Parliamentary Joint Committee on Human Rights

Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*

Bills introduced 11 – 27 February 2014

Legislative Instruments received

1 - 21 February 2014

Third Report of the 44th Parliament

March 2014

ISBN 978-1-74229-950-1

This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

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Functions of the committee

The Committee has the following functions:

a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

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Abbreviations

Abbreviation	Definition
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
FRLI	Federal Register of Legislative Instruments
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination

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Executive Summary

This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* of bills introduced into the Parliament during the period 11 to 27 February 2014 and legislative instruments received during the period 1 to 21 February 2014. The committee has also considered responses to the committee's comments made in previous reports.

Bills introduced 11 to 27 February 2014

The committee considered seventeen bills, all of which were introduced with a statement of compatibility. Of these seventeen bills, seven of the bills considered do not require further scrutiny as they do not appear to give rise to human rights concerns.

The committee has identified nine bills that it considers require further examination and for which it will seek further information.

Of the bills considered, those which are scheduled for debate during the sitting week commencing 3 March 2014 include:

- Tax and Superannuation Laws Amendment (2014 Measures No. 1) Bill 2014;[1] and
- Tertiary Education Quality and Standards Agency Amendment Bill 2014.[2]

The committee has decided to defer its consideration of the Fair Work Amendment Bill 2014, which was introduced on 27 February 2014, to enable closer consideration of the issues.

Legislative instruments received between 1 and 21 February 2014

The committee considered 87 legislative instruments received between 1 and 21 February 2014. The full list of instruments scrutinised by the committee can be found in Appendix 1 to this report.

Of these 87 instruments, 81 (or approximately 93 percent) do not appear to raise any human rights concerns and are accompanied by statements of compatibility that are adequate. A further four instruments do not appear to raise any human rights concerns but are not accompanied by statements of compatibility that fully meet the committee's expectations. As the instruments in question do not appear to raise human rights compatibility concerns, the committee has written to the relevant

1 See pp 19 - 26 of this report.

2 See pp 27 - 30 of this report.

Ministers in a purely advisory capacity providing guidance on the preparation of statements of compatibility. The committee has decided to seek further information from the relevant Minister in relation to the remaining two instruments before forming a view about their compatibility with human rights.

Responses

The committee has considered seven responses which related to 20[3] bills and legislative instruments and were in response to the committee's comments its *First Report of the 44th Parliament*. The committee has concluded its consideration of three bills and eight instruments.

The committee has deferred its consideration of the Minister's response to the committee's comments on a further two legislative instruments to enable closer examination of the issues raised in light of information requested of the Minister in relation to related legislation considered in the committee's *Second Report of the 44th Parliament*.[4]

The committee notes that a number of responses to comments in its *Second Report of the 44th Parliament* were not received in time to be considered in this report. The committee will consider these responses in its next report.

Senator Dean Smith
Chair

3 This figure does not include the eleven related bills to the DisabilityCare Australia Fund Bill 2013.

4 Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulations 2013 and Migration Amendment (Temporary Protection Visas) Regulation 2013

Part 1

Bills introduced
11 – 27 February 2014

Bills requiring further information to determine human rights compatibility

Adelaide Airport Curfew Amendment (Protecting Residents' Amenity) Bill 2014

Sponsor: Senator Wright
Introduced: Senate, 12 February 2014

Summary of committee concerns

1.1 The committee seeks clarification whether the bill is consistent with the right to work.

Overview

1.2 This bill seeks to strengthen the night-time curfew imposed by the *Adelaide Airport Curfew Act 2000*, which prohibits large passenger aircraft from taking off or landing at Adelaide Airport between 11pm and 6am.

1.3 The Act currently provides for a shoulder period between 11pm to midnight and between 5am and 6am, which, subject to approval by the Minister, permits certain international aircraft to take off and land during those periods.[1]

1.4 This bill proposes to remove that discretion by repealing the relevant provisions in the Act. In other words, the bill seeks to ensure that the curfew period operates between 11pm and 6am without exception.

1.5 The new requirements will apply to all take-offs and landings which occur after the bill commences, regardless of whether the relevant Ministerial approval was granted prior to commencement.

Compatibility with human rights

Statement of compatibility

1.6 The bill is accompanied by a statement of compatibility that concludes that the bill does not engage any human rights.

Committee view on compatibility

Right to privacy/right to health

1.7 The right to privacy encompasses the right to respect for one's home as well as one's private and family life.[2] The right to health recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health',

1 *Adelaide Airport Curfew Act 2000*, sections 7, 8 and 9.

2 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

and extends to the underlying determinants of health, such as healthy environmental conditions.[3]

1.8 The committee notes the amendments may be viewed as promoting the right to privacy and the right to health, in so far as they seek to reduce noise pollution.

Right to work

1.9 The right to work is recognised in article 6 of the ICESCR. It includes the right of individuals to freely choose or accept work, and the right not to be deprived of work unfairly. States parties are obliged to adopt policies 'to achieve … full and productive employment, under conditions safeguarding fundamental political and economic freedoms to the individual.'[4] As the UN Committee on Economic, Social and Cultural Rights has commented:

> The right to work requires formulation and implementation by States parties of an employment policy with a view to 'stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment.[5]

1.10 The right to work is not absolute and may be subject to permissible limitations provided that such limitations are aimed at a legitimate objective, and are reasonable, necessary and proportionate to that objective.[6]

1.11 The statement of compatibility does not explain whether these changes are consistent with the right to work. In particular, no information is provided about the potential economic impact of these changes, and whether they could result in reduced employment opportunities.

1.12 The committee intends to write to Senator Wright to seek clarification whether the bill is compatible with the right to work, including information with regard to the nature and scope of any impact on the local economy and whether it may result in any job losses.

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3 Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

4 Article 6(2) of the ICESCR.

5 UN Committee on Economic, Social and Cultural Rights, *General comment No 18: The right to work*, (2006), para 26.

6 Article 4 of the ICESCR.

Appropriation (Parliamentary Departments) Bill (No. 2) 2013-2014

Appropriation Bill (No. 3) 2013-2014

Appropriation Bill (No. 4) 2013-2014

Portfolio: Finance
Introduced: House of Representatives, 13 February 2014

Summary of committee concerns

1.13 The committee seeks clarification whether existing budgetary processes currently incorporate any explicit human rights considerations.

Overview

1.14 The Appropriation (Parliamentary Departments) Bill (No. 2) 2013-2014 appropriates additional money out of the Consolidated Revenue Fund (CRF) for expenditure in relation to the parliamentary departments. The Appropriation Bill (No. 3) 2013-2014 proposes appropriations from the CRF for the ordinary annual services of the government. The Appropriation Bill (No. 4) 2013-2014 proposes appropriations from the CRF for services that are not considered to be the ordinary annual services of the government.

