

## **Chapter 2**

### **Concluded matters**

- 2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.
- 2.2 Correspondence relating to these matters is included at Appendix 1.

## **Criminal Code Amendment (Animal Protection) Bill 2015**

*Sponsor: Senator Chris Back*

*Introduced: Senate, 11 February 2015*

### **Purpose**

2.3 The Criminal Code Amendment (Animal Protection) Bill 2015 (the bill) proposes to amend the *Criminal Code Act 1995* to insert new offences in relation to failure to report a visual recording of malicious cruelty to domestic animals, and interference with the conduct of lawful animal enterprises.

2.4 Measures raising human rights concerns or issues are set out below.

### **Background**

2.5 The committee previously considered the bill in its *Twenty-fourth Report of the 44<sup>th</sup> Parliament* (previous report) and requested further information from the legislation proponent as to whether a number of measures in the bill were compatible with human rights.<sup>1</sup>

### **Requirement to report malicious cruelty to animals**

2.6 The bill would introduce an offence provision to provide that a person recording what they believe to be malicious cruelty to an animal or animals commits an offence if they fail to report the event to the relevant authorities within one business day of the event occurring, and to provide all recorded material within five business days.

2.7 The committee previously considered that the bill engages and limits the right not to incriminate oneself.

### ***Right to a fair trial and fair hearing rights***

2.8 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

2.9 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right to not incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

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1 Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (23 June 2015) 3-6.

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### *Compatibility of the measures with the right to a fair trial and fair hearing rights*

2.10 The committee considered that the bill engages and limits the right not to incriminate oneself as providing a recording of cruelty to animals to the relevant authorities may provide evidence of the individual undertaking the recording committing an offence, such as criminal trespass.

2.11 However, the statement of compatibility does not identify the measure as limiting the right to protection from self-incrimination in this way, and therefore provides no justification for the limitation.

2.12 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law.

2.13 The committee therefore sought the advice of the legislation proponent as to whether the limitation on the right to freedom from self-incrimination is compatible with the right to a fair trial, 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.

### **Legislation proponent's response**

#### **Self-incrimination**

1.23 and 1.24 of the Report state:

*"The committee's assessment of the requirement to report malicious cruelty to animals against article 14 of the International Covenant on Civil and Political Rights (right not to incriminate oneself) raises questions as to whether the requirement to potentially incriminate oneself is justifiable.*

*As set out above, the requirement to report malicious cruelty to animals engages and limits the right not to incriminate oneself. The statement of compatibility does not provide an assessment as to the compatibility of the measure with this right. The committee therefore seeks the advice of the legislation proponent as to whether the limitation on the right to freedom from self-incrimination is compatible with the right to a fair trial, 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."*

Response:

Firstly, it is clear and self-evident that the proposals are aimed at achieving a legitimate objective, namely to require the timely reporting of malicious cruelty to animals to allow immediate preventative action to be taken.

Secondly, there is indisputably a rational connection between the possible limitation and the twin objectives of preventing cruelty to animals and preventing illegal interference in the lawful operation of animal enterprises.

Whether a limitation regarding self-incrimination actually exists at all is an arguable point, however if it does exist then the magnitude of the limitation is certainly very minimal in comparison to the seriousness of illegal and malicious cruelty against animals.

Thirdly, the limitation is a reasonable and proportionate measure for the achievement of the objective of addressing malicious cruelty because it requires a person with records of illegal activities to soon present them to the appropriate enforcement agencies for immediate action. The legitimate purpose of this legislation is to make responsible enforcement authorities aware of what may or may not be illegal activity.

The handing over of a visual recording does not in itself necessarily imply any association or potential culpability, nor does it impact on an individual's subsequent right for a fair trial.

Importantly the requirement to disclose materials detailing animal cruelty to authorities in a timely manner is wholly consistent with norms of responsible citizenry and delivers the opportunity for the acts of cruelty to be swiftly interrupted.

By way of a simple comparison, under State legislation it is an offence to fail to report a traffic accident to enforcement agencies as soon as possible. This absolute reporting requirement exists even if no other person is present at the scene of the accident and whether or not there are liability considerations for the person making the report. This requirement does not limit the right to not incriminate oneself, and there is no impact whatsoever on procedural fairness nor upon the presumption of innocence.

Another notable comparison relates to the issue of child abuse where Parliaments in all Australian states and territories have enacted mandatory reporting laws of some description (for professionals). While not wishing to link or associate the subject matter in any way, the legal principle provides an example of a requirement to report egregious activities of cruelty.

The key point is that it is immaterial as to whether or not the person disclosing the information to authorities has themselves potentially participated in any illegal activities, the primary requirement to report is simple and absolute.

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Of course one could envisage certain circumstances where the person who is required to hand over the material might themselves be complicit with the illegal activities or may have already withheld the information in contravention of the reporting requirements. However similar situations can exist in the provided examples of mandatory reporting of child abuse and traffic accidents. However the reporting is a discrete requirement in its own right and does not in itself constitute any limitation on the right to freedom from self-incrimination nor the right to a fair trial.

