

Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at **Appendix 3**.

Federal Financial Relations (National Partnership payments) Determination No. 116-119 (February 2017)-(May 2017)¹

Purpose	Specifies the amounts to be paid to the states and territories to support the delivery of specified outputs or projects, facilitate reforms by the states or reward the states for nationally significant reforms
Portfolio	Treasury
Authorising legislation	<i>Federal Financial Relations Act 2009</i>
Last day to disallow	Exempt
Rights	Health; social security; adequate standard of living; children; education (see Appendix 2)
Previous report	7 of 2017
Status	Concluded examination

Background

2.3 The committee first reported on the Federal Financial Relations (National Partnership payments) Determination No. 116-119 (February 2017)-(May 2017) in its *Report 7 of 2017*, and requested a response from the treasurer by 22 August 2017.²

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- 1 Federal Financial Relations (National Partnership payments) Determination No. 116 (February 2017) [F2017L00198]; Federal Financial Relations (National Partnership payments) Determination No. 117 (March 2017) [F2017L00413]; Federal Financial Relations (National Partnership payments) Determination No. 118 (April 2017) [F2017L00540]; Federal Financial Relations (National Partnership Payments) Determination No. 119 (May 2017) [F2017L00707]. This report entry also deals with Federal Financial Relations (National Partnership payments) Determination No.121 (29 June 2017) [F2017L00939] and Federal Financial Relations (National Partnership payments) Determination No. 120 (June 2017) [F2017L00943] received since *Report 7 of 2017*.
 - 2 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) 2-6.

2.4 The assistant minister to the treasurer's response to the committee's inquiries was received on 18 August 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

2.5 The committee has previously examined a number of related Federal Financial Relations (National Partnership payments) Determinations made under the *Federal Financial Relations Act 2009* and requested and received further information from the treasurer as to whether they were compatible with Australia's human rights obligations.³

Payments to the states and territories for the provision of health, education, employment, housing and community services

2.6 The Intergovernmental Agreement on Federal Financial Relations (the IGA) provides for a range of payments from the Commonwealth government to the states and territories. These include National Partnership payments (NPPs) which are financial contributions to support the delivery of specified projects, facilitate reforms or provide incentives to jurisdictions that deliver on nationally significant reforms. These NPPs are set out in National Partnership agreements made under the IGA, which specify mutually agreed objectives, outcomes, outputs and performance benchmarks.

2.7 The *Federal Financial Relations Act 2009* provides for the minister, by legislative instrument, to determine the total amounts payable in respect of each NPP in line with the parameters established by the relevant National Partnership agreements. Schedule 1 to each of the determinations sets out the amounts payable under the NPPs to states and territories, contingent upon the attainment of specified benchmarks or outcomes, in areas including health, employment, education, community services and affordable housing.

Compatibility of the measure with multiple rights

2.8 In its previous analysis, the committee has noted that setting benchmarks for achieving certain standards, which may consequently result in fluctuations in funding allocations, has the capacity to both promote rights and, in some cases, limit rights, including the right to health; the right to social security; the right to an adequate standard of living, including housing; the right to education; and the rights of children.

2.9 Under international human rights law, Australia has obligations to progressively realise economic, social and cultural (ESC) rights using the maximum of

3 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 10-14; *Thirtieth report of the 44th Parliament* (10 November 2015) 102-109; *Report 7 of 2016* (11 October 2016) 40-43; *Report 8 of 2016* (9 November 2016) 84-87; and *Report 3 of 2017* (28 March 2017) 13-16.

resources available, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.

2.10 Because realisation of these rights is reliant on government allocation of expenditure, a reduction in funding for services such as health and education may be considered a retrogressive measure in the attainment of ESC rights.⁴ Any backward step regarding the progressive attainment of such rights therefore needs to be justified for the purposes of international human rights law.

2.11 As noted in the previous human rights analysis, the statement of compatibility for each of the determinations contains a standard paragraph, similar to information provided for past related determinations considered by the committee, which states:

neither this determination nor the making of National Partnership payments more generally could be said to have a detrimental impact on any human right.⁵

2.12 The statements of compatibility for the determinations therefore do not provide an assessment of the extent to which fluctuations in funding, with reference to the achievement or failure to achieve specific benchmarks or outcomes, may promote human rights (where funding is increased) or may be regarded as retrogressive (where funding is reduced).

2.13 As noted above, the committee previously requested further advice from the treasurer as to whether the setting of benchmarks for the provision of funds under the previous NPPs is compatible with human rights (for example, how the benchmarks may or may not support the progressive realisation of human rights such as the rights to health and education); whether there are any retrogressive trends over time indicating reductions in payments which may impact on human rights (such as health, education or housing); and whether any retrogressive measures or trends pursue a legitimate objective, are rationally connected to their stated objective, and are a reasonable and proportionate measure for the achievement of that objective.