1.15 The amounts proposed for appropriation are in addition to the amounts appropriated through the Appropriation Acts that implemented the 2013-2014 Budget. Together, these three bills are termed the Additional Estimates Appropriation Bills.

Compatibility with human rights

Statement of compatibility

1.16 Each of the three appropriation bills is accompanied by a brief and substantially identical statement of compatibility, that notes that the High Court has stated that beyond authorising the withdrawal of money for the broadly identified purposes, Appropriation Acts 'do not create rights and nor do they, importantly, impose any duties'.[1] The statements conclude that as their legal effect is limited in this way, the bills do not engage, or otherwise affect, human rights.[2] They also state that '[d]etailed information on the relevant appropriations, however, is contained in the Portfolio [Budget] Statements'.[3]

1 Statement of compatibility for each bill, para 3.

2 Statement of compatibility for each bill, para 4.

3 Statement of compatibility for each bill, para 5.

Committee view on compatibility

1.17 The predecessor to this committee considered the human rights implications of appropriation bills in its Third and Seventh Reports of 2013.[4] It noted that:

> Proposed government expenditure to give effect to a particular policy may have implications for both the promotion and limitation of human rights. Statements that routinely conclude that appropriation bills do not engage any human rights therefore may not be accurate in a strict sense. This would particularly be the case where specific appropriations may involve reductions in expenditure which could amount to retrogression or limitations on rights.[5]

1.18 However, our predecessor committee acknowledged the difficulties that appropriation bills present for the preparation of statements of compatibility, given their technical nature and the fact that they frequently include appropriations for a wide range of programs and activities across many portfolios. It accepted the then Finance Minister's explanation that the detail about specific appropriations is mainly contained in the individual agency's portfolio budget statement and the budget papers generally, rather than in the appropriation bill itself.

1.19 With these considerations in mind, our predecessor committee suggested that:

> It appears that the most practical way to address the compatibility of appropriation bills is to ensure that human rights are appropriately incorporated in the underlying budgetary processes, including requiring portfolio budget statements to contain express human rights impact assessments. The committee encourages the government to consider this proposition, not least as it would be consistent with the government's policy objectives in implementing Australia's Human Rights Framework, that is, to ensure appropriate recognition of human rights issues in policy and legislative development.[6]

1.20 The committee notes the government's view that appropriation bills do not engage or otherwise affect any human rights, and that this view is based on the understanding that appropriation bills do not create rights or impose duties and are therefore considered to have a limited legal effect. Identical statements were made in relation to previous appropriations bills considered by our predecessor committee,[7] which noted that:

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4 See, Parliamentary Joint Committee on Human Rights (PJCHR), *Third Report of 2013*, 13 March 2013, pp 65-67; and *Seventh Report of 2013*, 5 June 2013, pp 21-24.

5 PJCHR, *Seventh Report of 2013*, 5 June 2013, p 23.

6 PJCHR, *Seventh Report of 2013*, 5 June 2013, p 23.

7 See statements of compatibility for the Appropriation (Parliamentary Departments) Bill (No. 1) 2013-2014; Appropriation Bill (No. 1) 2013-2014; and Appropriation Bill (No. 2) 2013-2014.

> While appropriation bills may not create any statutory rights or duties, the committee notes that they may nevertheless have an impact on the implementation of international human rights obligations, including the obligation to progressively realise economic, social and cultural rights using the maximum of resources available.[8]

1.21 The committee notes that the statements of compatibility for these bills simply reiterate that view without addressing the committee's concerns that such bills may nonetheless engage Australia's human rights obligations.

1.22 Similarly to our predecessor committee, this committee does not consider that it will be generally necessary for it to make substantive comments on all appropriation bills. Nonetheless, in principle, appropriation bills, like all other bills, are subject to the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the committee notes that there may be cases in which the committee considers it appropriate to comment on such bills.

1.23 The committee considers that it would be desirable for the government to give active consideration to requiring human rights impact assessments to be expressly incorporated in portfolio budget statements to ensure that human rights are properly reflected in the underlying budgetary processes that lead to specific appropriations. Our predecessor committee requested information with regard to whether budgetary processes took account of human rights but did not receive a response. The committee considers that such a systematic approach to the identification of human rights impacts and appropriate priorities is particularly important when government is seeking to reduce expenditure or redirect funds across the whole of government or within particular portfolios.

1.24 The committee intends to write to the Minister for Finance to seek clarification whether the current budgetary processes expressly take account of human rights factors.

8 PJCHR, *Seventh Report of 2013*, 5 June 2013, p 22.

Great Barrier Reef Legislation Amendment Bill 2014

Sponsor: Senator Waters
Introduced: Senate, 13 February 2014

Summary of committee concerns

1.25 The committee seeks clarification whether the bill is consistent with the prohibition against retrospective criminal laws.

Overview

1.26 This bill seeks to amend:

- the *Environment Protection and Biodiversity Conservation Act 1999* to prohibit certain developments adversely affecting the Great Barrier Reef World Heritage Area; and
- the *Environment Protection (Sea Dumping) Act 1981* to prohibit the dumping of dredged material within the Great Barrier Reef World Heritage Area.

1.27 The explanatory memorandum states that the amendments are intended to implement 'key recommendations that the World Heritage Committee has made to ensure the Great Barrier Reef does not get added to the “world heritage in danger” list'.[1]

Compatibility with human rights

Statement of compatibility

1.28 The bill is accompanied by a brief statement of compatibility that states that the bill is 'confined solely to changing how major ports and other industrial developments which would impact the world heritage values of the Great Barrier Reef are regulated under our national environment laws'.[2] The statement concludes that the bill is compatible with human rights because it 'does not engage any human rights in a positive or negative manner'.[3]

Committee view on compatibility

Presumption of innocence

1.29 The bill proposes to make it an offence to dump dredged material within the Great Barrier Reef World Heritage Area, which attracts a maximum penalty of 250

1 Explanatory memorandum, p 1.

2 Statement of compatibility, p 1.

3 Statement of compatibility, p 1.

penalty units or imprisonment for 12 months or both.[4] Strict liability applies to the Great Barrier Reef element of the offence.[5]

1.30 Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. Strict liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault.

1.31 However, strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such offences must be reasonable, necessary and proportionate to that aim.

1.32 The statement of compatibility does not provide any justification for the strict liability offence in the bill, however, the explanatory memorandum states that the application of strict liability is appropriate because it may otherwise:

> be difficult to prove that a person knew they were in the Great Barrier Reef (or were reckless to that fact) making the offence difficult to prosecute and accordingly undermining the deterrent effect of the provisions. The application of strict liability is also justifiable on the basis that a defendant can reasonably be expected, because of his or her professional involvement in the dredging industry, to know the requirements of the law.[6]

1.33 The committee considers that the application of strict liability in the offence is likely to be compatible with the presumption of innocence. Notwithstanding the fact that the offence carries a penalty of up to 12 months' imprisonment, strict liability is only being applied to the jurisdictional elements of the offence, which does not go to the core of the criminality being addressed.

