

National Disability Insurance Scheme Legislation Amendment Bill 2013 and DisabilityCare Australia Fund Bill 2013 and eleven related bills⁴

Portfolio: Social Services

Introduced: House of Representatives, 15 May 2013

Status: Act, received Royal Assent 28 May 2013

PJCHR comments: Seventh Report of 2013, tabled 5 June 2013

Response dated: 26 June 2013

Information sought by the committee

3.16 The National Disability Insurance Scheme Legislation Amendment Bill 2013 amended the National Disability Insurance Scheme Act 2013 to, among other things, exempt the scheme from the operation of the Age Discrimination Act 2004. The committee sought clarification of why a general exemption from the provisions of the Age Discrimination Act 2004 was justified.

3.17 The committee also sought clarification as to whether the exclusion from access to the National Disability Insurance Scheme (NDIS) of New Zealand citizens who are long-term residents of Australia, and not protected Special Category Visa (SCV) holders or permanent residents, was consistent with the right to non-discrimination and the right to social security.

3.18 The former Minister's response is attached.

Committee's response

3.19 The committee thanks the former Minister for her response.

General exemption from the Age Discrimination Act

3.20 In the *First Report of 2013*, the committee outlined its concerns that the National Disability Insurance Scheme Bill 2012, which established the framework for the NDIS, limited access to the NDIS to people under 65 years old. The statement of

4 Family Trust Distribution Tax (Primary Liability Amendment (DisabilityCare Australia) Bill 2013, Fringe Benefits Tax Amendment (DisabilityCare Australia) Bill 2013, Income Tax (First Home Saver Accounts Misuse Tax) Amendment (DisabilityCare Australia) Bill 2013, Income Tax (TFN Withholding Tax (ESS)) Amendment (DisabilityCare Australia) Bill 2013, Income Tax Rates Amendment (DisabilityCare Australia) Bill 2013, Medicare Levy Amendment (DisabilityCare Australia) Bill 2013, Superannuation (Excess Concessional Contributions Tax) Amendment (DisabilityCare Australia) Bill 2013, Superannuation (Excess Non-concessional Contributions Tax) Amendment (DisabilityCare Australia) Bill 2013, Superannuation (Excess Untaxed Roll-over Amounts Tax) Amendment (DisabilityCare Australia) Bill 2013, Taxation (Trustee Beneficiary Non-disclosure Tax) (No. 1) Amendment (DisabilityCare Australia) Bill 2013 and Taxation (Trustee Beneficiary Non-disclosure Tax) (No. 2) Amendment (DisabilityCare Australia) Bill 2013.

compatibility suggested that this limitation was in accordance with 'the broader intent of an integrated system of support operating nationally and providing seamless transition through different phases of life'.⁵ The committee, however, was concerned that the aged care system may not be designed with the same comprehensive and holistic approach to disability that would underpin the NDIS.

3.21 The former Minister responded by explaining that the aged care system provided a number of supports consistent with those that would be delivered through the NDIS. In addition, recent changes to the aged care system would allow the system to 'better meet the needs of individual consumers, including needs that relate to a person's disability'. A copy of the former Minister's response can be found in the *Sixth Report of 2013*.

3.22 The committee had, therefore, understood that there would be some equivalence in the forms of assistance and support available between the NDIS and the aged care system, and was accordingly satisfied that the scheme was unlikely to raise significant concerns with regard to the rights to equality and non-discrimination. However, it has since been brought to the committee's attention that the types and level of supports and services provided by DisabilityCare may be inadequately reflected in the aged care system, even taking into account the recent reforms to the system.⁶ These concerns are further exacerbated by the amendments introduced by the National Disability Insurance Scheme Legislation Amendment Bill 2013 to exempt the NDIS from the *Age Discrimination Act 2004*.

3.23 In its *Seventh Report of 2013*, the committee expressed concern about this blanket exemption and asked the former Minister to explain why such an exemption was necessary. In her response, the former Minister acknowledged the committee's concern in relation to the breadth of a general exemption. The response stated that the 'government considered whether a more limited exemption would achieve its policy objective but considered that it would not and chose instead to seek a general exemption from the Age Discrimination Act'. The response did not provide any information as to the nature of the other exemption(s) that were considered.

3.24 The response explains that:

Developing launch sites for DisabilityCare Australia requires the Commonwealth to negotiate with the States and Territories. A general exemption is necessary in order to facilitate the introduction of any additional launch sites negotiated with jurisdictions that involve temporary restrictions on the basis of age in order to ensure their success. ...

5 Statement of compatibility, National Disability Insurance Scheme Bill 2012, p 4.

6 See, for example, correspondence to the committee from the Macular Disease Foundation Australia and National Seniors Australia on 18 June 2013. This correspondence is available on the committee's website.

