

## 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**.

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

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| <b>Purpose</b>          | Proposes to amend the <i>Social Security Act 1991</i> and the <i>Social Security (Administration) Act 1999</i> to restrict the eligibility criteria for mobility allowance, to provide that the allowance will no longer be payable to individuals who transition to the National Disability Insurance Scheme and to close the mobility allowance program from 1 July 2020 |
| <b>Portfolio</b>        | Social Services  |
| <b>Introduced</b>       | House of Representatives, 13 October 2016  |
| <b>Right</b>            | Equality and non-discrimination (see <b>Appendix 2</b> )   |
| <b>Previous reports</b> | 8 of 2016  |

#### Background

2.3 The committee first reported on the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016 (the bill) in its *Report 8 of 2016*, and requested a response from the Minister for Social Services by 18 November 2016.<sup>1</sup>

2.4 The minister's response to the committee's inquiries was received on 18 November 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

#### Discontinuing the mobility allowance program

2.5 Schedule 1 of the bill seeks to amend the *Social Security Act 1991* to replace the current definitions which determine who is qualified to receive mobility allowance. Mobility allowance is a payment designed to assist with transport costs

<sup>1</sup> Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 9-11.

for persons with a disability who participate in work and certain approved activities and who are unable to use public transport without substantial assistance.

2.6 The amendments will provide that the mobility allowance provisions only apply to persons aged between 16 and 65 (the current age requirement is only that the person be over 16). This eligibility criterion would apply to new claimants from 1 January 2017. The bill also provides that the mobility allowance will cease on 1 July 2020 consistent with the transition from the mobility allowance to the National Disability Insurance Scheme (NDIS).

2.7 The initial human rights analysis acknowledged that the transition to the NDIS generally promotes the rights of persons with disabilities and may involve the reallocation of resources. However, limiting access to the mobility allowance so that those aged over 65 would no longer qualify for this additional allowance engages and limits the right to equality and non-discrimination on the basis of age.<sup>2</sup>

2.8 The initial human rights analysis noted that the statement of compatibility addresses the issue of age discrimination. The statement of compatibility explains that the amendment is intended to provide consistency with the access requirements for the NDIS, which applies to persons under the age of 65, and that the NDIS:

...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.<sup>3</sup>

2.9 The statement of compatibility also addresses transitional arrangements for those recipients of the mobility allowance who turn 65 prior to the discontinuation of the mobility allowance program in 2020. These recipients will not be affected by the change, and can continue to be paid the mobility allowance. The statement of compatibility then states:

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

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2 Persons aged 65 and older also do not qualify for support under the NDIS. For the committee's previous examination of this issue see the analysis of the National Disability Insurance Scheme Legislation Amendment Bill 2013 and DisabilityCare Australia Fund Bill 2013 and eleven related bills in Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 187-196; *Third Report of the 44th Parliament* (4 March 2014) 91-100; and *Seventh Report of the 44th Parliament* (18 June 2014) 76-81.

3 Explanatory memorandum (EM), statement of compatibility (SOC) 13.

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over who will be ineligible to transition to the National Disability Insurance Scheme.<sup>4</sup>

2.10 The initial human rights analysis observed that it was not clear from the statement of compatibility what the 'continuity of support arrangements' for those over 65 years will be once the mobility allowance program is closed. It was also not explained whether those aged 65 and older who are not receiving mobility allowance when the program is closed (but who would qualify for support under the existing law) will be eligible to receive comparable support through the aged care system.

2.11 Accordingly, the committee sought the minister's advice as to whether the continuity of support arrangements for existing recipients of mobility allowance will provide for the same level of support as that existing under the current allowance.

2.12 The committee also sought the minister's advice as to whether there is comparable assistance under the aged care system for persons aged 65 and older who 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).