1.34 The committee, however, emphasises its expectation, as set out in its Practice Note 1, that statements of compatibility should include sufficient detail of relevant provisions in a bill which affect human rights to enable the committee to assess their compatibility. This includes identifying and providing a justification for strict liability offences.

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4 Proposed new section 10AA(1) of the *Environment Protection (Sea Dumping) Act 1981*, inserted by item 2 in Schedule 2 to the bill.

5 Proposed new section 10AA(2) of the *Environment Protection (Sea Dumping) Act 1981*, inserted by item 2 in Schedule 2 to the bill.

6 Explanatory memorandum, p 2.

Prohibition against retrospective criminal laws

1.35 In addition to the strict liability offence of dumping dredged material in the Great Barrier Reef World Heritage Area discussed above, the bill also proposes to make it an offence to load dredged material on a vessel or platform in Australia or Australian waters for the purpose of dumping such material in the Great Barrier Reef World Heritage Area.[7] Both these offences carry penalties of up to 12 months' imprisonment. The bill further provides that no permits or approval could be given for these prohibited activities after 31 December 2013.[8]

1.36 The intended effect of the proposed amendments would appear to be that, following the commencement of the proposed amendments, a person could be prosecuted for carrying out acts which, if carried out before commencement pursuant to a permit issued after 31 December 2013, would not have been criminal offences at the time they were committed. Thus, the bill would appear in effect to provide for the retrospective application of these new offences.

1.37 Article 15 of the ICCPR prohibits retrospective criminal laws and provides that no-one can be found guilty of an offence that was not a crime at the time it was committed. The prohibition supports long recognised criminal law principles that there can be no crime or punishment without a prior provision by law. This is an absolute right which cannot be limited.

1.38 The committee intends to write to Senator Waters to seek clarification as to whether and how these amendments are compatible with the prohibition against retrospective criminal laws in article 15 of the ICCPR.

7 Proposed new section 10CA(1) of the *Environment Protection (Sea Dumping) Act 1981*, inserted by item 2 in Schedule 2 to the bill.

8 Item 4 in Schedule 2 to the bill.

Social Security Legislation Amendment (Green Army Programme) Bill 2014

Portfolio: Environment
Introduced: House of Representatives, 26 February 2014

Summary of committee concerns

1.39 The committee seeks further information on how the measures in the bill are compatible with the right to social security and the right to just and favourable conditions of employment.

Overview

1.40 This bill proposes to amend the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* to implement changes necessary to support the commencement of the Green Army. The Green Army will be a voluntary initiative for young people aged 17-24 to participate in projects protecting the environment, while gaining practical skills, training and experience.

1.41 The bill proposes to amend the above-mentioned Acts to specify:

- that persons receiving a green army allowance under the Green Army Programme cannot also receive a social security benefit or social security pension and that a determination made in this regard may be backdated;
- that participants of the Green Army Programme will not be considered workers or employees for the purposes of various Commonwealth laws; and
- the income testing arrangements that will apply to a person receiving a social security pension if their partner is receiving a green army allowance.

Compatibility with human rights

Statement of compatibility

1.42 The bill is accompanied by a statement of compatibility that states that the bill does not engage any of the applicable rights and freedoms.

Committee view on compatibility

1.43 The committee considers that the bill engages a number of rights which were not addressed in the statement of compatibility. These concerns are set out below.

Right to social security

1.44 The committee considers that the measures specifying that persons receiving a green army allowance cannot also receive a social security benefit or pension and specifying the income test arrangements applying to partners of green army allowance recipients engage the right to social security.

1.45 The UN Committee on Economic, Social and Cultural Rights has stated that social security should be available, adequate and accessible. In relation to adequacy:

> benefits must be adequate in amount and duration in order that everyone may realise his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in articles 10, 11 and 12 of the [International Covenant on Economic, Social and Cultural Rights].[1]

1.46 In particular, states have an immediate obligation to ensure minimum essential levels of social security so as to enable persons to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs and the most basic forms of education.[2]

1.47 These measures may limit the right to social security. For example, under the bill, a person receiving a green army allowance is barred from receiving any other social security benefit or pension. Economic, social and cultural rights, including the right to social security, may be subject to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.[3] It is necessary for the government to demonstrate that the measure pursues a legitimate objective and has a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

1.48 It is unclear to the committee whether the effect of the measures will be to reduce a person's income support where they are barred from receiving social security payments by virtue of receiving the green army allowance. It is also unclear whether the green army allowance will be sufficient to meet minimum essential levels of social security.

1.49 The committee intends to write to the Minister to seek further information as to what impact the measures in the bill will have on the right to social security and how the measures are compatible with that right.

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1 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19 (2008), para 22.

2 CESCR, General Comment No. 19 (2008), para 59.

3 Article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Right to work

1.50 The bill proposes to amend the Social Security Act to specify that people participating in the Green Army Programme are not taken to be workers or employees under certain Commonwealth laws, including the *Work Health and Safety Act 2011*, the *Safety Rehabilitation and Compensation Act 1988*, and the *Fair Work Act 2009*.[4] This includes participants on a full-time or a part-time basis who are receiving the green army allowance and participants on a part-time basis who are not receiving green army allowance.

1.51 The right to work includes a right to just and favourable conditions of employment.[5] This includes, for example, remuneration which provides workers with a fair wage and a decent living and safe and healthy working conditions with policies in place designed to minimise workplace health hazards and mechanisms to investigate workplace accidents.

1.52 The committee notes that the Green Army Programme is a voluntary initiative. However, it is intended that participants may participate in the Programme on a full-time basis and as such, participation may be their sole means of earning a living. The committee also notes that part-time Green Army Team supervisors who are not receiving the green army allowance because they are receiving a wage from their Service Provider employer will also be excluded from the operation of the above-mentioned Commonwealth laws under the bill.[6]

1.53 The committee considers that the exclusion of participants from such laws may constitute a limitation on the right to just and favourable conditions of employment. The statement of compatibility has not addressed why it is necessary to exclude participants from such laws, in particular workplace health and safety protections, and how the exclusion is proportionate (for example, whether such persons may be protected through other means should they suffer an injury while undertaking voluntary work under the Programme).

1.54 The committee intends to write to the Minister to seek further information on how the bill is compatible with the right to just and favourable conditions of employment, including why it is not possible for the bill itself to exclude part-time supervisors from the scope of the proposed exclusion from Commonwealth laws.

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4 Proposed new section 38J inserted by item 2 of the bill.