To reaffirm this point, the Bill requires a person who has acquired significant information regarding illegal animal cruelty to immediately provide this to enforcement agencies regardless of whether the person has participated in the activities or has potentially committed an ancillary offence.<sup>2</sup>

### **Committee response**

2.14 **The committee thanks the Senator for his response.** The response states that 'it is clear and self-evident' that the bill seeks to achieve a legitimate objective, 'namely to require the timely reporting of malicious cruelty to animals to allow immediate preventative action to be taken.' Under international human rights law, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. There must be evidence and reasoning to support a claim that illegal and malicious cruelty against animals is a pressing or substantial concern that requires a limitation on fair hearing rights. Without that evidence, there is a question as to whether the bill pursues a legitimate objective for the purposes of international human rights law.

2.15 The response also states that 'there is indisputably a rational connection' between the measure and the objective being achieved, namely the twin objectives of preventing cruelty to animals and preventing illegal interference in the lawful operation of animal enterprises. However, no evidence is provided to support this claim, and it is possible that the measure would have the opposite effect; it could be, for example, that individuals may be discouraged from filming, and therefore reporting on, animal cruelty as a result of the bill for fear of being liable for criminal trespass. As a result, less instances of animal cruelty could come to light, making the problem of animal cruelty worse. In the absence of evidence or information to establish the likely efficacy of the measure there is a question as to whether there is a rational connection between the measure and the objective being achieved.

2.16 To show the proportionality of the bill, the bill could have included, for example, a requirement that any evidence of animal cruelty provided by an individual may not be used against that individual if they themselves were not involved in the cruelty (known as a 'use immunity' and a 'derivative use immunity');

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2 See Appendix 2, Letter from Senator Chris Back to the Hon Philip Ruddock MP (dated 17 July 2015) 2-3.

this would have protected against self-incrimination. Because the bill does not include a safeguard such as this the limitation on fair hearing rights and on the specific protection against self-incrimination is not proportionate.

**2.17 The committee considers that the measure engages and limits the right not to incriminate oneself. In order to avoid being incompatible with this right the committee recommends that the offence provision include a 'use' and 'derivative use' immunity so that an individual who provides footage of animal cruelty to the police may not have that footage or evidence obtained as a result of that footage used against them in a criminal trial (provided that the individual is not involved in the animal cruelty).**

### **Offence provision for conduct that destroys or damages property**

2.18 The bill provides that a person commits an offence if they engage in conduct that destroys or damages property used in carrying on an animal enterprise, or belonging to a person who carries on, or is associated with, a person who carries on an animal enterprise. A person who causes economic damage exceeding \$10 000 is liable to a maximum five year prison term.

2.19 The committee considered that this offence provision engages and may limit the prohibition against arbitrary detention.

### ***Right to liberty (prohibition against arbitrary detention)***

2.20 Article 9 of the ICCPR protects the right to liberty, understood as the procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. The prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

2.21 Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require the detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary.

### ***Compatibility of the measures with the right to liberty***

2.22 The committee previously noted that the *Guide to Framing Commonwealth Offences* states that 'a penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness'.<sup>3</sup> As it not clear that a prison term of five years for economic damage in excess of \$10 000 is comparable to similar types of offences, the committee considered that the penalty may be so excessive as to be unjust (and therefore could amount to arbitrary detention under article 9 of the ICCPR).

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2.23 However, the statement of compatibility does not identify the measure as limiting the right to liberty, and therefore provides no justification for the limitation.

2.24 The committee further noted that, as other legislation already includes provisions that make property damage a criminal offence, it is important that the human rights assessment of the bill address the question of whether the proposed offence provisions may be regarded as necessary in pursuit of a legitimate objective for the purposes of international human rights law.

2.25 The committee therefore sought the advice of the legislation proponent as to 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.

## Legislation proponent's response

### Arbitrary detention

1.34 of the Report states:

*"The committee's assessment of the offence provision against article 9 of the International Covenant on Civil and Political Rights (right not to be arbitrarily detained) raises questions as to whether the offence may be excessive or disproportionate having regard to the breadth of the provision."*

### Response:

The Bill does not propose arbitrary detention.

Arbitrary detention involves the arrest or detainment of an individual in a case in which there is no likelihood or evidence that they committed a crime against a legal statute, or in which there has been no proper due process of law.

The drafting of the proposed Bill is consistent with the existing Criminal Code provisions and alleged offenders will be fully subject to normal legal due process. While there are maximum penalties for serious offences which may involve imprisonment, these could only be implemented following the normal judicial process. The maximum penalties are certainly not mandatory.

