

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 3**.

Australian Public Service Commissioner's Directions 2016 [F2016L01430]

Purpose	Prescribes standards with which Agency Heads and Australian Public Service (APS) employees must comply to meet their obligations under the <i>Public Service Act 1999</i>
Portfolio	Prime Minister and Cabinet
Authorising legislation	<i>Public Service Act 1999</i>
Last day to disallow	30 November 2016
Right	Privacy (see Appendix 2)
Previous reports	8 of 2016 and 10 of 2016
Status	Concluded examination

Background

2.3 The committee first reported on the Australian Public Service Commissioner's Directions 2016 (the 2016 directions) in its *Report 8 of 2016*, and requested further information from the Australian Public Service Commissioner (the Commissioner).¹

2.4 The Commissioner's response to the committee's inquiries was received on 22 November 2016 and discussed in the committee's *Report 10 of 2016*.²

2.5 A further response from the Commissioner was received on 23 June 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 12-15.

2 Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) 13-16.

Publishing termination decision for breach of the Code of Conduct

2.6 Paragraph 34(1)(e) of the 2016 directions provides that decisions to terminate the employment of an ongoing APS employee for breach of the Code of Conduct must be published in the Public Service Gazette (the Gazette). The requirement to publish details of an APS employee when their employment has been terminated on the grounds of breach of the Code of Conduct in the Gazette engages and limits the right to privacy.

2.7 The committee reported on previous similar directions, the Australian Public Service Commissioner's Directions 2013 [F2013L00448] (the 2013 directions), in its *Sixth Report of 2013, Eighteenth Report of the 44th Parliament* and *Twenty-first Report of the 44th Parliament*.³ It raised concerns about the human rights compatibility of measures relating to the notification in the Gazette of certain employment decisions, particularly in relation to the publication of decisions to terminate employment and the grounds for termination. These concerns arose in relation to the right to privacy and the rights under the Convention on the Rights of Persons with Disabilities (CRPD).

2.8 In response to these concerns, the Commissioner conducted a review of the 2013 directions. As a result, the 2013 directions were amended by the Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426] (the amendment direction) to remove most of the requirements to publish termination decisions. However, the requirement to notify termination on the grounds of the breach of the Code of Conduct in the Gazette was retained at that time.

2.9 In its *Twenty-first Report of the 44th Parliament*,⁴ the committee acknowledged that the amendment direction addressed the committee's concerns in relation to the compatibility of the 2013 directions with the CRPD, and largely addressed the committee's concerns in relation to the measure's compatibility with the right to privacy. However, the committee considered that the retained measure to publish details of an APS employee when their employment has been terminated on Code of Conduct grounds limited the right to privacy.

2.10 The statement of compatibility to the 2016 directions states that the notification of certain employment decisions in the Gazette promotes APS

3 See, Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) Australian Public Service Commissioner's Directions 2013 [F2013L00448] 133-134; *Eighteenth Report of the 44th Parliament* (10 February 2015) Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426] 65-67; and *Twenty-first Report of the 44th Parliament* (24 March 2015) Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426] 25-28.

4 Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015) 25-28.

employees' right to privacy insofar as there is an option for agency heads to decide that a name should not be included in the Gazette because of the person's work-related or personal circumstances.

2.11 The initial human rights analysis of the directions noted, however, that rather than promoting the right to privacy, the requirement arising from paragraph 34(1)(e) of the directions was a limit on the right to privacy.⁵ However, the statement of compatibility provided no significant evidence or assessment of why the requirement arising from paragraph 34(1)(e) of the directions was a reasonable and proportionate limit on the right to privacy in pursuit of its apparent objective, that is, maintaining public confidence in the good management and integrity of the APS.

2.12 In relation to whether there were other, less restrictive, ways to achieve the same aim, the initial human rights analysis observed that there were other methods by which an employer could determine whether a person had been dismissed from the APS for breach of the Code of Conduct rather than publishing an employee's personal details in the Gazette. For example, it was noted that it would be possible for the APS to maintain a centralised, internal record of dismissed employees, or to use references to ensure that a previously dismissed APS employee was not rehired by the APS. Further, as the previous analysis stated, it would be possible to publish information in relation to the termination of employment for breaches of the Code of Conduct without the need to name the affected employee.

2.13 As these matters were not addressed by the statement of compatibility, the committee sought the advice of the Commissioner as to whether the limitation on the right to privacy was a reasonable and proportionate measure for the achievement of the apparent objective of the directions, and in particular, whether there were other less rights restrictive means available.

