

## Higher Education (Maximum Amounts for Other Grants) Determination 2013

FRLI: F2013L02165

Portfolio: Education

Tabled: Scheduled for House of Representatives and Senate, 11 February 2014

### Summary of committee concerns

2.36 The committee seeks further information on the impact of the proposed changes on the right to education and, to the extent that the instrument may involve a limitation or a retrogressive measure, a statement of justification for the changes.

### Overview

2.37 The *Higher Education Support Act 2003* provides for the payment of 'other grants' to higher education providers and other eligible bodies for a variety of purposes.<sup>1</sup> Such purposes include, for example, the promotion of equality and opportunity in higher education. The Act sets out the maximum total payments for 'other grants' in respect of a year.<sup>2</sup> In relation to each of the years 2013-2016, the Act sets out an amount or provides that, in the alternative, the Minister may determine an amount by legislative instrument. In relation to the year 2017 and each later year, the Act provides that the Minister must determine the amount by legislative instrument.

2.38 This instrument sets out the maximum amounts of all grants for 'other grants' for the 2013-2017 calendar years.

### Compatibility with human rights

#### *Statement of compatibility*

2.39 The statement of compatibility accompanying the instrument states that the instrument engages the right to education.<sup>3</sup> The statement states that, given the purposes of the 'other grants' payments, the instrument 'enables access to education and therefore will be compatible with human rights'.<sup>4</sup> Further, that:

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1 *Higher Education Support Act 2003*, Part 2-3.

2 *Higher Education Support Act*, section 41-45.

3 Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

4 Statement of compatibility, p 1.

To the extent that the right to education is engaged, this right is promoted by the Instrument as the Instrument aims to improve the integrity of the higher education sector.<sup>5</sup>

2.40 The statement concludes that the instrument is compatible with human rights because it advances the protection of human rights.

### ***Committee view on compatibility***

#### ***Right to education***

2.41 The committee agrees that, overall, the payment of 'other grants' under the Higher Education Support Act appears to promote the right to education. However, the committee notes that the purpose of this particular instrument is to prescribe the maximum amounts payable in respect of a given year. The committee also notes that the amounts specified in the instrument for the years 2013-2017 are all lesser amounts than those currently specified in the Act.<sup>6</sup>

2.42 The statement of compatibility does not address why the amounts specified in the instrument are lower than those specified in the Act. To the extent that this instrument reduces the level of funding available, the measure may be either a limitation on the right to education or a retrogressive measure.

2.43 Article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that the rights guaranteed in the Covenant, such as the right to education, may be limited but only by:

such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

2.44 Our predecessor committee also noted that retrogressive measures affecting economic, social and cultural rights have to be clearly justified:

A deliberate retrogressive measure has been described to mean any measure which implies a backwards step in the level of protection of ICESCR as a consequence of an intentional decision by the state and includes an unjustified reduction in public expenditure in the absence of adequate compensatory measures aimed to protect the affected individuals. Deliberate retrogressive measures are not prohibited per se under international human rights law but will require close justification,

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5 Statement of compatibility, p 1.

6 See section 41-45 of the Higher Education Support Act.

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even during times of severe resource constraints, whether caused by a process of adjustment, economic recession, or by other factors.<sup>7</sup>

2.45 If the effect of the instrument is to reduce the amount of funding available, it is necessary for the Minister to demonstrate that the measure pursues a legitimate objective and has a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

2.46 The statement of compatibility does not address these matters. The committee expects that where funding cuts are made, the statement of compatibility should provide an assessment of the practical impact on the relevant rights, including, where the enjoyment of such rights will be affected, an appropriate justification.

2.47 The committee notes that relevant to this analysis will be whether such funding has been directed elsewhere due to the identification of different needs and priorities in the education sector. For example, the committee notes that another recent legislative instrument appears to have the effect of increasing the amount of funding currently specified in the Higher Education Support Act for other types of payments under the Act.<sup>8</sup>

**2.48 The committee intends to write to the Minister for Education to seek further information about:**

- **whether the provision of lesser amounts for certain grants under the Higher Education Support Act than the amounts presently specified under the Act may constitute a limitation on the right to education or a retrogressive measure; and**
- **how the reduction in funding is considered to be reasonable, necessary and proportionate to achieving a legitimate objective.**

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7 PJCHR, *Social Security Legislation Amendment (Fair Incentives to Work) Act 2012, Final Report, Fifth Report of 2013*, pp 16-17.

8 Higher Education Support (Maximum Amounts for Commonwealth Scholarships) Determination 2013.

