

## 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.

### **Comptroller-General of Customs (Use of Force) Directions 2015 [F2015L01044]**

### **Comptroller Directions (Use of Force) 2015 [F2015L01085]**

*Portfolio: Immigration and Border Protection*

*Authorising legislation: Customs Act 1901*

*Last day to disallow: 17 September 2015 (Senate)*

#### **Purpose**

2.3 The Comptroller-General of Customs (Use of Force) Directions 2015 and the Comptroller Directions (Use of Force) 2015 (the new directions) give directions, respectively, to mainland customs officers and customs officers of the Indian Ocean Territories Customs Service regarding the deployment of approved firearms and other approved items of personal defence equipment in accordance with Operational Safety Order (2015).

2.4 A customs officer may only use force in accordance with the procedures set out in Operational Safety Order (2015).

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

#### **Background**

2.6 The committee commented on the Customs Act 1901 - CEO Directions No. 1 of 2015 and Customs Act 1901 - CEO Directions No. 2 of 2015 (the previous directions) in its *Nineteenth Report of the 44<sup>th</sup> Parliament*.<sup>1</sup> A response was received and commented on in the committee's *Twenty-second Report of the 44<sup>th</sup> Parliament*.<sup>2</sup>

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1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 45-50.

2 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 187-190.

2.7 The committee considered the new directions in its *Twenty-sixth Report of the 44<sup>th</sup> Parliament*, and requested a copy of the Operational Safety Order (2015) in order for the committee to fully assess the new directions with the right to life.<sup>3</sup>

### **Use of lethal force**

2.8 The previous directions were, in the main, in the same form as the new directions. The directions were remade to reflect the introduction of the Australian Border Force and the integration of the Australian Customs and Border Protection Service within the Department of Immigration and Border Protection.

2.9 The new directions permit the use of force in accordance with procedures set out in the Operational Safety Order (2015).

2.10 The committee considered in its previous report that the use of force engages and may limit the right to life.

### **Right to life**

2.11 The right to life is protected by article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) and article 1 of the Second Optional Protocol to the ICCPR. The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it requires the state to undertake an effective and proper investigation into all deaths where the state is involved.

2.12 The use of force by state authorities resulting in a person's death can only be justified if the use of force was necessary, reasonable and proportionate in the circumstances. For example, the use of force may be proportionate if it is in self-defence, for the defence of others or if necessary to effect arrest or prevent escape (but only if necessary and reasonable in the circumstances).

2.13 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

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3 Parliamentary Joint Committee on Human Rights, *Twenty-sixth Report of the 44<sup>th</sup> Parliament* (18 August 2015) 4-6.

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

2.14 The Chief Executive Officer of the Australian Customs and Border Protection Service made a copy of the previous Use of Force Order (2015) available to the committee in confidence. As the Operational Safety Order (2015) supersedes the Use of Force Order (2015), the committee requested a copy of the new order on an in-confidence basis in order to properly assess its compatibility with the right to life.

2.15 The committee also noted a commitment made to the committee to make an edited version of the previous Use of Force Order available on a public website. The committee therefore recommended that the Operational Safety Order (2015) be similarly published (and redacted if necessary).

### **Australian Border Force Commissioner's response**

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.<sup>4</sup>

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4 See Appendix 1, Letter from Mr Roman Quaedvlieg APM, Australian Border Force Commissioner, to the Hon Philip Ruddock MP (dated 11 September 2015) 1.

## **Committee response**

**2.16 The committee thanks the Australian Border Force Commissioner for his response and for providing a copy of the Operational Safety Order (2015) to the committee on an 'in confidence' basis.**

2.17 The committee also appreciates the advice that an edited version of the Operational Safety Order (2015) will be published on the Australian Border Force's website.

2.18 Having reviewed the Operational Safety Order (2015), the committee considers that it continues to contain sufficient safeguards.

**2.19 On the basis of the information provided, the committee concludes that the Operational Safety Order (2015) and the new directions are likely to be compatible with human rights.**

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## Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2015 [F2015L01027]

*Portfolio: Trade and Investment*

*Authorising legislation: Export Market Development Grants Act 1997*

*Last day to disallow: 17 September 2015 (Senate)*

### **Purpose**

2.20 The Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2015 (the 2015 Guidelines) are being made to replace the Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2014. The 2015 Guidelines provides the Chief Executive Officer (CEO) of Austrade guidance in:

- making decisions regarding 'excluded consultants' under the *Export Market Development Grants Act 1997* (the EMDG Act);
- determining who is an 'associate' of a person for the purposes of the EMDG Act; and
- forming an opinion whether a person, or any associate, is a fit and proper person to receive a grant.