Australian Public Service Commissioner's initial response

2.14 The Commissioner's initial response, as discussed in *Report 10 of 2016*,⁶ recognised that the requirement to publish details in the Gazette of an APS employee when their employment has been terminated on the grounds of breach of the Code of Conduct limited the right to privacy. The Commissioner stated that the committee had raised valid questions about whether the limitation was a reasonable or proportionate measure in upholding integrity in the APS, and agreed that further investigation into the requirement was warranted. The Commissioner stated that he would undertake a review into the necessity of publicly notifying information about termination decisions on the grounds of breach of the Code of Conduct, and that this

5 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 12-15.

6 Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) 13-16.

review would include appropriate consultation and examination of evidence regarding the deterrent effects and impact on public confidence in the good management and integrity of the APS. The Commissioner stated that he would notify the committee of his findings in this matter by June 2017.

The Commissioner's further response regarding the outcome of the review

2.15 On 22 June 2017, the Commissioner informed the committee that, after consultation with APS agencies, he had concluded that the current arrangements of publishing terminations of employment for breaching the Code of Conduct in the Gazette should not continue.

2.16 The Commissioner states that he intends to establish a new secure database of employment terminations for breaches of the Code of Conduct that will not be accessible to the general public. As outlined in the Commissioner's response, this approach would enable agencies to access the database and maintain the integrity of their respective workforces, while respecting the privacy of affected employees. Appropriate amendments to the directions will be made in this regard.

2.17 Accordingly, the Commissioner has adopted the suggestion outlined in the committee's previous report of adopting a less rights restrictive means of achieving the legitimate objective of the measure.

Committee response

2.18 The committee thanks the Commissioner for his response and has concluded its examination of this issue.

2.19 The committee welcomes the commitment by the Commissioner of establishing a new secure database of employment terminations for breaches of the Code of Conduct that will not be accessible to the general public.

2.20 The proposed approach would substantially address the right to privacy concerns in relation to the current measure, constituting a less rights restrictive means of achieving the objective of maintaining public confidence in the good management and integrity of the APS.

2.21 The committee looks forward to reviewing the amendments to the directions when they are made.

Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017

Purpose	Seeks to introduce reforms to the funding, provision and administration of higher education in Australia
Portfolio	Education and Training
Introduced	House of Representatives, 11 May 2017
Rights	Education; equality and non-discrimination (see Appendix 2)
Previous report	5 of 2017
Status	Concluded examination

Background

2.22 The committee first reported on the Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017 (the bill) in its *Report 5 of 2017*, and requested a response from the Minister for Education and Training by 30 June 2017.¹

2.23 The committee has previously commented on proposed reforms to the funding of higher education in its *Twelfth Report of the 44th Parliament*, *Eighteenth Report of the 44th Parliament* and its *Twenty-second Report of the 44th Parliament*.²

2.24 The minister's response to the committee's inquiries was received on 7 July 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Decrease in funding for commonwealth supported students in higher education

2.25 Schedule 1 of the bill seeks to decrease the amount of commonwealth funding or subsidies for commonwealth supported students at universities and increase the amount of student contribution to higher education funding.³ From 1

1 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 22-30.

2 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 8-13; *Eighteenth Report of the 44th Parliament* (10 February 2015) 43-64; *Twenty-second Report of the 44th Parliament*.

3 A commonwealth supported student place is part subsidised by the Australian government through the government paying part of the fees for the place directly to the university. Students are also required to contribute towards the study and pay the remainder of the fee called the 'student contribution amount' for each unit they are enrolled in at the higher education institution.

January 2018, a 2.5 percent efficiency dividend will be applied to commonwealth contribution amounts in each of 2018 and 2019. Student contribution amounts for commonwealth supported students will increase by 1.8 percent from 2018 to 2021 (7.5 percent in total).

Compatibility of the measure with the right to education

2.26 Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the right to education. It specifically requires, with a view to achieving the full realisation of the right to education, that:

Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

2.27 Australia has obligations to progressively introduce free higher education by every appropriate means but also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of the right to education.⁴

2.28 As the initial human rights analysis noted, the statement of compatibility acknowledges that the decrease in commonwealth funding is counter to the progressive introduction of the right to free higher education;⁵ that is, it constitutes a retrogressive measure.

2.29 Retrogressive measures may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective. In this context, the United Nations Committee on Economic, Social and Cultural Rights has noted that:

There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.⁶

4 See, UN Committee on Economic, Social and Cultural Rights, General Comment 13: the Right to education (8 December 1999).

5 SOC 3.

6 See, UN Committee on Economic, Social and Cultural Rights, General Comment 13: the Right to education (8 December 1999) [45].