5 Article 7 of the ICESCR.

6 The explanatory memorandum states that it is not the intention for the exclusion provisions to apply to such people and proposed new subsections 38J(2) and (3) of the bill allow the Secretary to prescribe in a legislative instrument that the exclusion does not apply to such persons, see p 4.

Social Security Legislation Amendment (Increased Employment Participation) Bill 2014

Portfolio: Employment
Introduced: House of Representatives, 27 February 2014

Summary of committee concerns

1.55 The committee seeks further information to determine whether the proposal to extend the non-payment period for social security benefits from 12 weeks to 26 weeks is compatible with the right to social security.

Overview

1.56 This bill proposes to amend the *Social Security Act 1991*, the *Social Security (Administration) Act 1999*, and the *Income Tax Assessment Act 1997* to enable the implementation of the Job Commitment Bonus and the 'Relocation Assistance to Take Up a Job' programme.

Job Commitment Bonus

1.57 The Job Commitment Bonus payment will provide job seekers aged 18-30 who have been receiving Newstart Allowance or Youth Allowance (other than as an apprentice or full time student) for 12 months or more with:

- a $2,500 payment, if they undertake gainful work and remain off income support for a continuous period of 12 months; and
- a further $4,000 to eligible job seekers if they remain in a job and do not receive an income support payment for a continuous period of 24 months, for a total payment of $6,500.

1.58 If job seekers later return to receipt of an income support payment and then qualify again for the Job Commitment Bonus, they will be able to receive a further Job Commitment Bonus (that is, a further $2,500, or $2,500 plus an additional $4,000, depending on whether the further period of work is 12 or 24 months).

'Relocation Assistance to Take Up a Job' programme

1.59 The 'Relocation Assistance to Take Up a Job' programme is intended to replace a current scheme that provided relocation assistance to job-seekers, called 'Move 2 Work'. The replacement scheme will come into effect on 1 July 2014 and will provide financial assistance to long term unemployed job seekers with participation requirements who have been receiving Newstart Allowance, Youth Allowance or Parenting Payment for at least the preceding 12 months, to relocate for the purposes of commencing ongoing employment.

1.60 Those who relocate to a regional area (whether from a metropolitan area or another regional area) will receive up to $6,000. Those who move to a metropolitan area from a regional area will receive up to $3,000. Relocations between capital

cities (metropolitan areas) will be limited to cases where the relocation is to a capital city with a lower unemployment rate. Families with dependent children will be provided with up to an additional $3,000.

1.61 The bill also seeks to introduce a non-payment period of 26 weeks for which the relevant income support payment is not payable if the person ends their employment because of their own voluntary act or misconduct within a period of 6 months of the relocation assistance being paid. This requirement will apply to participants in the new 'Relocation Assistance to Take Up a Job' programme. The current non-payment period of 12 weeks will continue to apply to participants in the present 'Move 2 Work' programme.

Compatibility with human rights

Statement of compatibility

1.62 The bill is accompanied by a comprehensive statement of compatibility that identifies that the bill engages a range of rights. The rights discussed include the right to equality and non-discrimination;[1] the right to work;[2] the right to social security;[3] and the right to an adequate standard of living.[4] The statement concludes that the bill is compatible with human rights.

1.63 The committee commends the Minister for Employment on the quality of the statement of compatibility for this bill. The detailed analysis of the proposed measures demonstrates a careful and thorough understanding of the relevant human rights requirements, and has greatly assisted the committee's scrutiny of the bill.

Committee view on compatibility

1.64 The committee considers that the statement of compatibility adequately addresses most of the issues it raises and provides sufficient justifications for any proposed limitations. In general, sufficient safeguards are provided in the bill and parent legislation to ensure that the relevant powers, in particular those relating to the non-payment of social security benefits, are exercised compatibly with human rights. The committee makes the following comments on three aspects of the bill.

Job Commitment Bonus – key details to be provided in legislative instruments

1.65 The Job Commitment Bonus will be available to eligible individuals who undertake 'gainful work', which is defined as 'work for financial gain or reward

1 Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and article 26 of the International Covenant on Civil and Political Rights (ICCPR).

2 Article 6 of the ICESCR.

3 Article 9 of the ICESCR.

4 Article 11 of the ICESCR.

(whether as an employee, a self-employed person or otherwise)'.[5] Some of the key matters for implementing the Job Commitment Bonus, however, will be set out in legislative instruments.[6] This includes provision for a legislative instrument to exclude work of a kind prescribed in the instrument from being work which would attract the Job Commitment Bonus.[7]

1.66 The committee notes that it is unable to reach a definitive view on the compatibility of these measures because key details are not provided in the bill but will be contained in legislative instruments, which have not yet been made. The committee notes that the relevant legislative instruments will be disallowable and subject to the statement of compatibility requirement.

Job Commitment Bonus – exclusion of protected SCV holders

1.67 The bill provides that a person must be an Australian resident throughout the period of work on which they rely to claim the Job Commitment Bonus.[8] An 'Australian resident' is usually defined in social security law to mean a person who resides in Australia and who is an Australian citizen, the holder of a permanent visa, or the holder of a protected special category visa (SCV). Protected SCV holders are New Zealand citizens who meet certain criteria.[9] Therefore, New Zealand citizens who are protected SCV holders are treated on an equal basis with Australian citizens and permanent residents for the purposes of accessing the full range of social security benefits and programmes.

1.68 The bill, however, proposes to utilise a modified definition of an Australian resident, which would exclude protected SCV holders from being eligible for the Job Commitment Bonus. The statement of compatibility states that excluding protected SCV holders is reasonable and proportionate to attaining the goals of the measure but provides no further information as to why this might be case.

1.69 The committee intends to write to the Minister for Employment to seek clarification as to why it is considered necessary to exclude protected SCV holders from accessing the Job Commitment Bonus, and the basis for considering that their inclusion may jeopardise the goals of the measure.

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5 Proposed new section 861(11) of the *Social Security Act 1991*, inserted by item 2, Schedule 1.

6 See proposed new sections 861(6) and (8) of the *Social Security Act 1991*, inserted by item 2, Schedule 1.

7 Proposed new section 861(8) of the *Social Security Act 1991*, inserted by item 2, Schedule 1.

8 Proposed new section 861(12) of the Social Security Act 1991, inserted by item 2, Schedule 1.

9 Protected SCV holders are New Zealand citizens who were in Australia on 26 February 2001, or were in Australia for 12 months in the two years immediately before this date and later returned to Australia, or who are in certain other similar categories. New Zealand citizens who arrive in Australia after 26 February 2001 have access to a less extensive range of benefits covered by the bilateral social security arrangement between Australia and New Zealand announced on 26 February 2001.

