

## **National Disability Insurance Scheme Legislation Amendment Bill 2013 and DisabilityCare Australia Fund Bill 2013 and eleven related bills**

*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 and First Report of the 44th Parliament, tabled 10 December 2013*

*Response dated: 3 February 2014*

### **Information sought by the committee**

3.84 In its *First Report of the 44th Parliament* the committee raised two concerns in its second round of comments on the National Disability Scheme Legislation Amendment Bill 2013 and related legislation. These involved:

- the inclusion of a general exemption in the NDIS legislation from the *Age Discrimination Act 2004*; and
- the question of whether the exclusion from the NDIS of long-term New Zealand residents of Australia who are not Australian citizens or permanent residents or protected SCV holders, was based on objective and reasonable criteria or was discriminatory within the meaning of the applicable human rights treaties.

3.85 These concerns had previously been raised by the predecessor committee to this committee in its *Seventh Report of 2013*.

3.86 In relation to the second point, the position of non-protected New Zealand SCV holders, the committee also noted that the Joint Report of the Australian and New Zealand Productivity Commissions had drawn attention to the difficulties that such persons experienced and made a number of recommendations to alleviate those difficulties. The committee sought information about the government's response to those recommendations.

3.87 The committee's concerns were referred to the Assistant Minister for Social Services as the matters fall within his portfolio responsibilities. The response appears as part of the overall response to the concerns raised by the committee in relation to this bill and a number of other legislative instruments relating to the NDIS. The relevant extract from the Assistant Minister's response is attached.<sup>1</sup>

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1 Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, Chair PJCHR, 3 February 2014, Attachment, pp 12-13.

## Committee's response

3.88 The committee thanks the Assistant Minister for his response.

### ***Exemption from the Age Discrimination Act 2004***

3.89 Our predecessor committee raised concerns about a general exemption of the NDIS from the *Age Discrimination Act 2004* in its *Seventh Report of 2013*.<sup>2</sup> In response, the former Minister stated that the former government had '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. According to the former Minister:

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. ...

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.

3.90 This committee considered the former Minister's response in its *First Report of the 44th Parliament*.<sup>3</sup> The committee accepted that temporary age-based restrictions for the purpose of establishing launch sites were likely to be consistent with the rights to equality and non-discrimination. However, the committee was concerned that the amendments had instead introduced a general and permanent exemption from the Age Discrimination Act, which was not restricted to the temporary purpose of establishing launch sites.

3.91 The Assistant Minister's response notes the committee's concerns and states that '[a]s the previous Government advised the committee, a number of alternatives, including limited exemptions, were considered but it was concluded

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2 PJCHR, *Seventh Report of 2013*, 5 June, 2013, pp 17-20.

3 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, pp 187-192.

that these alternatives were not able to adequately achieve the policy objectives of the Government.’ The response continues:

Without a general exemption from the Age Discrimination Act, any new temporary age-based restrictions in trial sites could constitute unlawful age discrimination. New trial sites have been negotiated since the commencement of the trials and the flexibility created by the legislation has allowed those negotiations to take place.

3.92 The response repeats in substance a passage contained in the former Minister's earlier response:

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 trial sites. The government notes that 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.

3.93 The committee notes the statement that ‘a number of alternatives, including limited exemptions, were considered but it was concluded that these alternatives were not able to adequately achieve the policy objectives of the Government.’ The committee is not aware of the specific alternatives that were considered by government, as there is no specific discussion of these in the responses provided to the committee. The committee itself suggested that one alternative might be for the government to apply the Australian Human Rights Commission for an exemption from the operation of the legislation, as is provided for under the Age Discrimination Act. In its *First Report of the 44th Parliament* the committee sought clarification from the Minister ‘as to whether the government had considered this option and if so, why it was not considered suitable.’<sup>4</sup> The Assistant Minister's response has not responded to this request.

3.94 The committee notes that further alternatives might be a specific exclusion for the purposes of establishing trial sites rather than a general exemption, and a sunset clause on the exemption to reflect what the government maintains is its temporary nature (other than in relation to the cut-off eligibility age of 65, which could be explicitly reflected in the legislation if it is considered that this cut-off is consistent with the Convention on the Rights of Persons with Disabilities (CRPD) and other treaty obligations).

**3.95 The committee is of the view that general exemptions to the provisions of the anti-discrimination statutes are in general to be avoided, unless there is a**

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4 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, p 189, para 3.26.

compelling case that such an exemption is needed. The committee recognises that partial or temporary exemptions may be necessary and accepts that this may be so in relation to the establishment of trial sites for the NDIS. However, the committee considers that there appear to be ways of achieving the legitimate goal of ensuring that the NDIS can be phased in without adopting the general exemption which the legislation contains.

**3.96** The committee regrets the fact that the approach adopted has been use of a general exemption, unlimited as to time, to advance a goal which is said to be limited and temporary, without any substantive engagement with the committee on the issue of whether a more limited exemption or exclusion would serve those goals equally well.