2.30 The statement of compatibility argues that the reduction of funding is a permissible limitation on the right to education including the progressive introduction of free higher education:

Recalibration of Commonwealth contribution and student contribution amounts in Schedule 1 will result in decreased Government funding and an increase in student contributions. This measure is counter to the goal of progressive introduction of free education however the savings measure is proportionate to the policy objective of ensuring long-term financial sustainability necessary to support opportunities in higher education. It also sits within student loan arrangements that ensure no domestic student need pay upfront fees for access to higher education. The savings as a result of this measure will be an important contribution towards Budget repair.⁷

2.31 The previous analysis stated that, in general terms, budgetary constraints and financial sustainability have been recognised as legitimate objectives for the purpose of justifying reductions in government support that impact on the progressive realisation of the right to education. However, limited information was provided to support the characterisation of financial sustainability or budgetary constraints as a pressing or substantial concern in these specific circumstances. Evidence explaining why a proposed cut in funding of this size is a proportionate reduction in terms of the right to education was not provided in the statement of compatibility. Further, no information was provided about the consideration of alternatives, in the context of Australia's use of its maximum available resources.

2.32 The committee therefore sought the advice of the minister as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;
- whether the limitation is a reasonable and proportionate measure to achieve its stated objective;
- whether alternatives to reducing higher education funding have been fully considered; and
- how the measure complies with Australia's obligation to use the maximum of its available resources to progressively introduce free higher education.

Minister's response

2.33 The minister's response re-states much of the information contained in the statement of compatibility including acknowledging that the reduction of commonwealth contribution is a retrogressive measure as regards Australia's

7 SOC 8.

obligation to progressively realise free higher education. In relation to the objective of the measure, the minister's response states:

This measure is reasonable and proportionate to the policy objective of ensuring long-term financial sustainability of the higher education system. By ensuring that the demand driven funding system can be preserved for bachelor level studies and extended to approved sub-bachelor courses, the rebalancing of student and Commonwealth contribution amounts supports future opportunities for students to access higher education.

2.34 In relation to the particular budgetary context of the measures, the minister's response further states:

Given the Budget context and the Government's commitment to a return to surplus, there is a need to reduce the overall levels of Government spending. The savings as a result of this measure will also be an important contribution towards budget repair, which is an important objective of this Government.

2.35 In this respect, it is acknowledged that budgetary constraints and concerns about financial sustainability in the context of extending commonwealth support to sub-bachelor degrees indicate that the measure may address a pressing and substantial concern.

2.36 In relation to the proportionality of the measure, the minister's response states at a general level that the measure is proportionate on the basis that:

it creates a more sustainable higher education system and, by doing so, ensures future generations of Australians will remain able to access higher education and the substantial private benefits it confers.

2.37 It should be noted however that higher education confers not only private benefits, but significant public benefits, and the ICESCR requires that higher education be made equally accessible to all on the basis of capacity, not ability to pay.

2.38 The minister's response provides some specific information about the proportionality of the reduction in commonwealth funding and the application of the efficiency dividend:

Students are well resourced through the CGS [Commonwealth Supported Places], expenditure through which totalled \$7.1 billion in 2016. Average funding per student has increased by around 15 per cent over the five years from 2010 to 2015. In comparison the average cost of delivery per equivalent full time student has only grown at 9.5 per cent over the same period. The effect of an efficiency dividend on the CGS should have minimal effect on the ability of students to access higher education, or on providers to deliver high quality courses.

Even after the efficiency dividend and rebalancing of Commonwealth and student contribution amounts is fully implemented by 2021, the

Commonwealth will still fund on average 54 per cent of the cost of courses.

The rebalancing of contributions also sits within the context of Australia's generous and highly regarded student loan scheme that ensures no domestic student need pay upfront fees for access to higher education. That is, despite the modest increase in student contribution amounts, access to higher education will be maintained through the continued availability of Higher Education Loan Program (HELP) loans.

2.39 It is acknowledged that Australian students will continue to be able to access the higher education system through HELP loans, such that payment is deferred until the student earns a threshold income.⁸ The provision of HELP loans to all students is relevant to Australia meeting its obligations in relation to access to higher education. It is also relevant to the proportionality of the retrogressive step of reducing commonwealth funding to higher education.

2.40 However, Australia is required to take the least rights restrictive approach in pursuing its budgetary objectives, where reductions in funding constitute backward steps on social and economic rights. In this regard, the minister's response does not address the committee's specific questions about whether alternatives to reducing funding to higher education have been fully considered. Further, in the current matter there are some uncertainties about the extent and scope of the impact on higher education.⁹

Committee response

2.41 The committee thanks the minister for his response and has concluded its examination of this issue.

2.42 The preceding analysis indicates that, based on the information provided and depending on the extent and scope of the impact on higher education, the measure may be compatible with the right to education. However, it is noted that Australia has an obligation under international law to progressively introduce free

8 However, it should be noted that the UN Committee on Economic, Social and Cultural Rights (UNESCR) has raised serious concerns about access to education in relation to the operation of the student loans scheme in the United Kingdom which shares similar elements to the Australian HELP scheme: UNESCR, Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/1/Add.79 (5 June 2002) [22]; UNESCR, Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/5 (12 July 2009) [44]; UNESCR, Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6 (14 July 2016) [65]-[66].