2.14 As outlined in the previous analysis, the response previously provided by the Treasurer in relation to similar measures provided a very useful assessment of the human rights compatibility of the NPPs in the context of ESC rights. The provision of

4 The committee has previously considered similar issues in relation to the human rights compatibility of funding allocation measures through appropriation bills: See, Parliamentary Joint Committee on Human Rights, *Twenty-third report of the 44th Parliament* (18 June 2015) Appropriation Bill (No. 3) 2014-2015 and Appropriation Bill (No. 4) 2014-2015, 13-17; *Report 2 of 2017* (21 March 2017) Appropriation Bill (No. 3) 2016-2017 and Appropriation Bill (No. 4) 2016-2017, 44-46; *Report 5 of 2017* (14 June 2017) Appropriation Bill (No. 1) 2017-2018 and Appropriation Bill (No. 2) 2017-2018, 42-44.

5 Explanatory statement, statement of compatibility 2.

such additional information by the treasurer allowed the committee to conclude that past determinations were likely to be compatible with Australia's international obligations.⁶ While the committee recommended this type of information be included in future statements of compatibility going forward, this had not occurred to date.

2.15 Without this additional information included in statements of compatibility, it is difficult for the committee to complete its assessment of the compatibility of NPPs. The previous analysis stated that, if such information were included in the statement of compatibility at the outset then the committee may not need to request further information from the Treasurer in relation to NPPs.

2.16 In relation to the determinations examined in its *Report 7 of 2017*, the committee therefore sought the advice of the treasurer as to:

- whether the setting of benchmarks for the provision of funds under the National Partnership payments is compatible with human rights (for example, how the benchmarks may or may not support the progressive realisation of human rights such as the rights to health and education);
- whether there are any retrogressive trends over time indicating reductions in payments which may impact on human rights (such as health, education or housing); and
- whether any retrogressive measures or trends pursue a legitimate objective; are rationally connected to their stated objective; and are a reasonable and proportionate measure for the achievement of that objective.

2.17 Additionally, the committee sought the advice of the treasurer as to whether this type of information, previously provided by the treasurer to the committee, could be included in future statements of compatibility for related National Partnership payment determinations to assist the committee to fully assess the compatibility of the measure with human rights in future.

Assistant minister's response

2.18 The response addresses whether the setting of benchmarks for the provision of funds through NPPs is compatible with human rights. The response states that the setting of performance requirements promotes the progressive realisation of human rights by creating an incentive for the efficient delivery of services, projects and reforms where NPPs support human rights in sectors such as health, education, housing and community services. It explains that states and territories meet the overwhelming majority of performance requirements in NPPs. The response notes that the associated funding is then paid in accordance with the determinations for NPPs, consistent with the terms and conditions of the relevant agreement. This

6 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 84-87.

indicates that setting mutually-agreed benchmarks for the provision of payments under the NPPs is likely to be positively impacting a number of service areas that affect the progressive realisation of ESC rights.

2.19 The previous human rights assessment of the determinations also raised concerns regarding whether there have been any retrogressive trends over time in relation to the allocation of NPPs. In relation to potential issues of decreases in funding and the impact this may have on the capacity of states and territories to deliver essential services, the assistant minister states that there is no evidence to suggest that the setting of performance requirements would lead to a situation where states and territories frequently become ineligible for NPPs due to a failure to meet those requirements. He states that where payments do cease, this is usually because the agreed project or reform is completed and no further funding is required. As such, decreases in payments are usually a direct result of the achievement of the agreement's stated objective. This in itself could indicate potential steps towards the progressive realisation of ESC rights in that state or territory.

2.20 The assistant minister also sets out other reasons for fluctuations in payments that do not necessarily reflect retrogressive trends (for example, structural changes to funding mechanisms as a result of the full implementation of the National Disability Insurance Scheme).

2.21 In relation to the committee's request that the type of information provided in this response be included in future statements of compatibility, the assistant minister agreed that from September 2017 onwards, the statements of compatibility that accompany determinations will be expanded to include this information.

Committee response

2.22 The committee thanks the assistant minister for his response and has concluded its examination of the determinations.

2.23 The committee welcomes the useful information in relation to the operation and impact of NPPs set out in this response.

2.24 The preceding legal analysis indicates that, based on the information provided, the NPPs are unlikely to constitute a retrogressive measure for the purposes of international human rights law.

2.25 Based on the information provided, NPPs are likely to assist and provide a mechanism for the progressive realisation of a number of economic, social and cultural rights.

2.26 The committee welcomes the commitment by the treasurer to include the above information in future statements of compatibility for related NPP determinations to assist the committee to fully assess the continued compatibility of NPPs with human rights.

Mr Ian Goodenough MP

Chair