

Chapter 2

Key issues and committee view

Summary of the bill

Amendments to the Parliamentary Entitlements Act

2.1 The bill amends the Parliamentary Entitlements Act to restrict the 'additional travel for children' entitlement for senior officers from those under 25 years of age to children under the age of 18 by amending the definition of 'dependent child'.¹

2.2 The bill also establishes a 25 per cent penalty loading on any adjustment (either voluntary or involuntary) of a parliamentarian's claim for prescribed travel benefits. The penalty loading will not be applied where the adjustment is made within 28 days after the claim was made or where the adjustment is a result of an administrative error by the Department of Finance.²

Amendments to the Life Gold Pass Act

2.3 The bill amends the Life Gold Pass Act to rename the Act as the *Parliamentary Retirement Travel Act 2002* and to change the name of the entitlement from the Life Gold Pass to the Parliamentary Retirement Travel Entitlement. The bill will also implement reforms which will reduce, remove and reform benefits under the entitlement. Specifically, the bill:

- imposes time limits, after which a person's ability to access travel under the Parliamentary Retirement Travel Entitlement expires, unless they are a former Prime Minister;
- imposes additional limits on access to the entitlement, closing it to people who have not met the qualifying periods before 14 May 2014 and mandating that no person who retires on or after 1 January 2020 can access benefits under the scheme, unless they are a former Prime Minister;
- provides for future Prime Ministers who had not entered or re-entered the Parliament before 6 March 2012 to become a holder of a Parliamentary Retirement Travel Entitlement;
- reduces the number of trips available per financial year under the Parliamentary Retirement Travel Entitlement;

1 Proposed amendment to subparagraph 3(b)(i) of the *Parliamentary Entitlements Act 1990*; EM, p. 2.

2 The Hon Kevin Andrews MP, Second Reading Speech, *House of Representatives Hansard*, 2 October 2014, p. 11080. The bill includes a provision for the Special Minister of State to determine, by legislative instrument, the prescribed travel benefits that will be subject to the 25 per cent penalty loading.

- removes the ability of spouses or de facto partners, other than those of a retired former Prime Minister, to access travel under the Parliamentary Retirement Travel Entitlement; and
- requires that travel under the Parliamentary Retirement Travel Entitlement be for a purpose that is for the public benefit and not for a commercial purpose or a private purpose.³

Key issues

Abolition of the Life Gold Pass

2.4 The Association of Former Members of the Parliament of Australia (AFMPA) outlined a number of objections to the abolition of the Life Gold Pass in the bill. AFMPA outlined the history of the Life Gold Pass, arguing:

[T]he Life Gold Pass was a benefit provided to long-serving Federal parliamentarians in lieu of inadequate salaries arising from successive governments denying politically sensitive salary increases[.]⁴

2.5 AFMPA stated:

[I]t is unconscionable that the Government is seeking to legislate to remove retrospectively a benefit which clearly was a term and condition of parliamentary remuneration for which current retired Pass holders have met the eligibility criteria.⁵

2.6 On the issue of retrospective operation of the bill, AFMPA contended:

Retrospective legislation is contrary to all principles of democracy and fairness. Traditionally it has been regarded as unacceptable to the Australian Parliament. On the rare occasions in which it has been introduced, it always has been controversial and generally has been accepted only in dealing with the most serious mischief, for example, the bottom-of-the-harbour tax schemes, which were regarded by most as a tax fraud. Any suggestion that there is such justification for removing retrospectively the Life Gold Pass is fanciful.⁶

2.7 Further, AFMPA argued that the bill 'insofar as it relates to the Life Gold Pass, most probably would be declared unconstitutional and therefore, invalid, under section 51(xxxi) of the Australian Constitution as acquisition of property on other than just terms'.⁷ AFMPA indicated that it is well advanced with plans to test in the High Court the validity of the *Members of Parliament (Life Gold Pass) and Other*

3 EM, p. 2.

4 *Submission 2*, p. 9.

5 *Submission 2*, p. 7.

6 *Submission 2*, p. 7.

7 *Submission 2*, p. 9.

Legislation Amendment Bill 2012 (the 2012 legislation) and earlier legislation which effected a reduction in Gold Pass travel entitlements.⁸

2.8 AFMPA noted that the current legislation, and the 2012 legislation provide for compensation to be paid if the legislation is found to be an acquisition of property other than on just terms:

In the Association's view, this is a concession by both the previous and current governments that they are on very shaky ground indeed regarding the constitutional validity of the legislation.⁹

2.9 AFMPA noted the Government's claims that the abolition of the Life Gold Pass would produce savings of \$1 million per annum for the next five years. However, AFMPA contended that as was 'highly likely' the Government would be liable to pay compensation in the event that the bill, and the 2012 legislation, were found to involve the acquisition of property without compensation under section 51(xxxi) of the Constitution:

Such compensation necessarily would have to be capital in nature and take into account potential future use of the benefit by all Pass holders, rather than current use, which for some in some years is zero.