9 See, for example, University of New South Wales, *Submission 32*; University of Sydney, *Submission 34*, to the Senate Education and Employment Legislation Committee inquiry into the Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017, which argues that under the bill Australian students will pay more while universities will receive substantially less funding.

higher education and the minister's response did not address whether alternatives to reducing higher education funding had been fully considered.

Increase in student contributions for enabling courses

2.43 Currently, students undertaking enabling courses cannot be required to pay a student contribution amount.¹⁰

2.44 Schedule 2 of the bill seeks to introduce a student contribution amount fixed at a rate of \$3,271 for a full time study load in 2018. Students will be able to borrow their contribution amount through HELP.

Compatibility of the measure with the right to education

2.45 As set out above, article 13 of the ICESCR protects the right to education including the progressive introduction of free higher education by every appropriate means. The initial analysis noted that by requiring students to make a financial contribution towards the costs of enabling courses, the measure engages and limits the right to education.

2.46 The statement of compatibility did not identify this measure as engaging and limiting the right to education and accordingly did not provide an assessment of whether the limitation is permissible.

2.47 Accordingly, the committee requested the further advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective;
- whether alternatives to reducing higher education funding have been fully considered; and
- how the measure complies with Australia's obligation to use the maximum of its available resources to progressively introduce free higher education.

Minister's response

2.48 The minister's response acknowledges that the introduction of a student contribution amount for enabling courses 'may be considered a retrogressive measure in terms of the right to education, specifically the progressive introduction of free higher education'.

10 An enabling course is a course of instruction that enables a person to undertake a course leading to a higher education award (sometimes referred to as a bridging course).

2.49 In relation to the objective of the measure, the minister's response states:

However, access to higher education is also an important aspect of this right, and these measures are aimed at improving the system of enabling places to assist underprepared learners to progress to undertaking higher education courses. Enabling courses are recognised as a preparation tool for students with social or educational disadvantages, and an important means of access to higher education.

The Report of the Review of the Demand Driven System by Dr David Kemp and Andrew Norton found that the overall attrition rates for enabling courses can be as high as 40 or 50 per cent. The Report suggested that a contributory factor is the lack of investment from the student, including in a financial sense. By ensuring that students are making a modest financial commitment towards their education, the measure aims to improve progression to higher education for students enrolled in enabling places. This expands the right to education by ensuring that there are viable alternative entry pathways available to underprepared learners.

2.50 Improving the progression of students with social and educational disadvantages to higher education would appear to constitute a legitimate objective for the purposes of international human rights law.

2.51 The minister's response provides a range of information in relation to the proportionality of the measure as a retrogressive step in the progressive introduction of free higher education:

Further, while providers may charge a student contribution amount for an enabling course of study, students will be able to defer these upfront costs via a HELP loan. This ensures that the student contribution amount does not present an upfront financial barrier for students.

Additionally, under the current system of allocation of Commonwealth supported enabling places some providers under-utilise their allocation which is inefficient and effectively diminishes opportunities for individuals who may benefit from participation in an enabling course. The measure ensures that with cyclical competitive tender processes, enabling places will always be allocated to providers who have demonstrated a history of high standards of academic preparation and completion rates, among other criteria currently under consideration. The right to access higher education is being expanded by ensuring the efficiency of allocation of these places to providers who are most likely to fully utilise the places allocated to them, and to deliver high quality outcomes for students.

The measure expands access to higher education by improving the enabling funding mechanism, and incentivising commitment to ensure higher completion rates.

2.52 The availability of HELP loans to students enrolling in enabling courses means that the student contribution amount will not necessarily be an upfront cost to students. However, under the HELP scheme as it currently operates, students who do

not successfully complete a course, after the census date, still incur a HELP debt. The prospect of such a debt may be a disincentive to disadvantaged students thinking of embarking on an enabling course. Given that enabling courses are a preparation tool for disadvantaged students, the significant attrition rate from enabling courses referred to by the minister may arise from legitimate reasons other than lack of financial investment by students, such as the financial pressures of full or part-time study or the challenges of the course or workload for the particular student. It may be that remission of fees for students who find themselves unable to complete an enabling course for such reasons is necessary to ensure that students with social or educational disadvantages feel able to take up the opportunity that an enabling course provides.

2.53 Based on the information provided including about expanding and incentivising access to higher education it appears that the measure may be capable of being a proportionate limit on the progressive realisation on the right to free higher education. However, this will in significant part depend on the operation of the measure in practice, including the application and remission of fees and effect on educational attainment. Monitoring of the availability, uptake and successful completion of enabling courses will assist in identifying whether the measure is effective in achieving its stated objective.

