

Appendix 3

Correspondence



The Hon Christian Porter MP
Minister for Social Services

18 NOV 2016

MC16-010043

Chair
Parliamentary Joint Committee on Human Rights
S1.111
P.O. BOX 6100
CANBERRA ACT 2600

Dear Chair

Thank you for your email of 9 November 2016 regarding Fairer Paid Parental Leave Bill 2016 and the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016. I appreciate the time you have taken to bring these matters to my attention.

The Parliamentary Joint Committee on Human Rights, in its 'Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011' report, has sought advice on whether certain components included in the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016 and the Fairer Paid Parental Leave Bill 2016 are compatible with human rights, as defined in the Act.

With regard to the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016, the Committee has questioned the compatibility of some of the proposed changes with the right to equality and non-discrimination. The enclosed document provides responses to the Committee's request for advice on compatibility of the Bill identified with those rights, and other matters.

I trust this information is of assistance.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016

The Parliamentary Joint Committee on Human Rights, in its 'Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*' report, has sought advice from the Minister of Social Services on whether certain components included in the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016 (the Bill) are compatible with human rights, as defined in the Act.

Specifically the Committee has questioned the compatibility of some of the proposed changes with the right to equality and non-discrimination. This document provides responses to the Committee's request for advice on compatibility of the Bill identified with those rights, and other matters.

Compatibility of the measure with the right to equality and non-discrimination

1.34 The transition to the NDIS generally promotes the rights of persons with disabilities, the preceding legal analysis raises questions as to the compatibility of the measures with the right to equality and non-discrimination on the basis of age.

Right to equality and non-discrimination on the basis of age

Australia's social security system is designed to be highly targeted and to provide for different payments, rates and other settings that reflect the needs and circumstances of different cohorts. For this reason, age-based eligibility criteria are already part of a number of social security payments, including Mobility Allowance.

The Bill limits access to Mobility Allowance to persons under the age of 65. This amendment is intended to provide consistency with access requirements for the National Disability Insurance Scheme. Existing Mobility Allowance recipients will not be affected by this change and both new and existing recipients can continue to be paid Mobility Allowance if they turn 65 while receiving the payment. This is to ensure there is no loss of entitlement for current recipients on the basis of age.

Once the Mobility Allowance program is closed, any remaining recipients under 65 years of age will either transition to the National Disability Insurance Scheme or be supported under continuity of support arrangements. Mobility Allowance recipients who are aged 65 and over will be transitioned to continuity of support arrangements. Funding for continuity of support arrangements includes current recipients aged 65 or over who will be ineligible to transition to the National Disability Insurance Scheme.

The National Disability Insurance Scheme is part of a broader system of support available in Australia and persons over the age of 65 who are not eligible for assistance through the National Disability Insurance Scheme can access support through the aged care system. This limitation is reasonable and necessary because it supports the broader intent of an integrated system of support operating nationally and providing seamless transition through different phases of life.

The *Convention on the Rights of Persons with Disabilities* (CRPD) recognises the barriers that persons with disabilities may face in realising their rights. While the rights under all human rights treaties apply to everyone, including persons with disabilities, the CRPD applies human rights specifically to the context of persons with disabilities.

Article 3(b) of the CRPD provides that non-discrimination is a general principle in relation to all rights in the CRPD. As noted by the Human Rights Committee in General Comment No. 18 on equivalent rights in the *International Covenant on Civil and Political Rights* (ICCPR), the rights to equality and non-discrimination in the ICCPR sometimes require nation states 'to take affirmative action in order to diminish or eliminate conditions which cause or help perpetuate discrimination'. In this context, the amendments made by this Bill promote and advance the rights of persons with disabilities in Australia by strengthening support for them to exercise their social, economic and cultural rights through their participation in the National Disability Insurance Scheme.

Non-discrimination ensures that no-one is denied their rights because of factors such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth. In addition to those grounds, discrimination on certain other grounds may also be prohibited. These grounds include age, nationality, marital status, disability, place of residence within a country and sexual orientation.

Differential treatment will not constitute discrimination if the differences in treatment are aimed at achieving a legitimate purpose and are reasonable and proportionate to this purpose.

Right to social security

This Bill engages the rights to social security contained in article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system. The social security scheme must provide a minimum essential level of benefits to all individuals and families that will enable them to cover essential living costs.