All of these restrictions are or will be temporary except for the limitation on access for people over the age of 65. ... [T]hese temporary age-based restrictions for launch sites have a legitimate aim (to test the effectiveness of supports under DisabilityCare for particular sub-groups of people with disabilities) and are reasonable and proportionate means of achieving this.

...

The Australian Government does not envisage undertaking any additional acts which would fall within the exemption in the Age Discrimination Act, except those analogous to the existing exemptions in establishing launch sites.

3.25 The committee accepts that temporary age-based restrictions for the purpose of establishing launch sites are likely to be consistent with the rights to equality and non-discrimination. However, the committee is concerned that the amendments instead introduce a *general and permanent* exemption from the Age Discrimination Act, which is not restricted for the temporary purpose of establishing launch sites. It is also not clear to the committee why the existing provisions in the Age Discrimination Act which enable the Australian Human Rights Commission to determine exemptions on a case by case basis would not be an appropriate and less restrictive alternative to the approach of exempting the Age Discrimination Act in its entirety.

3.26 The committee intends to seek clarification from the Minister as to whether the government had considered this option and if so, why it was not considered suitable.

3.27 The response does not explain whether the government considers that a general exemption from the Age Discrimination Act is necessary to ensure that the exclusion of over 65-year olds from accessing the NDIS does not constitute unlawful age discrimination under the Act. The committee accepts that the NDIS needs to be financially sustainable to be workable and that the government intends for there to be a 'seamless transition' between the NDIS and the aged care system. The committee is, however, concerned, in light of the information received, that there may be substantial differences between the supports provided to individuals in the aged care system compared to those on the NDIS, which could result in the inequitable treatment of people over 65 years old who acquire a disability.

3.28 The committee recommends that this issue should be evaluated when the *National Disability Insurance Scheme Act 2013* is reviewed after two years in accordance with section 208 of the Act.

Exclusion of long-term NZ residents

3.29 The issue had been raised with the committee whether excluding certain New Zealand citizens who are resident in Australia (but not permanent residents) from accessing the NDIS, even though they will be subject to the increased Medicare levy to help fund the scheme, is compatible with human rights, in particular the rights to equality and non-discrimination and the right to social security.

3.30 The committee has previously noted that differential treatment will not constitute discrimination contrary to the rights to equality and non-discrimination provided that it is aimed at a legitimate objective and is reasonable, necessary and proportionate to that objective. Similarly, the right to social security may be subject to permissible limitations, provided that the limitation pursues a legitimate objective and bears a rational and proportionate connection to that objective.

3.31 The former Minister's response states that the NDIS was designed in accordance with the recommendations of the Productivity Commission, which recommended that the residence requirements of the scheme should initially be comparable to social security payments and that reciprocal arrangements with New Zealand could be negotiated at a later date.

3.32 The response notes that the 2001 changes to Australian social security law were publicised and were designed to provide a more sustainable and affordable platform for the movement of people between Australia and New Zealand. It explains that limiting access to the NDIS by New Zealand non-protected SCV holders is for the purpose of ensuring the sustainability of the NDIS in the longer term.

3.33 The response notes that New Zealand citizens may apply for an Australian permanent visa (and therefore become eligible for the NDIS) and that information regarding a New Zealand citizen's access to Australian government payments and services is widely available. It also points out that 'non-protected' SCV holders retain full access to Medicare and the Pharmaceutical Benefits Scheme.

3.34 The committee recognises that the question of access to various forms of social welfare and other benefits, and their relationship to immigration and citizenship status raise complex policy issues, including issues of the sustainability of social welfare arrangements and fairness. The committee notes that the former Minister maintained that the exclusion of non-protected SCV holders from eligibility for the NDIS was 'for the legitimate objective of ensuring the sustainability of DisabilityCare Australia by providing consistency of access with the social security system consistent with the recommendations of the Productivity Commission, and is reasonable and proportionate to achieving this objective.'⁷

3.35 The committee notes that this justification is offered in very general terms and considers that further detail of how this exclusion was necessary for ensuring the sustainability of the NDIS would have assisted the committee in assessing compatibility.