While the Association lacks the resources for financial and actuarial analysis to provide an accurate prediction of the cost of compensation, we assert confidently the annual opportunity cost of providing the capital required will be many multiples of the claimed \$1 million per annum saving.

Quite simply, given the likelihood of compensation being required and its cost, retrospective abolition of the Life Gold Pass will be a substantial cost, rather than saving, to the government and would be irresponsible financial management.¹⁰

2.10 In contrast, the Shadow Special Minister for State, the Hon Gary Gray AO MP, stated that he believed abolition of the Life Gold Pass was important. Mr Gray indicated that, in his view, the bill would not cause a successful claim against the Commonwealth:

I understand some retired members will challenge the Gold Pass abolition legislation in the High Court. I disassociate myself from this challenge. I support the parts of this bill that abolish the Gold Pass...¹¹

2.11 In its submission, the Department of Finance (Finance) stated it did not consider the reforms in the bill to constitute an acquisition of property. However, Finance acknowledged that if a court decided otherwise, the Commonwealth would be

8 *Submission 2*, p. 7.

9 *Submission 2*, p. 7.

10 *Submission 2*, p. 9.

11 *Submission 1*, p. 1.

required to pay compensation for the removal or limitation of Life Gold Pass entitlements.¹²

2.12 On the quantum of any such compensation, Finance noted:

It would be a matter for a court to determine the amount of compensation that is reasonable in the circumstances.

Finance has estimated the cost of Life Gold Pass travel in the 2014-15 to 2017-18 financial years based on entitlement expenditure in forecasting the savings from the removal of the entitlement. Should a court decide that there has been an acquisition of property, Finance would expect that a court would take travel patterns into account in determining a reasonable amount of compensation. Finance therefore would not expect that any compensation amount set by a court would exceed the savings from this measure.¹³

New 'public benefit' test

2.13 Mr Gray opposed the inclusion of the new requirement that travel under the Parliamentary Retirement Travel Entitlement must be for the public benefit.¹⁴ Mr Gray argued that the test was not adequately defined:

The Bill requires that all travel post-service be for an undefined concept; called public benefit. I argue all such travel is for that purpose, but what impact will this new test have aside from additional bureaucracy? And how will it be administered? If there are to be parameters for this test; they should be defined in The Bill for all of us to see and consider.¹⁵

2.14 AFMPA also commented on this issue:

Some former parliamentarians use the Life Gold Pass admirably in voluntarily assisting not-for-profit organisations and in other ways for the benefit of the community, whether or not that community benefit arises from the retiree's former involvement as a serving parliamentarian. It would appear that even that philanthropic use is not permitted under the extreme restrictions placed on retirement travel. Any such restrictions on Gold Pass travel or retirement travel, other than the existing and appropriate prevention of use of the benefit for commercial gain, completely ignore the reasons for the original provision of the benefit, principally as a retirement benefit offsetting inadequate remuneration while in office[.]¹⁶

2.15 Mr Gray contended there would be an increase in bureaucracy and cost in administering the scheme:

12 *Submission 3*, pp 3-4.

13 *Submission 3*, p. 4.

14 See item 9 of Schedule 1 of the bill which inserts proposed new section 4AA into the *Members of Parliament (Life Gold Pass) Act 2002* (to be renamed *Parliamentary Retirement Travel Act 2002*).

15 *Submission 1*, pp 1-2.

16 *Submission 2*, p. 8.

A seemingly good idea such as public benefit will bring additional work for the already stretched entitlements administration area within the Department of Finance. It will create an environment where former parliamentarians are too nervous to access this entitlement at all.¹⁷

2.16 Mr Gray concluded that the bill would make travel for the public benefit 'risky':

Because Parliamentary Office Holders, Ministers, Members, Senators and ex-parliamentarians cannot get advice that helps them do their job well, sometimes there are things that we just decide not to do, because of the inability to interpret the guidance. This is not a good outcome and in this test the bill moves us further away from achieving a more functional entitlements system.¹⁸

2.17 On the issue of the public benefit test, the submission from Finance acknowledged that the term 'public benefit' was not defined, 'other than to clarify that in order to satisfy the public benefit test, travel must not be undertaken for a commercial [or] a private purpose'.¹⁹ The submission continued:

