

Bills requiring further information to determine human rights compatibility

Aged Care (Living Longer Living Better) Bill 2013

Introduced into the House of Representatives on 13 March 2013

Portfolio: Health and Ageing

Summary of committee view

1.1 The committee considers that the bill engages a number of rights including the right to health, the right to equality and non-discrimination and rights under the Convention on the Rights of Persons with Disabilities. It seeks further details about the overall impact of the proposed means test for aged care services and the justification for what appears to be a retrogressive measure.

1.2 The committee seeks further information about the protections that are provided where a person faces a possible reduction of subsidy if the person fails to produce information or documents under the bill and the *Aged Care Act 1997*.

Overview

1.3 This bill seeks to amend the *Aged Care Act 1997* and a number of other Acts to give effect to the *Living Longer Living Better* reforms announced by the government in April 2012. This bill was introduced with four other bills as part of a package of legislation to give effect to these reforms.¹ This bill implements reforms across a range of areas including:

- changes relating to residential care, including:
 - in relation to approvals for permanent residential care;
 - the way that residential care subsidies and fees are calculated;
 - contributions to accommodation costs;
- changes to establish a new type of care, home care, including:
 - extension of the existing community visitors scheme for people receiving residential care to home care;
 - amendments to how home care subsidy and fees are calculated, including an income tested care fee;

1 See Australian Aged Care Quality Agency Bill 2013; Australian Aged Care Quality Agency (Transitional Provisions) Bill 2013; Aged Care (Bond Security) Amendment Bill 2013; and Aged Care (Bond Security) Levy Amendment Bill 2013.

- additional dementia supplements, a new veterans' mental health supplement and a workforce supplement to be payable to certain providers;
- changes relating to governance and administration, including:
 - a new Aged Care Pricing Commissioner empowered to make decisions on certain pricing issues;
 - provision for an independent review of the reforms to commence in 2016; and
- minor, administrative or consequential amendments.

Compatibility with human rights

1.4 The bill is accompanied by a self-contained statement of compatibility which identifies a number of rights engaged by the bill, including the right to health under article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to equality and non-discrimination under article 2(2) of the ICESCR, and rights under the Convention on the Rights of Persons with Disabilities.

1.5 The overall purpose of the bill is to change the basis on which older persons are provided with and contribute to the cost of their accommodation and services both in residential care and in their own homes. The explanatory memorandum notes that the package of reforms involves the expenditure of an additional \$3.5 billion dollars over 5 years from 2012-2013.²

1.6 The statement of compatibility notes that the bill promotes the enjoyment of the right to the highest attainable standard of physical and mental health guaranteed by article 12 of the ICESCR. In addition, the bill may also be viewed as promoting the right of a person to an adequate standard of living guaranteed by article 11 of the ICESCR and also the right to social security guaranteed by article 9 of the ICESCR. Other ICESCR rights may also be engaged.³ Insofar as the bill provides further support to persons in their own home, it may be seen as giving effect to the positive obligations of the State under article 17 of the ICCPR. The same analysis would apply in relation to persons living in aged residential care; these residences fall within the guarantee of protection for privacy and the home contained in article 17 of the ICCPR.

1.7 Many older persons may live with disability, and the statement of compatibility identifies the Convention on the Rights of Persons with Disabilities (CRPD) as relevant, noting that article 3(a) of the CRPD sets out as one of the general principles underlying that convention 'respect for inherent dignity, individual

2 Explanatory memorandum, p 3.

3 See the discussion by the UN Committee on Economic, Social and Cultural Rights in its General Comment No 6 (1995) on the economic, social and cultural rights of older persons.

autonomy including the freedom to make one's own choices, and independence of persons.'⁴ Other provisions of the CRPD are also relevant, including (but not limited to):

- article 16: the right of persons with disability to be protected against all forms of exploitation, violence and abuse, including their gender-based aspects;
- article 19: the right of persons with disability to live in the community and to choose their place of residence, and to have access to a range of in-residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- article 22: the right of persons with disability, regardless of place of residence or living arrangements, not to be subjected to arbitrary or unlawful interference with his or her privacy, family or correspondence or other types of communication;
- article 25: the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability; and
- article 28: the right to an adequate standard of living and to social protection.

