impacts for people depend on payment type and people's circumstances and will be experienced by people with sufficient private income/assets to be assessed under the relevant means test. Payments will not be reduced unless customers' circumstances change, such as their income or assets increasing in value.[2]

Committee response

2.6 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

Removal of eligibility for Newstart allowance for 22-24 year olds

2.7 The committee sought the Minister for Social Services' advice as to whether the removal of eligibility of 22-24 year olds for the Newstart allowance is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The proposed extension of the youth allowance (other) eligibility age is aimed at achieving consistency across payments, as well as encouraging young people to undertake or participate in education or training to ensure that they are able to achieve long term sustainable employment outcomes. The measure will provide unemployed young people with

2 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment B 2.

incentives and support to take advantage of the opportunities that Australia's labour market provides.

The changes to the Youth Allowance maximum age build on those already passed in the Social Security and Other Legislation Amendment (Income Support and Other Measures) Act 2012. These changes increased the maximum age of Youth Allowance (other), Sickness Allowance and ABSTUDY from 21 years of age to 22 years for young people.

Since 1998, there have been two different maximum ages for Youth Allowance - one for full-time students and one for young unemployed people. Once a young person reaches the maximum age for Youth Allowance as a job seeker, they transition to Newstart Allowance which is paid at a higher rate of payment.

Presently, around 78,500 unemployed youth aged 22-24 are paid Newstart or Sickness Allowance. Such a person would be advantaged by staying on Newstart Allowance instead of pursuing full-time study or employment, given the higher rate of these allowances. This measure removes this disincentive by placing all under 25 year olds on the same payment levels whether unemployed or studying full-time.

This proposal will affect new claimants from 1 January 2015, who will continue to receive Youth Allowance between the ages of 22 to 24 years. Grandfathering arrangements will apply to young people aged 22 years or over and in receipt of Newstart Allowance or Sickness Allowance as at 1 January 2015.

Youth Allowance is paid at a lower rate than Newstart Allowance however, a persons right to social security will remain. This is justified given the intent to ensure payment rates are aligned for young people in receipt of Youth Allowance aged under 25 years, regardless of their circumstances. Young people will continue to be supported, including a range of programs and other services provided by the Commonwealth and state governments, and grandfathering arrangements ensure that no young person will have their payment rate reduced as at 1 January 2015.[3]

Committee response

2.8 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

Twenty-six week waiting period for social security payments for under-30 year olds

2.9 The committee sought the Minister for Social Services' advice as to whether the 26-week waiting period for social security benefits for those under 30 is

3 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment B 2-3.

compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

The proposed 26 week waiting period for all new job seekers up to 30 years of age claiming Newstart Allowance, Youth Allowance (other) and Special Benefit who are considered to be job ready is aimed at increasing the level of young job ready people achieving gainful employment outcomes.

According to the *OECD Factbook 2013: Economic, Environmental and Social Statistics*, 'young people who are neither in employment nor in education and training are at risk of becoming social excluded individuals with income below the poverty-line and lacking the skill to improve their economic situation.' This measure seeks to address youth unemployment by encouraging young people to accept jobs rather than relying on income support at risk of becoming disengaged- both socially and economically.

Income support data (March 2013) supports that the targeted job ready group of young people that the measure is aimed at are more likely to achieve positive employment outcomes. Newstart Allowance and Youth Allowance (job seeker) data shows that a majority of these job ready young people exit payment within 6 months of being granted (52.9% for Newstart Allowance and 34 per cent for youth allowance (job seeker)), are more likely to have parental support (66.2% considered to be dependent on their parents for youth allowance purposes) and therefore less likely not to have access to an adequate standard of living. The 2011 Census data also supports that 29% of young Australians aged 18-34 years are still living in the parental home.

During the 26 week waiting period young job seekers will have access to the full range of employment services to support their job search efforts. After a person's waiting period is served, job seekers will be eligible to receive income support. This will continue to be paid until a person has been participating in 25 hours per week of Work for the Dole for 26 weeks. After this time, a non-payment period will be imposed for 26 weeks;

however a young person will have access to a wage subsidy[4] for potential employers and access to relocation assistance.

Exemptions will be available to certain groups with extra responsibilities or those that are not able to work or study. Exemptions from the new waiting period will be available for people who have a partial capacity to work less than 30 hours a week, parents receiving Family Tax Benefit for a child, part time apprentices, principal carer parents, a job seeker with significant barriers to employment under the current employment services arrangements (or the Remote Jobs and Communities Programme equivalent), Disability Employment participants and Farm Household Allowance recipients. Evidence suggests that this measure will be most effective if it is supported by an appropriate level of employment services, targeted at job seeker deficits.[5]

The specific targeting of this measure to those young people who are job ready without any barriers to prevent them from gaining employment will mitigate the risk of limiting a person's right to social security. Young people will have access to the full range of programmes and assistance under the employment service model to enable them to find employment and access to a Health Care Card which provides people with access to the Pharmaceutical Benefit Scheme and other state based concessions.[6]

Committee response

2.10 **The committee thanks the Minister for Social Services for his response.**

2.11 However, the response does not provide any further information as to how young people are to sustain themselves during a six-month period without social security. The committee noted in its original assessment that information regarding the likely impact of the measure on individuals and their families, and how

4 Wage subsidy trials carried out in South Africa (*Stellenbosch Economic Working Papers: 02/14: Levinsohn/Rankin/Roberts/Schoer*) amongst young people showed that targeted wage subsidies are a powerful tool for getting job seekers into long term sustainable work. The key finding of the paper was that those who were allocated a wage subsidy were more likely (25%) to be employed both one year and two years, long after the subsidy had expired. Under this measure, the foregone income support payment is set aside to be used as a wage subsidy after 12 months of unemployment.

5 Analysis commissioned by the New Zealand Government (*Actuarial valuation of the Benefit System for Working-age Adults as at 30 June 2013: Greenfield/Miller/McGuire*), which would be broadly applicable to the Australian system, shows that if young unemployed people are not provided with the right mix of programmes and support, there is a high chance that they will end up trapped on welfare for much of their lives. Work for the Dole evaluations shows that referral to Work for the Dole has a powerful 'tree shaking' effect, with job seekers exiting income support rather than commencing in Work for the Dole.

6 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment B 3-4.

individuals subject to the measure will retain access to adequate shelter and food, is necessary in order to assess the human rights compatibility of this measure.

2.12 **Accordingly, the committee considers that the measure is incompatible with the right to social security and the right to an adequate standard of living.**

Change to eligibility criteria for the large family supplement

2.13 The committee sought the advice of the Minister for Social Services as to whether the change to the eligibility criteria for the family tax benefit large family supplement is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The proposed change to eligibility criteria for the large family supplement is aimed at ensuring that the family payments system remains sustainable in the long term and is better targeted to support those who need it most. As noted in the Statement of Compatibility, the United Nations Committee on Economic, Cultural and Social Rights has stated that a social security scheme should be sustainable. Ensuring the sustainability of the family payments system helps preserve the right to social security over the long term.
>
> This measure will only impact on families with three or more children. No families will lose access to the family tax benefit system as a result of this measure, and all eligible families will continue to receive FTB Part A on a per child basis to assist with day to day costs.
>
> The National Commission of Audit recommended abolishing the LFS as research into the direct costs of children has found that there are decreasing costs for each additional child.
>
> The 2010 Henry Tax Review recommended that the LFS be reconsidered as the case for the payment was not strong. Reports by the National Centre for Social and Economic Modelling in 2002, 2007 and 2013 consistently found that additional children cost less than a first child. The reason for this is that families experience "economies of scale" in which fixed costs are spread among more children. After a first child many items have already been purchased and can be reused by subsequent children.
>
> As the monetary impact on families affected will be relatively small, and the evidence base does not support the idea that LFS is necessary for larger families to achieve an adequate standard of living, the limitations on

the right to social security imposed by this measure are reasonable and proportionate.[7]

Committee response

2.14 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

Reduced access to family tax benefit Part B

2.15 The committee sought the advice of the Minister for Social Services as to whether the proposed reduction in access to family tax benefit Part B is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

The proposed reduced access to family tax benefit Part B is aimed at encouraging parents to re-enter the workforce when a child reaches school age. This recognises that there are significant social and economic benefits to children and families when parents are in paid employment.

From 1 July 2017, all families with a youngest child aged six and over would no longer be eligible for FTB Part B as a result of this measure. Families with a youngest child above the new age limit who are currently eligible for FTB Part B will be grandfathered under the current rules until 30 June 2017.

Targeting FTB Part B to families with children below primary school age aims to increase workforce participation incentives and encourage self-reliance for families once their youngest child enters primary school. Most primary carers in Australia already return to the workforce once their children are in school, which is reflected in FTB Part B population data. This measure aligns with other government payments to encourage participation, such as Parenting Payment, which is now only available to single parents with a youngest child aged less than eight years or couples with a child aged less than six. This signifies that this measure is based on objective and reasonable grounds, as it reflects broad trends in the wider population.

7 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment B 5.

As noted in the Statement of Compatibility, care requirements for children are higher when children are very young. This measure retains assistance for families when children are not yet school age, ensuring families are supported to access an adequate standard of living when caring duties may present a barrier to work.

In addition, a per child single parent supplement will be available for single parent families on the maximum rate of FTB Part A when their children are aged between six and 12. Low income single parents may continue to face increased barriers to work when children are in primary school. The single parent supplement recognises that these families may continue to require additional assistance to access an adequate standard of living during this time.

Families with a youngest child aged six and over will continue to be eligible for the payment for two years under grandfathering arrangements, giving them time to adjust to the change.

As the benefits of workforce participation are significant, and assistance is retained where workforce barriers are most pronounced, the limitations on the right to social security imposed by this measure are reasonable and proportionate.[8]

Committee response

2.16 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

Increase to age pension entitlement age

2.17 The committee sought the advice of the Minister for Social Services as to whether the increase in age eligibility for the age pension is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

The proposed change to increase the Age Pension qualifying age to 70 is aimed at achieving savings that maintain the sustainability of the retirement income system into the future, and encourage increased workforce participation for senior Australians. The Australian income

8 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment B 6.

support system is a non-contributory, tax payer funded system and its ability to target income support to those most in need is key to achieving sustainability.

Australians are living longer, with an increasing proportion of the population over the current Age Pension qualifying age. Australian Bureau of Statistics (ABS) projections show that the proportion of people aged over 65 years is expected to increase from 14 % at 30 June 2012 (3.2 million), to between 22 and 25% by 2061 (between 9.0 million and 11 .1 million). As the proportion of the population over the Age Pension qualifying age increases, so too will Age Pension expenditure, placing the sustainability of the system at risk.

While demographic change has resulted in an increasing proportion of people over Age Pension qualifying age, who are receiving payments for longer, there are also many people who are working longer or are able to support themselves financially after they retire. Measures of quality of life, as life expectancy increases, provide insights into the capacity of older Australians to work. Australian Institute of Health and Welfare (AIHW) analysis of life expectancy and disability status indicates that, between 1998 and 2012, 37% of the gains in life expectancy were disability free years for women, and 54% for men. Increasing the Age Pension qualification age provides an incentive for people to remain working for longer.

People unable to support themselves financially under Age Pension age are supported by Australia's social security safety net. This means they are still able to access social security and their right to an adequate standard of living. Social security payments such as Newstart Allowance and Disability Support Pension will continue to be available to those under Age Pension qualifying age.[9]

Committee response

2.18 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

Right to equality and non-discrimination

Residency requirements for the disability support pension

2.19 The committee requested the Minister for Social Services' advice on the compatibility of the proposed changes to residency requirements for disability support pension recipients with the right to equality and non-discrimination and in particular, whether these measures are:

9 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment B 7.

- based on objective and reasonable grounds; and
- is a proportionate measure in pursuit of a legitimate objective.

Minister's response

Australia's social security system is based on residence and need. All working-age payments are designed to assist Australian residents with the cost of living in Australia and to assist people who are actively seeking work in Australia. Some working-age payments, such as Newstart Allowance, do not have general portability as the community reasonably expects recipients to be actively seeking work or participating in work-related activities in Australia. The proposed four week portability period is considered to be reasonable time to allow DSP recipients to deal with personal matters that may arise from time to time overseas.

The measure is based on the expectation that DSP recipients who have some capacity to work, including assisted employment, be available in Australia to engage in activities to maximise participation, such as work or training. Being outside Australia for extended periods of time reduces a person's availability and opportunity to be actively engaging in training and work-related activities and social participation in Australia.

Limiting the portability period to four weeks is also consistent with the proposed changes to introduce, where appropriate, participation requirements for DSP recipients who are under 35 years of age. They will need to actively participate in a program of support in Australia to build their skills and work capacity.

There will continue to be a number of exceptions that permit temporary absences longer than four weeks. For example, a person's portability period may be extended if they are overseas and cannot return to Australia due to unexpected events. There are also limited circumstances where a person may be allowed additional absences beyond the single four week absence in a 12-month period. These circumstances include attending an acute family crisis, seeking medical treatment not available in Australia or for a humanitarian purpose.