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

### **Background**

2.22 The committee previously considered the 2015 Guidelines in its *Twenty-sixth Report of the 44<sup>th</sup> Parliament* (previous report) and requested further information from the Minister for Trade and Investment as to the compatibility of the 2015 Guidelines with the right to privacy (right to reputation).<sup>1</sup>

### **Criteria for establishing a person is a 'fit and proper' person**

2.23 Under the EMDG Act grants can be made to specified Australian businesses which have incurred expenses promoting the export of their Australian goods, services, intellectual property rights and know-how. The EMDG Act sets out that the CEO can form the opinion, in accordance with the guidelines, that a person, or associate of a person, is not a 'fit and proper' person for the purposes of a grant.

2.24 The 2015 Guidelines set out a very broad basis on which the CEO of Austrade can determine whether a person, or associate of a person, is not to be considered to be a 'fit and proper person',

2.25 The committee considered in its previous report that the broad basis on which the CEO can declare that a person is ineligible for a grant on the basis that they

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1 Parliamentary Joint Committee on Human Rights, *Twenty-sixth Report of the 44th Parliament* (18 August 2015) 12-15.

are not a 'fit and proper' person engages and may limit the right to privacy (right to reputation).

***Right to privacy (right to reputation)***

2.26 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home and prohibits unlawful attacks on a person's honour and reputation.

2.27 This right includes protection of the professional and business reputation of a person. The article is understood as meaning that the law must provide protection against attacks on a person's reputation (for example, through the law of defamation), as well as requiring that any law which affects a person's reputation must not be arbitrary.

2.28 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

***Compatibility of the measure with the right to privacy (right to reputation)***

2.29 The statement of compatibility states that the determination is compatible with human rights.

2.30 The committee noted that it previously examined this same issue when it considered legislation relating to the fit and proper person test in respect of the EMDG Act.<sup>2</sup> In this assessment, the committee noted that a finding that a person is not a 'fit and proper' person to be involved in the process of preparing an application for a government grant is a finding that is likely to have an adverse impact on a person's business reputation.

2.31 The committee considered in its previous report that the condition engages and limits the right to privacy and reputation. The committee therefore sought the advice of the Minister for Trade and Investment as to whether the proposed measure 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.

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2 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (March 2013) 12-15 and Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (May 2013) 205-211.

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## Minister's response

### 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.<sup>3</sup>

## **Committee response**

### **2.32 The committee thanks the Minister for Trade and Investment for his response.**

2.33 The committee notes the minister's advice regarding the objective of the measure, including that the fit and proper person test provides a means of monitoring the conduct of consultants, helping to ensure they act professionally and honestly, and accepts that this is likely to be a legitimate objective for the purposes of international human rights law.

2.34 The committee also notes the information provided regarding the proportionality of the measure, including access to merits review and judicial review of adverse decisions. However, the committee considers that for as long as the

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3 See Appendix 1, Letter from the Hon Andrew Robb MP, Minister for Trade and Investment, to the Hon Philip Ruddock MP (dated 15 September 2015) 1-4.

procedural safeguards relating to a finding that a person is not a 'fit and proper' person are not specified, the broad discretion given to the CEO may unjustifiably limit the right to privacy.

**2.35 The committee therefore recommends that, in order to avoid any incompatibility with the right to privacy (right to reputation) under article 17 of the International Covenant on Civil and Political Rights, the 2015 Guidelines be amended to include procedural safeguards relating to how the Chief Executive Officer makes an assessment that a person is not a 'fit and proper' person to be involved in preparing an application for a government grant.**

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## **Social Security (Parenting payment participation requirements—classes of persons) Amendment Specification 2015 (No. 1) [F2015L00938]**

*Portfolio: Employment*

*Authorising legislation: Social Security Act 1991*

*Last day to disallow: 17 September 2015 (Senate)*

### **Purpose**

2.36 The Social Security (Parenting payment participation requirements—classes of persons) Amendment Specification 2015 (No. 1) (the 2015 Specification) amends the Social Security (Parenting payment participation requirements—classes of persons) (DEEWR) Specification 2011 (No. 1), with the effect that individuals will continue, from 30 June 2015 to 31 March 2016, to be considered to fall within the 'teenage parent' or 'jobless families' class of persons. These individuals will be subject to the Helping Young Parents (HYP) and Supporting Jobless Families (SJF) measures. These measures provide select recipients of Parenting Payments with additional support and additional responsibilities.

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

### **Background**

2.38 The committee previously considered the 2015 Specification in its *Twenty-sixth Report of the 44<sup>th</sup> Parliament* (previous report) and requested further information from the Assistant Minister for Employment as to the compatibility of the 2015 Specification with human rights.<sup>1</sup>

### **Extension of measures requiring certain classes of persons to participate in compulsory activities**

2.39 Under the HYP and SJF measures, parents in receipt of Parenting Payments are required to attend appointments with the Department of Human Services and sign a Parenting Payment Employment Pathway Plan ('Parenting Plan'). In addition, parents who fall within the 'teenage parent' class of persons are required to have a minimum of two compulsory activities in their Parenting Plan. Failure to attend appointments or compulsory activities without a reasonable excuse, or sign their Parenting Plan, may result in a person's social security benefits being suspended.