1.8 The committee notes that given the difference in life expectancy of men and women that the provision of aged care may also have gendered dimensions. In this regard the Convention on the Elimination of All Forms of Discrimination against Women is also relevant.⁵

Permissibility of retrogressive measures

1.9 The explanatory memorandum and statement of compatibility refer to changes to the way in which residential care subsidies and fees are calculated for those who enter residential care after 1 July 2014, including 'a new means test combining income and assets tests, and new annual and lifetime caps on means tested care fees'.⁶ The explanatory memorandum states that as a result of changes that will take effect from 1 July 2014 'some care recipients [will] contribute more to the cost of their care through an income tested care fee'.⁷ The bill contains a number of provisions which set out the manner in which contributions are to be calculated.

4 Statement of compatibility, p 5.

5 See generally UN Committee on the Elimination of Discrimination against Women, *General recommendation No. 27 on older women and protection of their human rights* (2010).

6 Explanatory memorandum, p 1.

7 Explanatory memorandum, p 2.

1.10 However, neither the explanatory memorandum nor the statement of compatibility provides a clear indication of the extent of the proposed reductions, either generally or for individual recipients. It would be of assistance if figures were provided which indicated the overall savings estimated to be made from the introduction of a means test, and examples of the impact on persons who will be subject to the means test.

1.11 A reduction in the amount of subsidies or other support provided to individual recipients encroaches on the person's enjoyment of the relevant right, and may be viewed as a retrogressive measure. Such measures need to be justified, as the UN Committee on Economic, Social and Cultural Rights has noted:

[A]ny deliberately retrogressive measures in that regard would require the most careful consideration and would need to be 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 maximum available resources.⁸

1.12 The committee has addressed similar issues relating to the need to justify retrogressive measures in its interim report on the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012⁹ and in its examination of the changes to the Medicare Chronic Disease Dental Scheme (CDDS).¹⁰

Equality and non-discrimination

1.13 The statement of compatibility also notes that the bill engages the rights to equality and non-discrimination under article 2(2) of the ICESCR (it would also engage article 26 of the International Covenant on Civil and Political Rights). Article 2(2) of the ICESCR provides a guarantee against discrimination in the enjoyment of the rights contained in the ICESCR. The imposition of a means test for eligibility for certain benefits involves differential treatment based on 'property'. However, as the UN Committee on Economic, Social and Cultural Rights has noted:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.

8 UN Committee on Economic, Social and Cultural Rights, General Comment No 3 (1990), para 9.

9 PJCHR, *Interim Report—Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012, Fourth Report of 2012*.

10 See PJCHR, *Seventh Report of 2012*, pp 51-55, and *Third Report of 2013*, pp 133-134.

1.14 In this case the use of a means test as the basis for the reduction in benefits or subsidies would involve the employment of an objective criterion. The question of whether the purpose being pursued is legitimate and whether the imposition of a means test is a reasonable and proportionate measure, raises similar issues to those that fall to be considered in deciding whether any retrogression in the enjoyment of rights is justifiable.

1.15 The committee intends to write to the Minister for Mental Health and Ageing to request further details about the overall impact of the proposed means test, including any savings from the means test and the impact on individuals, and the justification for what appears to be a retrogressive measure under the ICESCR.

Procedural protections in case of reduction of subsidies

1.16 Under the bill the Secretary of the Department of Health is empowered to determine that a person should have certain subsidies reduced. The Secretary may request the provision of information relevant to that matter, and a failure by the person to provide it may mean that the relevant subsidy is reduced. An example is the proposed new section 44-20A of the *Aged Care Act 1997*. This provides that where the Secretary 'believes on reasonable grounds that a care recipient is entitled to compensation under a judgement, settlement or reimbursement arrangement', the Secretary may direct the person to produce relevant information or documents. If the person fails to produce the information or documents, the Secretary may determine reductions in subsidies to be received by the person. Given that the request may be made to an older person who may be in poor health that may affect the person's ability to understand or respond to such a request, there may be concerns about the fairness of such procedures.

1.17 The committee intends to write to the Minister for Mental Health and Ageing to request further information about the protections that are provided where a person faces a possible reduction of subsidy if the person fails to produce information or documents under proposed new section 44-20A and other similar provisions of the bill and the *Aged Care Act 1997*.