By way of background explanation, the words "maximum penalty" used to appear in Commonwealth legislation, but this expression is no longer used in new Acts. Additionally the older references in statutes are gradually being amended to the new standard. To be clear, the current reference to "penalty" in this Bill is still intended to be a maximum penalty, and it is a matter for the court, in the exercise of judicial discretion, to determine what level of penalty to impose.

A court always has a range of penalty options at its disposal which it will readily choose to utilise according to the circumstances of the offence or the character of the offenders.

It is envisaged that in ordinary circumstances, many of the indictable offences can be summarily dealt with before a Magistrate in the Local Court where the maximum penalty which can be imposed for an offence is generally two years imprisonment. This is regardless of the stated maximum penalty for the offence.

The Local Court hearing might apply to less significant breaches such as simple trespass or minor damage. However, there are some indictable offences which rightfully may be considered too serious to be dealt with in the Local Court. The hearings for these offences may well start off in the Local Court but be then referred to the District or Supreme Court for trial or sentencing. However if the alleged offences are clearly of a strictly indictable nature which requires arraignment, then the Local Court would be avoided altogether.

If found guilty, the accused would then face a penalty which is appropriate to both the level of offence seriousness and the specific case circumstances. The decision of the Court regarding a penalty would presumably also be influenced by many other factors which might include the testimony of character witnesses, existing criminal history, degree of repentance and the guidance of pre-sentence or psychiatric reports.

As such the accused may possibly face a strong penalty in a superior Court for serious offences conducted with wilful intent, or for lesser offences may just receive a fine, community service or a suspended sentence.

The key point is that the normal array of checks and balances will always apply in the Court and there is certainly nothing arbitrary or mandatory proposed in this Bill with regard to detention, sentencing or maximum penalties.

Once more, to be clear with regard to the concerns raised in 1.34, the penalties are reasonable and certainly not excessive or disproportionate. Further discussion and evidence to demonstrate this is provided in following section.

#### **Degree and consistency of penalty**

While a clarification has not been specifically sought by the Committee, I feel bound to respond to two concerns contained in point 1.30, notably:

*"a penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness"; and*

*"As it not clear that a prison term of five years for economic damage in excess of \$10,000 is comparable to similar types of offences, the committee considers that the penalty may be so excessive as to be unjust".*

I wish to state that the proposed penalties in this Bill are fully consistent with normal practice and neither excessive nor unjust. The high-end of

contemplated offences are serious activities with direct consequences for human and animal life and as such they beckon a firm deterrent.

The proposed maximum penalties are in most cases less than comparable State and Territory legislation for malicious property damage.

As a test of relativity, in NSW under s195 of the *Crimes Act 1900*, a person who intentionally or recklessly destroys or damages property is liable for imprisonment for up to five years; or if the damage is caused by fire or explosion, for up to ten years. However if the offences are carried out in the company of another, the maximum terms are longer.

Under s29 of the Commonwealth *Crimes Act 1914*, destroying or damaging Commonwealth property by fire has a maximum penalty of 10 years imprisonment.

Under the Australian Capital Territory *Crimes Act 1900*, offenders can be imprisoned for 15 years plus 1500 penalty units, or up to 20 years if they acted dishonestly with a view to gain. Indeed, even threatening to damage property by fire has a maximum of 7 years jail plus 700 penalty units.

In Tasmania, under the *Criminal Code Act 1924*, a person placing combustible material with the intent to injure property faces a maximum jail term of 21 years plus a discretionary fine. In my home state of Western Australia, under s144 of the *Criminal Code* the maximum penalty for wilful damage to property by fire is 14 years.

It is clear that the proposed penalties in the Criminal Code Amendment (Animal Protection) Bill 2015 are moderate by comparison.

### **Necessary nature**

While a clarification has not been specifically sought by the Committee, I would like to respond to a statement contained in point 1.33, notably:

*"as other legislation already includes provisions that make property damage a criminal offence ..... whether the proposed offence provisions may be regarded as necessary in pursuit of a legitimate objective for the purposes of international human rights law".*

As exemplified earlier in this document, the various levels of penalties within Commonwealth, State and Territory Criminal Codes are quite inconsistent. This Bill will provide some consistency by way of federal legislation.

While some elements of the possible suite of offences might be provided for in existing legislation (such as trespass or arson) there are other costly nuisance activities which may impact upon a primary producer attempting to lawfully conduct their business (such as biosecurity breaches, releasing animals from captivity, preventing the transportation of stock and interfering with husbandry practices) which are not.

Whatever the reason, it is abundantly apparent that incidences of the types of unruly activities contemplated in this Bill are currently not being

prosecuted through normal channels. Therefore there is ample justification for legislation which defines and captures the central nature of the problem relating to animals and primary producers so that the enforcement action which is currently not being taken will be taken in the future.

I also wish to comment on the question as to whether or not the intent of this Bill is a legitimate objective for the purposes of international human rights law. The answer is yes.