The Government does not consider the proposed changes to DSP portability to be directly or indirectly discriminatory in relation to DSP recipients, and the measure is not expected to have a disproportionate or unintended negative impact on DSP recipients compared to the general working-age payment population. Portability periods are set to suit the type of payment and the circumstances and may broadly be seen as on a continuum. For example, as mentioned Newstart Allowance has no general portability, DSP has mostly limited portability for temporary absences and Age Pension is portable indefinitely (noting that after an overseas absence of more than 26 weeks, the Age Pension is paid at a proportional rate based on the persons working life residence in Australia). The measure endeavours to ensure that DSP recipients who have some work capacity are available the great majority of the time in Australia to

participate in training, work-related and social activities when opportunities arise.

DSP recipients who have been assessed as having a severe and permanent disability and no future work capacity, or those who have a terminal illness, will continue to be able to apply for indefinite portability of their pension. As with Age Pensioners, the community does not reasonably expect this group of DSP recipients to be actively looking for work.[10]

Committee response

2.20 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

Age criteria for Newstart allowance and exclusion periods

2.21 The committee requested the advice of the Minister for Social Services as to the compatibility of the proposed measures in Schedules 8 and 9 with the right to equality and non-discrimination and in particular, whether these measures are:

- based on objective and reasonable grounds; and
- is a proportionate measure in pursuit of a legitimate objective.

Minister's response

The United Nations, for statistical purpose, defines youth as those persons between the ages of 15 and 24 years, without prejudice to other definitions by Member States. For the purposes of increasing the Youth Allowance (other) maximum age to 24 years, this is a case of aligning existing parameters for full-time students and full-time Australian Apprentices and adheres to the an internationally accepted definition of youth. Schedule 8 changes the qualification arrangements for Youth Allowance; however claimants in the affected groups will be maintaining access to social security.

For changes under Commonwealth law, the *Age Discrimination Act* states that treating individuals differently because of their age is allowed when in compliance with Commonwealth laws, including laws about taxation, social security and migration.

The Government is able to set these age limits when changing qualification and payability conditions under Social Security law. Whilst young people aged under 30 years will not immediately receive Newstart Allowance or Youth Allowance (other), their right to access social security has not been withdrawn, this is similar to the operation of existing waiting periods that are targeted towards specific groups. Affected young people will continue to have a right to an appropriate level of social security, set by

10 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment B 8-9.

> Government. Young people will continue to have this access without illegitimate differential treatment and without affecting their other rights.[11]

Committee response

2.22 **The committee thanks the Minister for Social Services for his response.**

2.23 However, the committee notes that, for human rights purposes, 'discrimination' is impermissible differential treatment among persons or groups that results in a person or group being treated less favourably than others, based on one of the prohibited grounds for discrimination.[12]

2.24 The committee notes that measures that impact differentially on individuals based on their age are likely to be incompatible with the right to equality and non-discrimination. The committee noted in its initial examination of the bill that, to establish that the apparent discrimination against people on the basis of their age is not arbitrary, an assessment of how the proposed age cut-offs are necessary, reasonable and proportionate to achieve a legitimate objective would be required. The committee considers that the response does not provide an adequate justification.

2.25 **Accordingly, the committee considers that the measures in Schedules 8 and 9 are incompatible with the rights to equality and non-discrimination on the basis of age.**

Reduced access to family tax benefit Part B

2.26 The committee requested the advice of the Minister for Social Services on the compatibility of the measure in Schedule 10 with the right to equality and non-discrimination and, in particular, whether these measures are:

- based on objective and reasonable grounds; and
- is a proportionate measure in pursuit of a legitimate objective.

Minister's response

> The objective of limiting access to FTB Part B to families with a youngest child under six is to encourage parents to re-enter the workforce when a child reaches school age. There are significant social and economic benefits to children and families when parents are in paid employment. The aim of the new allowance is to recognise that single parent families

11 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment B 9.

12 The prohibited grounds 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.

often have fewer resources to meet living costs, and have a reduced capacity to work because of their caring responsibilities.

The Committee notes that limiting FTB Part B to families with children under six years of age is likely to disproportionately affect women, as they are more likely to be single parent primary carers. Most primary carers in Australia already return to the workforce once their children are in school, which is reflected in FTB Part B population data. This signifies that this measure is based on objective and reasonable grounds, as it reflects broad trends in the wider population.

In addition, the introduction of an FTB Part A single parent supplement per child aged six to 12 may counteract the disproportionate economic impact of this measure on women, as it is likely to be received by more households headed by women than men.

As this measure is based on objective and reasonable grounds, and disproportionate economic impacts on women are counteracted with the introduction of a single parent supplement, these measures are compatible with the right to equality and non-discrimination.[13]

Committee response

2.27 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

Right to education

Removal of the pensioner education supplement

2.28 The committee sought the advice of the Minister for Social Services as to whether removing the PES is compatible with the right to education, and particularly:

- whether the proposed change is aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

The proposed cessation of PES is aimed at ensuring the long term sustainability of the social security system by improving the Commonwealth's fiscal position by an estimated $281 .2 million over five years from 2013-14 and simplifying the structure of the system, and in recognition of better targeted and individualised means of assisting

12 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment B 10.

vulnerable cohorts to participate in training or education that have to a large extent subsumed the original intent of the PES.

Since the introduction of PES, several policy changes have been introduced that reduce the amount of time that parents remain out the workforce. This includes introducing participation requirements and providing employment services to support recipients of Parenting Payment to improve their employability from when their youngest child is aged six.

The combination of the development of more individualised and focused support to assist pensioners and parents to engage in study and prepare for the workforce, and the ongoing provision of student payments, makes the removal of PES a rational response to achieving the objective of simplifying and improving the sustainability .of the social security system.

The Australian Government also provides other assistance for students with the cost of their fees. Commonwealth Supported Places are offered for university level qualifications, vocational education and training qualifications and post-graduate level courses at university through HECS-HELP, VET-FEE HELP and FEE-HELP loans. These loan schemes assist eligible students to pay or defer paying the full cost of their tuition fees.

An individual's decision to undertake study, whether at university or at a vocational institution, is influenced by many factors, including family circumstances, previous educational history and career aspirations. It is not possible to isolate the impact of the removal of one Government payment on overall enrolments as this is an effect that cannot be predicted by the Department.

While the change may have a minor impact on a small, targeted group of people who access education at a particular point in time, it is consistent with Australia's human rights obligations as it is a reasonable, proportionate and necessary response to achieving a broader objective when considered in the context of the range and level of income support and other assistance available to pensioners and those undertaking study. Australia's underlying system of secondary and tertiary education remains robust and flexible.[14]

Committee response

2.29 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

Removal of the education entry payment

2.30 The committee sought the advice of the Minister for Social Services as to whether removing the EES is compatible with the right to education, and particularly:

13 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment B 11.

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

The proposed cessation of EdEP is aimed at ensuring the long-term sustainability of the social security system by improving the Commonwealth's fiscal position by an estimated $65.4 million over five years from 2013-14 and simplifying the structure of the system, in recognition of significant enhancements to education-related assistance and support available to income support recipients and pensioners, including the Employment Pathway Fund (EPF).

EdEP was introduced in 1993 to provide financial assistance to eligible pensioners and unemployed Australians to assist with the up-front costs of study and help remove financial barriers to education. The role of EdEP has to a large extent been subsumed by the broader regime of Government-funded study and training support, including for Australians who wish to undertake tertiary or vocational education.

The vast majority of allowance recipients and recipients of Parenting Payment with children aged over six years old are registered with a JSA provider and therefore have access to the EPF at their provider's discretion. The EPF can play a similar role offsetting some of the costs associated with commencing study or training, such as course materials, fees and essential equipment. In addition, the EPF provides better targeted and individualised assistance than the EdEP as it is based on the specific needs and barriers to employment of an individual job seeker.

Pensions, allowances, the EPF and student payments will continue unaffected by the removal of EdEP.

The Australian Government also provides other schemes to assist students with the cost of their fees. Commonwealth Supported Places are offered for university level qualifications, vocational education and training qualifications and post-graduate level courses at university through HECS-HELP, VET-FEE HELP and FEE-HELP loans. These loan schemes assist eligible students to pay or defer paying the full cost of their tuition fees.

The 2014-15 Budget also seeks to introduce additional measures to assist students with the costs of study, including the Commonwealth Scholarship scheme. Higher education institutions will be required to commit $1 in every $5 of additional revenue to a new Commonwealth Scholarship scheme to provide tailored, individualised support to students including needs-based scholarships to help meet costs of living, fee exemptions, tutorial support, and assistance at other critical points in their university

career. Subject to the passage of legislation, these Commonwealth scholarships will be available from 1 January 2016.

The removal of EdEP is not anticipated to have any impact on rates of enrolment. EdEP is a small, annual, one-off payment and alternative and other ongoing support is available. It is a reasonable and proportionate measure to ensure the ongoing sustainability of the social security system because a wide range of better targeted support will continue to be offered to those who choose to undertake study.[15]

Committee response

2.31 **The committee thanks the Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

14 See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment B 11-12.

Trade Support Loans Act 2014

Portfolio: Industry
Introduced: House of Representatives, 18 June 2014

Purpose

2.32 The Trade Support Loans Bill 2014 (the bill) establishes the Trade Support Loans Program to provide concessional, income-contingent loans of up to $20 000 over four years to certain apprentices. The loans will be repayable when the individual's income reaches the Higher Education Loan Program repayment threshold.

Background

2.33 The committee reported on the bill in its *Ninth Report of the 44th Parliament*, and subsequently in its *Tenth Report of the 44th Parliament*.

2.34 The Trade Support Loans Bill 2014 passed both Houses of Parliament on 15 July 2014 and received Royal Assent on 17 July 2014.

Committee view on compatibility

Right to education

Support for apprentices through the institution of concessional income contingent loan scheme

2.35 The committee sought the advice of the Minister for Industry as to the compatibility of the bill with the right to education, and particularly whether the Trade Support Loans Scheme offers equivalent terms to the 'Tools for Your Trade Program' (or otherwise might be regarded as a limitation or retrogressive measure in relation to the right).

Minister's response

> In addressing the right to education and its interaction with the TSL Act, the Committee has requested further advice on whether the Trade Support Loans Programme offers equivalent protection of human rights to the 'Tools for Your Trade Program'.
>
> The Trade Support Loans Programme offers equivalent protection of human rights through its inclusion of similar eligibility criteria to those for the Tools For Your Trade personal benefit payment under the Australian Apprenticeships Incentives Programme. The criteria diverge in only one place, and that is that New Zealand citizens are not eligible under Trade Support Loans.
>
> The removal of New Zealand citizens potentially impacts human rights under the Trade Support Loans Programme but it is important to note that the decision to exclude New Zealand citizens in the eligibility criteria was taken to ensure that those who benefit from Australian taxpayer funded Trade Support Loans are Australian citizens or permanent residents. In

> addition, because of the repayment requirements of the programme with repayments collected through the Australian taxation system, there would be New Zealand citizens who would not repay Trade Support Loan debts if they returned to New Zealand and did not continue paying tax in Australia. The successful continuation of the programme depends on the repayment of loans by those who reach the income repayment threshold.[16]

Committee response

2.36 **The committee thanks the Minister for Industry for his response.**

2.37 The committee notes that the minister's response provides some information as to the eligibility criteria it relation to the TSL scheme. However, the response does not provide a comprehensive assessment of whether the substance of the TSL scheme provides equivalent, greater or less protection of the right to education than the 'Tools for Your Trade Program' which it was intended to replace. The committee notes that information on, and an assessment of, the key features of each scheme and their impact on access to education would have been relevant to this analysis. In particular, the committee notes that the new TSL loans scheme replaces what had been a monetary payment with a loan, and may therefore provide different levels of support in respect to access to and attainment of educational qualifications. To the extent that the TSL scheme may be considered a limitation in respect of the right to education, it would have also have been relevant for the minister to provide an assessment as to whether any such limitation was reasonable, necessary and proportionate in pursuit of a legitimate objective. However, no such information has been provided.

2.38 **The committee therefore considers that, based on the information provided, the Trade Support Loan Scheme may be incompatible with the right to education.**

Rights to equality and non-discrimination

Availability of loans to qualifying apprenticeships on the trade support loans priority list

2.39 The committee requested the advice of the Minister for Industry as to whether, in establishing and maintaining the Trade Support Loan (TSL) priority list, there will be appropriate policy safeguards or measures to ensure that the list does not, in practice, indirectly discriminate against women.

Minister's response

> In addressing the rights to equality and non-discrimination and their interaction with the TSL Act, the Committee has also requested advice on whether, in establishing and maintaining the Trade Support Loans Priority

1 See Appendix 1, Letter from the Hon. Ian Macfarlane MP, Minister for Industry, to Senator Dean Smith (dated 09/09/2014) 1.

List, there will be appropriate policy safeguards or measures to ensure that the list does not, in practice, indirectly discriminate against women.

The purpose of the Trade Support Loans Programme is to ensure the ongoing supply of trade-qualified workers to the Australian economy to support Australia's future productivity and competitiveness. The programme particularly targets occupations that have long lead times and are important to the future economy. The eligibility criteria do not discriminate directly against women, as long as they are undertaking an apprenticeship in an occupation listed on the TSL Priority List and that they meet the residency criteria.

As the committee points out, the majority of those currently undertaking apprenticeships in occupations on the TSL Priority List are male (preliminary internal data for 2013-14 show 82% of commencements in apprenticeships in priority occupations are males). While the Government would agree that participation by women in the workforce is an important human rights issue, the addition of occupations that employ more women would distance the programme from its stated policy goal as outlined above.

