

Appendix 1

Correspondence



**Australian
BORDER FORCE**



COMMISSIONER

The Honourable Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2601

Dear Mr Ruddock

Department of Immigration and Border Protection Operational Safety Order (2015)

In response to the Parliamentary Joint Committee on Human Rights *Twenty-sixth Report of the 44th Parliament*, please find attached a copy of the Operational Safety Order (2015) to assist in your assessment of the instrument's compatibility with the right to life.

Note that the Order is classified as For Official Use Only and is provided on an in-confidence basis to the Committee. Consistent with past practice, the Department of Immigration and Border Protection will publish a version of the Operational Safety Order (2015), which has been edited to an Unclassified level, on its website.

This Order provides a policy framework around using reasonable force by an officer in the exercise of their statutory powers and is mainly relevant to the duties of officers who are in the Australian Border Force.

You would already be aware that the Operational Safety Order (2015) supersedes the Use of Force Order (2015). I note that the Committee recently reviewed the Use of Force Order (2015) and concluded in its *Twenty-second Report of the 44th Parliament* that it was 'likely compatible with human rights'.

I wish to inform the Committee that some minor amendments have since been made to the Operational Safety Order (2015). These amendments were made following a review to ensure currency and consistency with other law enforcement agencies, and to ensure the order accurately reflected changes to terminology and workforce structure following integration with the Department of Immigration and Border Protection on 1 July 2015. The Operational Safety Order (2015) otherwise remains consistent with the Use of Force Order (2015), and it is the Department's view that it continues to remain compatible with human rights.

I trust this information is of assistance to the Committee.

Yours sincerely

Roman Quaedvlieg APM
Commissioner

// September 2015



THE HON ANDREW ROBB AO MP

MINISTER FOR TRADE AND INVESTMENT

C15-247

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

15 SEP 2015

Dear Mr ~~Ruddock~~ *Philip*

Thank you for your letter of 18 August 2015 seeking my advice about the human rights compatibility of the Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2015 [F2015L01027].

I understand that the Parliamentary Joint Committee on Human Rights is seeking my advice on:

- whether the proposed measure is aimed at achieving a legitimate objective
- whether there is a rational connection between the limitation [on a person's right to reputation] and that objective
- whether the limitation [on a person's right to reputation] is a reasonable and proportionate measure for the achievement of that objective.

Objective of the measure

The *Export Market Development Grants Act 1997* (the EMDG Act) provides non-discretionary grants to Australian small and medium-sized businesses that have incurred specified expenses promoting the export of their goods, services, intellectual property rights and know-how. The grant is a partial reimbursement of the expenses incurred.

The *Export Market Development Grants Amendment Act 2004* (the 2004 Amendment Act) introduced a 'not fit and proper person' test, to be applied by Austrade in accordance with Ministerial guidelines when assessing entitlement to payment of an EMDG grant.

The 2004 Amendment Act provided that a grant to which an applicant is otherwise entitled is not payable if, in accordance with Ministerial guidelines, Austrade determines that the applicant or an associate of the applicant is 'not fit and proper' to receive a grant.

As required under paragraph 101(1)(bb) of the Act, the Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2004 (the 2004 instrument) provide guidelines to be complied with by Austrade:

- in determining who is an associate of a person, for the purposes of the 'not fit and proper' provision; and
- in forming an opinion whether a person or any associate of the person is a fit and proper person to receive a grant.

In 2014 the Government amended the Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2004 so that the instrument's 'not fit and proper person' rules also applied to consultants preparing applications on behalf of their clients.

Recently this instrument was remade as it was due to sunset. The remade instrument is unchanged from the 2014 instrument.

Connection between the limitation and the objective of the Guidelines

The probity and good public image of EMDG applicants and consultants can have a significant impact on the public perception of the EMDG scheme, and the Government's management of it. The Government, applicants and EMDG consultants all share an interest in the EMDG scheme maintaining broad public support. This support depends upon public confidence in the probity of the scheme.