I bring the Committee's attention to the right of a farmer, primary producer or animal enterprise manager to support their family and lawfully conduct their business or operations without illegal interruption from those who simply do not respect this right. Just the same as all other citizens in the community, they hold the right to protection under the law when their fundamental rights to maintain the safety of their property and person are threatened, as supported by Article 3 of the Universal Declaration of Human Rights which states:

*"Everyone has the right to life, liberty and security of person."*

Furthermore, Article 8 states: *"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."*

Importantly, Article 7 states: *"All are equal before the law and are entitled without any discrimination to equal protection of the law."*

With regard to those who choose to offend their universal civic obligations as set out in Article 1 to: *"act towards one another in a spirit of brotherhood,"* they will rightly face appropriate sanctions when undertaking illegal activities against primary producers.

In this regard Article 10 states: *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*

As such I would contend that human rights considerations are implicitly central to both the purpose and utility of this Bill. The legislation as proposed provides a degree of protection for law-abiding citizens in the pursuit of activities such as primary production, while also providing offenders the right to fairly defend their actions in a court of law.

From a human rights perspective this supports the universal recognition that basic rights and fundamental freedoms are inalienable and equally applicable to all human beings.<sup>4</sup>

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4 See Appendix 2, Letter from Senator Chris Back to the Hon Philip Ruddock MP (dated 17 July 2015) 3-7.

## Committee response

2.26 **The committee thanks the Senator for his detailed response.** The Senator states that arbitrary detention only arises where the detention is unlawful and that the bill would only result in individuals being detained as a result of a criminal conviction in accordance with Australian domestic law. However, arbitrary detention under international human rights law is much broader than unlawful detention. The UN Human Rights Committee has explained:

...arrests or detentions may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful.<sup>5</sup>

2.27 Accordingly, detention that is lawful under Australian law may nevertheless be arbitrary and thus in breach of Australia's obligations under article 9 of the ICCPR. The UN Human Rights Committee has further explained:

The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law.<sup>6</sup>

2.28 The legislation proponent's response was that the offences in the bill are modest by comparison with a number of Commonwealth offences and offences under state and territory law.

2.29 However, the offences cited are not directly comparable to the offences in the bill. For example, under section 195 of the *Crimes Act 1900* (NSW), a person who destroys or damages property is liable for imprisonment for up to five years. Whereas under the bill, a person who recklessly destroys or damages property could be liable to a penalty of up to 20 years imprisonment should their actions lead to economic damage of a specified amount. The accused person would not be able to ascertain in advance the quantum of economic damage that might be caused by their actions and so the penalty may go up significantly depending on the nature of the business involved.

2.30 Further, the terms 'economic damage' and 'animal enterprise' are defined so broadly that it would not necessarily be evident when the provision applies to a situation and when it does not as well as the nature of the penalty that may apply to conduct. Individuals who do the same act may be treated differently and subject to a different penalty depending on the economic consequences of their action even though there may be no intention to cause economic damage and the likely amount of economic damage was completely unforeseen. These outcomes are also

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5 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons)*, UN Doc CCPR/C/GC/35 (16 December 2014) 3.

6 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons)*, UN Doc CCPR/C/GC/35 (16 December 2014) 3.

inconsistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

2.31 Because of the breadth of the offence provision as drafted, the uncertainty in its application and the size of the penalty, it may result in a term of imprisonment being imposed that could amount to arbitrary detention.

2.32 The legislation proponent also states that the offence provision is necessary on the basis that 'incidences of the types of unruly activities contemplated in this Bill are currently not being prosecuted through normal channels'. No information is provided to support the claim that there is a gap in the existing criminal law rather than a failure of police to properly prosecute offenders using existing offences. Moreover, no statistics are provided to support the claim that there is an endemic or significant problem with the 'types of unruly activities contemplated in the bill.'

**2.33 The committee considers that the offence provision for conduct that destroys or damages property causing 'economic damage' engages and limits the right not to be arbitrarily detained. In order to be compatible with this right the committee recommends that the legislation proponent seek the advice of the Attorney-General to ensure that the offence provision is drafted consistently with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

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## Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015

*Portfolio: Social Services*

*Introduced: House of Representatives, 28 May 2015*

### Purpose

2.34 The Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015 (the bill) seeks to amend the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* to:

- extend the ordinary waiting period for all working age payments from 1 July 2015;
- remove access to Newstart Allowance and Sickness Allowance to 22 to 24 year olds and replace these benefits with access to Youth Allowance (Other) from 1 July 2016;
- provide for a four-week waiting period for certain persons aged under 25 years applying for Youth Allowance (Other) or Special Benefit from 1 July 2016;
- pause indexation on certain income free and income test free areas and thresholds for three years; and
- cease the low income supplement from 1 July 2017.

2.35 Measures raising human rights concerns or issues are set out below.

### Background

2.36 The bill reintroduces a number of measures previously included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014 (the No. 4 bill). The No. 4 bill reintroduced some measures previously included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 (the No. 1 bill) and the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 (the No. 2 bill).