In this period of fiscal constraint, it is important that the Government targets spending to achieve its goals and that the TSL Priority List supports this targeting of funds. Addressing the shortage of women in priority occupations on the List is a long-term goal that will come through cultural change and a multi-pronged approach by Government, employers and educators, and not in the short-term through broadening eligibility for the Trade Support Loans Programme.

It is important to note the Trade Support Loans Programme is only one of several measures that underpin this Government's agenda to support the ongoing supply of skilled workers to the economy. Among these are measures better aimed at supporting occupations that currently employ a majority of women. One of these is the Australian Apprenticeships Incentives Programme, which supports employment and training opportunities. In making recent changes to this programme, which included the removal of the Tools For Your Trade incentive paid to apprentices, the Government has been careful to maintain support for the priority areas of aged care, child care, disability care and enrolled nurses. As the Committee will be aware, the majority of employees in these occupations are women. Another measure is the Australian Apprenticeships Ambassadors Programme, which show-cases successful apprentices including a large number of women in non-traditional trades.[17]

2 See Appendix 1, Letter from the Hon. Ian Macfarlane MP, Minister for Industry, to Senator Dean Smith (dated 09/09/2014) 1-2.

Committee response

2.40 **The committee thanks the Minister for Industry for his response.**

2.41 The committee notes the minister's acknowledgement that men are disproportionately represented in apprenticeships in occupations on the TSL Priority List, and account for 82 per cent of commencements based on preliminary internal government data for 2013-14. These figures confirm that, while the Trade Support Loan (TSL) Priority List may be neutral on its face, in practice it is likely to limit women's access to the scheme (that is, to indirectly discriminate), given the extent to which occupational segregation continues to persist across a number of industries in Australia.

2.42 The committee concurs with the minister's view that equal participation of women in the workforce is an important human rights issue. However, the committee notes that the mere highlighting of the problem as one to be addressed by long-term cultural change is insufficient to address such inequalities. Indeed, by indirectly discriminating against women through reduced access, the scheme may, in practice, entrench existing inequalities.

2.43 In this respect, the committee notes that the minister's provides no human rights assessment of whether the identified limitation on the rights to equality and non-discrimination is reasonable, necessary, and proportionate in pursuit of a legitimate objective.

2.44 **The committee therefore considers that the Trade Support Loan Scheme is incompatible with the rights to equality and non-discrimination.**

Appendix 1

Correspondence

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Senator Dean Smith
Chair
Parliamentary Joint Standing Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Response to questions received from Parliamentary Joint Committee on Human Rights

Thank you for your letters of 15 July 2014 in which further information was requested on the following bill and legislative instruments:

- *Migration Amendment (Protection and Other Measures) Bill 2014*
- *Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [F2014L00622]*
- *Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00726]*

My response to your requests is attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
2/9/2014

Migration Amendment (Protection and Other Measures) Bill 2014

1.178 The committee therefore requests the advice of the Minister for Immigration and Border Protection on the compatibility of the proposed section 5AAA with Australia's non-refoulement obligations under the ICCPR.

The Committee acknowledges 'it is a general principle of international law' that the 'burden of proof' rests with the asylum seeker'. Consistent with the UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, the government accepts there are certain cases, such as vulnerable applicants, where the 'burden of proof' rests with the applicant in principle, but the duty to evaluate and ascertain all relevant facts is shared between the applicant and examiner (para 196, p. 38, December 2011). The UNHCR states that these cases may occur "often" but the same guidelines later reinforce the rule that the applicant should "assist the examiner in full in establishing the facts of his case" and "supply all pertinent information ... in as much detail as is necessary" to enable relevant facts to be established (para 205, p. 40, December 2011).

The proposed section 5AAA and 423A of the Migration Act (the Act) articulates a responsibility on non-citizens who seek protection in Australia to present all claims and supporting evidence as soon as possible. An express legislative provision puts that responsibility beyond doubt and clearly communicates expectations to all people seeking protection in Australia. Section 5AAA supports the integrity of protection determination processes in Australia. Early and full presentation of claims allows refugees to be recognised at the earliest opportunity and the amendment therefore assists Australia to observe and determine its *non-refoulement* obligations under the International Covenant on Civil and Political Rights (ICCPR). In addition to merits review, people seeking protection in Australia have access to Australian courts.

The proposed section 5AAA makes it clear that the role of the departmental decision maker or Refugee Review Tribunal (RRT) member is not to advocate on behalf of a person seeking protection, but to decide whether there is an obligation to provide protection. At no point does this provision negate the decision-maker's own obligation to appropriately investigate a claim for protection. The duty to evaluate and ascertain all relevant facts is shared between the applicant and decision maker, consistent with the UNHCR guidelines. Decision-makers must evaluate each case on its individual merits with regard to circumstances in the home country or countries. Applicants have repeated opportunities to present or clarify claims and evidence as their application is processed.

People seeking protection in Australia will be advised of their responsibilities under the proposed section 5AAA through the departmental website, including the Protection Application Information and Guides (PAIG), and through initial, written communication with Protection visa applicants.

Proposed section 5AAA is consistent with Australia's non refoulement obligations under the ICCPR. Procedural guidance and training is provided to decision makers to ensure the dignity and rights of vulnerable people, including unaccompanied minors, are respected. The proposed section 5AAA does not affect the government's obligations to conduct an effective and thorough assessment of claims for protection. The Government considers that sufficient safeguards exist to ensure the claims of vulnerable people are fully assessed and that they will not be removed in contravention of Australia's non-refoulement obligations. The Government considers section 5AAA to be compatible with Australia's non-refoulement obligations under the ICCPR.

1.193 The committee therefore considers the proposed amendments in Schedule 2 of the bill to be incompatible with Australia's non-refoulement obligations under the ICCPR and CAT.

The Government notes the Committee's comments and, noting that international jurisprudence can be persuasive but is not binding, remains of the view that Schedule 2 of the Bill represents an interpretation which is open as a matter of international law and is compatible with Australia's *non-refoulement* obligations under the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The reasons supporting this view have been set out in the Statement of Compatibility with Human Rights, attached to the Explanatory Memorandum for the Bill and the Government reiterates those reasons.

1.199 The committee therefore considers that proposed section 423A is incompatible with Australia's obligations of non-refoulement under the ICCPR and CAT.

The Committee's consideration that the proposed section 423A is not compatible with Australia's *non-refoulement* obligations under ICCPR and CAT is based upon the Committee's understanding that this provision "would limit the RRT to facts and claims provided in the original application" (para 1.197) and the Committee's view that section 423A is incompatible with the fundamental and typical nature of merits review. However, the proposed section 423A does not prevent new claims and evidence being presented at the review stage. Applicants will continue to be able to introduce new claims and evidence to support their applications at the review stage. What the provision does require is that if the RRT is satisfied that there is not a reasonable explanation for not providing the information at the primary stage, the Tribunal will draw an inference unfavourable to the credibility of the new claims or evidence raised.

Section 423A does not allow or require the RRT to disregard new claims or evidence. All claims and evidence presented must be considered and evaluated. It is only once all claims have been considered that a Tribunal member can determine whether an applicant's explanation for presenting new claims or evidence is reasonable.

Where a reasonable explanation has not already been provided by the applicant, it is open to the RRT to seek such an explanation. The manner in which that explanation is sought is a matter for the Tribunal.

It is open to the Tribunal to determine whether or not a reasonable explanation is implicit in the new claims or evidence. For instance, there may have been a significant change in the home country after the primary decision was made, so it may not have been possible for the applicant to make the new claims or provide relevant evidence earlier. An applicant may also experience a direct and obvious change to their circumstances, for instance, the birth of a child who may have protection claims in their own right. In such cases, the Tribunal member may consider a reasonable explanation to be self-evident.

Clear notice will be given to applicants about the consequences of section 423A, in order to ensure a fair hearing. Non-citizens claiming protection in Australia will be advised of their responsibility to provide all claims and evidence as soon as possible through general public information, including that available on the departmental website and in the Protection Application Information and Guides (PAIG), as well as through initial written communication between the department and

applicants. It is in the interests of the applicant and the process as a whole that there be consistent and clear messaging about the provisions in question.

The RRT may reinforce this advice to applicants in any way it deems appropriate. For instance, applicants may be reminded of the requirements of section 423A through the tribunal website, in general information available to applicants (eg. the RRT form *Information on making an Application for review to the Refugee Review Tribunal*).

Application assistance is not required in order to apply for, or be granted a Protection visa in Australia, however, it is open to all protection visa applicants to arrange application assistance from a registered migration agent privately, at their own expense. Publicly funded application assistance is not available at the review stage; however, those who arrive lawfully and are disadvantaged or face financial hardship may be eligible for assistance with their primary application for a Protection visa through the Immigration Advice and Application Assistance Scheme (IAAAS). A limited amount of support will also be available to illegal arrivals who are considered vulnerable, including unaccompanied minors. The government is currently considering the most effective and efficient way to provide this support.

This measure is intended to encourage applicants to present all relevant claims and evidence at the earliest opportunity and, if necessary, to support the RRT in making adverse credibility findings with regard to new claims and evidence in those cases where the RRT is not satisfied that there is a reasonable explanation for their delayed presentation.

Given the above, the government is of the view that the proposed section 423A does not preclude the full consideration of applicants' claims in the assessment process and is therefore compatible with Australia's obligations of non-refoulement under the ICCPR and CAT.

1.202 The committee therefore requests the advice of the Minister for Immigration and Border Protection on whether the measure, as currently drafted, meets the standards of the quality of law test for human rights purposes.

In paragraph 1.201 the Committee expresses the view that "what constitutes a 'reasonable explanation' for the purpose of the unfavourable inference not being drawn by the RRT is not well defined". This leads to the Committee questioning whether this provision meets the "quality of law" test. The Government's view is that there is no interference with human rights, the quality of law test does not arise.

A "reasonable explanation" has not been defined within the proposed section 423A because the general principles of administrative law and reasonable decision-making apply. A "reasonable explanation" is one that satisfies a Tribunal member that the new claims and evidence **could not** be presented earlier because the applicant was **unable** to do so. It is an explanation which is legitimate and appropriate. If required, the Tribunal may seek evidence to verify that the applicant's explanation is reasonable.

A reasonable explanation may include, but is not limited to:

- no reasonable opportunity to present the claim, eg. interpreting or translating error made in the primary stage of the application;

- a change in country situation affecting human rights after the primary decision was made;
- new information relevant to the purposes of the application not known earlier, eg. new documentary evidence of identity has been provided;
- a change in personal circumstances allowing presentation of new claims, eg. a new relationship (spouse or child) with a person who has protection claims in their own right;
- being a survivor of torture and trauma, where the ill-treatment has affected an applicant's ability to recall or articulate protection claims;
- language or cultural barriers with a material bearing on the applicant's ability to present their case for protection; or
- the applicant is considered most vulnerable, eg. a minor, mentally or physically disadvantaged person, who has a restricted ability to participate in the protection process.

The Explanatory Memorandum states the purpose of this measure is "encouraging asylum seekers to provide all claims and supporting evidence as soon as possible" (p. 2). As outlined in the Second Reading Speech this provision intends to ensure that "any claim that can be presented at the initial application stage is presented at that stage." This provision is appropriate to the seriousness of an application for a Protection visa. That application rests on the need for international protection due to a well-founded fear of persecution or risk of suffering significant harm, possibly including torture. Under those circumstances it is reasonable to expect that claims and supporting evidence be provided by an applicant as quickly as possible, and that a reasonable explanation is provided when claims and evidence are unduly delayed. The proposed section 423A does not prevent new claims and evidence being presented or evaluated, but clarifies the manner in which that should be done.

1.208 The committee therefore considers that the proposed amendments to section 91W and new section 91WA are likely to be incompatible with Australia's obligations of non-refoulement under the ICCPR and CAT.

The Committee has expressed concern that the refusal powers in these measures may be inconsistent with effective and thorough assessment of claims for protection, particularly where a person may have genuine claims but fails to establish identity. To assist the Committee in considering whether sections 91W and 91WA are compatible with *non-refoulement* obligations, and explain why the Government maintains proposed sections 91W and 91WA are compatible with *non-refoulement* obligations under ICCPR and CAT, a brief explanation of the process for assessing identity and protection claims follows.

Where protection claims are made in a Protection visa application, those claims will be assessed by a decision maker before any decision to refuse under sections 91W or 91WA is made. Refusal under sections 91W or 91WA will not short-circuit the assessment of any protection claim. The primary assessment of a Protection visa application is subject to independent merits review.

It is possible for a person to be assessed as engaging Australia's protection obligations and then be refused a Protection visa under section 91W or 91WA. In these circumstances, *non-refoulement* obligations prevail and the person engaging those obligations will not be returned to their receiving country. Should the necessary documentary evidence of identity, nationality or citizenship become available subsequent to the refusal of a Protection visa, the Minister may consider the exercise of his non-compellable power under section 48A of the *Migration Act 1958* (the Act) to allow a further Protection visa application to be made. It is also open to the Minister to exercise his non-

compellable powers under sections 417 (following RRT review) or 195A of the Act to grant any type of visa. The combination of legislation, policy and practices will ensure that *non-refoulement* obligations are met.