Finance would expect that travel that is for a philanthropic purpose is unlikely to be for a commercial or a private purpose and would therefore be within entitlement.²⁰

2.18 Finance stated:

[I]t will be the responsibility of the entitlement holder to be satisfied that his or her use of parliamentary retirement travel is for the public benefit. The entitlement holder will be asked to certify, as part of the six-monthly reporting process, that his or her entitlement use was for the public benefit.²¹

Recoverable payments

2.19 The bill establishes a statutory right for the Commonwealth to recover from a parliamentarian or former parliamentarian an amount equivalent to a payment made to, or on behalf of, a parliamentarian or former parliamentarian that is beyond entitlement under the Parliamentary Entitlements Act.²²

2.20 Mr Gray expressed concern that the bill imposed a cost recovery mechanism onto parliamentarians for errors that are made by others:

17 *Submission 1*, p. 2.

18 *Submission 1*, p. 2.

19 *Submission 3*, p. 6.

20 *Submission 3*, p. 6.

21 *Submission 3*, p. 6.

22 The Hon Kevin Andrews MP, Second Reading Speech, *House of Representatives Hansard*, 2 October 2014, p. 11080. See Item 7 of Schedule 2 which inserts proposed new section 10A – Recoverable payments – into the *Parliamentary Entitlements Act 1990*.

The current debt recovery system works by allowing repayments to be made as needed and in consultation with the Parliamentary Office Holder, the relevant Minister, Member, Senator or their staff. This new provision would mean any overpayment to a staff member could, at the delegated officer or Secretary's discretion, be recovered from future travel allowance claims of a Parliamentary Office Holder, Minister, Member or Senator.

A Minister with a large staff may not know of, or be expected to know about, claim errors that may have occurred at staff level. The Bill creates a cost-recovery process from a future travel entitlement payment to that Minister or Parliamentary Office Holder which will lead to confusion and possible financial embarrassment.²³

2.21 Finance acknowledged that this issue was an error in the bill which would require amendment:

The Bill does not impose any cost recovery on Ministers in relation to the travel of their employees. The cost recovery mechanism is limited to the entitlements provided under the *Parliamentary Entitlements Act 1990*, the *Parliamentary Entitlements Regulations 1997* and determinations of the Remuneration Tribunal made under section 7 of the *Remuneration Tribunal Act 1973*. The domestic travel entitlements of Ministers' employees are provided under the *Members of Parliament (Staff) Act 1984* and so are not covered by this recovery provision. The entitlement for Ministers' employees to accompany Ministers overseas is provided under executive power and is also not covered by this recovery mechanism.

The reference to recovery from a Minister for travel by a member of his or her staff in the note at the end of new section 10A (6) is incorrect, and therefore misleading. Such travel is under executive power, not the *Parliamentary Entitlements Act 1990*, the *Parliamentary Entitlements Regulations 1997* or a determination of the Remuneration Tribunal made under section 7 of the *Remuneration Tribunal Act 1973*. Accordingly, this section may require amendment to remove staff travel and note that family and spousal travel is the only travel that would be recovered from an individual parliamentarian under this section.²⁴

Parliamentarians retiring during parliamentary terms

2.22 The bill provides:

- the parliamentary retirement travel entitlement of Senior Office Holders who retire on or after 14 May 2008, is limited to 10 domestic return trips per year for the public benefit. The entitlement expires at the earlier of six years after their date of retirement, or the second end of a parliament to occur after their date of retirement;²⁵ and

23 *Submission 1*, p. 2.

24 *Submission 3*, pp 5-6.

25 See EM pp 7-8 and 9-10.

- the parliamentary retirement travel entitlement of parliamentarians, other than former Prime Ministers or Senior Office Holders, who retire on or after 14 May 2011, is reduced to five domestic return trips per year for the public benefit. The entitlement expires at the earlier of three years after their date of retirement, or the next end of a parliament to occur after their date of retirement.²⁶

2.23 On this point, Finance indicated to the committee that it understood 'there may be some conjecture over the bill's treatment of parliamentarians retiring during a parliamentary term, who qualify for parliamentary retirement travel'.²⁷ Finance foreshadowed the need for the bill to be amended to provide clarity on this issue:

A parliamentarian who retires during a parliamentary term may have significantly less than three or six years of parliamentary retirement travel. This section may benefit from a minor amendment to remove any ambiguity of the entitlement in this circumstance.²⁸

Referral to the Remuneration Tribunal

2.24 Mr Gray concluded his submission by outlining a list of 'improvements, designed to build upon the useful components of the Bill', which should be referred, along with the bill itself, to the Remuneration Tribunal for consideration and determination.²⁹

2.25 Some of the matters on Mr Gray's list of improvements included:

- that it is essential to align any cost recovery investigation with existing high level departmental and Minchin Protocol processes, and not to delegate this to a Senior Executive Officer;³⁰
- amending superannuation arrangements for parliamentarians to allow parliamentary superannuation payments to be paid into self-managed superannuation funds;
- other measures needed such as the occupational health and safety, sickness and death benefit insurance for all parliamentary office holders, Ministers, Members and Senators;

26 See EM pp 7-8 and 9-10.

27 *Submission 3*, p. 5.

