

Migration Act 1958 – Determination under subsection 262(2) – Daily Maintenance Amounts for Persons in Detention – October 2013

FRLI: F2013L01785

Portfolio: Immigration and Border Protection

Tabled: House of Representatives and Senate, 12 November 2013

PJCHR comments: First Report of 44th Parliament, tabled 10 December 2013

Response dated: 20 January 2014

Information sought by the committee

3.117 The committee sought further information as to the effect and operation of this instrument, and a statement of compatibility, to enable it to assess the instrument's compatibility with human rights.

3.118 The Minister's response is included as part of an overall response to the concerns raised by the committee in relation to a range of migration legislation. The relevant extract from the Minister's response is attached.¹

Committee's response

3.119 The committee thanks the Minister for his response.

3.120 The committee notes that the Minister's response provides information on the operation and effect of this instrument. However, it does not provide an assessment of the compatibility of the instrument with human rights, as requested by the committee.

3.121 The committee considered that the instrument may give rise to issues of compatibility with the right to humane treatment in detention² and the right to equality and non-discrimination.³

3.122 The committee notes that charging individuals who are being held in mandatory detention may be argued not to be, in and of itself, incompatible with the right to humane treatment in detention. In any event, article 26 of the International Covenant in Civil and Political Rights (ICCPR) recognises the right to non-discrimination and equal protection of the law and prohibits discrimination in law or

1 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, pp 2-3.

2 Article 10 of the International Covenant on Civil and Political Rights (ICCPR).

3 Article 26 of the ICCPR and other relevant treaties.

practice. The right to non-discrimination is also protected in article 2(2) in relation to the fulfilment of the rights protected under the ICCPR. The grounds of prohibited discrimination are not closed, and include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. A clearly defined group of people linked by their common status is likely to fall within the category of 'other status'. A difference in treatment on prohibited grounds, however, will not be directly or indirectly discriminatory provided that it is (i) aimed at achieving a purpose which is legitimate; (ii) based on reasonable and objective criteria, and (iii) proportionate to the aim to be achieved.

3.123 According to the Minister's response, persons convicted of people smuggling or illegal foreign fishing are liable for their detention costs. This raises the issue of why these groups are being made liable for detention costs and whether there is a reasonable and objective basis for differential treatment, so as not to infringe the right to equality and non-discrimination.

3.124 The Minister states that changes to the *Migration Act 1958* in 2009 removed liability for immigration detention and related costs for most people in immigration detention.⁴ This followed several reviews on the debt recovery provisions, which all raised concerns with the effect of the provisions. According to the explanatory memorandum accompanying the 2009 changes:

[t]hese reviews highlighted that the detention debt policy ... was not meeting its stated objective of minimising the costs to the Australian community associated with the detention of unlawful non-citizens, was poorly administered, was operating inequitably and adversely impacting on former detainees as they sought to resettle in Australia.⁵

3.125 However, the provisions imposing liability on convicted illegal foreign fishers and people smugglers were retained. According to the explanatory memorandum, '[t]hese provisions are being retained in response to the serious nature of the offences ... and in recognition of the need for a significant deterrent to apply to these offences'.⁶

3.126 According to the Minister's response, imposing liability on this group is for the purpose of supporting the integrity of Australia's border security through ensuring that convicted people smugglers and illegal foreign fishers do not profit from their offences.

4 *Migration Amendment (Abolishing Detention Debt) Act 2009*.

5 Explanatory memorandum to the *Migration Amendment (Abolishing Detention Debt) Act 2009*, p 3.

6 Explanatory memorandum to the *Migration Amendment (Abolishing Detention Debt) Act 2009*, p 3.

3.127 In relation to the actual recovery of the debt, the Minister's response states that '[t]he extent to which these debts are recoverable depends to a large extent on whether the person has funds available and the legal basis for the person's detention in Australia'. While there is an obligation on agency Chief Executives to pursue recovery of debts owing to the Commonwealth, the response states that:

Departmental policy is that consideration should be given to writing off debts if the debtor:

- resides overseas and cannot be traced; or
- is known to be destitute and there is no prospect of their financial situation improving in the near future.