1.217 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of proposed section 5AAA with the best interests of the child, and particularly:

- **Whether the proposed changes are aimed at achieving a legitimate objective;**
- **Whether there is a rational connection between the limitation and that objective; and**
- **Whether the limitation is [a] reasonable and proportionate measure for the achievement of that objective.**

A legislative body is required to consider the best interests of the child as a primary consideration. The Australian Government is also required to determine if these interests are outweighed by other primary considerations such as the integrity of the migration programme and the effective and efficient use of government resources.

The reality is that all actions taken by the Government will affect children in some way. Where decisions have major impact on children, a greater level of protection may be required. Compatibility with the obligation to treat the best interests of the child as a primary consideration does not necessarily require a full or formal process of assessing and determining the best interests of the child or to act in those interests after taking into account other primary considerations. The Government has provided comments regarding its approach to the treatment of the best interests of the child in the statement of compatibility for the Bill when I stated the following:

> 'Treating the best interests of the child as a primary consideration will take place on a case-by-case basis. Other considerations may also be primary considerations such as the integrity of the migration programme. The obligation in the CRC in relation to the best interests of the child does not amount to a right to remain in Australia if a person has no other lawful authority to stay, but should be taken into account when arranging removal.
>
> The Government has policies and procedures to give effect to this obligation and is committed to acting in a manner consistent with the CRC.'

As noted in the Statement of Compatibility, the Department will ensure that vulnerable persons, including children, will be given a meaningful opportunity and appropriate assistance to present their claims. The committee has noted at 1.216, that to demonstrate that a limitation is permissible, proponents of legislation must provide why the measures are necessary in pursuit of a legitimate objective. The government is of the view that section 5AAA does not limit the obligation to treat the best interests of children as a primary consideration.

1.223 The committee therefore requests the advice of the Minister for Immigration and Border Protection on the compatibility of proposed section 423A with the obligations in relation to the best interests of the child, and particularly:

- **Whether the proposed changes are aimed at achieving a legitimate objective;**
- **Whether there is a rational connection between limitation and that objective; and Whether the limitation is [a] reasonable and proportionate measure for the achievement of that objective.**

Section 423A does not prevent claims being assessed and the RRT will determine the most appropriate way of eliciting an explanation for new claims from applicants, including children.

The government is of the view that section 423A does not limit the obligation to treat the best interests of children as a primary consideration.

1.227 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of proposed section 91W and section 91WA with the obligation in relation to the best interests of the child, and particularly:

- **Whether the proposed changes are aimed at achieving a legitimate objective;**
- **Whether there is a rational connection between limitation and that objective; and**
- **Whether the limitation is [a] reasonable and proportionate measure for the achievement of that objective.**

As noted above, claims for protection will still be fully assessed, including in cases where the sections 91W and 91WA permit refusal of the protection visa application.

The government is of the view that section 91W and section 91WA do not limit the obligation to treat the best interests of children as a primary consideration.

1.232 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the obligation to consider the best interests of the child as a primary consideration and, particularly, how the measures are:

- **Aimed at achieving a legitimate objective; and**
- **There is a rational connection between the measures and the objective; and**
- **The measures are proportionate to the objective.**

The government is of the view that Schedule 1 of the Bill is compatible with the obligation to treat the best interests of children as a primary consideration.

This measure is intended to prevent and discourage the use of the onshore component of Australia's Humanitarian Programme as a means of family migration. It puts beyond doubt that when a family migration outcome is sought, the Protection visa process is not the appropriate stream. An applicant

who is a member of the same family unit as a Protection visa holder retains the right to seek the grant of a Protection visa on the basis of their own, specific protection claims.

As the Committee acknowledges in paragraph 1.231, there is no right to family reunification for recognised refugees under international law. Nor is there any prescribed mechanism for family reunification. This measure does not, therefore, limit existing rights of the child.

Consistent with the reasons already set out, section 91WB does not affect the rights of a permanent Protection visa *holder* to sponsor migration of members of their family unit under the appropriate family migration programmes. Family members outside Australia may also continue to apply for migration to Australia under the offshore Humanitarian Programme.

The Committee is concerned "that the Migration Act currently provides a number of measures that seek to preserve, where appropriate and reasonable, the family unity of those seeking protection in Australia" and that this bill "seeks to limit those rights" (Para 1.231). However, this measure upholds the principle of family unity for Protection visa *applicants*. Proposed section 91WB does not affect the definition of a member of the same family unit, and continues to allow family members to be included in a Protection visa application, or for members of the same family unit to combine separate applications. The purpose of section 91WB is not to change existing provisions regarding family unity within the Protection visa process, but to put their interpretation beyond doubt.

Furthermore, proposed section 91WB does not affect children born to Protection visa holders. These children are eligible for the grant of a Protection visa under section 78 of the Act. In addition, section 12 of the *Australian Citizenship Act 2007* continues to apply and allows for automatic acquisition of Australian citizenship for children born in Australia to a permanent visa holder. Current provisions of the Citizenship Act, and the Migration Act, maintain the principle of family unity, where appropriate and reasonable, for those seeking protection in Australia.

This measure also protects the rights of the child by discouraging family members of Protection visa holders from making dangerous boat voyages to Australia, or otherwise arriving in Australia illegally, in the expectation of being granted a Protection visa, on the basis of being a member of the same family unit of a Protection visa holder.

1.237 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the obligation to consider the best interests of the child and, particularly, how the measures are:

- **Aimed at achieving a legitimate objective; and**
- **There is a rational connection between the measures and the objective; and**
- **The measures are proportionate to the objective.**

A legislative body is required to consider the best interests of the child as a primary consideration. The Australian Government is also required to determine if these interests are outweighed by other primary considerations such as the integrity of the migration programme and the effective and efficient use of government resources.

The changes to the bars do not represent a policy shift. The expanded operation of the section 46A bar makes section 91K redundant for the purpose of managing unauthorised maritime arrivals in the

community, and the amendments will ensure section 91K no longer applies to unauthorised maritime arrivals.

The government is of the view that Schedule 3 of the Bill is compatible with the obligation to treat the best interests of children as a primary consideration, as, for the reasons already set out, the Government has considered those interests and has concluded that they are outweighed by the policy objectives of preserving the integrity of the migration programme and encouraging lawful migration pathways.

1.247 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of Section 5AAA with the rights to equality and non-discrimination.

As previously stated, section 5AAA does not impose new responsibilities on non-citizens seeking protection in Australia, but rather, expressly states it is the responsibility of the person seeking protection to establish their claims.

The Committee is concerned about possible discrimination under this provision, which may compromise equality before the law or rights to equal protection of the law. Specific concerns are raised regarding possible discrimination on the basis of disability and gender, particularly the difficulty for women to obtain documentary evidence of harm experienced. However, proposed section 5AAA does not insist on the provision of documentary evidence. It calls for a person seeking protection in Australia to state "all particulars of his or her claim" and provide "sufficient evidence to establish the claim". The role of the decision maker, as previously discussed in response to 1.178, is to evaluate that claim. In that process, a decision maker may ask questions, seek clarification and check that the person's claims for protection are consistent with generally known facts and the specific country situation in question. Where relevant, country information assists the consideration of whether the availability of documentation is gender specific. The department's *Procedures Advice Manual – Gender Guidelines* and *Refugee Law Guidelines* assist in assessing claims from vulnerable applicants, including women and applicants with an intellectual disability. Greater details regarding claims will, therefore, be sought and the veracity of claims will be established further during the process of evaluation.

Various forms of application assistance are available to people seeking Australia's international protection. People living with a disability may be entitled to publicly funded application assistance, depending on the nature of their disability.

1.250 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of section 423A with the rights to equality and non-discrimination.

The Committee is concerned that the proposed section 423A may have a disproportionate or unintended negative impact on persons with a disability and notes that a person experiencing particular disabilities may be less able to accurately provide evidence or repeat evidence. Accordingly, the Committee suggests that some people with disabilities who seek protection in

Australia may not provide their claims fully and in a timely manner due to circumstances beyond their control.

This situation has been taken into account in the proposed section 423A. The RRT will draw an inference unfavourable to the credibility of new claims or evidence only if the Tribunal is not satisfied that the applicant has a reasonable explanation to justify why they were not presented during the primary application stage. Where an applicant is unable to present all their claims and supporting evidence because of a proven disability, it is open to the RRT to determine whether a "reasonable explanation" is implicit.

1.255 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed RTT [sic] to dismiss an application is compatible with the right to a fair hearing in article 14 of the ICCPR, and particularly:

- **Whether the proposed changes are aimed at achieving a legitimate objective;**
- **Whether there is a rational connection between the limitation and that objective; and**
- **Whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

The purpose of this amendment is to clarify that if a review applicant fails to appear before the Migration Review Tribunal (MRT), in response to an invitation under section 360 of the Act, the MRT has the option of dismissing the application or making a decision on the review, as is the case under current subsection 362B(1). Proposed section 426A(1A) mirrors this amendment for the RRT.

The Government is committed to ensuring that MRT and RRT review applicants remain entitled to a fair hearing. The power to dismiss a review application for non-attendance is not intended to impact on procedural fairness already codified in the Act. It is intended to increase tribunal efficiency by providing for a quick resolution of a case where, following the usual accordance of procedural fairness, the applicant for review has not attended the hearing. Dismissal for failure to attend a hearing is one of three possible options the tribunals may consider for non-attendance by an applicant at a hearing. The other options are either to proceed to a decision on the review or reschedule the hearing.

If dismissal is chosen, the tribunals will have a power to reinstate an application where the applicant applies within a certain time period and the relevant tribunal considers it appropriate to reinstate the application.

Review applicants will be made aware in the invitation to hearing letter that, if they do not attend a hearing after being invited to do so, their application may be dismissed for failing to appear. The tribunals will be required to notify the applicant of the decision to dismiss the application for failure to appear. The notice will also include information that sets out how the review applicant can seek reinstatement of their review application within a specified timeframe. Where the tribunals reinstate a review application, the applicant will be notified that their application is taken never to have been dismissed and the review will continue.

The tribunals are required to afford procedural fairness in accordance with the Act. The Government notes that, in the migration and refugee context, there is a high incentive for merits review to be used by unsuccessful visa applicants and asylum seekers with unmeritorious claims to

delay their removal from Australia. The Government therefore considers that a power enabling review applications at the MRT and RRT to be dismissed for non-attendance at a scheduled hearing would allow the tribunals to focus resources away from matters that are not actively being pursued by the review applicant.

This proposed measure applies to all individuals within the MRT's and RRT's jurisdiction and will achieve the Government's legitimate objective of strengthening the administrative efficiency and processes of the tribunals to support the integrity of the merits review process. Proposed sections 362B(1A) and 426B(1A) do not limit a person's right to equality before the tribunals or the right to a fair hearing by a competent, independent and impartial tribunal established by law.

In light of the above and articulated previously in the statement of compatibility, the Government is of the view that ability for the MRT and RRT to dismiss an application in the above circumstances does not limit any rights.

Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [F2014L00622]

1.543 The committee therefore requests the Minister for Immigration and Border Protection' advice on the compatibility of the repeal of the specified visa classes with the protection of the family, and particularly:

- **Whether the measure is aimed at achieving a legitimate objective;**
- **Whether there is a rational connection between the measure and that objective; and**
- **Whether the measure is proportionate to that objective.**

Noting the Committee's comments at 1.541 that it accepts the non-citizens do not have a stand-alone right to family reunification under international rights law', the decision to migrate to Australia involves the often very difficult decision to leave family and friends behind, however this is a matter of individual choice and brings with it no unfettered right to extended family reunification.

1.554 The committee therefore requests the Minister for Immigration and Border Protection's Advice on the compatibility of the repeal of certain carer visa classes with the right to health, and particularly:

- **Whether the measure is aimed at achieving a legitimate objective;**
- **Whether there is a rational connection between the measure and that objective; and**
- **Whether the measure is proportionate to that objective.**

Is the measure aimed at achieving a legitimate objective?

The measure achieves a legitimate objective of removing visa subclasses that are not providing their intended objectives due to the long wait times for a decision on their application.

Is there a rational connection between the measure and that objective?

The Carer visa was only to be used when other forms of care cannot reasonably be provided by any other relative or obtained from welfare, hospital, nursing or community services in Australia. Yet it is expected that applicants currently wait up to six years for their carer to obtain a visa, while still requiring this same high level of care.

In addition, the majority of Carer visa places are granted to dependent applicants (spouse or de facto partner, minor children and adult dependent relatives). In the 2013-14 programme year 62.5% of visa grants were given to dependent applicants. This meant that only 37.5% of the available Carer visa places were used to provide an outcome that provided care for an Australian citizen, permanent resident or eligible New Zealand citizen.

Is the measure proportionate to that objective?

The repeal of the Carer visa does not prejudice access to health and welfare services that every Australian has. The repeal does not change the availability to family members outside Australia to apply for a visitor visa where they can show that the purpose of their visit is to assist with the short-term care needs of a seriously ill relative who is an Australian citizen or permanent resident.

Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014 (the Regulation) [F2014L00726]

1.563 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the ability to release information concerning a person's previous changes of name is compatible with the right to privacy.

Section 37 of the *Australian Citizenship Act 2007* provides that a person may make an application for evidence of the person's Australian citizenship. When given, that evidence must be in a form prescribed by the *Australian Citizenship Regulations 2007* (the Citizenship Regulations) and contain any other matter prescribed by the Citizenship Regulations.

