

Consideration of responses

Financial Framework Legislation Amendment Bill (No. 2) 2013

Portfolio: Finance

Introduced: House of Representatives, 13 March 2013;

Status: Act, received Royal Assent 28 May 2013

PJCHR comments: Fourth Report of 2013, tabled 20 March 2013

Response dated: 27 June 2013

Information sought by the committee

3.1 The committee sought further information on the purpose and effect of the amendments relating to recoverable payments made under the Australian Government Disaster Recovery Payments scheme and the exclusion of the right of review under the *Social Security (Administration) Act 1999* in relation to these payments.

3.2 The former Minister's response is attached.

Committee's response

3.3 The committee thanks the former Minister for her response.

3.4 The response explains that it is appropriate to exclude the review provisions in Part 4 of the *Social Security (Administration) Act 1999* because 'decisions under the recoverable payment and recoverable death payment provisions relate to the treatment of an overpayment and do not involve judgement calls regarding the entitlement of individuals to social security'.

3.5 However, it is not clear to the committee whether a person will have any right to challenge a decision if it is incorrect or based on the wrong facts. A person's right to such review will be necessary to ensure compatibility with article 14(1) of the ICCPR. The committee therefore intends to write to the Minister to seek clarification:

- whether the decisions will be subject to judicial review, for instance, under *the Administrative Decisions (Judicial Review) Act 1977*; and
- if so, whether this encompasses review of the facts.

3.6 The committee notes that the bill has already been passed by the Parliament and regrets that the committee's concerns were not addressed more fully and in a timelier manner.



SENATOR THE HON PENNY WONG

Minister for Finance and Deregulation
Deputy Leader of the Government in the Senate

REF:C13/859

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

27 JUN 2013

Dear Chair *Harry*

Thank you for your letter of 20 March 2013, concerning certain amendments to the *Social Security Act 1991* (the Act), in relation to payments made under the Australian Government Disaster Recovery Payments (AGDRP) scheme, that was contained within the *Financial Framework Legislation Amendment Bill (No. 2) 2013* (FFLA Bill). I apologise for the delay in replying to you.

The FFLA Bill amended the Act to incorporate recoverable payment and recoverable death payment provisions, in relation to payments made under AGDRP scheme only. These provisions were developed to address concerns raised by the Australian National Audit Office (ANAO) about potential breaches of section 83 of the Constitution, while auditing financial statements for the 2010-11 financial year.

Following discussions between officials from my Department and the Attorney-General's Department, payments made under the AGDRP scheme, which are supported by a special appropriation, were identified as being at risk of breaching section 83 of the Constitution.

This risk arises where payments are made from special appropriations, such as the AGDRP special appropriation, and the administrative processes for making the payments do not align with legislative requirements or preconditions for payments. For example, the AGDRP scheme provides that a recipient qualifies for payment where a number of preconditions are satisfied, including factual matters, such as; that a potential recipient is an Australian resident and is adversely affected by a disaster.

Following recent natural disasters, it has become clear that it would be unreasonable to halt a payment where a potential recipient is technically ineligible for an AGDRP scheme payment because they are unable to produce evidence of citizenship and/or their home address. Without amendment, payments under this scheme posed a high risk of breaching section 83 of the Constitution.

Accordingly, the amendment provided appropriation authority for payments that, although made in the bona fide administration of the legislation, are not, in practice, consistent with the requirements or preconditions imposed by the legislation. For example, where a payment is made to a recipient during a disaster situation in honest administration of the Act, and is later found to have fraudulently claimed entitlement; been deceased at the time the payment was made; or was in fact not entitled to payment due to residency, the amount may be recoverable in line with section 47 of the *Financial Management and Accountability Act 1997*.

This amendment is consistent with the approach taken to address other potential risks of this nature, for example, in the *Financial Framework Legislation Amendment Act (No. 2) 2012* and the *Financial Framework Legislation Amendment Act (No. 1) 2013*.

Decisions under the recoverable payment and recoverable death payment provisions relate to the treatment of an overpayment, once identified, and do not involve judgement calls regarding the entitlement of individuals to social security. These provisions could only be used where a recipient had not, in fact, been eligible to receive a payment or where an overpayment has occurred due to good faith human error such as to a deceased recipient.

As the provisions relate to how the Commonwealth treats administrative overpayments, either by seeking reimbursement, off-setting the relevant amount against a future entitlement (including a potential future entitlement) or waiving the debt, they do not impact on the right to social security generally. Accordingly, it was deemed appropriate to exclude the provisions from review under Part 4 of the *Social Security (Administration) Act 1999*. The provisions were not designed to deny social security payments or to remove an individual's right to social security, rather they provide a mechanism for Government to manage overpayments that are administrative in nature.

Further the FFLA Bill amendments require the Secretary of the Department to ensure a report is published where the recoverable payment provisions are used. The report may be included in the agency's annual report or publicly on its website to ensure appropriate transparency and accountability.

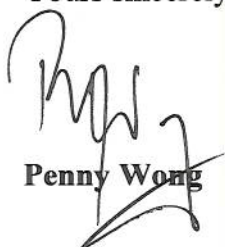
The recoverable payment and recoverable death payment provisions do not affect any other social security mechanisms under the Act and it is my belief that they do not impede the right to social security under article 9 of the International Covenant on Economic, Social and Cultural Rights, given the safeguards embodied in the transparency and accountability requirements for the public report.

In developing the recoverable payment and recoverable death payment mechanisms, my Department worked closely with the Attorney-General's Department, the ANAO and the Australian Government Solicitor.

I have copied this letter to the Attorney-General, given his portfolio responsibility.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely


Penny Wong