1.70 The committee notes that it has separately commented on the human rights implications of long-term New Zealand residents of Australia who are not protected SCV holders on several occasions.[10]

'Relocation Assistance to Take Up a Job' programme – increase of non-payment period from 12 to 26 weeks

1.71 The statement of compatibility suggests that extending the non-payment period for social security benefits under the new programme is justifiable because the new programme will provide for higher levels of assistance compared to the existing programme:

> The increase to the non-payment period more closely aligns the value of social security entitlements for such a period with the amount of relocation assistance that can be received, particularly taking into account the increased amount of assistance which the new Relocation Assistance to Take Up a Job programme involves.[11]

1.72 The statement, however, does not provide any details with regard to the type of assistance that the 'Move 2 Work' programme currently provides or the amount by which the replacement programme will enhance existing levels of assistance. The committee notes that the 'financial impact of the [proposed] 26 week non-payment period is marginally less than the full relocation assistance that can be received by eligible recipients with dependent children'.[12] It is not clear whether individuals without dependents or who do not receive the full relocation assistance may therefore be required to effectively 'repay' (via the prescribed withholding of social security entitlements) a greater amount than they received through the relocation assistance. The committee requires this information to satisfy itself that the proposal to extend the non-payment period from 12 to 26 weeks is not a retrogressive measure, and is consistent with the rights to social security and an adequate standard of living.

1.73 The committee intends to write to the Minister for Employment to seek the following information:

- **The levels of assistance provided under the current 'Move 2 Work' programme, including how the present 12-week non-payment period correlates with the applicable relocation assistance provided to eligible individuals.**
- **Whether for some individuals the proposed 26-week non-payment period may amount to more than the relocation assistance received.**

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10 In addition to comments elsewhere in this report, see PJCHR, *Seventh Report of 2013*, 5 June 2013, pp 11-16; and *First Report of the 44th Parliament*, 10 December 2013, pp 189-192.

11 Statement of compatibility, p 25.

12 Statement of compatibility, p 25.

Tax and Superannuation Laws Amendment (2014 Measures No. 1) Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 26 February 2014

Summary of committee concerns

1.74 The committee seeks further information to determine whether the amendments proposed in Schedules 1 and 3 to the bill are compatible with human rights.

Overview

1.75 This bill proposes to amend various taxation and superannuation laws.

1.76 Schedule 1 to the bill will introduce penalties to deter and penalise persons who promote the illegal early release of superannuation benefits.

1.77 Schedule 2 to the bill will introduce administrative directions and penalties for contraventions relating to self-managed superannuation funds (SMSFs) including rectification directions; education directions; and administrative penalties.

1.78 Schedule 3 to the bill seeks to amend the *Income Tax Assessment Act 1936* to phase-out the net medical expenses tax offset by the end of the 2018-19 income year. During the income years 2013-14 to 2018-19 the tax offset will be subject to transitional arrangements.

1.79 Schedule 4 to the bill seeks to amend the *Income Tax Assessment Act 1997* to update the list of specifically-listed deductible gift recipients.

Compatibility with human rights

Statement of compatibility

1.80 The bill is accompanied by a separate statement of compatibility for each schedule. The statements for Schedules 1 and 4 conclude that the relevant amendments do not raise any human rights issues. The statements for Schedules 2 and 3 conclude that the proposed amendments are compatible with human rights.

Committee view on compatibility

1.81 The committee considers that the amendments contained in Schedules 2 and 4 do not appear to give rise human rights concerns. The committee's comments on the amendments proposed in Schedules 1 and 3 of the bill are set out below.

Schedule 1 – Illegal early release schemes

1.82 The amendments in Schedule 1 will insert a new civil penalty provision, section 68B, into the *Superannuation Industry (Supervision) Act 1993* (SIS Act) that

prohibits a person from promoting a scheme that has resulted, or is likely to result, in the illegal early release of superannuation benefits.[1]

1.83 The consequences of contravening a civil penalty provision are provided for in Part 21 of the SIS Act under a provision of general application that applies to all civil penalty provisions in the Act. In proceedings commenced by the Regulator, a court may make a declaration that a person has committed a violation of a civil penalty provision (here the illegal early release of superannuation funds). The court may impose a pecuniary penalty of up to 2000 penalty units (or $340, 000) on the person. However, the court may not impose such a penalty 'unless it is satisfied that the contravention is a serious one'.[2] In hearing a civil penalty application, the court is to apply the rules of evidence and procedure applied in civil proceedings.[3]

1.84 Part 21 of the SIS Act also provides for the institution of criminal proceedings against a person who contravenes a civil penalty provision 'dishonestly, and intending to gain, whether directly or indirectly, an advantage for that, or any other person' or 'intending to deceive or defraud someone'. It is open to a court hearing criminal proceedings to make a declaration that a person has contravened a civil penalty provision, to make a civil penalty order imposing a financial penalty, and to order compensation be paid to a superannuation entity which has suffered loss, where the court does not proceed to a conviction.[4] Where a court in criminal proceedings convicts a person of an offence, the court may also order the payment of compensation to a superannuation entity which has suffered loss.[5]

1.85 If a person has been proceeded against for a civil penalty, a criminal prosecution may not be brought subsequently in relation to the same conduct.[6] If a person is prosecuted for an offence, the person may be proceeded against for a civil penalty order, where the person is not convicted in the criminal proceedings.[7]

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1 Our predecessor committee examined these measures in the 43rd Parliament, see comments on the Superannuation Legislation Amendment (Reducing Illegal Early Release and Other Measures) Bill 2012 in the *First Report of 2013*, 6 February 2013. The committee sought clarification from the then Treasurer on the compatibility of the civil penalty provision with the right to a fair trial in article 14 of the International Covenant on Civil and Political Rights but did not receive a response. The bill subsequently lapsed when the Parliament was prorogued.

2 *Superannuation Industry (Supervision) Act 1993*, section 196(4).

3 *Superannuation Industry (Supervision) Act 1993*, section 199(1).

4 *Superannuation Industry (Supervision) Act 1993*, section 215.

5 *Superannuation Industry (Supervision) Act 1993*, section 216.

6 *Superannuation Industry (Supervision) Act 1993*, section 203.

7 *Superannuation Industry (Supervision) Act 1993*, section 207.

Civil penalty provision as a 'criminal charge'

1.86 The issue arises whether the civil penalty provision should be considered 'criminal' for the purposes of human rights law. The committee has noted on various occasions that where a penalty is described as 'civil' under national or domestic law, it may nonetheless be classified as 'criminal' for the purposes of Australia's human rights obligations because of its purpose, character or severity. As a consequence, the specific criminal process guarantees set out in article 14 of the International Covenant on Civil and Political Rights (ICCPR) may apply to such penalties and proceedings to enforce them.

1.87 The committee has set out in its Interim Practice Note 2 the expectation that statements of compatibility should provide an assessment as to whether civil penalty provisions in bills are likely to be 'criminal' for the purposes of article 14 of the ICCPR, and if so, whether sufficient provision has been made to guarantee their compliance with the relevant criminal process rights provided for under the ICCPR.