Since 1 July 2011, the Citizenship Regulations have provided that the following information, among other matters, may be included on the back of a notice of evidence of citizenship:

- the applicant's legal name at time of acquisition of Australian citizenship, if different to the applicant's current legal name;
- any other name in which a notice of evidence has previously been given;
- any other dates of birth in which a notice of evidence has previously been given.

Schedule 6 of the Regulation amends Schedule 2 of the Citizenship Regulations by expanding the range of information that may be included on the back of a notice to include the date of any notice of evidence of Australian citizenship previously given to the person.

The provision of details of previous notice of evidence on the back of a notice of evidence assists in maintaining the integrity of Australia's identity framework. Identity integrity is essential in maintaining Australia's national security, law enforcement and economic interests. It is essential that the identities of persons accessing government or commercial services, benefits, official documents and positions of trust can be verified. False or multiple identities can and do underpin terrorist activities; impact on border and citizenship controls; finance crimes; and facilitate fraud.

The Attorney-General's National Identity Security Strategy states that 'if identity security risk is negligible to all parties, an individual should be able to remain anonymous or use a pseudonym if they choose. However, if risks to one of the parties are unacceptable, the identity of the other party must be confirmed. For government agencies, unacceptable risks include those that may lead to identity fraud'. Identity fraud has a significant impact on Australia's people and economy. According to the *Australian Bureau of Statistics Personal Fraud Survey 2010-11*, Australians lost $1.4 billion due to personal fraud (which includes credit card fraud, identity theft and scams). The survey estimated a total of 1.2 million Australians aged 15 years and over were victim of at least one incident of identity fraud in the 12 months prior to the survey interview.

Notices of evidence of citizenship are treated as a foundation identity document by many Australians and recording the particulars of previous notices of evidence on the back of a notice of evidence helps prevent misuse of identity. For example, where a person has multiple identities and only one is recorded on the evidence of citizenship, the following risks may present where the evidence of citizenship is presented as a primary form of identification:

- National police checks (including working with vulnerable people checks) may not include all identities, resulting in criminal charges not being detected and increasing risk to the

Australian public, government, business and care facilities – for example, a person with child sex convictions under one identity may gain a position in a child care centre under another identity.

- Security vetting for government positions of trust may not include all identities, increasing risk to national security – for example, a person who would be considered a national security risk under one identity receives a clearance under another identity and gains access to sensitive information, restricted areas or high risk jobs, such as at an Australian port of entry.
- A person may fraudulently collect benefits under multiple identities from state and federal government – for example, a person could collect Centrelink benefits under multiple identities.
- Credit checks may be incomplete, presenting a risk to financial institutions and business – for example, a person with a bad credit history under one identity may present a clear credit check and procure finance under another identity.

The provisions in Schedule 2 of the Citizenship Regulations aid in the mitigation of these risks, preventing and deterring identity crime and misuse (objective one of the National Identity Security Strategy) and offering increased confidence in the verification of identity of Australians born overseas, for government, business and the Australian public.

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with, among other matters, an individual's privacy. However, the right to privacy is not an absolute right. This means it does not apply in an unlimited or absolute manner and Australia can limit the extent of these rights, as long as it limits the right consistent with the principle of non-discrimination which outlines the test for legitimate differential treatment under international law. Limitations that are reasonable, necessary and proportionate in achieving a legitimate objective are permissible.

Schedule 2 of the Citizenship Regulations engages the right to privacy in that it allows for the inclusion on the back of a notice of evidence of citizenship information about when and in what identity a person has previously been issued with such a notice.

The legitimate objective of the recording of details of previous notices of evidence on the back of a notice of evidence is enhancing the integrity of the identity framework. The potential limitations on the right to privacy are:

- reasonable as they seek to reduce the opportunity for identity fraud and the consequent impact on the community;
- necessary as there is no other practical way to associate the details of previous notices of evidence with a current notice of evidence; and
- proportionate as they do not make the person's identity details available to the general public. Rather, notices of evidence are generally used when individuals are dealing with government or other bodies that have a need to establish the person's identity and citizenship status, therefore the extent of the limitation on privacy and need to disclose this information is limited. Persons holding a notice of evidence maintain control over who or what organisation they disclose the notice to and for what purpose In addition, the Australian Citizenship Instructions provide that officers have the discretion not to include

previous names and/or dates of birth if they are satisfied that the inclusion of a particular name will endanger the client or another person connected to them.

1.572 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the ability to release information concerning a person's change of name is compatible with the right to equality and non-discrimination.

The committee has stated that Schedule 2 of the Citizenship Regulations indirectly engages the rights of equality and non-discrimination in that it allows for the inclusion on the back of a notice of evidence of citizenship information about when and in what identity a person has previously been issued with such a notice, and that information may disclose that the person has undergone sex or gender reassignment.

The rights to equality and non-discrimination in articles article 2, 16, and 26 of the ICCPR are not absolute rights.

As noted above, the legitimate objective of the recording of details of previous notices of evidence on the back of a notice of evidence is enhancing the integrity of the identity framework. The potential limitations on the right to equality and non-discrimination are:

- reasonable as they seek to reduce the opportunity for identity fraud and the consequent impact on the community;
- necessary as there is no other practical way to associate the details of previous notices of evidence with a current notice of evidence; and
- proportionate as they do not make the person's identity details available to the general public. The person has control of the notice of evidence and over the disclosure of the information. Notices of evidence are generally used when individuals are dealing with government or other bodies and used as primary evidence to establish the person's identity and citizenship status, therefore while importance of the notice of evidence, the extent of the limitation on privacy and need to disclose this information is limited. Persons holding a notice of evidence maintain control over who or what organisation they disclose the notice to and for what purpose. In addition, the Australian Citizenship Instructions provide that officers have the discretion not to include previous names and/or dates of birth if they are satisfied inclusion of a particular name will endanger the client or another person connected to them.

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MC14-009095

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
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Dear Senator Smith

Thank you for your letter of 15 July 2014 about the Social Services and Other Legislation Amendment (2014 Budget Measures No 1) Bill 2014 and the Social Services and Other Legislation Amendment (2014 Budget No 2) Bill 2014.

I have noted the comments in the Committee's *Ninth Report of the 44th Parliament* and have provided my response to these comments in the enclosed documents.

Thank you again for writing.

Yours sincerely

KEVIN ANDREWS MP

Encl.

ATTACHMENT A: **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

Social Services and other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014

The Parliamentary Joint Committee on Human Rights, in its 'Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*' report, has sought advice from the Minister for Social Services on whether certain measures included in the Social Services and other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 are compatible with human rights, as defined in the Act.

Specifically the Committee has questioned the compatibility of some of the proposed changes with the right to equality and non-discrimination, the right to social security and the right to an adequate standard of living. This document provides responses to the Committee's request for advice on compatibility of the measures identified with those rights.

Right to equality and non-discrimination

Statement of compatibility does not address potential indirect discrimination against women

All Schedules

1.337 The committee therefore requests the Minister for Social Services' advice on the compatibility of each schedule in the bill with the rights to equality and non-discrimination and, in particular, whether these measures are:

- aimed at achieving a legitimate objective;
- there is a rational connection between the measures and the objective; and
- the measures are proportionate to that objective.

The proposed changes affect all recipients, regardless of their gender and are aimed at ensuring that social security is targeted, sustainable and consistent over the long term.

The measures will help ensure ongoing assistance is targeted to those who need it most, and the impacts are sufficiently small as to be proportionate to the objective of preserving access to payments system over the long term.

Furthermore a per child single parent supplement will become available for single parent families on the maximum rate of FTB Part A when their children are aged between six and 12, as part of the Social Services and other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014, to provide additional assistance to this group.

Right to Social Security and Right to an adequate standard of living

Abolition of seniors supplement

Schedule 1

- **cease payment of the seniors supplement for holders of the Commonwealth Seniors Health Card or the Veterans' Affairs Gold Card from 20 June 2014.**

1.351 The committee therefore seeks the Minister for Social Services' advice as to whether the removal of the seniors supplement is compatible with the right to social security, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and

- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

The proposed abolition of the seniors supplement is aimed at ensuring that social security assistance to self-funded retirees remains sustainable over the longer term and is consistent with a well-targeted means tested income support system, which provides financial assistance to those most in need.

It should also be noted that the value of assistance to self-funded retirees has grown considerably over time. The original intention of the Commonwealth Seniors Healthcare Card (CSHC), which was introduced in 1994, was to provide concessions to low-income retired aged persons who were not eligible for the age pension (or service pension).

The Government's election commitment to index the CSHC income limits by the CPI from 20 September 2014 will increase the number of people qualifying for the card by 27,000 people by 2017-18. This will support their efforts to be independent.

The limitation is both reasonable and proportionate. Self-funded retirees who are not entitled to the Age Pension will continue to be entitled to the CSHC and Energy Supplement (currently $361.40 p.a. for singles and $273.00 p.a. for each member of a couple). These benefits are not available to Australians of workforce age with similar means.

Holders of a CHSC will remain entitled to the concessions attached to the CSHC such as the provision of Pharmaceutical Benefits Scheme (PBS) medicines at the concessional co-payment amount of $6.00 ($36.90 for non-concession card holders) and access the lower Medicare Safety net, which is currently $624.10 per year for concession card holders and $1,248.70 for non-concession card holders.

Ceasing indexation of the (clean) energy supplement

Schedule 2

- **Rename the clean energy supplement as the energy supplement, and permanently cease indexation of the payment from 1 July 2014.**

1.358 The committee seeks the Minister for Social Services' advice as to whether ceasing indexation of the energy supplement is compatible with the right to social security and the right to an adequate standard of living , and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

The proposed cessation of indexation of the (clean) energy supplement is aimed at returning savings to the Budget, while at the same time continuing to provide a benefit to families and income support recipients even though the original purpose of this compensation payment no longer exists i.e. the price impacts of the carbon tax have been removed due to its abolition. The renamed Energy Supplement will provide ongoing assistance to families and income support recipients with household expenses, including energy costs.

Price pressures due to the introduction of the carbon tax will be removed now that the carbon tax has been abolished and families and income support recipients will have greater disposable income. The ceasing of indexation of the Energy Supplement limits the payment to a rate that is current at the time this legislation is passed. The original purpose of this payment and the need to continue it in its entirety will have been extinguished with the repeal of the carbon tax, however, people will continue to receive a non-indexed Energy Supplement meaning their standard of living will be enhanced.

The limitation effect of ceasing indexation is very reasonable when accounted for in conjunction with the Repeal of the Carbon Tax legislation and proportionally people will be better off and the government will still achieve its savings objective.

Pausing indexation of income and asset thresholds for a range of benefits

Schedule 3

- **pause indexation for three years of the income-free areas and assets-value limits for all working age allowances (other than student payments), and the income test free area and assets value limit for parenting payment single from 1 July 2014.**

1.364 The committee therefore seeks the Minister for Social Services' advice as to whether the these measures in Schedule 3 of the bill are compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable.

The proposed pauses to indexation of income and asset thresholds for a range of payments are aimed at slowing growth in social security expenditure. The changes will help ensure Australia has a well-targeted means tested income support system that provides financial assistance to those most in need, while encouraging self-provision whenever possible.

The changes to the value of income and assets test free areas and thresholds for certain Australian Government payments assist in limiting growth in overall social security expenditure in the context of targeting payments according to need. This measure applies irrespective of gender.

The limitation is both reasonable and proportionate. Specific impacts for people depend on payment type and people's circumstances and will be experienced by people with sufficient private income/assets to be assessed under the relevant means test. Payments will not be reduced unless customers' circumstances change, such as their income or assets increasing in value.

Pausing indexation of the parenting payment single

Schedule 3

- **Index parenting payment single to the Consumer Price Index only, by removing benchmarking to Male Total Average Weekly Earnings from 20 September 2014.**

1.370 The committee therefore seeks the Minister for Social Services' advice as to whether changing the indexation of the parenting payment single from benchmarking against Male Total Average Weekly Earnings to the Consumer Price Index is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

The proposed pause of indexation of parenting payment single is aimed at standardising indexation arrangements across all social security payments and putting the income support system on a more sustainable footing by slowing down the growth of the Government's expenditure on social security. This measure applies irrespective of gender.

The measure is designed to reduce fiscal pressures on future budgets in the context of constrained budgetary circumstances. The measure does this by slowing down the growth in Government expenditure on social security.

The limitation is both reasonable and proportionate. The measure does not affect eligibility or qualification requirements for the payment and therefore access to social security support remains unchanged. At the same time, the measure achieves legitimate objectives of helping to constrain growth in social security expenditure, to assist the system to remain sustainable.

Pensions will continue to be indexed twice a year and purchasing power will be maintained through indexation to movements in prices.

Restrictions on eligibility for immediate social welfare payments

Schedule 6

- **Extend and simplify the ordinary waiting period for all working age payments from 1 October 2014.**

1.380 The committee therefore seeks the Minister for Social Services' advice as to whether changing the eligibility for immediate social welfare payments is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

The proposed restrictions on eligibility for immediate social welfare payments are aimed at ensuring access to income support is consistent across similar payments. The OWP that currently applies to Newstart Allowance and Sickness Allowance is designed to enforce a period of self-support and has existed since the first iteration of these payments commenced in 1945.

There are currently a number of income support payments available for working age people with full or partial capacity to support themselves through paid employment, or who are temporarily incapacitated. Eligibility for these working age payments, such as Youth Allowance (other), Parenting Payment (Partnered and Single) and Widow Allowance, has gradually changed in recognition that recipients of these payments generally have some capacity for self-support and often take advantage of the increased opportunities for flexible, part-time and casual workforce participation.