2.37 The committee reported on the No. 1 bill and No. 2 bill in its *Ninth Report of the 44<sup>th</sup> Parliament*,<sup>7</sup> and concluded its examination of the No. 2 bill in its *Twelfth Report of the 44<sup>th</sup> Parliament*.<sup>8</sup> In that report, the committee requested further

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7 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 83.

8 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 67.

information from the Minister for Social Services regarding measures contained within the No. 1 bill.<sup>9</sup>

2.38 The committee then considered the No. 4 bill in its *Fourteenth Report of the 44<sup>th</sup> Parliament*, and in the *Seventeenth Report of the 44<sup>th</sup> Parliament* concluded its consideration of the No. 1 bill and No. 4 bill.<sup>10</sup>

2.39 The committee considered the bill in its *Twenty-fourth Report of the 44<sup>th</sup> Parliament*, and requested further information from the Minister for Social Services as to whether the bill was compatible with Australia's international human rights obligations.<sup>11</sup>

2.40 The bill was negated in the Senate on 9 September 2015.

## **Schedule 2 – Age requirements for various Commonwealth payments**

2.41 Schedule 2 of the bill would provide that 22-24 year olds are no longer eligible for Newstart Allowance (or Sickness Allowance), and are instead eligible for Youth Allowance. Existing recipients of Newstart Allowance (or Sickness Allowance) would continue to receive those payments until such time as they are no longer eligible.

2.42 The committee considered in its previous analysis that increasing the age of eligibility for various Commonwealth payments engages and limits the right to equality and non-discrimination.

### ***Right to equality and non-discrimination***

2.43 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

2.44 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides 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 and non-discriminatory protection of the law.

2.45 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),<sup>12</sup> which has either the purpose (called

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9 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 55-64.

10 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 94-95, and Parliamentary Joint Committee on Human Rights, *Seventeenth Report of the 44th Parliament* (2 December 2014) 11-13.

11 Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (24 June 2015) 12-19.

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.

'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.<sup>13</sup> The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.<sup>14</sup>

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

2.46 The changes to the threshold for Newstart eligibility in Schedule 2 of the bill reintroduce measures previously contained within Schedule 8 of the No. 2 bill and Schedule 6 of the No. 4 bill, which the committee has previously considered.

2.47 The statement of compatibility for the bill does not identify the measures as engaging and potentially limiting the right to equality and non-discrimination.

2.48 However, as the committee noted in its *Ninth Report of the 44<sup>th</sup> Parliament*, a measure that establishes criteria for access to social security based on age is likely, on its face, to limit the right to equality and non-discrimination. That is, by reducing access to the amount of social security entitlements for persons of a particular age, the measure appears to directly discriminate against persons of this age group.

2.49 A measure which appears directly discriminatory in this way may nevertheless be justifiable under international human right law. The human rights assessment of the measure therefore must establish that the proposed age cut offs are necessary, reasonable and proportionate in pursuit of a legitimate objective.

2.50 As the statement of compatibility for the bill does not identify the measure as engaging and potentially limiting the right to equality and non-discrimination, it therefore provides no assessment as to the compatibility of the measure with reference to the committee's previous examination of the measures.

2.51 The committee noted its usual expectation that where a measure that it has previously considered is reintroduced, previous responses to the committee's requests for further information be used to inform the statement of compatibility for the reintroduced measure.

2.52 The committee therefore sought the advice of the Minister for Social Services as to 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.

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13 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989).

14 *Althammer v Austria* HRC 998/01, [10.2].

## Minister's response

The measure in schedule 2 to extend 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 better ensure that they are able to achieve long term sustainable employment outcomes.

Since 1998, there have been two different maximum ages for Youth Allowance - one for full-time students on Youth Allowance (student) and one for young unemployed people on Youth Allowance (other). Once a young person passes the maximum age for youth allowance as a job seeker (currently 21) they transition to Newstart Allowance, which is paid at a higher rate of payment.

For full-time students, however, the transition from Youth Allowance (student) to the adult student payment, Austudy, occurs at the age of 25 years.

Evidence suggests that education and training can play a significant role in improving a person's chances of finding and maintaining employment, particularly for young people. However, the higher rates of Newstart Allowance and Sickness Allowance (currently paid to around 73,000 unemployed youth aged 22 to 24 years) can act as an incentive for young people to stay on Newstart Allowance or Sickness Allowance instead of pursuing full-time study or employment, or to give up study in order to receive these payments. This measure achieves the dual objective of removing this perverse incentive and achieving consistent eligibility criteria, by placing all under 25 year olds on the same payment level, whether they are unemployed or studying full-time.

Australia's social security system is designed to be highly targeted and to provide for different payments, rates and other settings that reflect the needs and circumstances of different cohorts. For this reason, age-based eligibility criteria are already part of a number of social security payments, including Youth Allowance as outlined above. To the extent that this measure may limit the right to non-discrimination by affecting only a particular age group, this is reasonable and proportionate to the objective of ensuring that payment rates are aligned for young people aged under 25 with similar needs and circumstances, irrespective of whether they are studying or looking for work.