2.40 The committee considered in its previous analysis that the measure engages and may limit the right to social security, the right to an adequate standard of living and the right to equality and non-discrimination.

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1 Parliamentary Joint Committee on Human Rights, *Twenty-sixth Report of the 44th Parliament* (18 August 2015) 20-25.

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

2.41 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.

2.42 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;
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent; and
- affordable (where contributions are required).

2.43 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.

2.44 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***

2.45 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.

2.46 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.

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

2.47 The statement of compatibility explains that the 2015 Specification engages and limits the right to social security and an adequate standard of living and sets out why this limitation is justifiable. It sets out the objective of the measure as providing 'opportunities... to boost the educational attainment and job readiness... of young parents and jobless families with young children in highly disadvantaged locations in Australia'.<sup>2</sup>

2.48 The committee previously considered that the measure seeks to achieve a legitimate objective for the purposes of international human rights law. However, the committee considered that it is unclear whether the limitation on the right to social security and an adequate standard of living (in suspending a person's social security payments), is rationally connected to the objective being sought. In other words, it is unclear if the measures are likely to be effective in achieving the objective.

2.49 The committee therefore sought 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, whether there is evidence that demonstrates that the measures are likely to be effective in achieving the stated objective.

### **Assistant Minister's response**

#### **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

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2 Explanatory Statement, Statement of Compatibility 1.

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

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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.<sup>3</sup>

### **Committee response**

**2.50 The committee thanks the Assistant Minister for Employment for his response.**

2.51 The committee notes the minister's advice that the measures are being extended for nine months in order to ensure eligible parents can access local services and address barriers to employment before the transition to the new Supporting Parents to Plan and Prepare for Employment commences on 1 April 2016.

2.52 The committee further notes the detailed evidence provided regarding the effectiveness of the measures in improving participation and education rates of participants in the trials, and on the basis of this information the committee considers that they are likely to be rationally connected to their stated objective.

**2.53 Accordingly, the committee considers that the measures are likely to be compatible with the right to social security and right to an adequate standard of living.**

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

2.54 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

2.55 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.

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3 See Appendix 1, Letter from the Hon Luke Hartsuyker MP, Assistant Minister for Employment, to the Hon Philip Ruddock MP (dated 11 September 2015) 2-3.

2.56 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),<sup>4</sup> which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.<sup>5</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>6</sup>

2.57 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 state parties are required to take into account to ensure the rights to equality for women.

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

2.58 The statement of compatibility does not address the right to equality and non-discrimination. Both measures distinguish between Parenting Payment recipients based on their age. The HYP measure only applies to parents who are 19 or under at the relevant time and the SJF measure applies to parents who are 22 or under at the relevant time (as well as to persons who have been on income support for two years or more).

2.59 The distinction between recipients based on age constitutes direct discrimination on the basis of a personal attribute, and therefore limits the right to equality and non-discrimination. This limitation requires justification.

2.60 The measures may also be indirectly discriminatory on the basis of sex, as the vast majority of those affected by the measures (Parenting Payment recipients) are likely to be female. Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination.

2.61 The committee therefore sought the advice of the Assistant Minister for Employment 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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4 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.

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

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



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## Assistant Minister's response

### 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 documented<sup>7</sup> 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.

### 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.<sup>8</sup> Women make up the largest proportion of parents heading jobless families.

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7 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>.

8 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](http://www.oecd.org/els/family/LMF_1_1_Children_in_families_by_employment_status_Jul2014.pdf).

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.<sup>9</sup>

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.<sup>10</sup>

### **Committee response**

**2.62 The committee thanks the Assistant Minister for Employment for his response.**

2.63 The committee considers that that response demonstrates that assisting young parents and jobless families with young children to improve their family wellbeing, educational attainment and work readiness is a legitimate objective for the purposes of international human rights law, and that the measures appear to be rationally connected to that objective and proportionate to achieving the stated objective.

**2.64 Accordingly, the committee considers that the measures are likely to be compatible with the right to equality and non-discrimination and has concluded its examination of the bill.**

### **The Hon Philip Ruddock MP**

#### **Chair**

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9 For a summary of the literature on this topic, see Harrison, U 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](https://www.dss.gov.au/sites/default/files/documents/05_2012/sprp_40.pdf)

10 See Appendix 1, Letter from the Hon Luke Hartsuyker MP, Assistant Minister for Employment, to the Hon Philip Ruddock MP (dated 11 September 2015) 4-5.