Therefore in order to meet the objective of consistency, this measure will extend the application of the OWP to new claimants of Youth Allowance (other), Parenting Payment (Partnered and Single) and Widow Allowance. This limitation is reasonable as it ensures more consistent access to similar working age payments while maintaining the longstanding principle of self-support. Claimants without the means to support themselves will have access to exemptions and waivers.

The proposed changes are also aimed at ensuring a sustainable and well-targeted payment system. Exclusion periods, such as the Income Maintenance Period and Liquid Assets Waiting Period, apply to certain working age income support payments to enforce self-support for a period which is based on the person's level of resources.

The changes to the concurrency rules in this measure ensure that income support payments are directed towards those in need. The tightening of the severe financial hardship waiver also acts as a discouragement for people to spend their resources on non-essential items in order to obtain income support payments. These limitations are reasonable as they ensure claimants use their own resources

first, while still enabling those who are in hardship due to extenuating circumstances to access payments immediately.

Restrictions on eligibility for immediate social welfare payments – quality of law test

Schedule 6

- **Extend and simplify the ordinary waiting period for all working age payments from 1 October 2014.**

1.384 The committee therefore requests the Minister for Social Service's advice on whether the measure, as currently drafted, meets the standards of the quality of law test for human rights purposes.

As the individual circumstances of people are many and sometimes complex, it is not possible to envisage or legislate specifically in the primary legislation to cover all circumstances. The use of legislative instruments provides the Secretary or the Minister with the flexibility to refine policy settings to ensure that the rules operate efficiently and fairly without unintended consequences.

The measure in Schedule 6 allows the Secretary (under the current Administrative Arrangements Order, this means the Secretary of the Department of Social Services) to prescribe, by legislative instrument, the circumstances which constitute a 'personal financial crisis' for the purposes of waiving the Ordinary Waiting Period. Such circumstances may include where a person has experienced domestic violence or has incurred reasonable or unavoidable expenditure.

This provision provides the Secretary with the flexibility to consider other unforeseeable or extreme circumstances which may be identified in the future where it would be appropriate for a person to have immediate access to income support. Using an instrument will enable this to occur in a timely manner without having to amend the primary legislation. This power can only be used beneficially and any instrument issued by the Secretary would be subject to Parliamentary scrutiny and disallowance.

Pausing indexation of Family Tax Benefits

Schedule 7

- **Pause indexation for two years of the family tax benefit Part A and family tax benefit Part B standard payment rates from 1 July 2014.**

1.390 The committee therefore seeks the Minister for Social Services' advice as to whether pausing the indexation of family tax benefit payments is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

The proposed pause of indexation of FTB is aimed at ensuring that the family payments system remains sustainable in the long term and is better targeted to support those who need it most. As noted in the

Statement of Compatibility, the United Nations Committee on Economic, Cultural and Social Rights has stated that a social security scheme should be sustainable. Ensuring the sustainability of the family payments system helps preserve the right to social security over the long term.

Only a small number of higher income families will lose access to the payment altogether as a result of income growth and the pause to standard payment rates. These families would only be receiving a nominal amount of payment, and would not rely on FTB to achieve an adequate standard of living.

Therefore the limitations on the right to social security imposed by this measure are reasonable and proportionate as they contribute to the sustainability of the family payments system.

Social Services and other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014

The Parliamentary Joint Committee on Human Rights, in its 'Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*' report, has sought advice from the Minister of Social Services on whether certain measures included in the Social Services and other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 are compatible with human rights, as defined in the Act.

Specifically the Committee has questioned the compatibility of some of the proposed changes with the right to equality and non-discrimination, the right to social security, the right to an adequate standard of living and the right to an education. This document provides responses to the Committee's request for advice on compatibility of the measures identified with those rights.

Right to Social Security and Right to an adequate standard of living

Changes to indexation of pension

Schedule 1

- **Provide that all pensions are indexed to the Consumer Price Index only be removing from 20 September 2017:**
  - **benchmarking to Male Total Average Weekly Earnings;**
  - **indexation to the Pensioner and Beneficiary Living Cost Index.**

1.403 The committee therefore seeks the Minister for Social Services' advice as to whether the changes to indexation of pensions are compatible with the right to social security, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

The proposed changes to indexation of pensions are aimed at standardising indexation arrangements across all social security payments and putting the income support system on a more sustainable footing by slowing down the growth of the Government's expenditure on social security.

The measure is designed to reduce fiscal pressures on future budgets in the context of demographic changes associated with an ageing population. The measure does this by slowing down the growth in Government expenditure on social security.

The limitation is both reasonable and proportionate. The measure does not affect eligibility or qualification requirements for the payment and therefore access to social security support remains unchanged. At the same time, the measure achieves legitimate objectives of helping to constrain growth in social security expenditure, to assist the system to remain sustainable.

Pensions will continue to be indexed twice a year and purchasing power will be maintained through indexation to movements in prices.

Pausing indexation of income and asset test thresholds for a range of benefits

Schedule 1

- **pause indexation for three years of the income free areas and assets value limits for student payments, including the student income bank limits from 1 January 2015;**
- **pause indexation for three years of the income and assets test free areas for all pensioners (other than parenting payment single) and the deeming thresholds for all income support payments from 1 July 2017.**

1.410 The committee therefore seeks the Minister for Social Services' advice as to whether the these measures in Schedule 1 of the bill are compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

The proposed pause of indexation of income and asset test thresholds for a range of benefits is aimed at slowing the growth in social security expenditure. The changes will help ensure Australia has a well-targeted means tested income support system that provides financial assistance to those most in need, while encouraging self-provision whenever possible.

The changes to the value of income and assets test free areas and thresholds for certain Australian Government payments assist in limiting growth in overall social security expenditure in the context of targeting payments according to need.

The measure is reasonable and proportionate for the achievement of the above objectives. Specific impacts for people depend on payment type and people's circumstances and will be experienced by people with sufficient private income/assets to be assessed under the relevant means test. Payments will not be reduced unless customers' circumstances change, such as their income or assets increasing in value.

Removal of eligibility for Newstart allowance for 22-24 year olds

Schedule 8

- **extend youth allowance (other) from 22 to 24 year olds in lieu of the Newstart allowance and sickness allowance from 1 January 2015.**

1.416 The committee therefore seeks the Minister for Social Services' advice as to whether the removal of eligibility of 22-24 year olds for the Newstart allowance is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

The proposed extension of the youth allowance (other) eligibility age is aimed at achieving consistency across payments, as well as encouraging young people to undertake or participate in education or training to ensure that they are able to achieve long term sustainable employment outcomes. The

measure will provide unemployed young people with incentives and support to take advantage of the opportunities that Australia's labour market provides.

The changes to the Youth Allowance maximum age build on those already passed in the *Social Security and Other Legislation Amendment (Income Support and Other Measures) Act 2012.* These changes increased the maximum age of Youth Allowance (other), Sickness Allowance and ABSTUDY from 21 years of age to 22 years for young people.

Since 1998, there have been two different maximum ages for Youth Allowance – one for full-time students and one for young unemployed people. Once a young person reaches the maximum age for Youth Allowance as a job seeker, they transition to Newstart Allowance which is paid at a higher rate of payment.

Presently, around 78,500 unemployed youth aged 22-24 are paid Newstart or Sickness Allowance. Such a person would be advantaged by staying on Newstart Allowance instead of pursuing full-time study or employment, given the higher rate of these allowances. This measure removes this disincentive by placing all under 25 year olds on the same payment levels whether unemployed or studying full-time.

This proposal will affect new claimants from 1 January 2015, who will continue to receive Youth Allowance between the ages of 22 to 24 years. Grandfathering arrangements will apply to young people aged 22 years or over and in receipt of Newstart Allowance or Sickness Allowance as at 1 January 2015.

Youth Allowance is paid at a lower rate than Newstart Allowance however, a persons right to social security will remain. This is justified given the intent to ensure payment rates are aligned for young people in receipt of Youth Allowance aged under 25 years, regardless of their circumstances. Young people will continue to be supported, including a range of programs and other services provided by the Commonwealth and state governments, and grandfathering arrangements ensure that no young person will have their payment rate reduced as at 1 January 2015.

Twenty-six week waiting period for social security payments for under-30 year olds

Schedule 9

- **Require young people with the capacity to learn, earn or Work for the Dole from 1 January 2015.**

1.423 The committee therefore seeks the Minister for Social Services' advice as to whether the 26 week waiting period for social security benefits for those under 30 is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

The proposed 26 week waiting period for all new job seekers up to 30 years of age claiming Newstart Allowance, Youth Allowance (other) and Special Benefit who are considered to be job ready is aimed at increasing the level of young job ready people achieving gainful employment outcomes.

According to the *OECD Factbook 2013: Economic, Environmental and Social Statistics,* 'young people who are neither in employment nor in education and training are at risk of becoming social excluded

individuals with income below the poverty-line and lacking the skill to improve their economic situation.' This measure seeks to address youth unemployment by encouraging young people to accept jobs rather than relying on income support at risk of becoming disengaged – both socially and economically.

Income support data (March 2013) supports that the targeted job ready group of young people that the measure is aimed at are more likely to achieve positive employment outcomes. Newstart Allowance and Youth Allowance (job seeker) data shows that a majority of these job ready young people exit payment within 6 months of being granted (52.9% for Newstart Allowance and 34 per cent for youth allowance (job seeker)), are more likely to have parental support (66.2% considered to be dependent on their parents for youth allowance purposes) and therefore less likely not to have access to an adequate standard of living. The 2011 Census data also supports that 29% of young Australians aged 18-34 years are still living in the parental home.

During the 26 week waiting period young job seekers will have access to the full range of employment services to support their job search efforts. After a person's waiting period is served, job seekers will be eligible to receive income support. This will continue to be paid until a person has been participating in 25 hours per week of Work for the Dole for 26 weeks. After this time, a non-payment period will be imposed for 26 weeks; however a young person will have access to a wage subsidy[1] for potential employers and access to relocation assistance.

Exemptions will be available to certain groups with extra responsibilities or those that are not able to work or study. Exemptions from the new waiting period will be available for people who have a partial capacity to work less than 30 hours a week, parents receiving Family Tax Benefit for a child, part time apprentices, principal carer parents, a job seeker with significant barriers to employment under the current employment services arrangements (or the Remote Jobs and Communities Programme equivalent), Disability Employment participants and Farm Household Allowance recipients. Evidence suggests that this measure will be most effective if it is supported by an appropriate level of employment services, targeted at job seeker deficits.[2]

The specific targeting of this measure to those young people who are job ready without any barriers to prevent them from gaining employment will mitigate the risk of limiting a person's right to social security. Young people will have access to the full range of programmes and assistance under the employment service model to enable them to find employment and access to a Health Care Card which provides people with access to the Pharmaceutical Benefit Scheme and other state based concessions.

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[1] Wage subsidy trials carried out in South Africa (*Stellenbosch Economic Working Papers: 02/14: Levinsohn/Rankin/Roberts/Schoer*) amongst young people showed that targeted wage subsidies are a powerful tool for getting job seekers into long term sustainable work. The key finding of the paper was that those who were allocated a wage subsidy were more likely (25%) to be employed both one year and two years, long after the subsidy had expired. Under this measure, the foregone income support payment is set aside to be used as a wage subsidy after 12 months of unemployment.

[2] Analysis commissioned by the New Zealand Government (*Actuarial valuation of the Benefit System for Working-age Adults as at 30 June 2013: Greenfield/Miller/McGuire*), which would be broadly applicable to the Australian system, shows that if young unemployed people are not provided with the right mix of programmes and support, there is a high chance that they will end up trapped on welfare for much of their lives. Work for the Dole evaluations shows that referral to Work for the Dole has a powerful 'tree shaking' effect, with job seekers exiting income support rather than commencing in Work for the Dole.

Change to eligibility criteria for the large family supplement

Schedule 10

- **Limit the family tax benefit Part A large family supplement to families with four or more children**

1.429 The committee therefore seeks the Minister for Social Services' advice as to whether the change to the eligibility criteria for the family tax benefit large family supplement is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

The proposed change to eligibility criteria for the large family supplement is aimed at ensuring that the family payments system remains sustainable in the long term and is better targeted to support those who need it most. As noted in the Statement of Compatibility, the United Nations Committee on Economic, Cultural and Social Rights has stated that a social security scheme should be sustainable. Ensuring the sustainability of the family payments system helps preserve the right to social security over the long term.

This measure will only impact on families with three or more children. No families will lose access to the family tax benefit system as a result of this measure, and all eligible families will continue to receive FTB Part A on a per child basis to assist with day to day costs.

The National Commission of Audit recommended abolishing the LFS as research into the direct costs of children has found that there are decreasing costs for each additional child.

The 2010 Henry Tax Review recommended that the LFS be reconsidered as the case for the payment was not strong. Reports by the National Centre for Social and Economic Modelling in 2002, 2007 and 2013 consistently found that additional children cost less than a first child. The reason for this is that families experience "economies of scale" in which fixed costs are spread among more children. After a first child many items have already been purchased and can be reused by subsequent children.

As the monetary impact on families affected will be relatively small, and the evidence base does not support the idea that LFS is necessary for larger families to achieve an adequate standard of living, the limitations on the right to social security imposed by this measure are reasonable and proportionate.