Affected young people will continue to be supported by a range of programmes and other services provided by the Commonwealth and state governments. Grandfathering arrangements will apply to young people aged 22 years or over who are in receipt of Newstart Allowance or

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Sickness Allowance as at 1 July 2016 to ensure that no existing recipients will have their payment rate reduced.<sup>15</sup>

### **Committee response**

2.53 **The committee thanks the Minister for Social Services for his response.** The committee notes the minister's advice that the measure is aimed at achieving consistency across payments for young people as well as to encourage young people to undertake or participate in education or training to help achieve long term sustainable employment outcomes. The committee also notes that currently there are higher rates of payments to young people on Newstart and Sickness Allowances than to those on Youth Allowance, which may act as a disincentive to pursue full-time study.

2.54 **Accordingly, the committee considers that the measure may be compatible with the right to equality and non-discrimination and has concluded its examination of this matter.**

### **Schedule 3 – Income support waiting periods**

2.55 Schedule 3 of the bill would introduce a requirement from 1 July 2016 that individuals under the age of 25 be subject to a four-week waiting period, as well as any other waiting periods that may apply, before social security benefits become payable.

2.56 The measure would apply to applicants seeking Youth Allowance (Other) and Special Benefit. The four-week waiting period may be reduced if a person has previously been employed, and there are a range of exemptions for parents and individuals with a disability.

2.57 The committee considered previously that the income support waiting periods engage and limit the rights to social security and an adequate standard of living.

### ***Right to social security***

2.58 The right to social security is protected 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.

2.59 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;

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15 See Appendix 2, Letter from the Hon Scott Morrison MP, Minister for Social Services, to the Hon Philip Ruddock MP (dated 31 July 2015) 1-2.

- 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).

2.60 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.

2.61 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***

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

2.63 In respect of the right to an adequate standard of living, article 2(1) of the ICESCR also imposes on Australia the obligations listed above in relation to the right to social security.

### ***Compatibility of the measure with the rights to social security and an adequate standard of living***

2.64 The introduction of the four-week waiting period in Schedule 3 of the bill re-introduces, with some amendments (particularly to the timeframe), the proposal for a 26-week waiting period previously contained in Schedule 9 of the No. 2 bill and Schedule 7 of the No. 4 bill.

2.65 The committee previously concluded, in its *Twelfth Report of the 44<sup>th</sup> Parliament*, that the measure was incompatible with the right to social security and an adequate standard of living.<sup>16</sup>

2.66 In comparison to the previous measure, the bill would reduce the waiting period to four weeks rather than 26 weeks; and introduce an additional \$8.1 million

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16 See Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 73, para 2.12.

in funding that will be allocated to Emergency Relief providers to provide assistance for those that have been disproportionately impacted by the measure.

2.67 The statement of compatibility for the bill acknowledges that the measure engages the rights to social security and an adequate standard of living, and states that the objective of the measure is to 'encourage greater participation in work through establishing firm expectations for young job seekers'.<sup>17</sup>

2.68 The committee considered that this may be regarded as a legitimate objective, and that the measure is rationally connected to that objective, for the purposes of international human rights law.

2.69 However, the committee considered that the statement of compatibility has not demonstrated that the measure is proportionate to its stated objective, that is, that it is the least rights restrictive means of achieving that objective.

2.70 In particular, the statement of compatibility has not addressed how young people are to sustain themselves and provide for an adequate standard of living during the four-week period without social security.

2.71 Further, while the committee welcomes additional funding for Emergency Relief providers, the bill provides no explicit guarantee that individuals subject to the measure will be able to access support from the charitable organisations allocated the funding. In addition, the statement of compatibility provides no justification as to how this additional funding supports the compatibility of the measure with the right to social security (which is broader than the receipt of charity) and the right to an adequate standard of living.

2.72 The committee therefore sought the advice of the Minister for Social Services as to whether the measure is a proportionate means of achieving the stated objective.

## Minister's response

### Right to social security

Unemployment rates for young people have increased significantly since the global financial crisis. As at June 2015, the youth unemployment rate was 13.4 per cent, compared with an average total unemployment rate of six per cent. The proportion of young Australians not in employment, education or training is also high, with young people in this category at particular risk of social exclusion. The 2014 report by National Centre for Vocational Education Research, *How young people are faring in the transition from school to work*, indicates that in 2012 more than a quarter of 21 year olds (27.4 per cent) were either not engaged or not fully engaged in employment, education or training. The report also notes that not all young people in this category are 'vulnerable' and that some may be in this category voluntarily. This measure seeks to address youth

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17 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 9.

unemployment by establishing firm expectations for young people to accept jobs or move into education and training, rather than relying on income support in the first instance at the risk of becoming disengaged, both socially and economically.