3.36 The committee also notes, however, that in a joint report released in November 2012, the Australian Productivity Commission and the New Zealand Productivity Commission considered in detail the situation of New Zealand non-

7 Letter from The Hon Jenny Macklin MP, Minister for Families, Community Services and Indigenous Affairs and Minister for Disability Reform to Mr Harry Jenkins MP, Chair, PJCHR, 26 June 2013, Attachment, p 3.

protected SCV holders living in Australia, in the context of an overall examination of trans-Tasman migration and its implications.⁸ The *Joint Report* noted the difficulties that the 2001 changes to entitlements to certain benefits to non-protected SCV holders in Australia had led to for some groups, as well as the fact that the pathway to full access to such benefits by way of permanent residency and then Australia citizenship was not open to a significant proportion of New Zealand non-protected SCV holders because they did not satisfy the applicable age requirement or requirements applicable under the skilled migration program. The *Joint Report* also considered other dimensions of the changes in entitlement, including the fiscal considerations, social inclusion issues and the significance of citizenship.⁹

3.37 The two Commissions concluded:

Permanent residency and citizenship

As noted, the more limited pathways to Australian permanent residence and citizenship for some members of this group compound the problem for non-protected SCV holders. For many SCV holders living long term in Australia, access to citizenship is the key to gaining access to social policy payments and supports and the ability to vote across all Australian jurisdictions. Moreover, the undesirable social outcomes experienced by a small but growing share of these ‘indefinite temporaries’ may develop into a point of irritation within the trans-Tasman relationship.

The Commissions understand that both Governments are aware of the situation and that the Australian Government is working towards a resolution (Gillard 2012).

R4.24 The Australian Government should address the issues faced by a small but growing number of non Protected Special Category Visa holders living long term in Australia, including their access to certain welfare supports and voting rights. This requires policy changes by the Australian Government, including the development of a pathway to achieve permanent residency and/or citizenship.¹⁰

3.38 The committee draws the attention of the Minister to the *Joint Report* of the two Productivity Commissions and the hardship that the Commissions identify as arising for some groups from the 2001 changes and the difficulties that some long-term New Zealand residents have in applying for permanent residence and citizenship. The hardship identified by the two Commissions has implications for the enjoyment of a number of human rights to which New Zealand nationals who are residents of Australia are entitled and may be relevant to a consideration as to

8 Australian Government Productivity Commission and New Zealand Productivity Commission, *Strengthening trans-Tasman economic relations, Final report [Joint Report]*, November 2012, transtasman-review.pc.gov.au/sites/default/files/trans-tasman.pdf.

9 Joint Report, pp 149-158 and Supplementary Paper D, pp 15-51.

10 Joint Report, p 154 and Recommendation R4.24.

whether the differential treatment involved in excluding long-term NZ non-protected SCV holders is justifiable.

3.39 The committee would welcome the Minister's response to the recommendations made by the two Productivity Commissions in relation to the situation faced by New Zealand non-protected SCV holders who are long-term residents of Australia but who are not eligible to apply for permanent residence in Australia or for Australian citizenship because they do not satisfy the age requirement or requirements applicable under the skilled migration program.



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Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
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Dear Mr Jenkins

Thank you for your letter of 5 June 2013 in which the Committee seeks clarification with regard to aspects of the National Disability Insurance Scheme Legislation Amendment Bill 2013 and the package of legislation attached to the DisabilityCare Australia Fund Bill 2013.

I appreciate the Committee's consideration of the Bills and am pleased to have the opportunity to provide clarification on the issues the Committee has raised.

Please find attached detailed responses to the specific issues on which you enquired.

Yours sincerely

JENNY MACKLIN MP
Encl.

RESPONSES TO THE SPECIFIC ISSUES RAISED BY THE COMMITTEE

The Committee intends to write to the Minister for Families, Community Services and Indigenous Affairs and the Minister for Disability Reform to seek clarification as to why a general exemption from the provisions of the *Age Discrimination Act 2004* is justified and what specific type of acts it is envisaged will be covered by this exemption.

The Australian Government strongly supports the protections provided by federal anti-discrimination legislation and understands the concern of the Parliamentary Joint Committee in relation to the breadth of a general exemption from the *Age Discrimination Act 2004*. The Government considered whether a more limited exemption would achieve its policy objective but considered that it would not and chose instead to seek a general exemption from the Age Discrimination Act.

Developing launch sites for DisabilityCare Australia requires the Commonwealth to negotiate with the States and Territories. A general exemption is necessary in order to facilitate the introduction of any additional launch sites negotiated with jurisdictions that involve temporary restrictions on the basis of age in order to ensure their success. It is already necessary to limit access to persons over the age of 65, to children in South Australia from birth until five years of age, with children aged five to thirteen years of age being eligible prior to July 2014, extending to age 14 years in 2015, and to young people aged 15 to 24 years in Tasmania, in order to ensure the success of the DisabilityCare Australia launch sites.

All of these restrictions are or will be temporary except for the limitation on access for people over age 65. As outlined in the Statement of Compatibility with human rights, these temporary age-based restrictions for launch sites have a legitimate aim (to test the effectiveness of supports under DisabilityCare for particular sub-groups of people with disabilities) and are reasonable and proportionate means of achieving this. Without a general exemption from the Age Discrimination Act, any temporary age-based restrictions for future launch sites could constitute unlawful age discrimination. Prescriptions around the launch sites are to be set out in the rules made under the NDIS Act to allow flexibility in introducing new launch sites. As such, a general exemption is necessary so that any future rules made under the *National Disability Insurance Scheme Act 2013* establishing new launch sites are also exempt from the Age Discrimination Act.