Reduced access to family tax benefit Part B

Schedule 10

- **Limit family tax benefit Part B to families with children under six years of age, with two-year transitional arrangements for current recipients with children above the new age limit.**

1.436 The committee therefore seeks the Minister for Social Services' advice as to whether the proposed reduction in access to family tax benefit Part B is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

The proposed reduced access to family tax benefit Part B is aimed at encouraging parents to re-enter the workforce when a child reaches school age. This recognises that there are significant social and economic benefits to children and families when parents are in paid employment.

From 1 July 2017, all families with a youngest child aged six and over would no longer be eligible for FTB Part B as a result of this measure. Families with a youngest child above the new age limit who are currently eligible for FTB Part B will be grandfathered under the current rules until 30 June 2017.

Targeting FTB Part B to families with children below primary school age aims to increase workforce participation incentives and encourage self-reliance for families once their youngest child enters primary school. Most primary carers in Australia already return to the workforce once their children are in school, which is reflected in FTB Part B population data. This measure aligns with other government payments to encourage participation, such as Parenting Payment, which is now only available to single parents with a youngest child aged less than eight years or couples with a child aged less than six. This signifies that this measure is based on objective and reasonable grounds, as it reflects broad trends in the wider population.

As noted in the Statement of Compatibility, care requirements for children are higher when children are very young. This measure retains assistance for families when children are not yet school age, ensuring families are supported to access an adequate standard of living when caring duties may present a barrier to work.

In addition, a per child single parent supplement will be available for single parent families on the maximum rate of FTB Part A when their children are aged between six and 12. Low income single parents may continue to face increased barriers to work when children are in primary school. The single parent supplement recognises that these families may continue to require additional assistance to access an adequate standard of living during this time.

Families with a youngest child aged six and over will continue to be eligible for the payment for two years under grandfathering arrangements, giving them time to adjust to the change.

As the benefits of workforce participation are significant, and assistance is retained where workforce barriers are most pronounced, the limitations on the right to social security imposed by this measure are reasonable and proportionate.

Increase to age pension entitlement age

Schedule 11

- **increase the qualifying age for the age pension and the non-veteran pension age to 70 (increasing by six months every two years from 1 July 2015).**

1.442 The committee therefore seeks the advice of the Minister for Social Services as to whether the increase in age eligibility for the age pension is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

The proposed change to increase the Age Pension qualifying age to 70 is aimed at achieving savings that maintain the sustainability of the retirement income system into the future, and encourage increased workforce participation for senior Australians. The Australian income support system is a non-contributory, tax payer funded system and its ability to target income support to those most in need is key to achieving sustainability.

Australians are living longer, with an increasing proportion of the population over the current Age Pension qualifying age. Australian Bureau of Statistics (ABS) projections show that the proportion of people aged over 65 years is expected to increase from 14 % at 30 June 2012 (3.2 million), to between 22 and 25% by 2061 (between 9.0 million and 11.1 million). As the proportion of the population over the Age Pension qualifying age increases, so too will Age Pension expenditure, placing the sustainability of the system at risk.

While demographic change has resulted in an increasing proportion of people over Age Pension qualifying age, who are receiving payments for longer, there are also many people who are working longer or are able to support themselves financially after they retire. Measures of quality of life, as life expectancy increases, provide insights into the capacity of older Australians to work. Australian Institute of Health and Welfare (AIHW) analysis of life expectancy and disability status indicates that, between 1998 and 2012, 37% of the gains in life expectancy were disability free years for women, and 54% for men. Increasing the Age Pension qualification age provides an incentive for people to remain working for longer.

People unable to support themselves financially under Age Pension age are supported by Australia's social security safety net. This means they are still able to access social security and their right to an adequate standard of living. Social security payments such as Newstart Allowance and Disability Support Pension will continue to be available to those under Age Pension qualifying age.

Right to equality and non-discrimination

Residency requirements for the disability support pension

Schedule 2

- **generally limit the overseas portability period for disability support pension to 28 days in a 12-month period from 1 January 2015.**

1.449 The committee therefore requests the Minister for Social Services' advice on the compatibility of the proposed changes to residency requirements for disability support pension recipients with the right to equality and non-discrimination and in particular, whether these measures are:

- based on objective and reasonable grounds; and
- is a proportionate measure in pursuit of a legitimate objective.

Australia's social security system is based on residence and need. All working-age payments are designed to assist Australian residents with the cost of living in Australia and to assist people who are actively seeking work in Australia. Some working-age payments, such as Newstart Allowance, do not have general portability as the community reasonably expects recipients to be actively seeking work or participating in work-related activities in Australia. The proposed four week portability period is considered to be reasonable time to allow DSP recipients to deal with personal matters that may arise from time to time overseas.

The measure is based on the expectation that DSP recipients who have some capacity to work, including assisted employment, be available in Australia to engage in activities to maximise participation, such as work or training. Being outside Australia for extended periods of time reduces a person's availability and opportunity to be actively engaging in training and work-related activities and social participation in Australia.

Limiting the portability period to four weeks is also consistent with the proposed changes to introduce, where appropriate, participation requirements for DSP recipients who are under 35 years of age. They will need to actively participate in a program of support in Australia to build their skills and work capacity.

There will continue to be a number of exceptions that permit temporary absences longer than four weeks. For example, a person's portability period may be extended if they are overseas and cannot return to Australia due to unexpected events. There are also limited circumstances where a person may be allowed additional absences beyond the single four week absence in a 12-month period. These circumstances include attending an acute family crisis, seeking medical treatment not available in Australia or for a humanitarian purpose.

The Government does not consider the proposed changes to DSP portability to be directly or indirectly discriminatory in relation to DSP recipients, and the measure is not expected to have a disproportionate or unintended negative impact on DSP recipients compared to the general working-age payment population. Portability periods are set to suit the type of payment and the circumstances and may broadly be seen as on a continuum. For example, as mentioned Newstart Allowance has no general portability, DSP has mostly limited portability for temporary absences and Age Pension is portable indefinitely (noting that after an overseas absence of more than 26 weeks, the Age Pension is paid at a proportional rate based on the persons working life residence in Australia). The measure endeavours to ensure that DSP recipients who have some work capacity are available the great majority of the time in Australia to participate in training, work-related and social activities when opportunities arise.

DSP recipients who have been assessed as having a severe and permanent disability and no future work capacity, or those who have a terminal illness, will continue to be able to apply for indefinite portability of their pension. As with Age Pensioners, the community does not reasonably expect this group of DSP recipients to be actively looking for work.

Age criteria for Newstart allowance and exclusion periods

Schedules 8 and 9

- **extend youth allowance (other) to 22 to 24 year olds in lieu of the Newstart allowance and sickness allowance from 1 January 2015;**
- **From 1 January 2015, all new job seekers up to 30 years of age claiming Newstart Allowance, Youth Allowance (other) and Special Benefit who are considered to be job ready, will have a 26 week waiting period.**

1.453 The committee therefore requests the Minister for Social Services' advice on the compatibility of the proposed changes in schedules 8 and 9 with the right to equality and non-discrimination and in particular, whether these measures are:

- based on objective and reasonable grounds; and
- is a proportionate measure in pursuit of a legitimate objective.

The United Nations, for statistical purpose, defines youth as those persons between the ages of 15 and 24 years, without prejudice to other definitions by Member States. For the purposes of increasing the Youth Allowance (other) maximum age to 24 years, this is a case of aligning existing parameters for full-time students and full-time Australian Apprentices and adheres to the an internationally accepted definition of youth. Schedule 8 changes the qualification arrangements for Youth Allowance; however claimants in the affected groups will be maintaining access to social security.

For changes under Commonwealth law, the *Age Discrimination Act* states that treating individuals differently because of their age is allowed when in compliance with Commonwealth laws, including laws about taxation, social security and migration.

The Government is able to set these age limits when changing qualification and payability conditions under Social Security law. Whilst young people aged under 30 years will not immediately receive Newstart Allowance or Youth Allowance (other), their right to access social security has not been withdrawn, this is similar to the operation of existing waiting periods that are targeted towards specific groups. Affected young people will continue to have a right to an appropriate level of social security, set by Government. Young people will continue to have this access without illegitimate differential treatment and without affecting their other rights.

Reduced access to family tax benefit Part B

Schedules 10

- **Limit family tax benefit Part B to families with children under six years of age, with two-year transitional arrangements for current recipients with children above the new age limit.**

1.458 The committee therefore requests the Minister for Social Services' advice on the compatibility of the measure in Schedule 10 with the right to equality and non-discrimination and in particular, whether these measures are:

- based on objective and reasonable grounds; and
- is a proportionate measure in pursuit of a legitimate objective.

The objective of limiting access to FTB Part B to families with a youngest child under six is to encourage parents to re-enter the workforce when a child reaches school age. There are significant social and economic benefits to children and families when parents are in paid employment. The aim of the new allowance is to recognise that single parent families often have fewer resources to meet living costs, and have a reduced capacity to work because of their caring responsibilities.

The Committee notes that limiting FTB Part B to families with children under six years of age is likely to disproportionately affect women, as they are more likely to be single parent primary carers. Most primary carers in Australia already return to the workforce once their children are in school, which is reflected in FTB Part B population data. This signifies that this measure is based on objective and reasonable grounds, as it reflects broad trends in the wider population.

In addition, the introduction of an FTB Part A single parent supplement per child aged six to 12 may counteract the disproportionate economic impact of this measure on women, as it is likely to be received by more households headed by women than men.

As this measure is based on objective and reasonable grounds, and disproportionate economic impacts on women are counteracted with the introduction of a single parent supplement, these measures are compatible with the right to equality and non-discrimination.

Right to education

Removal of pensioner education supplement

Schedules 6

- **cease the pensioner education supplement from 1 January 2015.**

1.469 The committee therefore seeks the advice of the Minister for Social Services as to whether removing the PES is compatible with the right to education:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

The proposed cessation of PES is aimed at ensuring the long term sustainability of the social security system by improving the Commonwealth's fiscal position by an estimated $281.2 million over five years from 2013-14 and simplifying the structure of the system, and in recognition of better targeted and individualised means of assisting vulnerable cohorts to participate in training or education that have to a large extent subsumed the original intent of the PES.

Since the introduction of PES, several policy changes have been introduced that reduce the amount of time that parents remain out the workforce. This includes introducing participation requirements and providing employment services to support recipients of Parenting Payment to improve their employability from when their youngest child is aged six.

The combination of the development of more individualised and focused support to assist pensioners and parents to engage in study and prepare for the workforce, and the ongoing provision of student payments, makes the removal of PES a rational response to achieving the objective of simplifying and improving the sustainability of the social security system.

The Australian Government also provides other assistance for students with the cost of their fees. Commonwealth Supported Places are offered for university level qualifications, vocational education and training qualifications and post-graduate level courses at university through HECS-HELP, VET-FEE HELP and FEE-HELP loans. These loan schemes assist eligible students to pay or defer paying the full cost of their tuition fees.

An individual's decision to undertake study, whether at university or at a vocational institution, is influenced by many factors, including family circumstances, previous educational history and career aspirations. It is not possible to isolate the impact of the removal of one Government payment on overall enrolments as this is an effect that cannot be predicted by the Department.

While the change may have a minor impact on a small, targeted group of people who access education at a particular point in time, it is consistent with Australia's human rights obligations as it is a reasonable, proportionate and necessary response to achieving a broader objective when considered in the context of the range and level of income support and other assistance available to pensioners and those undertaking study. Australia's underlying system of secondary and tertiary education remains robust and flexible.

Removal of the education entry payment

Schedules 7

- **cease education entry payment from 1 January 2015.**

1.476 The committee therefore seeks the advice of the Minister for Social Services as to whether removing the EES is compatible with the right to education:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

The proposed cessation of EdEP is aimed at ensuring the long-term sustainability of the social security system by improving the Commonwealth's fiscal position by an estimated $65.4 million over five years from 2013-14 and simplifying the structure of the system, in recognition of significant enhancements to education-related assistance and support available to income support recipients and pensioners, including the Employment Pathway Fund (EPF).

EdEP was introduced in 1993 to provide financial assistance to eligible pensioners and unemployed Australians to assist with the up-front costs of study and help remove financial barriers to education. The

role of EdEP has to a large extent been subsumed by the broader regime of Government-funded study and training support, including for Australians who wish to undertake tertiary or vocational education.

The vast majority of allowance recipients and recipients of Parenting Payment with children aged over six years old are registered with a JSA provider and therefore have access to the EPF at their provider's discretion. The EPF can play a similar role offsetting some of the costs associated with commencing study or training, such as course materials, fees and essential equipment. In addition, the EPF provides better targeted and individualised assistance than the EdEP as it is based on the specific needs and barriers to employment of an individual job seeker.

Pensions, allowances, the EPF and student payments will continue unaffected by the removal of EdEP.

The Australian Government also provides other schemes to assist students with the cost of their fees. Commonwealth Supported Places are offered for university level qualifications, vocational education and training qualifications and post-graduate level courses at university through HECS-HELP, VET-FEE HELP and FEE-HELP loans. These loan schemes assist eligible students to pay or defer paying the full cost of their tuition fees.