### **Minister's response**

2.13 In relation to continuity of support arrangements for existing recipients of mobility allowance, the minister's response states that continuity of support will provide support for existing Commonwealth disability support program recipients who are assessed as ineligible for the NDIS 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. However, the minister's response indicates that long term continuity of support arrangements have yet to be finalised.

2.14 In relation 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, the minister's response states that the Australian Government subsidises many different types of aged care services to help people stay as independent as they can, including support for living in their own home and transport services. 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, the minister advises that transport services within the aged care system achieve the same outcomes without the need for ongoing monetary payments. Additionally, affected individuals aged 65 and over will continue to be supported by other services that address mobility issues. Two of these services appear to relate to mobility, being GST exempt purchase of cars for work use, where

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4 EM, SOC 13.

the individual has a disability affecting them to the extent they cannot use public transport, and state and territory transport, vehicle modification and parking subsidies.

2.15 As noted in the previous human rights analysis of the bill, the transition to the NDIS generally promotes the rights of persons with disabilities and may involve the reallocation of resources. The information provided by the minister indicates that there are a range of programs in place, including transitional arrangements to support people over 65 years of age in relation to transport and mobility. Such programs will assist to provide ongoing support to people over the age of 65 even after the mobility allowance is discontinued. On the basis of the information provided by the minister and the range of ongoing support for persons over 65 years of age, it appears that discontinuing the mobility allowance program is likely to be compatible with the right to equality and non-discrimination on the basis of age.

### **Committee response**

2.16 **The committee thanks the minister for his response and has concluded its examination of this issue.**

2.17 **Noting the preceding legal analysis and the advice of the minister, the committee considers that the measure is likely to be compatible with the right to equality and non-discrimination on the basis of age.**

## Australian Public Service Commissioner's Directions 2016 [F2016L01430]

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|--------------------------------|---|
| <b>Purpose</b>                 | Prescribes standards which Agency Heads and Australian Public Service (APS) employees must comply with to meet their obligations under the <i>Public Service Act 1999</i> |
| <b>Portfolio</b>               | Prime Minister and Cabinet  |
| <b>Authorising legislation</b> | <i>Public Service Act 1999</i>  |
| <b>Last day to disallow</b>    | 30 November 2016  |
| <b>Right</b>                   | Privacy (see <b>Appendix 2</b> )  |
| <b>Previous report</b>         | 8 of 2016   |

### Background

2.18 The committee first reported on the Australian Public Service Commissioner's Directions 2016 (the directions) in its *Report 8 of 2016*, and requested further information from the Australian Public Service Commissioner (the Commissioner).<sup>1</sup>

2.19 The Commissioner's response to the committee's inquiries was received on 22 November 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

### Publishing termination decision for breach of the Code of Conduct

2.20 Paragraph 34(1)(e) of the directions provides that decisions to terminate the employment of an ongoing APS employee for breach of the Code of Conduct must be published in the Public Service Gazette (the Gazette). The requirement to publish details of an APS employee when their employment has been terminated on the grounds of breach of the Code of Conduct in the Gazette engages and limits the right to privacy.

2.21 The committee reported on previous similar directions in its *Sixth Report of 2013*, *Eighteenth Report of the 44<sup>th</sup> Parliament* and *Twenty-first Report of the*

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 12-15.

44<sup>th</sup> Parliament.<sup>2</sup> This previous analysis raised concerns about the compatibility of measures relating to the notification in the Gazette of certain employment decisions, particularly in relation to the publication of decisions to terminate employment and the grounds for termination, with the right to privacy and the rights under the Convention on the Rights of Persons with Disabilities (CRPD).

2.22 In response to these previous concerns, the Commissioner conducted a review of the Australian Public Service Commissioner's Directions 2013 [F2013L00448] (the 2013 directions). As a result, the 2013 directions were amended by the Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426] (the amendment direction) to remove most of the requirements to publish termination decisions. However, the requirement to notify termination on the grounds of the breach of the Code of Conduct in the Gazette was retained.