The risk this measure could be considered to limit the right to social security by restricting immediate access to income support is mitigated by the specific targeting of the measure to those young people who are job ready (in Stream A of jobactive) and able to support themselves through paid work.

Job seekers who have been assessed as having significant barriers to work will be exempt from the measure. This will include job seekers in Stream B and C of jobactive, parents with 35 per cent or more care of a child, young people in or leaving state care and those with a temporary activity test exemption of more than two weeks, such as pregnant women in the six weeks before they are expected to give birth, or people testing their eligibility for Disability Support Pension. The Bill before Parliament also allows the Minister to make further exemptions via a legislative instrument. These exemptions ensure that young people who face more complex and/or multiple barriers to finding work and are less able to fully support themselves will continue to receive income support.

In recognition of the importance of education and training in preventing future unemployment, young people who return to school or full-time vocational education or university study will be able to access student payments, such as Youth Allowance (student), and therefore will not be subject to a four week waiting period.

Evidence also suggests that this measure will be most effective if it is supported by an appropriate level of employment services, targeted at job seeker deficits<sup>18</sup>. Job seekers subject to a four week waiting period will continue to be supported by the full range of programmes and assistance currently available under jobactive to enable them to find employment. Job seekers will also be required to participate in rapid activation activities designed to enhance their chances of moving into work as quickly as possible.

To the extent that this measure may limit the right social security, this limitation is reasonable and proportionate to the objective of encouraging young people to be either working or studying as targeted cohort are those who are job ready and capable of finding and maintaining a job.

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18 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.

### Right to an adequate standard of living

Income support data (as at June 2015) shows that a majority of young job seekers are receiving support from their parents, with 54 per cent of Youth Allowance (other) recipients considered to be dependent on their parents for the purposes of calculating their rate of payment. This indicates that a large proportion of affected recipients will have access to external support in order to maintain an adequate standard of living.

From 1 July 2016, pending the implementation of the measure, around \$8.1 million over three years in additional funding will be available to Emergency Relief providers to provide basic material aid to young people during the four week waiting period. This assistance is not intended to provide assistance to all young people affected by this measure. It is also not meant to meet affected individuals' living costs during the waiting period. Assistance will vary according to the needs and circumstances of the person.

This additional Emergency Relief funding will become available only following the implementation of the measure. The Department will undertake an analysis of payments data and consult with the Emergency Relief sector to inform the targeting and distribution of available funds to those most affected by the measure.

The limitation of the availability of income support is reasonable and proportionate as the measure is targeted at those who are job ready and able to be self-supporting through work and a large proportion of the targeted cohort will have access to parental support and additional Emergency Relief funding will be available for those in need.<sup>19</sup>

## **Committee response**

**2.73 The committee thanks the Minister for Social Services for his response.** The committee notes that it had previously accepted that the measure pursues a legitimate objective and that the measure is rationally connected to that objective. Accordingly, the committee sought further information from the minister in relation to the proportionality of the measure. Of particular concern to the committee was whether the measure was the least rights restrictive approach.

**2.74** The committee notes the minister's advice that the measure specifically targets those young people who are job ready and that there are important protections for parents and those assessed as unable to work who will be exempt from the measure. However, the measure will apply to all individuals assessed as job ready (in Stream A of jobactive) and there will be no individual assessment of each job seeker's engagement with seeking work, nor an individual assessment of their ability to find jobs. Currently, there is a youth unemployment rate of 13.4 per cent which suggests there are more job seekers than jobs available. Evidence is not

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<sup>19</sup> See Appendix 2, Letter from the Hon Scott Morrison MP, Minister for Social Services, to the Hon Philip Ruddock MP (dated 31 July 2015) 3-4.

provided to confirm that all jobseekers will be eligible and able to immediately engage with education and immediately gain income support.

2.75 The measure does not also allow for an individual assessment of the individual's capacity to live without social security support for four weeks and there is no discretion that would enable Centrelink to waive the waiting period if the individual does not meet the set exemptions. In the absence of these protections, the measure cannot be said to be the least rights restrictive means of achieving a legitimate objective and therefore does not impose a proportionate limitation on the right to social security.

2.76 In relation to an adequate standard of living, the response suggests that 46% of young people do not live at home and are thus not fully supported by their parents. The majority of these would appear to be in private rental accommodation of some sort. It is not clear from the response how those young people will meet the costs of housing during the waiting period and meet other basic living costs to provide an adequate standard of living.

2.77 While the response states that the department will analyse payment data and consult with the Emergency Relief sector to inform the targeting and distribution of available funds to those most affected by the measure, the response does not suggest that Emergency Relief will ensure that all individuals affected by the measure will be able to provide an adequate standard of living.

2.78 The measure does not appear to be proportionate as it does not include an individual assessment for each person affected by the measure nor does it provide safeguards to ensure that no individual is left unable to meet their basic needs during the waiting period.