Committee response

2.54 The committee thanks the minister for his response and has concluded its examination of this issue.

2.55 The preceding analysis indicates that, based on the information provided, the measure may be compatible with the right to education. The operation of the measure in practice is significant, in particular, the balance between the incentive and disincentive effects of the application of fees, and the treatment of fee liability for those who are unable to successfully complete an enabling course.

2.56 Monitoring of the availability, uptake and successful completion of enabling courses will assist in identifying whether the measure is effective in achieving its stated objective of improving the progression of students with social and educational disadvantages to higher education.

Eligibility of Australian permanent residents and New Zealand citizens to a commonwealth supported university place

2.57 Schedule 3 of the bill seeks to provide that Australian permanent residents and New Zealand citizens will no longer be eligible for commonwealth supported higher education places.¹¹ Permanent humanitarian visa holders and New Zealand

11 Item 3, new section 36-10(2)(b); EM 45.

Special Category Visa holders who arrived in Australia as dependent children will remain eligible for commonwealth supported places.¹²

2.58 A commonwealth supported place is partly subsidised by the Australian government through the government paying part of the fees for the place directly to the university. Students are also required to contribute towards their study and they pay the remainder of the fee called 'student contribution amount' for each unit they are enrolled in.

Compatibility of the measure with the right to education

2.59 As set out above, article 13 of the ICESCR protects the right to education including ensuring it is equally accessible and through the progressive introduction of free higher education by every appropriate means.

2.60 The previous analysis stated that, by providing that Australian permanent residents and New Zealand citizens will no longer be eligible for commonwealth supported higher education places, the measure engages and limits the right to education and specifically the progressive introduction of free higher education. Australia's obligations with respect to the right to education apply, regardless of citizenship status, to persons within Australia.

2.61 The statement of compatibility did not identify this measure as engaging and limiting the right to education and accordingly did not provide an assessment of whether the limitation is permissible.

2.62 The committee therefore requested the further advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective;
- whether alternatives to reducing higher education funding have been fully considered; and
- how the measure complies with Australia's obligation to use the maximum of its available resources to progressively introduce free higher education.

Compatibility of the measure with the right to equality and non-discrimination (direct discrimination)

2.63 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). 'Discrimination' under the ICCPR encompasses a distinction based on a personal attribute (for

12 Item 3, new section 36-10(2)(b); EM 45.

example, race, sex or on the basis of disability),¹³ which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.¹⁴

2.64 As stated in the previous analysis, the proposed measure, by providing that New Zealand citizens and Australian permanent residents are no longer eligible for commonwealth supported places, appears to directly discriminate against people on the basis of their nationality.

2.65 Differential treatment¹⁵ will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

2.66 However, the statement of compatibility did not identify this measure as engaging the right to equality and non-discrimination and accordingly did not provide an assessment of whether the limitation is permissible or constitutes unlawful discrimination.

2.67 The committee therefore requested the further advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

Right to education

2.68 In relation to the right to education, the minister's response states:

While this measure removes the Commonwealth subsidy that these groups currently receive, the measure expands access to tertiary education for New Zealand citizens and permanent residents of Australia by providing access to HELP loans.

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

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

15 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

Currently, these students must pay for their education upfront, which may be a significant limitation on their capacity to access higher education. Under current arrangements, most Australian permanent residents and most New Zealand citizens have faced inequalities in access to higher education. They have had to pay upfront fees for tuition that their Australian peers have been able to defer to a HELP loan.

While the Committee has specifically requested advice on the removal of the [Commonwealth Supported Places] CSP for permanent residents and New Zealand citizens, it cannot be considered without noting that this measure also expands access to HELP loans.

2.69 As such the minister's response asks that the measure removing the commonwealth subsidy be considered together with the measure granting access to HELP loans. It is acknowledged that granting access to HELP loans may pursue the legitimate objective of expanding access to higher education for New Zealand citizens and Australian permanent residents. In this respect, the minister's response provides some information about the likely impact of greater access to HELP loans:

While it is not yet known how universities will respond in terms of tuition fees, access to a HELP loan is likely to be the most important factor for those New Zealand citizens and permanent residents who are unable to afford upfront payment to undertake tertiary education. There is evidence that tuition fees, when coupled with access to income contingent loans, do not act as a disincentive to study. In this way, the overall measure expands the right to access higher education.

2.70 However, it is unclear from the information provided whether or why expanding access to HELP loans necessarily needs to be accompanied by the removal of commonwealth subsidies for such students. While it is proposed to give Australian permanent residents and New Zealand citizens access to HELP loans, this group will have to pay fees (either upfront, or repaid over time) that are substantially higher than Australian citizens.¹⁶ This aspect of the measure, which is a limitation on the rights of affected persons to education and equality and non-discrimination, still needs to be justified according to the criteria under international human rights law.