The amendments in this Bill initially tighten the eligibility criteria for Mobility Allowance and later close the program. These amendments are compatible with the right to social security as Mobility Allowance is not a social security payment intended to meet the regular costs of living; rather, it is a supplementary payment designed to assist with transport costs for people with a disability who are undertaking certain approved activities. Eligibility for social security pensions or benefits will be unaffected by these amendments. The assistance provided by Mobility Allowance is being replaced with individualised supports, including assistance with transportation, which will be provided under the National Disability Insurance Scheme. Therefore tightening eligibility rules, and then closing the program, ensures the more efficient allocation of resources. For people aged 65 and over, alternate transport arrangements may be provided through the Aged Care program.

To the extent that the changes in this Bill may limit the right to social security, those limitations are reasonable and proportionate to the policy objective of ensuring a sustainable and well-targeted payment system.

1.35 The committee seeks the Minister for Social Services advice as to whether the ‘continuity of support’ arrangements for existing recipients of Mobility Allowance provides for the same level of support as that existing under the current allowance

The Commonwealth has committed to providing continuity of support for existing Commonwealth disability support program recipients who are assessed as being not eligible for the NDIS.

This includes existing recipients of Mobility Allowance who will require Continuity of Support.

Continuity of support will provide support for these people to achieve similar outcomes, in accordance with the NDIS bilateral agreements, even if the arrangements for doing that change over time.

In the short term, continuity of support will be provided through existing programs. Commonwealth program recipients will be notified about long term continuity of support arrangements once they have been finalised.

1.36 The committee seeks the Minister for Social Services advice as to whether there is comparable assistance under the aged care system for persons aged 65 and older to participate in work and other approved activities (given there may be persons who are not currently receiving the allowance and who, if the program were not closed, would otherwise be eligible to receive mobility allowance.

The Australian Government subsidises many different types of aged care services. These aged care packages and programmes are there to help people stay as independent as they can, including living in your own home and transport services. Each programme or package has broad eligibility criteria and an assessment process to determine a person’s needs and eligibility. Under Aged Care arrangements there are two types of transport services available. A person can be picked up by a transport service or they can receive vouchers or subsidies, such as for taxi services. Given that the purpose of Mobility Allowance is to assist the recipient with the cost of transportation while they are undertaking approved activities, transport services within the Aged Care achieves the same outcomes without the need for ongoing monetary payments.

In addition to the transport services, affected individuals aged 65 and over will continue to be supported by a range of programmes and other services provided by the Commonwealth and state governments. Some of these assistance programs provide services to address mobility issues faced by individuals. Assistance programs available to these individuals include:

- GST exempt purchase of cars for work use, where the individual has a disability affecting them to the extent they cannot use public transport;
- the Employment Assistance Fund, providing financial assistance for people with disability or their workforce modification equipment or services;
- Employment services, through jobactive, Disability Employment Services and the Community Development Program assisting job seekers (including those with disability) become job ready and find work, including through providing wage subsidies;

- Disabled Australian Apprentice Wage Support Program, providing wage and mentoring support for the employers hiring apprentices and trainees with disability;
- State and territory transport, vehicle modification and parking subsidies.

Once the Mobility Allowance program is closed, any remaining recipients will either transition to the National Disability Insurance Scheme or be supported under continuity of support arrangements. Funding for continuity of support arrangements includes current recipients aged 65 or over who will be ineligible to transition to the National Disability Insurance Scheme.



Australian Government
Australian Public Service Commission

Australian Public Service Commissioner

Chair
Parliamentary Joint Committee on Human Rights
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Dear Mr Goodenough

Thank you for your letter of 10 November 2016, in which you sought my advice on the compatibility of the Australian Public Service Commissioner's Directions 2016 (the Directions) with the right to privacy.

Paragraph 34(1)(e) of the Directions requires the public notification of terminations of employment where the grounds is a breach of the Code of Conduct. As highlighted in the Committee's *Report 8 of 2016: Human rights scrutiny report*, this requirement engages and limits the right to privacy. The individual's name is usually included, except where the Agency Head chooses to withhold this information. This limitation was not identified in the accompanying statement of compatibility with Human Rights, as it had been addressed when the relevant change was made via the Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014.

The Committee raises valid questions about whether the limitation is a reasonable or proportionate measure in upholding integrity in the Australian Public Service (APS).

Further investigation is warranted. As these provisions were last reviewed in 2014, it is timely to consider the continued publication of terminations of employment and whether there may be a less rights-restrictive means of achieving the same objective.

Therefore, I shall review the necessity of publicly notifying this information. This will include appropriate consultation and examination of evidence regarding the deterrent effects and impact on public confidence in the good management and integrity of the APS. I will notify you of my findings in this matter by June 2017.

Yours sincerely

John Lloyd PSM
November 2016