2.79 **The committee's assessment of the proposed income support waiting period for young people aged under 25 against articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (right to social security and an adequate standard of living) raises questions as to whether the changes are justifiable under international human rights law.**

2.80 **However, as the bill has been negatived in the Senate, the committee draws the preceding analysis to the attention of the minister and has concluded its examination of the bill.**

### ***Right to equality and non-discrimination***

2.81 The right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR. More information is provided above at paragraphs [2.43] to [2.45].

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

2.82 The committee previously concluded that the measure in the No. 2 bill was incompatible with the right to equality and non-discrimination on the basis of age (direct discrimination).<sup>20</sup>

2.83 In comparison to the previous measure, the bill provides that the waiting period will apply to persons under the age of 25, rather than those under the age of 30.

2.84 The statement of compatibility for the bill acknowledges that the measure engages the right to equality and non-discrimination on the basis of age, but concludes that 'those subjected to a waiting period are young enough to reasonably draw on family support to assist them during the waiting period'.<sup>21</sup>

2.85 However, a measure that impacts differentially on or excludes individuals based on their age is likely, on its face, to be incompatible with the right to equality and non-discrimination. In this respect, by imposing a four-week waiting period based on a person's age, the measure appears to directly discriminate against persons under 25 years of age.

2.86 As noted above, a measure which appears directly discriminatory in this way may nevertheless be justifiable under international human right law. The human rights assessment of the measure must establish that the proposed age cut offs are necessary, reasonable and proportionate in pursuit of a legitimate objective.

2.87 However, the committee considered previously that the statement of compatibility had not established how persons under the age of 25, who will be impacted by the measure, will be able to 'reasonably draw on family support' any more than those over the age of 25.

2.88 In addition, no information was given as to how persons affected by the measure, who do not have the ability to draw on family support, could maintain housing and an adequate standard of living during the waiting period.

2.89 The committee therefore sought the advice of the Minister for Social Services as to whether the measure is a proportionate means of achieving the stated objective.

### **Minister's response**

Young unemployed people under 25 years have a significantly higher rate of unemployment compared to the general population, with a large number in the cohort also facing increased risk of social exclusion due to disengagement from work and education. The targeting of this measure to those under 25 is specifically aimed at addressing the risks for this

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20 See Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 79, para 2.25.

21 EM, SoC 12.

particular cohort by providing incentives for these young job seekers to pursue work or further education or training, which evidence suggests will reduce their chances of becoming long-term unemployed.

Additionally, around 43 per cent of the young people on unemployment payments aged under 25 years are still living in the parental home, compared to only seven per cent for those aged over 25. This shows that the cohort targeted by this measure is more likely to be drawing on family support and have secure housing than their older counterparts and therefore may be less likely to face hardship while serving a waiting period.

To the extent that this measure may limit the right to equality and non-discrimination by affecting only a particular age group, this is reasonable and proportionate in the context of factors particular to this group such as higher youth unemployment rates, high rates of youth disengagement from employment, education and training, and increased access to parental support.<sup>22</sup>

### **Committee response**

**2.90 The committee thanks the Minister for Social Services for his response.** The committee notes that it had previously accepted that the measure pursues a legitimate objective and that the measure is rationally connected to that objective. Accordingly, the committee sought further information from the minister in relation to the proportionality of the measure.

2.91 In terms of proportionality, the statement of compatibility concludes that 'those subjected to a waiting period are young enough to reasonably draw on family support to assist them during the waiting period'.<sup>23</sup> The minister's response states that 43 per cent of young people receiving unemployment benefits are living at home with their parents, compared with 7 per cent of those aged over 25. This shows there is some evidence that the measure is targeted at young people taking into account their ability to seek support from their parents. However, the response does show that the majority of young people on unemployment payments are not living at home (and are thus likely to have private rental costs) and are less likely to be able to rely on their parents for support during the waiting period. These figures also do not show whether a person living at home with their parents are doing so on a rent-free basis or whether such persons might be financially supporting their family members.

2.92 A human rights assessment of the measure must establish that the proposed age cut offs are necessary, reasonable and proportionate in pursuit of a legitimate objective. The response does not demonstrate that nearly all, or even a majority, of

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22 See Appendix 2, Letter from the Hon Scott Morrison MP, Minister for Social Services, to the Hon Philip Ruddock MP (dated 31 July 2015) 4.

23 EM, SoC 12.

individuals aged 25 or under will be able to rely on their parents for economic support and, as such, the measure does not appear sufficiently targeted to impose a proportionate limitation on the right to equality and non-discrimination based on age.

**2.93 The committee's assessment of the proposed income support waiting periods for young people aged under 25 against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (right to equality and non-discrimination) raises questions as to whether the changes are justifiable under international human rights law.**

**2.94 However, as the bill has been negated in the Senate, the committee draws the preceding analysis to the attention of the minister and has concluded its examination of the bill.**

**The Hon Philip Ruddock MP**

**Chair**