28 *Submission 3*, p. 5.

29 *Submission 1*, p. 2.

30 The Minchin Protocol refers to the protocol tabled in the Senate by the then Special Minister of State on 31 October 2000, which sets out the steps to be taken when an allegation is received of alleged misuse of entitlement by a Member or Senator. The process includes an internal audit by the Department of Finance to determine if the allegations are credible and, in the event of a more serious allegation or high incidence of transgression, the matter is referred to a high level Departmental Committee, chaired by the Secretary. For further information on the Minchin Protocol see the Department of Finance, Parliamentary Services website: http://maps.finance.gov.au/Protocol_on_Allegations.htm (accessed 13 November 2014).

- aligning Comcar and private car rules in Canberra and home base for Shadow Ministers and members of the parliamentary or governing executive.³¹

2.26 On the issue of referral to the Remuneration Tribunal, Finance stated:

There are no remuneration aspects to the entitlement changes contained in the Bill. Nor does the Bill impact on any parliamentary entitlements determined by the Remuneration Tribunal. For these reasons, the Government has not sought the views of the Remuneration Tribunal in relation to the Bill. The Government has, however, consulted the Remuneration Tribunal seeking its consideration of changes to the post retirement travel and severance travel entitlements in the context of the changes to parliamentary retirement travel contained in the Bill.³²

Committee view

2.27 The committee notes the bipartisan support for this bill. In particular, the committee acknowledges the support of the Shadow Special Minister for State for the measures in the bill to abolish the Life Gold Pass and that he stands by the validity of the bill, as well as previous legislation passed when he was the minister responsible in Government.

Changes to parliamentary retirement travel entitlement

2.28 The committee has some sympathy with the position of the Association of Former Members of the Parliament of Australia. Members of AFMPA have entered Parliament with the expectation that, following a qualifying period of service, they will be eligible to receive certain entitlements. The bill will limit and remove those entitlements.

2.29 The committee notes the contrary opinions it has received from AFMPA and Finance as to whether the bill will result in an acquisition of property within the meaning of section 51(xxxi) of the Constitution. The committee does not express any view on this matter.

2.30 While the committee does not oppose the bill and it understands the need to align parliamentary retirement travel entitlements with community expectations, it wishes to place on the record its concern about the legal ambiguity of retrospective diminution of accrued entitlements.

Retirement by 1 January 2020

2.31 The bill includes the following change to the parliamentary retirement travel entitlement:

Parliamentarians, other than the Prime Minister or future Prime Ministers, who qualify for parliamentary retirement travel, must retire before

31 *Submission 1*, pp 2-3.

32 *Submission 3*, p. 5.

1 January 2020 in order to access the parliamentary retirement travel entitlement.³³

2.32 This issue was not specifically addressed in submissions, however the committee notes that 1 January 2020 does not align with the terms of service for Senators. The committee suggests that amending the date for retirement to 1 July 2020 would be a sensible and practical change to the bill. Alternatively, the bill should be amended to require that a parliamentarian (other than the Prime Minister or a future Prime Minister) can only access the entitlement if they retire prior to the next Federal election.

Recommendation 1

2.33 The committee recommends that the bill be amended to provide that parliamentarians, other than the Prime Minister or future Prime Ministers, who qualify for parliamentary retirement travel, must retire before 1 July 2020, or prior to the next Federal election, in order to access the parliamentary retirement travel entitlement.

Retirement during a parliamentary term

2.34 In relation to the reduction of travel entitlement for Senior Office Holders who retired on or after 14 May 2008 and parliamentarians (other than former Prime Ministers or Senior Office Holders) who retire on or after 14 May 2011, the committee agrees with Finance that these provisions require amendment to remove any ambiguity of the entitlement.

2.35 However, the Finance submission did not indicate the nature or content of such an amendment. In the committee's view, the pragmatic option would be that, where a parliamentarian who is entitled to parliamentary retirement travel retires during the parliamentary term, then the entitlement should be six years for Senior Office Holders and three years for other parliamentarians (other than former Prime Ministers or Senior Office Holders).