The Government considers that it is therefore appropriate that applicants are required to be fit and proper to receive a grant, and that consultants should also meet a similar standard. If the scheme were to be withdrawn due to poor public perception thousands of small and medium-sized Australian exporters would be directly affected.

The public is entitled to expect that taxpayer funds are directed to businesses that operate in accordance with Australian laws and acceptable business standards, and that the Government will take all reasonable steps to be sure that this happens. The 'fit and proper person' test for applicants provides this assurance.

Export Market Development Grants (EMDG) consultants have a direct and vested interest in the outcome of their clients' EMDG assessments and have an increasingly high public profile associated with the EMDG scheme. Consultants currently prepare almost 70 per cent of EMDG claims, and earn fees from the scheme, usually on a commission basis.

A 'fit and proper person' test for consultants provides an incentive for consultants to act honestly and to prepare claims with a high attention to claim accuracy. Consultants are not subject to the disciplinary rules of any professional body. The only influence the Government has over the conduct of consultants in the preparation of claims is through the mechanism of preventing them from preparing and lodging further claims where they are found to be 'not fit and proper'.

The 'fit and proper person' test provides applicants that are using a consultant to lodge a claim on their behalf with a degree of confidence that the consultant will act in a professional manner, will have sufficient skills and experience to complete the claim.

Is the limitation reasonable and proportionate?

The Government recognises that the making of a finding that an applicant or a consultant is not a fit and proper person is significant, and therefore there are a number of procedural and other safeguards in place to ensure that an applicant's or consultant's right to reputation is not limited and that any treatment is reasonable and proportionate.

Guidelines in the legislative instrument set out criteria for the Chief Executive Officer's (CEO's) decision. The CEO's decision will be subject to the normal rules of administrative law. These include the principle of procedural fairness (natural justice). In accordance with this legal requirement, before a decision is made, Austrade must advise each applicant or consultant it considers may not be a fit and proper person of the grounds for that concern, and of any adverse material or information that may be taken into account, and give the applicant or consultant the opportunity to respond. The applicant's or consultant's response must be taken into account in making the decision.

Other applicable rules of administrative law include that the CEO must act reasonably on the basis of the evidence and must take account of relevant considerations and not take account of irrelevant considerations.

Applicants and consultants will have access to merits review by the Administrative Appeals Tribunal (AAT) of an adverse decision under section 87 AA or 79A (respectively) of the EMDG Act. This is provided for by section 97(ca) of the EMDG Act in the case of applicants and section 97(caa) of the EMDG Act in the case of consultants.

In addition, there is an entitlement to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* as well as under the common law. Judicial review would consider the lawfulness of a decision in particular, in relation to whether the decision complied with the rules of administrative law.

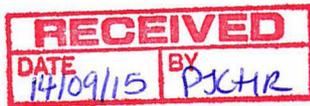
However, provided the CEO acts in good faith, there would be no liability in defamation in relation to a finding that an applicant or consultant is not a fit and proper person.

It is also important to note that section 87 AA and section 79A determinations are not made for an unlimited period. Further section 79E of the EMDG Act provides that the excluded consultant may apply at any time for a revocation of the determination. In doing so, the CEO will have to take into account any relevant submissions by the consultant and any change in the circumstances, such as a successful appeal against a conviction and the lapse of time since any adverse event. The safeguards outlined apply each time the CEO makes a decision. Thus, a decision by the CEO that an applicant or consultant is not a fit and proper person does not operate indefinitely into the future. It does not constitute a ban on the applicant or consultant in relation to all future applications.

In light of these various safeguards, the legislative instrument and its assessment criteria are considered to be a reasonable and proportionate measure to give effect to the aim being pursued by the legislative instrument. In particular, it is considered that they do not breach an applicant's or a consultant's right to be protected from unlawful attacks on his or her reputation.

Yours sincerely

Andrew Robb



**THE HON. LUKE HARTSUYKER MP
ASSISTANT MINISTER FOR EMPLOYMENT
DEPUTY LEADER OF THE HOUSE**

The Hon. Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Ruddock

Thank you for your letter of 18 August 2015 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) seeking advice on the human rights compatibility of the Social Security (Parenting payment participation requirements – classes of persons) Amendment Specification 2015 (No. 1) (the 2015 Specification).