The 2014-15 Budget also seeks to introduce additional measures to assist students with the costs of study, including the Commonwealth Scholarship scheme. Higher education institutions will be required to commit $1 in every $5 of additional revenue to a new Commonwealth Scholarship scheme to provide tailored, individualised support to students including needs-based scholarships to help meet costs of living, fee exemptions, tutorial support, and assistance at other critical points in their university career. Subject to the passage of legislation, these Commonwealth scholarships will be available from 1 January 2016.

The removal of EdEP is not anticipated to have any impact on rates of enrolment. EdEP is a small, annual, one-off payment and alternative and other ongoing support is available. It is a reasonable and proportionate measure to ensure the ongoing sustainability of the social security system because a wide range of better targeted support will continue to be offered to those who choose to undertake study.

THE HON IAN MACFARLANE MP

MINISTER FOR INDUSTRY

09 SEP 2014

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MC14-003077

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
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Dear Senator Dean

Thank you for your letters of 26 August 2014 concerning the Tenth Report of the 44th Parliament by the Parliamentary Joint Committee on Human Rights (the Committee) and advice you received from me about the *Student Identifiers Bill* and the *Trade Support Loans Act 2014* (TSL Act).

I note the Committee sought further information about the *Trade Support Loans Act 2014* and its interaction with the right to education, and the rights to equality and non-discrimination.

In addressing the right to education and its interaction with the TSL Act, the Committee has requested further advice on whether the Trade Support Loans Programme offers equivalent protection of human rights to the 'Tools for Your Trade Program'.

The Trade Support Loans Programme offers equivalent protection of human rights through its inclusion of similar eligibility criteria to those for the Tools For Your Trade personal benefit payment under the Australian Apprenticeships Incentives Programme. The criteria diverge in only one place, and that is that New Zealand citizens are not eligible under Trade Support Loans.

The removal of New Zealand citizens potentially impacts human rights under the Trade Support Loans Programme but it is important to note that the decision to exclude New Zealand citizens in the eligibility criteria was taken to ensure that those who benefit from Australian taxpayer funded Trade Support Loans are Australian citizens or permanent residents. In addition, because of the repayment requirements of the programme with repayments collected through the Australian taxation system, there would be New Zealand citizens who would not repay Trade Support Loan debts if they returned to New Zealand and did not continue paying tax in Australia. The successful continuation of the programme depends on the repayment of loans by those who reach the income repayment threshold.

In addressing the rights to equality and non-discrimination and their interaction with the TSL Act, the Committee has also requested advice on whether, in establishing and maintaining the Trade Support Loans Priority List, there will be appropriate policy safeguards or measures to ensure that the list does not, in practice, indirectly discriminate against women.

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The purpose of the Trade Support Loans Programme is to ensure the ongoing supply of trade-qualified workers to the Australian economy to support Australia's future productivity and competitiveness. The programme particularly targets occupations that have long lead times and are important to the future economy. The eligibility criteria do not discriminate directly against women, as long as they are undertaking an apprenticeship in an occupation listed on the TSL Priority List and that they meet the residency criteria.

As the committee points out, the majority of those currently undertaking apprenticeships in occupations on the TSL Priority List are male (preliminary internal data for 2013-14 show 82% of commencements in apprenticeships in priority occupations are males). While the Government would agree that participation by women in the workforce is an important human rights issue, the addition of occupations that employ more women would distance the programme from its stated policy goal as outlined above.

In this period of fiscal constraint, it is important that the Government targets spending to achieve its goals and that the TSL Priority List supports this targeting of funds. Addressing the shortage of women in priority occupations on the List is a long-term goal that will come through cultural change and a multi-pronged approach by Government, employers and educators, and not in the short-term through broadening eligibility for the Trade Support Loans Programme.

It is important to note the Trade Support Loans Programme is only one of several measures that underpin this Government's agenda to support the ongoing supply of skilled workers to the economy. Among these are measures better aimed at supporting occupations that currently employ a majority of women. One of these is the Australian Apprenticeships Incentives Programme, which supports employment and training opportunities. In making recent changes to this programme, which included the removal of the Tools For Your Trade incentive paid to apprentices, the Government has been careful to maintain support for the priority areas of aged care, child care, disability care and enrolled nurses. As the Committee will be aware, the majority of employees in these occupations are women. Another measure is the Australian Apprenticeships Ambassadors Programme, which show-cases successful apprentices including a large number of women in non-traditional trades.

I hope the Committee finds this information of assistance.

Yours sincerely

Ian Macfarlane

Appendix 2

Practice Note 1 and
Practice Note 2 (interim)

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

PRACTICE NOTE 1

Introduction

This practice note:

(i) sets out the underlying principles that the committee applies to the task of scrutinising bills and legislative instruments for human rights compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*; and

(ii) gives guidance on the committee's expectations with regard to information that should be provided in statements of compatibility.

The committee's approach to human rights scrutiny

- 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.
- Consistent with the approaches adopted by other human rights committees in other jurisdictions, the committee will test legislation for its potential to be incompatible with human rights, rather than considering whether particular legislative provisions could be open to a human rights compatible interpretation. In other words, the starting point for the committee is whether the legislation could be applied in ways which would breach human rights and not whether a consistent meaning may be found through the application of statutory interpretation principles.
- The committee considers that the inclusion of adequate human rights safeguards in the legislation will often be essential to the development of human rights compatible legislation and practice. The inclusion of safeguards is to ensure a proper guarantee of human rights in practice. The committee observes that human rights case-law has also established that the existence of adequate safeguards will often go directly to the issue of whether the legislation in question is compatible. Safeguards are therefore neither ancillary to compatibility and nor are they merely 'best practice' add-ons.
- 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 defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*.
- The committee notes that previously settled drafting conventions and guides are not determinative of human rights compatibility and may now need to be re-assessed for the purposes of developing human rights compatible legislation and practice.

The committee's expectations for statements of compatibility

- The committee views statements of compatibility as essential to the consideration

of human rights in the legislative process. It is also the starting point of the committee's consideration of a bill or legislative instrument.

- The committee expects statements to read as stand-alone documents. The committee relies on the statement to provide sufficient information about the purpose and effect of the proposed legislation, the operation of its individual provisions and how these may impact on human rights. While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee has found the templates[1] provided by the Attorney-General's Department to be useful models to follow.
- The committee expects statements to contain an assessment of whether the proposed legislation is compatible with human rights. The committee expects statements to set out the necessary information in a way that allows it to undertake its scrutiny tasks efficiently. Without this information, it is often difficult to identify provisions which may raise human rights concerns in the time available.
- In line with the steps set out in the assessment tool flowchart[2] (and related guidance) developed by the Attorney-General's Department, the committee would prefer for statements to provide information that addresses the following three criteria where a bill or legislative instrument limits human rights:
  1. whether and how the limitation is aimed at achieving a legitimate objective;
  2. whether and how there is a rational connection between the limitation and the objective; and
  3. whether and how the limitation is proportionate to that objective.
- If no rights are engaged, the committee expects that reasons should be given, where possible, to support that conclusion. This is particularly important where such a conclusion may not be self-evident from the description of the objective provided in the statement of compatibility.

SEPTEMBER 2012

1 http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/Statements-of-Compatibility-templates.aspx

2 http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/Tool-for-assessing-human-rights-compatibility.aspx

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

Practice Note 2 (interim)

Civil Penalties

Introduction

1.1 This interim practice note:

- sets out the human rights compatibility issues to which the committee considers the use of civil penalty provisions gives rise; and
- provides guidance on the committee's expectations regarding the type of information that should be provided in statements of compatibility.

1.2 The committee acknowledges that civil penalty provisions raise complex human rights issues and that the implications for existing practice are potentially significant. The committee has therefore decided to provide its initial views on these matters in the form of an interim practice note and looks forward to working constructively with Ministers and departments to further refine its guidance on these issues.

Civil penalty provisions

1.3 The committee notes that 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.[1] These penalties are pecuniary, and do not include the possibility of imprisonment. They are stated to be 'civil' in nature and do not constitute criminal offences under Australian law. Therefore, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters.

1.4 These provisions 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. The committee appreciates that these schemes are intended to provide regulators with the flexibility to use sanctions that are appropriate to and likely to be most effective in the circumstances of individual cases.

Human rights implications

1.5 Civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).[2] These articles set out specific guarantees that apply to proceedings involving the determination of 'criminal charges' and to persons who have been convicted of a 'criminal offence', and provide protection against the imposition of retrospective criminal liability.[3]

1.6 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 if it is considered to be 'civil' under Australian domestic law. Accordingly, when a provision imposes a civil penalty, an assessment is required of whether it amounts to a 'criminal' penalty for the purposes of the ICCPR.[4]

The definition of 'criminal' in human rights law

1.7 There are three criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law:

a) *The classification of the penalty in domestic law*: If a penalty is labelled as 'criminal' in domestic law, this classification is considered

determinative for the purposes of human rights law, irrespective of its nature or severity. However, if a penalty is classified as 'non-criminal' in domestic law, this is never determinative and requires its nature and severity to be also assessed.

b) *The nature of the penalty*: A criminal penalty is deterrent or punitive in nature. Non-criminal sanctions are generally aimed at objectives that are protective, preventive, compensatory, reparatory, disciplinary or regulatory in nature.

c) *The severity of the penalty*: The severity of the penalty involves looking at the maximum penalty provided for by the relevant legislation. The actual penalty imposed may also be relevant but does not detract from the importance of what was initially at stake. Deprivation of liberty is a typical criminal penalty; however, fines and pecuniary penalties may also be deemed 'criminal' if they involve sufficiently significant amounts but the decisive element is likely to be their purpose, ie, criterion (b), rather than the amount per se.

1.8 Where a penalty is designated as 'civil' under domestic law, it may nonetheless be classified as 'criminal' under human rights law if either the nature of the penalty or the severity of the penalty is such as to make it criminal. In cases where neither the nature of the civil penalty nor its severity are separately such as to make the penalty 'criminal', their cumulative effect may be sufficient to allow classification of the penalty as 'criminal'.

When is a civil penalty provision 'criminal'?

1.9 Many civil penalty provisions have common features. However, as each provision or set of provisions is embedded in a different statutory scheme, an individual assessment of each provision in its own legislative context is necessary.

1.10 In light of the criteria described in paragraph 1.9 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

1.11 As noted in paragraph 1.9(a) above, the classification of a civil penalty as 'civil' under Australian domestic law will be of minimal importance in deciding whether it is criminal for the purposes of human rights law. Accordingly, the committee will in general place little weight on the fact that a penalty is described as civil, is made explicitly subject to the rules of evidence and procedure applicable to civil matters, and has none of the consequences such as conviction that are associated with conviction for a criminal offence under Australian law.

b) The nature of the penalty

1.12 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 punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;[5]
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at regulating members of a specific group (the latter being more likely to be viewed as 'disciplinary' rather than as 'criminal').

c) The severity of the penalty

1.13 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;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed;
- whether the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision is higher than 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.

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

1.14 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 decriminalization. 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 article 14 and article 15 of the ICCPR.

1.15 If a civil penalty is characterised as not being 'criminal', the 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 committee's expectations for statements of compatibility

1.16 As set out in its *Practice Note 1*, the committee views sufficiently detailed statements of compatibility as essential for the effective consideration of the human rights compatibility of bills and legislative instruments. The committee expects statements for proposed legislation which includes civil penalty provisions, or which draws on existing legislative civil penalty regimes, to address the issues set out in this interim practice note.

1.17 In particular, 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 article 14 and article 15 of the ICCPR, including providing justifications for any limitations of these rights.[6]

1.18 The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions are set out briefly below. The committee, however, notes that the 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.

Right to be presumed innocent

1.19 Article 14(2) of the ICCPR provides that a person is entitled to be presumed innocent until proved 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.**

Right not to incriminate oneself

1.20 Article 14(3)(g) of the ICCPR provides that a person has the right 'not to be compelled to testify against himself or to confess guilt' in criminal proceedings. **Civil penalty provisions that are considered 'criminal' and which compel a person to provide incriminating information that may be used against them in the civil penalty proceedings should be appropriately justified in the statement of compatibility.[7] If use and/or derivative use immunities are not made available, the statement of compatibility should explain why they have not been included.**

Right not to be tried or punished twice for the same offence

1.21 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.**

1 This approach is reflected in the Regulatory Powers (Standard Provisions) Bill 2012, which is intended to provide a standard set of regulatory powers which may be drawn on by other statutes.

2 The text of these articles is reproduced at the end of this interim practice note. See also UN Human Rights Committee, General Comment No 32 (2007) on article 14 of the ICCPR.

3 Article 14(1) of the ICCPR also guarantees the right to a fair hearing in civil proceedings.

4 This practice note is focused on civil penalty provisions that impose a pecuniary penalty only. But the question of whether a sanction or penalty amounts to a 'criminal' penalty is a more general one and other 'civil' sanctions imposed under legislation may raise this issue as well.

5 In most, if not all, cases, proceedings in relation to the civil penalty provisions under discussion will be brought by public authorities.

6 That is, any limitations of rights must be for a legitimate objective and be reasonable, necessary and proportionate to that objective – for further information see *Practice Note 1*.

7 The committee notes that a separate question also arises as to whether testimony obtained under compulsion that has already been used in civil penalty proceedings (whether or not considered 'criminal') is consistent with right not to incriminate oneself in article 14(3)(g) of the ICCPR if it is used in subsequent criminal proceedings.

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Articles 14 and 15 of the International Covenant on Civil and Political Rights

1. Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal

case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

c) To be tried without undue delay;

d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.