Recommendation 2

2.36 The committee recommends that where a parliamentarian who is entitled to parliamentary retirement travel retires during the parliamentary term, then the entitlement should be six years for Senior Office Holders and three years for other parliamentarians (other than former Prime Ministers or Senior Office Holders).

Public Benefit test

2.37 The committee notes the advice of Finance that 'it will be the responsibility of the entitlement holder to be satisfied that his or her use of parliamentary retirement travel [is] for the public benefit'. Both Mr Gray and AFMPA objected to the inclusion of the public benefit test.

33 Department of Finance, *Submission 3*, p. 2.

2.38 The evidence to the committee demonstrated that the public benefit test may result in some uncertainty as to whether particular travel may come within the entitlement. AFMPA suggested that travel for a philanthropic purpose would not be covered by the entitlement.³⁴ However, Finance advised that it would 'expect' that such travel would be within the entitlement.³⁵

2.39 Finance informed the committee that it publishes comprehensive guidance on the entitlements framework to assist parliamentarians and their employees to understand their entitlements and that this guidance is publicly available on the Finance website.³⁶

2.40 In the committee's view, if a public benefit test is to be included in legislation, then it should be accompanied by guidance, as to when a trip will be considered to be for 'a purpose that is for the public benefit', which will avoid this uncertainty. This guidance should be published on Finance's website.

2.41 The committee notes that information relating to the travel expenses of former parliamentarians is available on the Finance website. The committee considers, in the interests of full disclosure, former parliamentarians should be required to list the purpose of all travel undertaken pursuant to the parliamentary retirement travel entitlement.

Recommendation 3

2.42 The committee recommends that in the records published by the Department of Finance of former parliamentarians travel, the purpose of the travel should be included.

Referral to the Remuneration Tribunal

2.43 Finance provided the committee with advice that it had not sought the view of the Remuneration Tribunal on the bill as '[t]here are no remuneration aspects to the entitlement changes contained in the bill [and the bill does not] impact on any parliamentary entitlements determined by the Remuneration Tribunal'.³⁷ However, Finance has consulted the Remuneration Tribunal on the changes to the post retirement travel and severance travel entitlements in the context of the changes to parliamentary retirement travel contained in the bill.³⁸

2.44 The committee has not been advised of the detail of these consultations but it feels that as a matter of principle, if there are aspects of the bill the Government has consulted with the Remuneration Tribunal on then it may mean these aspects should be referred to the Remuneration Tribunal for determination. The committee is

34 *Submission 2*, p. 8.

35 *Submission 3*, p. 6.

36 *Submission 3*, p. 6.

37 *Submission 3*, p. 5.

38 *Submission 3*, p. 5.

concerned to ensure that Parliament does not legislate on aspects that are more appropriately dealt with by the Remuneration Tribunal.

2.45 The committee agrees with Mr Gray that the Government should refer certain matters to the Remuneration Tribunal for consideration.

Recommendation 4

2.46 The committee recommends that the Government refer the following matters to the Remuneration Tribunal for consideration:

- **making the resettlement payment a redundancy payment;**
- **allowing parliamentary superannuation payments to be paid into self-managed superannuation funds;**
- **the provision of occupational health and safety, sickness and death benefit insurance for all parliamentarians; and**
- **where relevant, aligning the rules for Comcar and private car use in Canberra and home base.**

Recoverable payments

2.47 The committee accepts the advice in Finance's submission that the note to proposed new section 10A(6) of the *Parliamentary Entitlements Act 1990* is incorrect and misleading. On the basis of this advice, the committee expects that the Government will put forward an amendment to the bill to correct this error.

Conclusion

2.48 The committee supports the intention of the bill, to align the retirement travel entitlements of parliamentarians with community expectations. The committee believes that this bill is a step in the right direction but the committee notes its inquiry has raised uncertainties that need to be addressed through amendment to the bill.

2.49 The committee notes that the Senate Standing Committee for the Scrutiny of Bills had no comment to make on this bill.³⁹ In addition, the Parliamentary Joint Committee on Human Rights stated 'the bill is compatible with human rights'.⁴⁰

2.50 Subject to Recommendations 1 and 2 above, the committee recommends that the Senate pass the bill.

Recommendation 5

2.51 Subject to Recommendations 1 and 2, the committee recommends that the Senate pass the bill.

39 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No. 14 of 2014, 29 October 2014, p. 48.

40 Parliamentary Joint committee on Human Rights, *Fourteenth Report of the 44th Parliament*, 28 October 2014, p. 93.

Senator Cory Bernardi
Chair