1.88 The statement of compatibility accompanying these amendments provides such an assessment. It argues that the civil penalty provision should not be considered 'criminal' because (i) there is a clear demarcation between what constitutes a civil and a criminal penalty under Part 21 of the SIS Act; (ii) no term of imprisonment is available as an alternative to the monetary penalty; and (iii) the courts can tailor the amount of the monetary penalty to the circumstances of the case.

1.89 The committee accepts that the prosecution of an offence where a person contravenes a civil penalty provision 'dishonestly, and intending to gain, whether directly or indirectly, an advantage for that, or any other person' or 'intending to deceive or defraud someone' is a separate criminal proceeding under the SIS Act. The committee agrees that this is not a relevant factor for assessing whether the civil penalty provision in question is 'criminal' for the purposes of human rights law.

1.90 The committee also accepts that there is no direct prospect of imprisonment for a contravention of the civil penalty provision. The committee notes the suggestion in the statement of compatibility that this position can be contrasted with certain cases that were considered by the European Court of Human Rights, where the fact that the imposition of monetary penalties could be commuted into a period of imprisonment for non-payment contributed to/influenced the characterisation of those penalties as 'criminal'. The committee notes that imprisonment in those circumstances was not a direct consequence of the contravention, but rather a consequence which flowed from the non-payment of the monetary penalty. In the Australian context, it is possible that imprisonment could result in some cases where failure to pay is considered to be contempt of court. The committee notes that the European jurisprudence has found in other cases that coercive imprisonment for non-payment would not in and of itself transform a civil penalty into being

'criminal',[8] and would therefore caution against cherry-picking particular cases from comparative case law to support an argument. The committee notes that while imprisonment is a key indicator of criminality, it is not an exclusive factor for the purposes of determining whether a penalty is severe enough to be characterised as 'criminal'.

1.91 The committee notes the helpful discussion in the statement of compatibility on the case law to date with regard to civil penalty proceedings under the SIS Act, and accepts that the courts will and do take account of a range of factors when determining the amount of a civil penalty. The severity of a penalty, however, involves looking at the maximum penalty provided for by the relevant legislation. The legislation in this instance permits a maximum penalty of $340,000 to be imposed on an individual.

1.92 The committee considers that, even if the civil penalty provision were considered to be regulatory in nature (that is, it has a punitive/deterrent purpose but applies to a particular group of persons in a specific capacity), the committee remains concerned that the significant penalties involved – up to $340,000 for an individual – suggest that the civil penalty provision in question may be considered as 'criminal' for the purposes of human rights law. The committee considers that without adequate justification for setting the maximum penalty at this high level, appropriate procedural protections should be applied to the relevant enforcement proceedings.

1.93 The committee intends to write to the Treasurer to seek clarification as to why a maximum penalty of $340,000 for an individual is considered to be appropriate in these circumstances, and if not, whether sufficient provision has been made to guarantee compliance with the relevant criminal process rights provided for under the ICCPR, in particular the right to be presumed innocent, the right not to incriminate oneself and the prohibition against double jeopardy.

Schedule 3 – phase-out of the net medical expenses tax offset

1.94 The net medical expenses tax offset (NMETO) is a tax rebate to offset out-of-pocket medical expenses incurred above a certain threshold. Net medical expenses are out-of-pocket medical expenses incurred minus any refunds received from Medicare or a private health insurer. Medical expenses are broadly defined and include expenses related to an illness or operation which has been paid to a doctor, nurse, pharmacist or hospital; as well as the cost of the purchase and maintenance of medical aids and artificial limbs, artificial eyes and hearing aids.

8 See, for example, *Putz v Austria*, Application no. 18892/91, 22 February 1996; and *Ravnsborg v Sweden*, Application no. 14220/88, 23 March 1994.

1.95 In the 2013-14 Budget, the government announced that it would phase out the NMETO, with transitional arrangements for those currently claiming the offset. The amendments in Schedule 3 to this bill will give effect to that undertaking.

1.96 Under this measure the NMETO will be phased out between the 2013-14 and 2018-19 income years and ultimately be repealed on 1 July 2019. During that period there will be two sets of transitional arrangements in place:

- The NMETO will continue to be available for out-of-pocket medical expenses until the scheme is repealed on 1 July 2019 only for those medical expenses relating to disability aids, attendant care or aged care.
- The NMETO will continue to be available for out-of-pocket medical expenses unrelated to disability aids, attendant care or aged care until 30 June 2015 for taxpayers who receive an amount of the NMETO for the 2012-13 and 2013-14 income years.

1.97 The explanatory memorandum says that the NMETO is being phased out because of the following shortcomings:

> First, as it can only be claimed at the end of the financial year, it does not provide financial assistance when the medical expense is incurred. Secondly, only taxpayers who have a tax liability receive a benefit from the offset. Individuals with high out-of-pocket medical expenses and little or no tax liability gain no benefit from this offset as it is not refundable.[9]

Right to health

1.98 The committee notes that the phasing-out and eventual repeal of the NMETO may be viewed as either retrogressive or a limitation on the right to health.[10] It is therefore necessary for the government to demonstrate that the measure pursues a legitimate objective and has a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

1.99 The statement of compatibility argues that the phase out of the NMETO is consistent with the right to health for the following reasons:

- '[I]t merely removes an ineffective offset that is only really available to particular claimants for particular medical expenses'.[11]
- '[I]t will allow for further funding of other Government priorities, including health care'.[12]

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9 Explanatory memorandum, p 46.

10 Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

11 Statement of compatibility, p 55.

12 Statement of compatibility, p 56.

- Individuals will continue to have access to a range of other subsidies for medical expenses, via the 'Medicare Safety Net, which is supplemented by Medicare, the National Disability Insurance Scheme and the Pharmaceutical Benefits Scheme'.[13]

1.100 The committee recognises that the need for the government to manage and prioritise its fiscal needs is a legitimate objective. The committee also notes the value of including a phasing out period so that individuals will not be prejudiced by having their reasonable expectations frustrated. The statement of compatibility, however, does not articulate how the measure is rationally and proportionately connected to the stated objective of funding of other government priorities, including health care.

1.101 The committee notes that the NMETO applies to medical expenses which are incurred after available reimbursements are taken into account, such as those through the Medicare Benefits Schedule, the Pharmaceutical Benefits Scheme, government aged care subsidies and private health insurance refunds. The claim in the statement of compatibility that individuals will still have access to the core government health schemes and systems, therefore, does not address the question of whether removing the tax offset could result in any disadvantage by entrenching high out-of-pocket medical expenses.