***Concerns about the cut-off age of 65 and the supports offered by the aged care system***

**3.97** This committee (and its predecessor committee) raised concerns about the cut-off eligibility age of 65 for the NDIS. The government has stated that persons with disability aged 65 and above will receive appropriate services and support within the aged care system. However, as the committee noted in its *First Report of the 44th Parliament*:

[I]t has ... 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.<sup>5</sup>

**3.98** The committee concluded 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.'<sup>6</sup> It accordingly recommended that the '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.<sup>7</sup>

**3.99** The committee notes that the Assistant Minister's response did not respond to this recommendation. The committee intends to write again to the Assistant Minister to draw his attention to the committee's recommendation and to request a response.

***The position of New Zealand citizens who are non-protected SCV holders***

**3.100** The committee has sought clarification from the former Minister and the current Minister of the situation of New Zealand citizens who are non-protected SCV

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5 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, p 189, para 3.22.

6 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, p 189, para 3.27.

7 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, p 189, para 3.28.

holders, in particular whether their exclusion from access to certain benefits and from the NDIS, is consistent with the non-discrimination requirements of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

3.101 This group of long-term residents in Australia does have access to a range of welfare and other benefits. This access is less extensive than that available to Australian citizens or non-citizens who are permanent residents of Australia. The access of non-protected SCV holders is more extensive than persons of other nationalities who are resident in Australia but who are neither citizens nor permanent residents. The current situation reflects the preferential treatment given to New Zealand citizens in Australia (Australian citizens enjoy similar preferential treatment in New Zealand, though they enjoy access to a wider range of benefits). While New Zealand non-protected SCV holders still enjoy greater benefits than other non-citizen residents who are not permanent residents, the benefits are less extensive than they once were, with major changes having taken place in 2001.

3.102 The committee has previously raised the question of whether the exclusion of New Zealand non-protected SCV holders, who are long-term residents of Australia and required to pay the NDIS levy, from access to the NDIS is consistent with the guarantee of non-discrimination under the ICCPR, ICESCR and ICERD.

3.103 The response received in response to the committee's comments in its *Seventh Report of 2013* reiterated the explanation that the difference in treatment is based on the different immigration status of the SCV visa holder compared with that of an Australian citizen or a non-citizen permanent resident.<sup>8</sup> It also stated that limiting access to the NDIS for non-protected SACV holders 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.<sup>9</sup>

3.104 The committee notes the explanation that there is a difference in immigration status between non-protected SCV holders, and Australian citizens and permanent residents. However, under the ICCPR and ICESCR, non-citizens are entitled to the enjoyment of the human rights guaranteed by the Covenants without discrimination;<sup>10</sup> the CRPD also guarantees persons with disabilities the equal enjoyment of human rights without discrimination.<sup>11</sup> Exclusion from access to certain

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8 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, pp 195-196.

9 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, pp 195-196.

10 Articles 2 and 26 of the ICCPR; and article 2 of the ICESCR. See also, UN Human Rights Committee, *General comment No 15: The position of aliens under the Covenant* (1986).

11 Article 5 of the CRPD.

benefits on the ground of immigration status may therefore amount to discrimination, unless the distinction can be shown to be based on reasonable and objective criteria in pursuit of a legitimate objective.

3.105 The committee accepts that, among other matters, the following may be relevant to determining whether such arrangements are justified or discriminatory: (i) the goal of ensuring the financial sustainability of social welfare and other programs (though the committee also notes that the group affected will be subject to the NDIS levy while being excluded from access to the NDIS); (ii) obligations under reciprocal social security agreement with other countries; and (iii) the goal of encouraging long-term residents to apply for permanent residence or citizenship. Thus far, although there have been general references to these factors, the committee does not consider that a clear justification for the differential treatment has been clearly put forward.

**3.106 The committee intends to write again to the Assistant Minister to seek information on the question of whether the exclusion of non-protected SCV holders from the NDIS is differential treatment amounting to discrimination under the ICCPR, ICESCR and ICERD, or whether the exclusion is based on objective and reasonable justification in pursuit of a legitimate goal. In particular, the committee would appreciate the following specific information:**

- **In relation to the claim that exclusion is a reasonable and proportionate measure to ensure the financial sustainability of the NDIS, details of the additional costs that would be involved if access to the NDIS were extended to non-protected SCV holders and the amount of revenue that their contributions by way of the NDIS levy would raise;**
- **Whether there is a disparity in the numbers of Australian citizens receiving welfare and other benefits in New Zealand compared with the number of New Zealand citizens receiving such benefits in Australia; what the net cost to Australia is; and whether there is any transfer of funds between the two governments to reflect this; and**
- **Whether all non-protected SCV holders are eligible to apply for Australian permanent residence or citizenship, or whether age requirements or other conditions may prevent some of those, in particular those affected adversely by the 2001 changes, from doing so, and whether the number of those who might be ineligible is known.**

*Response to the Joint Report of the Productivity Commissions*

3.107 In its *First Report of the 44th Parliament* the committee stated that it: 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

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requirement or requirements applicable under the skilled migration program.<sup>12</sup>

3.108 The Assistant Minister's response states that the government 'is currently considering' recommendations from the Australian and New Zealand Productivity Commissions' Joint Report. The Assistant Minister's response also points out that non-protected SCV visa holders 'have greater entitlements than other temporary residents', noting that they have access to a number of tax, health and welfare benefits and to concession cards such as Commonwealth seniors and health cards. The response also notes that there is a bilateral social security agreement between Australia and New Zealand that can help such visa holder access social security payments by counting periods of working age residence in New Zealand toward residence qualifications for Australian aged pensions, disability support pensions, and carer payments.