2.71 By treating the removal of the commonwealth subsidy together with the expansion of the HELP scheme, the minister's response does not clearly provide specific information about the objective of removing the commonwealth subsidy or whether the removal addresses a pressing or substantial concern. It can be accepted that expansion of the HELP scheme aims to expand access to higher education. It

16 As noted in the minister's response, the commonwealth will contribute a subsidy of on average 54 per cent of the cost of courses for an Australian commonwealth supported student. A non-commonwealth supported student will have to cover the full fees for the course. From this it can be inferred that New Zealand citizens and Australian permanent residents would be required to pay close to twice the amount of a commonwealth supported student.

appears from the minister's response that the objective of the removal of the subsidy is 'budget repair' and 'financial sustainability', and for this reason the choice was made to remove the subsidy and provide access to HELP loans.

2.72 In this respect, the response notes in a conclusory way that:

This measure is reasonable and proportionate to both the policy objectives of expanding access for permanent residents and New Zealand citizens, and of creating a financially sustainable higher education system.

2.73 However, the response provides no detailed information about whether budget repair or financial sustainability would provide a basis for justifying the limitation on the right to progressively free higher education. The position appears to be that the measure is argued to be proportionate on the basis that affected students will not need to pay the substantially higher fees upfront, but will be able to repay a HELP loan over time.

2.74 The response states that:

In formulating this measure, the Government considered policy alternatives.

2.75 Beyond this statement, the response provides no information on what alternatives were considered and whether maintaining both commonwealth subsidies while permitting access to HELP loans was a feasible option, as was previously the case for Australian permanent residents and New Zealand citizens.¹⁷

2.76 Based on the information provided, it is not possible to conclude that a measure which removes commonwealth subsidies and requires New Zealand citizens and Australian permanent residents to pay substantially more for higher education than Australian citizens is a permissible limitation on the right to progressively free higher education.

Right to equality and non-discrimination

2.77 In relation to the right to equality and non-discrimination the minister's response acknowledges that the measure engages this right. In relation to this right the minister's response states:

Under the current arrangements permanent residents and New Zealand citizens have different entitlements to citizens of Australia. Replacing subsidies with loans for most Australian permanent residents and New

17 Until 1996 HECS-HELP loans were available to New Zealand citizens studying in Australia who were permanent residents. The *Higher Education Funding Amendment Act (No. 2) 1995* restricted access to HECS loans to those New Zealanders who had been permanent residents before 1 January 1996 and who had commenced their courses before this date. From 1 January 2005 under the *Higher Education Support Act 2003* permanent residents were no longer able to access HECS-HELP loans and defer their fees. While such students had to pay their fees upfront they were still eligible for commonwealth supported university places.

Zealand citizens, as proposed by this Bill, alters existing arrangements in order to expand access to higher education for these groups by removing financial barriers. Despite the loss of subsidised tuition fees, access to higher education for most Australian permanent residents and most New Zealand citizens will be improved through the availability of HELP loans.

Furthermore, loan repayment arrangements do not discriminate between Australian citizens, New Zealand citizens and Australian permanent residents; they are identical.

2.78 While the proposed access to HELP loans will not discriminate between Australian citizens, New Zealand citizens and Australian permanent residents, this does not address the concern that the removal of the commonwealth subsidy for New Zealand citizens and Australian permanent residents directly discriminates against permanent residents and New Zealand citizens.

2.79 In relation to the right to equality and non-discrimination, the minister's response appears to identify the objective of the removal of the subsidy as 'savings' which are required:

...in order to ensure the long-term sustainability of Australia's higher education system, and the policy objective of ensuring that most permanent residents and most New Zealand citizens are able to access higher education without the barrier of upfront fees.

2.80 However, no reasoning is provided as to how such savings are necessary to support sustainability or whether alternative approaches were reasonably available that did not discriminate in this manner.

2.81 The response does identify one relevant safeguard applying to certain New Zealand citizens:

It is also important to note that a special cohort of New Zealand citizens (who arrived here as children and have been long term residents of Australia) will remain eligible for both Commonwealth subsidies and all HELP schemes (including VET Student Loans). This Government introduced this arrangement in 2016 and this measure preserves access for this cohort.

2.82 Despite this one safeguard, based on the information provided, it is not possible to conclude that the measure is a justified limitation on the right to equality and non-discrimination for the purposes of international human rights law.

Committee response

2.83 The committee thanks the minister for his response and has concluded its examination of this issue.

2.84 The preceding analysis indicates that, based on the above analysis and the information provided, it is not possible to conclude that the measure is compatible with the right to the progressive introduction of free higher education and the right to equality and non-discrimination.