1.102 To assess whether this change is compatible with human rights the committee requires further information about the financial and other factors that the government has taken into account in phasing out the NMETO, including whether it will have a particular impact on vulnerable groups and individuals on low incomes. The committee notes its expectation that statements of compatibility provide more than assertions when justifying limitations on human rights.

1.103 The committee intends to write to the Treasurer to seek an explanation as to whether any limitations on the right to health that may result from the phasing out of the NMETO are reasonable and proportionate to the achievement of the government's fiscal priorities.

Rights of persons with disabilities

1.104 The statement of compatibility states that the amendments are consistent with the rights of persons with disabilities because 'the transitional arrangements allow for taxpayers to claim medical expenses under the NMETO where they relate to disability aids and attendant care'.[14]

1.105 The committee accepts that the transitional arrangements are likely to be consistent with the rights of persons with disabilities. However, issues in relation to the rights of persons with disabilities arise not only in the context of the transitional

13 Statement of compatibility, pp 55-56.

14 Statement of compatibility, p 56.

arrangements, but also when the NMETO is ultimately abolished. The statement of compatibility does not address this latter aspect of the amendments.

1.106 The committee intends to write to the Treasurer to seek clarification as to whether the repeal of the NMETO is consistent with the rights of persons with disabilities, including whether the National Disability Insurance Scheme and other relevant supports will adequately compensate for any gap left by its abolition.

Tertiary Education Quality and Standards Agency Amendment Bill 2014

Portfolio: Education
Introduced: House of Representatives, 27 February 2014

Summary of committee concerns

1.107 The committee seeks further information on the means by which quality standards in tertiary education will be maintained following the removal of the Tertiary Education Quality and Standards Agency's (TEQSA) quality assessment function.

Overview

1.108 This bill seeks to amend the *Tertiary Education Quality and Standards Agency Act 2011* to give effect to the Government's decision to implement recommendations arising from the independent Review of Higher Education Regulation (the Review). The purpose of the bill is to increase the efficiency of TEQSA and to reduce the regulatory burden on higher education institutions. The bill includes measures to:

- remove the quality assessment function that TEQSA currently has so as to allow it to focus on its core activities of provider registration and course accreditation and the development of more efficient processes around these functions;
- enhance TEQSA's delegation powers to enable it to implement more efficient decision making processes and provide applicants with access to internal review of decisions (rather than having to commence proceedings in the Administrative Appeals Tribunal);
- improve the Minister's ability to give directions to TEQSA in relation to the performance of its functions and exercise of its powers;
- provide the Minister with greater flexibility in determining the most appropriate organisational arrangements for TEQSA by removing the requirements to appoint a specific number of Commissioners and to appoint full-time and part-time Commissioners and provide that all Commissioners will cease to hold office under the TEQSA Act at a fixed time (including appropriate transitional arrangements); and
- provide for a number of technical amendments suggested by TEQSA to improve the efficiency of notification requirements.

Compatibility with human rights

Statement of compatibility

1.109 The bill is accompanied by a statement of compatibility that identifies that the bill engages the right to work and rights in work[1] and the right to education.[2] The statement concludes that the bill is compatible with human rights.

Committee view on compatibility

Right to work

1.110 The committee considers that the statement of compatibility adequately addresses the bill's engagement with the right to work and rights in work. The statement provides sufficient justification for the proposed limitation on these rights, namely the termination of the current Commissioners, in light of the objective sought to be achieved. This includes the application of transitional arrangements, the ability for Commissioners to reapply for positions in line with the amended Act and the intention to offer suitable alternative employment or financial compensation to those who are not reappointed.

Right to education

1.111 As set out above, the bill includes measures to re-focus TEQSA on its core functions of provider registration and course accreditation. This includes the removal of the current quality assessment function. According to the Minister's second reading speech, 'the bill will remove TEQSA's quality assessment function which allowed the agency to conduct sector-wide thematic reviews of institutions or courses of study'.[3]

1.112 The removal of existing mechanisms designed to uphold the quality of tertiary education might appear to constitute a limitation on the right to education. Economic, social and cultural rights, including the right to education, may be subject to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.[4]

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1 Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

2 Article 13 of the ICESCR.

3 The Hon Christopher Pyne MP, Minister for Education, *House of Representatives Hansard*, 27 February 2014, p 3.

4 Article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

1.113 To the extent that the withdrawal of TEQSA from certain activities might constitute a limitation on the right to education, it is necessary for the government to demonstrate that the measure pursues a legitimate objective and has a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

1.114 The statement of compatibility states that the purpose of the measures is to:

> provide for more efficient and targeted activity by TEQSA which will ensure that higher education institutions have more time and resources to devote to doing what they do best – delivering the highest quality teaching, learning and research. This will benefit Australian and international students as well as the broader Australian community and economy.[5]

1.115 The statement states that despite these changes, '[t]he highest standards of quality will continue to be upheld'.[6] On this basis, the statement concludes that the bill is compatible with the right to education. However, the statement of compatibility does not provide any information as to how quality standards will continue to be upheld and maintained at a high level. The committee notes its expectation that statements of compatibility provide more than assertions when justifying limitations on human rights.

1.116 The committee is aware that sections of the higher education sector have taken the view that TEQSA's involvement in quality assurance has not been appropriate in view of the established means for assuring quality that have been developed within the sector, and have questioned the necessity of TEQSA's involvement.[7] The committee also notes the findings of the Review that institutions themselves may be best placed, and should be largely responsible, for assuring the quality of their educational provision.[8] Nonetheless, the committee considers that further information on the standards and processes that will ensure that high quality education standards are maintained (for example, those standards and processes that existed pre-TEQSA or which exist alongside TEQSA) is necessary to enable it to conclude that the measure will not unjustifiably limit the right to education.

1.117 The committee intends to write to the Minister for Education to seek further information as to how quality standards in tertiary education will continue to be maintained in the absence of TEQSA's quality assessment function.

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5 Statement of compatibility, p 3.

6 Statement of compatibility, p 3.

7 See, for example, Professor Kwong Lee Dow AO and Professor Valerie Braithwaite, *Review of the Higher Education Regulation Report*, 2013, p 47.

8 *Review of the Higher Education Regulation Report,* p 48.

Bills unlikely to raise human rights concerns

Excise Tariff Amendment (Tobacco) Bill 2014

Customs Tariff Amendment (Tobacco) Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 26 February 2014

1.118 These bills propose to amend the *Excise Tariff Act 1921* and the *Customs Tariff Act 1995* to:

- increase the rates of excise and excise equivalent customs duty on tobacco through a series of four staged increases of 12.5 per cent, commencing on 1 December 2013; and
- index the rates of excise and excise equivalent customs duty on tobacco to average weekly ordinary time earnings (AWOTE) instead of the consumer price index.