In your letter you seek advice about the human rights compatibility relating to the intent of the 2015 Specification which extends the Helping Young Parents and Supporting Jobless Families measures for a further nine months to 31 March 2016.

I enclose the advice the Committee is seeking. There is a range of evidence demonstrating that these measures are effective in achieving the stated objectives to provide services, opportunities and responsibilities to boost educational attainment, job readiness, child wellbeing and functioning of young parents and jobless families with young children in highly disadvantaged locations in Australia.

The enclosed advice also provides evidence that establishes that the measures support a legitimate objective which addresses a pressing or substantial concern, thereby justifying the limitation of the right to equality and non-discrimination on the basis of age and gender.

Thank you for bringing this matter to my attention.

Yours sincerely

LUKE HARTSUYKER

Encl

11 SEP 2015

Advice to Joint Parliamentary Committee on Human Rights in regard to the Social Security (Parenting payment participation requirements – classes of persons) Amendment Specification 2015 (No. 1) [F2015L00938]

ITEM 1

1.103 The committee's assessment against articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (right to social security and right to an adequate standard of living) of the extension of the Helping Young Parents and Supporting Jobless Families measures raises questions as to whether the limitation on these rights is rationally connected to the objective sought to be achieved.

1.104 As set out above, the condition engages and limits the right to social security and right to an adequate standard of living. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Assistant Minister for Employment as to whether there is a rational connection between the limitation and the legitimate objective of helping teenage parents and jobless families, and in particular, is there evidence that demonstrates that the measures are likely to be effective in achieving the stated objective.

Background information

The Helping Young Parents and Supporting Jobless Families measures commenced in 2012 as early intervention measures targeting vulnerable groups of parents living in 10 socio-economically disadvantaged locations. Many of these parents face a higher risk of long-term unemployment, reliance on income support and intergenerational unemployment. This early intervention contact ensures earlier identification of the parents' and families' needs and barriers to employment and provides tailored assistance through linkages to the most appropriate local services—while recognising and taking into consideration their family responsibilities.

Extension of the Helping Young Parents and Supporting Jobless Families measures

As part of the Youth Employment Strategy under the Growing Jobs and Small Business package, a new programme incorporating successful elements of the trials was introduced in the 2015–16 Federal Budget. The *Supporting Parents to Plan and Prepare for Employment* (Supporting Parents) programme will commence on 1 April 2016 and will continue to support eligible parents residing in the 10 disadvantaged locations to make a better transition into paid employment. The new programme incorporates the compulsory participation model but with the requirement to participate in one activity only—instead of two compulsory activities under the Helping Young Parents measure.

Both the Helping Young Parents and Supporting Jobless Families measures have been extended until 31 March 2016 to enable eligible parents to access the local services that meet their needs and address identified vocational and non-vocational barriers to employment for as long as possible and on a continuous basis, ensuring eligible parents transition smoothly from the trials into the Supporting Parents measure from 1 April 2016.

Compliance

Under both the Helping Young Parents and Supporting Jobless Families measures, all participants are required to attend interviews and sign a Participation Plan, however, only the Helping Young Parents measure requires compulsory participation in activities.

Without regular ongoing contact with the Australian Government Department of Human Services (Human Services) and participation in the activities, parents may fail to participate actively in their community or to take up opportunities for building a more secure future for themselves and their children.

Rational connection between the limitation and legitimate objective

The rational connection between the limitation and legitimate objective is demonstrated by the range of evidence showing that the measures, in particular their compulsory elements, have been effective in achieving their stated objectives.

Increased participation in education

Departmental analysis has shown that the proportion of Helping Young Parents participants undertaking study increased by 15 percentage points to 39 per cent over their participation to 30 June 2013. By 30 June 2013, more than 250 parents in Helping Young Parents exited the measure due to having completed Year 12 or equivalent qualification and more than 40 young parents started a new job.