Lowering repayment threshold for HELP debts

2.85 Schedule 3 of the bill lowers the current minimum repayment threshold for HELP loans to \$41,999 per annum (currently, the repayment threshold is \$55,000). It also introduces additional repayment thresholds and rates (1 percent at \$42,000 and increasing to 10 percent on salaries over 119,882 per annum).¹⁸

2.86 From 1 July 2019 repayment thresholds including the minimum repayment amount will be indexed using the Consumer Price Index rather than Average Weekly Earnings.¹⁹

Compatibility of the measures with the right to education

2.87 As set out above, article 13 of the ICESCR protects the right to education including ensuring it is equally accessible and through the progressive introduction of free higher education by every appropriate means.

2.88 The Australian system of higher education allows students to defer the costs of their education under a HELP loan until they start earning a salary above a certain threshold. The previous analysis stated that the proposed lowering of the repayment threshold engages and may limit the right to education as it imposes payment obligations on those who earn lower incomes. This may be contrary to the requirement under article 13 to ensure that higher education is equally accessible and progressively free. Similarly, the proposed change to indexation also engages and may limit the right to education as it may increase the amount to be paid, relative to earnings, in the event that growth in the Consumer Price Index exceeds growth in Average Weekly Earnings.

2.89 The statement of compatibility did not identify this measure as engaging and limiting the right to education and accordingly did not provide an assessment of whether the limitation is permissible.

2.90 The committee therefore requested the further advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

18 EM 45.

19 EM 45.

Compatibility of the measure with the right to equality and non-discrimination (indirect discrimination)

2.91 As set out above, the right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR, and includes indirect discrimination.

2.92 The previous human rights analysis identified that the change in indexation may have a disproportionate negative effect on women. On average, women earn less over a lifetime of employment, are more likely to take time out of the workforce to care for children and are more likely to be engaged in part-time employment.²⁰ As the previous analysis stated, where a person takes longer to repay HELP debt, the change to indexation may result in increased levels of debt to be repaid relative to earnings. The longer period that women, on average, take to pay their HELP debt²¹ leads, consequently, to higher education costs than their male counterparts.

2.93 Reducing the minimum repayment income threshold for HELP debts to \$41,999 may also have a disproportionate impact on women, given that they are more likely to earn less than men, and therefore more likely to be affected by the reduction in the repayment threshold to cover those earning between \$41,999 and \$55,000.

2.94 The initial analysis noted that, where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.²² Differential treatment (including the differential effect of a measure that is neutral on its face)²³ will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

2.95 The statement of compatibility acknowledges that the measures engage the right to equality and non-discrimination due to their disproportionate impacts on women:

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- 20 See, Australian Bureau of Statistics (ABS), Employee Earnings and Hours (May 2016) <http://www.abs.gov.au/ausstats/abs@.nsf/0/27641437D6780D1FCA2568A9001393DF?OpenDocument>; ABS, Gender indicators, Australia (August 2016) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4125.0~August%202016~Main%20Features~Economic%20Security~6151>; Workplace Gender Equality Agency, Gender pay gap statistics (March 2016) https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf (accessed 24 May 2017).
- 21 See, for example, Senate Standing Committee on Education and Employment, The Future of HECS (28 October 2014) 52.
- 22 See, *D.H. and Others v the Czech Republic* ECHR Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v the Netherlands* ECHR, Application no. 58641/00 (6 January 2005).
- 23 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

introduction of new HELP repayment thresholds, may be seen as limiting the right to non-discrimination due to disproportionate impacts on women and other low income groups.

The Government currently carries a higher deferral subsidy from demographic groups that tend to have lower incomes. This includes women, individuals in part-time work or individuals in low paid professions. As a result, many of these individuals, including many women, will be making repayments for the first time as a result of the introduction of the new, lower thresholds. Addressing this income inequality, however, is not the role of the higher education loans system.²⁴

2.96 In this respect, it was noted that the statement of compatibility does not provide a substantive assessment of whether the measure amounts to indirect discrimination. To state that a negative impact on women results from income inequality is not a justification of the measure – which has the potential to exacerbate inequality – as a proportionate limitation on the right to equality and non-discrimination.

2.97 Accordingly, the committee requested the further advice of the minister 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;
- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

Right to education

2.98 In relation to the right to education, the minister's response argues that the measure does not limit the right to education, including ensuring access to higher education and through the progressive introduction of free higher education in article 13 of the ICESCR. In relation to the lower repayment threshold, the minister's response states:

In terms of access to education, there should be no effect on access based on the new repayment threshold. Eligible students will remain able to defer their student contribution amounts or tuition fees via a HELP loan. This includes individuals who earn more than the minimum repayment threshold.

Further, the new repayment threshold introduced by this Bill remains above the national minimum wage (\$35,000 for full-time workers), and the lower repayment rate ensures that any impact is minimal.