The Australian Government does not envisage undertaking any additional acts which would fall within the exemption in the Age Discrimination Act, except those analogous to the existing exemptions in establishing launch sites. The general exemption from the Age Discrimination Act only applies to acts done in direct compliance with the NDIS Act. Any other acts of unlawful discrimination carried out through the course of administering the scheme and Act, and which are not in direct compliance with the Act itself, are still prohibited under the Age Discrimination Act.

The Committee intends to write to the Minister for Families, Community Services and Indigenous Affairs and the Minister for Disability Reform to seek clarification as to whether the exclusion from access to the NDIS of New Zealand citizens who are long-term residents of Australia and not protected Special Category Visa holders or permanent residents, is consistent with the right to non-discrimination and the right to social security.

The Australian Government believes that restricting access to the scheme by New Zealand citizens who are long-term residents of Australia and not protected Special Category Visa holders constitutes legitimate differential treatment.

The residence requirements for the scheme are aligned with those for many other similar Australian Government schemes for people with disability and their carers, for example Helping Children with Autism, Better Start for Children with Disability, Disability Support Pension, Carer Payment and Disability Employment Service Program, which are restricted to Australian citizens or permanent residents unless specifically provided for under the International Social Security Agreement with New Zealand.

The Australian Government has designed the DisabilityCare Australia, the national disability insurance scheme, based on the recommendations of the Productivity Commission. The Productivity Commission recommended that, as a starting point, the residence requirements for the scheme be broadly comparable to social security payments given the scheme is a national entitlement system, and consistent with Australia's bilateral Social Security Agreement with New Zealand.¹ The Commission further recommended that reciprocal arrangements with New Zealand could be negotiated at a later date.

New Zealand citizens residing in Australia prior to February 2001 on a Special Category Visa (SCV), or at least one of the two years prior to the social security changes, are considered to be Australian residents for social security purposes and will therefore satisfy the residential requirements for DisabilityCare Australia. New Zealand citizens who arrived in Australia after this date are considered to be temporary residents and are therefore ineligible for DisabilityCare Australia, unless they hold a permanent visa or are also an Australian citizen (i.e. a dual national). These 'non-protected' SCV holders do retain full access to Medicare and the Pharmaceutical Benefits Scheme, however.

The Trans-Tasman Travel Arrangements allow Australian and New Zealand citizens to live and work in each other's country without restrictions. On arrival in Australia, most New Zealand citizens who do not hold another visa and present a valid New Zealand passport are granted a SCV. The SCV is a temporary visa, intended to provide more flexible travel arrangements and allow a New Zealand citizen to live, work or study in Australia lawfully. It is not a permanent visa and not designed for permanent migration.

On 26 February 2001 changes were made to Australian social security law restricting access to social security payments for New Zealand citizens. This means that generally SCV holders who entered Australia after 26 February 2001 are no longer eligible for working-age social security payments such as Newstart, Youth Allowance, Parenting Payment, Carer Payment, Sickness Allowance and Special Benefit, unless they apply for and are granted a permanent visa in the same manner as migrants from any other country. They also are unable to vote in Australian elections and cannot join the Australian Defence Force or obtain ongoing work for the Australian Government.

¹ *Disability Care and Support*, Productivity Commission Inquiry Report Vol 1, No. 54, 31 July 2011, pages 176-177.

The 2001 changes to Australian social security law were publicised and were designed to provide a more sustainable and affordable platform for the movement of people between Australia and New Zealand.

Limiting access to DisabilityCare Australia for New Zealand Special Category Visa holders is for the legitimate objective of ensuring the sustainability of DisabilityCare Australia by providing consistency of access with the social security system, consistent with the recommendations of the Productivity Commission, and is reasonable and proportionate to achieving this objective. This restriction is consistent with the purpose of the Trans-Tasman Travel Arrangement, as well as the existing arrangements within the broader social security system and is necessary to ensure the integrity and sustainability of the scheme in the longer term. Special Category Visas facilitate the travel of New Zealand residents to Australia. Any changes to the provisions for this group are most appropriately considered in the context of ongoing discussions between Australia and New Zealand.

Whether New Zealand citizens apply for an Australian permanent visa is a decision for each person to make based on their individual circumstances, however the Australian Government encourages people who have a long-term commitment to Australia to apply for permanent residence. Information regarding a New Zealand citizen's access to Australian government payments and services is widely available. The Australian Government believes that ultimately it is the responsibility of individuals to inform themselves about such issues if they are considering moving from one country to another.