3.128 The committee notes that the number of convicted persons who have been garnisheed prior to their removal is low. Since October 2011, 9 convicted people smugglers have been garnisheed, with a total of \$6,755.35 recovered.

3.129 While those persons who do not have the funds to fulfil their liability may not be pursued, the committee notes that the further consequence of such a person having an outstanding debt may be the refusal of a visa in the case that the person wishes to re-enter Australia at a future point in time, if, for example, that person remains unable to pay the debt.

3.130 The Minister's response also sets out the basis for increasing the nominated amount for keeping and maintaining a person in immigration detention. According to the Minister, 'the increase in the cost of keeping a person in immigration detention is attributed to the inclusion of corporate overheads associated with detention, such as risk and insurance costs payable under service provider contracts'.

3.131 On the basis of the above information, the committee makes no further comment on this instrument. The committee recommends that the effects of the instrument be monitored by the Department so as to ensure that it does not create undue hardship on individuals.

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The *Migration Amendment (Abolishing Detention Debt) Act 2009* amended the *Migration Act 1958* (the Act) and removed liability for immigration detention and related costs for most people in immigration detention. However, under the amended legal framework, persons convicted of people smuggling or illegal foreign fishing continue to remain liable for the daily cost of maintaining them while they are held in immigration detention as unlawful non-citizens.

Although this policy is not intended to make life unduly harsh for liable persons, in support of the integrity of Australia's border security, the Commonwealth Government's response to people smuggling and illegal foreign fishing is to ensure that convicted people do not profit from their offences.

Given the serious nature of people smuggling and illegal foreign fishing it is appropriate that people convicted of these crimes are liable for the cost of their immigration detention.

Who is required to pay the nominated amount?

Convicted people smugglers and illegal foreign fishers detained under section 189 of the Act because of section 250 of the Act (suspected of having been on a vessel in connection with the commission of an offence against the law in Australia), are liable for both their detention and removal costs under section 262 of the Act. In these cases, section 264 of the Act allows for the Department of Immigration and Border Protection (the department) to issue a notice of debt to convicted people smugglers or illegal foreign fishers so as to recover those monies as a means of discharging their debt to the Commonwealth. These debts may be recovered (under section 264), through the courts or by garnishee notice. The extent to which these debts are recoverable depends to a large extent on whether the person has funds available and the legal basis for the person's detention in Australia.

Consequences of not paying the nominated amount of debt

The *Financial Management and Accountability Act 1997* (the FMA Act) imposes an obligation on agency Chief Executives to pursue recovery of debts owing to the Commonwealth that arise in relation to the operations of their agency. As such, the department is obliged to pursue Commonwealth debts that arise due to explicit provisions in its legislative framework under sections 262, 263 and 264 of the Act.

Departmental policy is that consideration should be given to writing off debts if the debtor:

- resides overseas and cannot be traced; or
- is known to be destitute and there is no prospect of their financial situation improving in the near future.

However, the department can pursue the debt at a later point in time if circumstances change. For example, if the debtor applies for a visa to re-enter Australia and that visa is subject to Public Interest Criterion (PIC) 4004 I (or a decision who I have delegated my power to) must be satisfied that appropriate arrangements have been made for the payment of any outstanding debts in order for the visa to be granted.

Recovery of debt

Since October 2011, nine (9) convicted people smugglers have been garnisheed prior to their removal from Australia.

Funds recovered from these people amounted to \$6,755.35.

The basis for increasing the nominated amount for keeping and maintaining a person in immigration detention

Daily maintenance amounts for persons in detention represent the average indicative daily cost of keeping a person in an immigration detention facility, inclusive of health and detention services. The assessed cost is an average figure to be used for all facilities in the detention network for the purpose of calculating the relevant debt owed to the Commonwealth by convicted people smugglers and illegal foreign fishers.

The increase in the cost of keeping a person in immigration detention is attributed to the inclusion of corporate overheads associated with detention, such as risk and insurance costs payable under the service provider contracts. This revised costing does not represent the full scope of costs potentially associated with immigration detention, as some costs are variable or are incidental and occur irregularly.