2.99 In relation to the changes to the indexation of the repayment thresholds:

Changes to the indexation of the repayment thresholds similarly do not limit the right to access higher education and are not retrogressive in terms of the introduction of free education. According to the Grattan Institute, the AWE figure is distorted by several factors including increasingly larger incomes due to a rise in professional occupations over low-skilled occupations, and an ageing population staying longer in the workforce with high salaries. As growth in CPI is slower than growth in AWE, this results in people commencing repayments towards their HELP debt sooner. This does not equate to people paying more for their education. As individuals may begin repaying their debts more quickly, it may reduce the amount they repay over the life of their HELP debt, as faster repayments means that there is less debt to index each year.

Further, it should be noted that the growth in HELP repayments has not kept pace with the growth in HELP lending. The rate of spending on the HELP scheme is unsustainable and needs to be addressed. The amount of HECS-HELP loans accessed has increased by around 75 per cent from over \$2.1 billion in 2008 to over \$3.6 billion in 2013. Additionally, the expansion of HELP to the vocational education and training sector has led to VET FEE-HELP loans increasing from \$0.03 billion [in] 2009 to over \$1.7 billion in 2014. From 2008-09 to 2012-13 HELP repayments have only increased by 35 per cent (noting the inherent time lag between incurring the loan and commencing repayments).

The savings arising from this measure will help reduce the unsustainable growth in the HELP scheme, and ensure that it remains available for future generations of students.

Any perceived limitation on the right to education, including the progressive introduction of free higher education, is reasonable, necessary and proportionate to the objective of ensuring that the higher education loan scheme remains sustainable.

2.100 Based on the information provided, the measure may be compatible with the right to education, noting in particular that some evidence has been cited that the measures will not limit access to education or act as a disincentive to education, and noting the justification for the reliance on CPI indexation instead of Average Weekly Earnings.

Right to equality and non-discrimination

2.101 In relation to the right to equality and non-discrimination, the minister's response restates information provided in the statement of compatibility which acknowledges that the measures may have a disproportionate negative effect on women:

Women, and other low-earning demographic groups, may represent a disproportionately large number of those required to make HELP repayments for the first time as a result of the introduction of the new, lower threshold. This may present an indirect limitation on the right to non-discrimination.

2.102 However, as occurred in the statement of compatibility, instead of assessing whether this disproportionate negative effect is permissible the minister's response merely states:

Due to the income-contingent nature of the HELP scheme, those who earned less than the minimum repayment threshold have not previously been required to make repayment obligations. Any disproportionate impact on women as a result of this measure is the result of broader and complex social and economic factors that it is not within the scope of a student loan scheme to address or mitigate.

2.103 However, as noted in the initial human rights analysis, to state that a negative impact on women results from income inequality is not a justification of the measure, which has the potential to exacerbate inequality. Rather, where there is evidence that a measure may have a disproportionate negative effect on women it shows *prima facie* that the measure itself may be discriminatory. In these circumstances, the measure must serve a legitimate objective, be effective to achieve that legitimate objective and be a proportionate means of achieving that objective in order to be compatible with the right to equality and non-discrimination. International human rights law recognises that it is fundamentally the role of government to address existing inequalities and ensure that these are not exacerbated through particular measures.

2.104 The minister's response further argues that women make up the majority of higher education students, graduates and HELP debtors so that any change to the repayment amount would disproportionately affect them. While this may also be correct, it also does not directly address whether a measure which has a disproportionate negative effect on women, by virtue of its effect on those on lower incomes, is justifiable as a matter of international human rights law.

2.105 While not framed in these terms, the minister's response nevertheless provides some information that may go towards whether the limitation is permissible:

...this measure directly contributes to improving the sustainability of HELP and ensuring it remains a viable option for students in the future. HELP expenses, which consist mainly of debt not expected to be repaid and the deferral subsidy from the concessional interest applied to HELP loans, are estimated to be \$2.2 billion in 2017-18.

This measure is expected to bring approximately 183,000 new individuals into the repayment stream, and is expected to increase HELP repayments and reduce the amount of outstanding debt not expected to be repaid.

Any limitation on the right to non-discrimination as a result of the measures contained in Schedule 3 is reasonable, and proportionate to the policy objective of creating a sustainable higher education system, and to ensure that higher education remains accessible.

2.106 Aside from stating the objective of the measure, no further justification is provided as to whether the measure is proportionate. While acknowledging that the measure pursues the objective of improving the ongoing sustainability of HELP loans, the minister's response provides insufficient basis to conclude that the measure is compatible with the right to equality and non-discrimination.

Committee response

2.107 The committee thanks the minister for his response and has concluded its examination of this issue.

2.108 The preceding analysis indicates that the measure may be compatible with the right to education. However, based on the above analysis and the information provided, it is not possible to conclude that the measure is compatible with the right to equality and non-discrimination.

Mr Ian Goodenough MP

Chair