2.23 In its *Twenty-first Report of the 44<sup>th</sup> Parliament*,<sup>3</sup> the committee acknowledged that the amendment direction addressed the committee's concerns in relation to the compatibility of the 2013 directions with the CRPD, and largely addressed the committee's concerns in relation to their compatibility with the right to privacy. However, the committee considered that the retained measure to publish details of an APS employee when their employment has been terminated on Code of Conduct grounds limited the right to privacy.

2.24 The statement of compatibility to the directions states that the notification of certain employment decisions in the Gazette promotes APS employees' right to privacy insofar as there is an option for agency heads to decide that a name should not be included in the Gazette because of the person's work-related or personal circumstances.

2.25 The initial human rights analysis of the directions clarified that rather than promoting the right to privacy, the requirement arising from paragraph 34(1)(e) of the directions is a limit on the right to privacy, albeit one that may be justified as reasonable and proportionate to a legitimate objective.<sup>4</sup>

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2 See, Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) Australian Public Service Commissioner's Directions 2013 [F2013L00448] 133-134; *Eighteenth Report of the 44th Parliament* (10 February 2015) Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426] 65-67; and *Twenty-first Report of the 44th Parliament* (24 March 2015) Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426] 25-28.

3 Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015) 25-28.

4 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 12-15.

2.26 As noted with respect to the amendment direction, the committee accepts that maintaining public confidence in the good management and integrity of the APS is likely to be a legitimate objective for the purposes of international human rights law. However, the statement of compatibility provides no assessment of why the requirement arising from paragraph 34(1)(e) of the directions is a reasonable and proportionate limit on the right to privacy in pursuit of this objective.

2.27 The initial human rights analysis noted that neither the statement of compatibility, nor the Commissioner's response to the committee's previous inquiries, provide significant evidence as to how publishing personal information would achieve the apparent objective of showing that the APS deals properly with serious misconduct.

2.28 In relation to whether there are other, less restrictive, ways to achieve the same aim, the initial human rights analysis observed that there are other methods by which an employer could determine whether a person has been dismissed from the APS for breach of the Code of Conduct rather than publishing an employee's personal details in the Gazette. For example, it would be possible for the APS to maintain a centralised, internal record of dismissed employees, or to use references to ensure that a previously dismissed APS employee is not rehired by the APS. These measures may be more likely to be of use in the hiring process than an employer searching past editions of the Gazette. Further, it would be possible to publish information in relation to the termination of employment for breaches of the Code of Conduct without the need to name the affected employee.

2.29 As these matters were not addressed by the statement of compatibility, the committee sought the advice of the Commissioner as to whether the limitation on the right to privacy is a reasonable and proportionate measure for the achievement of the apparent objective of the directions, and in particular, whether there are other less rights restrictive means available.

### **Australian Public Service Commissioner's response**

2.30 The Commissioner's response recognises that the requirement to publish details of an APS employee when their employment has been terminated on the grounds of breach of the Code of Conduct in the Gazette engages and limits the right to privacy, and acknowledges that this limitation was not identified in the statement of compatibility.

2.31 The Commissioner notes that the committee has raised valid questions about whether the limitation is a reasonable or proportionate measure in upholding integrity in the APS, and agrees that further investigation into the requirement is warranted. The Commissioner's response notes that, as the provisions relating to the publication of details of employment termination decisions 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.

2.32 The Commissioner's response states that he will undertake a review into the necessity of publicly notifying information about termination decisions on the grounds of breach of the Code of Conduct, and that this review 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. The Commissioner will notify the committee of his findings in this matter by June 2017.

### **Committee response**

2.33 The committee thanks the Commissioner for his response and has concluded its examination of this issue.

2.34 The committee notes that the Commissioner will undertake a review into the requirement to publish termination decisions and will notify the committee of his findings by June 2017.

2.35 The committee looks forward to receiving the Commissioner's findings in relation to his review into this matter.

**Mr Ian Goodenough MP**

**Chair**