3.109 The committee notes that the Prime Ministers of Australia and New Zealand met in early February 2014 and issued a joint statement following that meeting. That statement included the following:

Underlining their commitment to making sure the economic relationship [between the two countries] fulfils its potential, the two governments have agreed on a way to take forward the joint Productivity Commissions' report on strengthening trans-Tasman economic relations. The Prime Ministers said this work would boost productivity, increase competitiveness and deepen economic integration between the two countries. Breaking down barriers to trans-Tasman commerce and travel has the potential to free businesses and citizens to pursue opportunities in both markets and the broader Indo-Pacific region. The Prime Ministers committed to review progress on implementing the report's recommendations at the next Leaders' meeting in 2015.<sup>13</sup>

3.110 No document indicating how the report of the two Productivity Commissions was to be taken forward appears to be publically available, and the joint statement makes no specific reference to the recommendations of the Joint Report relating to non-protected SCV holders.

**3.111 The committee intends to write to the Assistant Minister to request information as to whether the Australian government has adopted a position in relation to the recommendations of the two Productivity Commissions addressed to the Australian government relating to SCV visa holders, and how the report of the two Productivity Commissions is to be taken forward in that regard as indicated in the joint statement of 7 February 2014 by the Prime Ministers of the two countries.**

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12 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, p 192, para 3.39.

13 Joint Statement by Prime Minister Abbott and Prime Minister Key, Sydney, 7 February 2014.



## ***National Disability Insurance Scheme (Supports for Participants) Rules 2013***

**2.229 The committee re-iterates the concerns expressed by the Parliamentary Joint Committee on Human Rights in the 43rd Parliament and intends to write to the Minister for Social Services to seek information about the provision of assistance to individuals with disability who may wish to request a review of a decision to exercise their rights of review effectively.**

The Australian Government has provided funding to the Department of Social Services to assist individuals with disability who may wish to request a review of a National Disability Insurance Agency (NDIA) decision. Under the External Merits Review system a number of measures have been established. These include a designated National Disability Insurance Scheme (NDIS) division of the Administrative Appeals Tribunal (AAT), which acts as the external merits review body for the NDIS, a fee waiver for applicants seeking a review of NDIA decisions, and support services. The type of support services that may be provided include assistance from a skilled disability advocate to navigate the process of AAT review, and legal services in cases determined by the Department of Social Services to be complex or novel.

## ***National Disability Insurance Scheme Legislation Amendment Bill 2013 and DisabilityCare Australia Fund Bill 2013 and eleven related bills***

**3.26 The committee intends to seek clarification from the Minister as to whether the government had considered this option [temporary or otherwise limited exemptions to the *Age Discrimination Act 2004*] and if so, why it was not considered suitable.**

The Australian Government supports the protections provided by the 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*. As the previous Government advised the Committee, a number of alternatives, including limited exemptions, were considered but it was concluded that these alternatives were not able to adequately achieve the policy objectives of the Government.

Without a general exemption from the Age Discrimination Act, any new temporary age-based restrictions in trial sites could constitute unlawful age discrimination. New trial sites have been negotiated since the commencement of the trials and the flexibility created by the legislation has allowed those negotiations to take place. The Government will continue to require this flexibility in the context of continuing negotiations with State and Territory governments about trials leading to transition and full implementation, until the point that the scheme has been fully implemented.

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 trial sites. The Government notes that 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.



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

**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.**

The Government is currently considering recommendations from the Australia-New Zealand Productivity Commissions' Report on 'Strengthening Trans-Tasman Economic Relations'.

New Zealand Non-Protected Special Category Visa holders, while not having free access to all social security payments, have greater entitlements than other temporary residents.

New Zealand Non-Protected Special Category Visa holders have access to Australian Family Tax Benefits Parts A and B, the Baby Bonus, Maternity Immunisation Allowance, Child Care Benefit and Child Care Rebate, Paid Parental Leave, Double Orphan Pension and concession cards such as the Low Income, Commonwealth Seniors and Health Care cards.

There is also a Social Security Agreement between Australia and New Zealand that can help Non Protected Special Category Visa holders access social security payments by counting periods of working age residence in New Zealand towards residence qualification for Australian Age Pension, Disability Support Pension (severely disabled) and Carer Payment for the partner of a severely disabled Disability Support Pension recipient.