Helping Young Parents participants in areas of high unemployment obtained the most benefit, with almost half participating in education compared with 32 per cent of young parents not participating in the measure. Participants reported that their increased awareness and use of Jobs, Education and Training Child Care Fee Assistance had greatly helped them to participate in education.

Under the Helping Young Parents measure, the minimum education level requirement was to attain a Year 12 or equivalent qualification. However, operational data from Human Services shows some young parents have been willing to enrol in higher-level education courses, such as Certificates III/IV, diplomas and degrees. This highlights the benefits of the measure in increasing participants' education levels.

Increased engagement

Since the implementation of the Helping Young Parents and Supporting Jobless Families measures in 2012, Human Services officers have provided regular qualitative evidence to the Department of Employment that parents participating in the trials have shown a positive increase in their engagement with Human Services and interest in engaging with local services following the development of a Participation Plan tailored to their own and their families' needs.

ITEM 2

1.114 The committee's assessment against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (right to equality and non-discrimination) of the extension of the Helping Young Parents and Supporting Jobless Families measures raises questions as to whether the limitation on these rights is justifiable.

1.115 As set out above, the extension of the measures engages and limits the right to equality and non-discrimination on the basis of age and gender. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Assistant Minister for Employment as to:

- *whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;*
- *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.*

Justification for targeting teenage parents

There is ample evidence that the stated objective (to assist young parents and jobless families with young children to improve their family wellbeing, educational attainment and work readiness) addresses a pressing or substantial concern.

In Australia, at any one time there are around 11,000 teenage parents on Parenting Payment. Around 80 per cent of these parents have not completed Year 12 or equivalent qualifications and over 25 per cent only have primary school as their highest level of education.

It is well documented¹ that teenage parents and jobless families are far more likely to have poor employment prospects, low educational attainment, low incomes, poor health and low educational and employment outcomes for their children—contributing to the risk of long term welfare dependency for themselves and their children.

To the extent that the measures may limit the right to equality and non-discrimination on the basis of age and gender, the measures are reasonable and proportionate to the policy objective of assisting young parents to improve their family wellbeing, education attainment and work readiness. The measures assist parents to identify their barriers to education and employment, to develop a plan to address those barriers and to participate in the agreed activities, thereby increasing their capacity to study or work. This recognises that the right to educational and the right to work are essential for realising other human rights (such as the right to an adequate standard of living) and that the workforce participation of parents creates benefits for their children. As already demonstrated, there is a range of evidence that the measures have been effective in increasing young parents' participation in education and in increasing engagement with local services.

¹ See for example Whiteford, P. (2009). Family Joblessness in Australia, Paper commissioned by the Social Inclusion Unit of PM&C, Canberra.
<http://apo.org.au/research/family-joblessness-australia>

Justification for targeting jobless families

In Australia, joblessness among families is a significant social and economic problem resulting in one of the highest proportion of children living in jobless families in the OECD.² Women make up the largest proportion of parents heading jobless families.

Evidence shows that long periods out of the workforce increase the risk of difficulties returning to paid work. There is also increased risk of experiencing disadvantage and a lower quality of life.

For Australian families who become jobless, the likelihood of the family remaining jobless for a long period of time has increased in recent years. Being in a family where no adult has worked for a long time can mean higher levels of poverty, poorer health and lower levels of education for parents and their children. This can lead to the risk of long term welfare dependency and poor outcomes for the children.

Children from disadvantaged families, particularly where parents have a low level of education, benefit from early childhood programmes and perform better in their early school years because they are better prepared for school, move into school more easily and are more motivated.³

If parents on income support are assisted to gain job related skills and education earlier, as well as using the time when their children are young to stabilise their family life, they are more likely to gain ongoing employment and to move off income support.

² OECD, 11/7/2014, Children in families by employment status:

http://www.oecd.org/els/family/LMF_1_1_Children_in_families_by_employment_status_Jul2014.pdf

³ For a summary of the literature on this topic, see Harrison, LJ et al 'Child care and early education in Australia', Social Policy Research Paper No. 40, Longitudinal Study of Australian Children:

https://www.dss.gov.au/sites/default/files/documents/05_2012/sprp_40.pdf