1.119 According to the explanatory memorandum, '[t]hese amendments seek to reduce the premature death and disease due to smoking by increasing the rates of duty on tobacco through both indexation changes and staged increases to rates of duty'.[1]

1.120 These bills are accompanied by a statement of compatibility that states that the bills engage and promote the right to health.[2]

1.121 The committee considers that these bills do not appear to give rise to human rights concerns.

1.122 However, the committee notes its expectation that statements of compatibility provide more than assertions in relation to the impact of a proposed measure on the promotion of specific human rights. The committee expects that where a matter is capable of evaluation in light of empirical evidence, the statement should include relevant supporting data. For example, in relation to these bills, the committee considers that the statement should have included relevant data in support of the assertion that such measures will contribute to efforts to reduce smoking rates.

1.123 The committee also re-iterates its expectation that where a package of two or more bills is presented to Parliament accompanied by an explanatory memorandum addressing all of the bills, there should be a separate statement of compatibility accompanying each bill.

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1 Explanatory memorandum, p 8.

2 Article 12 of the International Covenant on Economic, Social and Cultural Rights.

Governor-General Amendment (Salary) Bill 2014

Portfolio: Prime Minister
Introduced: House of Representatives, 27 February 2014

1.124 This bill proposes to amend the *Governor-General Act 1974* to set the salary for the next Governor-General, General Peter Cosgrove AC MC, prior to his swearing-in on 28 March 2014.

1.125 Section 3 of the Constitution provides that the salary of the Governor-General shall not be altered during their continuance in office. The explanatory statement states that, in line with past practice, the proposed salary has been calculated with reference to the estimated average salary of the Chief Justice of the High Court of Australia over the notional five year term of the appointment of the Governor-General.[3]

1.126 The bill is accompanied by a statement of compatibility that states that the bill does not raise any human rights issues.

1.127 The committee considers that the bill does not appear to give rise to human rights concerns.

3 Explanatory statement, p 1.

Land Transport Infrastructure Amendment Bill 2014

Portfolio: Infrastructure and Regional Development
Introduced: House of Representatives, 27 February 2014

1.128 This bill proposes to amend the *Nation Building Program (National Land Transport) Act 2009* to rename the Act and provide for the Roads to Recovery Programme to continue after 30 June 2014.

1.129 The bill also proposes to make provision for a new eligible project type, Transport Development and Innovation Projects, to allow funding of research and investigations of projects funded under the Act.

1.130 Finally, the bill seeks to repeal the *Australian Land Transport Development Act 1988*, the *Roads to Recovery Act 2000* and the *Railway Standardization (New South Wales and Victoria) Agreement Act 1958* as they are spent legislation.

1.131 The bill is accompanied by a statement of compatibility that states that the bill does not raise any human rights issues.

1.132 The committee considers that the bill does not appear to give rise to human rights concerns.

Live Animal Export Prohibition (Ending Cruelty) Bill 2014

Sponsor: Mr Wilkie
Introduced: House of Representatives, 24 February 2014

1.133 This bill proposes to amend the *Australian Meat and Livestock Industry Act 1997* and the *Export Control Act 1982* to introduce a ban on the export of live animals for slaughter. The ban would commence on 1 July 2017. The bill also proposes to introduce additional conditions applying to a licence for export of live animals for slaughter up to 1 July 2017. These include that the licence holder will take all reasonable efforts to ensure that the live-stock are treated satisfactorily in the country of destination and notification requirements where the licence holder becomes aware of evidence that such live-stock have not been treated satisfactorily.

1.134 The bill is accompanied by a statement of compatibility that states that the bill engages the right to work[4] and may constitute a limitation on this right in that the 'prevention of live exports may negatively affect the business of farmers and exporters'.[5] The statement refers to evidence suggesting that agricultural workers are more likely to benefit from keeping slaughtering procedures within Australia and highlights the transitional period proposed by the bill, which will enable individuals to 'adapt to the change and mitigate the loss, if any'.[6] The statement concludes that any limitations on the right to work are therefore reasonable.

1.135 The committee has previously commented on measures relating to live-stock export licences and noted that powers relating to licencing regimes, including the power to refuse or revoke licences, are likely to engage the right to a fair hearing.[7] However, the committee considered that the specific operation of these powers would appear to be subject to the existing review framework contained in the parent Act and is therefore unlikely to raise any human rights concerns.

1.136 The committee considers that the bill does not appear to give rise to human rights concerns.

4 Article 6 of the International Covenant on Economic, Social and Cultural Rights.

5 Statement of compatibility, p 1.

6 Statement of compatibility, p 1.

7 Parliamentary Joint Committee on Human Rights, *Third Report of 2012*, 19 September 2012, p 18.

Primary Industries (Excise) Levies Amendment (Dairy Produce) Bill 2014

Portfolio: Agriculture
Introduced: House of Representatives, 13 February 2014

1.137 This bill proposes to increase the maximum rates (caps) of the Australian Animal Health Council levies on dairy produce from 0.058 to 0.145 of a cent per kilogram of milk fat and from 0.13850 to 0.34625 of a cent per kilogram of protein. The current operative levies are equivalent to the current cap rates.

1.138 The levies are payable by the producer of the relevant dairy produce and are collected by the Commonwealth for disbursement to Animal Health Australia, as provided for under the *Australian Animal Health Council (Live-stock Industries) Funding Act 1996*. Australian Dairy Farmers Limited, the national representative body for the dairy industry, has requested the amendments.

1.139 The bill is accompanied by a statement of compatibility that states that it does not engage any human rights.

1.140 The committee considers that the bill does not appear to give rise to human rights concerns.

Public Service Amendment (Employment for All of Us) Bill 2014

Sponsor: Mr Bandt
Introduced: House of Representatives, 24 February 2014

1.141 This bill proposes to amend the *Public Service Act 1999* to require the Public Service Commissioner to issue a direction to the Australian Public Service (APS) regarding the employment of people with a disability and people from a non-English speaking background. The direction requires the total number of APS employees with a disability and the total number APS employees who come from a non-English speaking background that exist at 1 July 2014 to be doubled by 1 July 2019.

1.142 The explanatory memorandum states that 'current employment in the public service does not reflect the diversity of the Australian population'[8] and that the bill seeks 'to address this failure by setting targets for the employment of people with a disability, and employment of people from culturally and linguistically diverse backgrounds'.[9]

1.143 The bill is accompanied by a statement of compatibility that states that the bill 'gives effect to a number of Australia's human rights obligations including those contained in the International Convention on the Elimination of All Forms of Racial Discrimination [ICERD] and the Convention on the Rights of Persons with Disabilities [CRPD].'[10] The statement concludes that 'the bill is compatible with human rights because it advances the protection of human rights'.[11]

1.144 The International Covenant on Civil and Political Rights (ICCPR) guarantees the right of every citizen '[t]o have access, on general terms of equality, to the public service in his [or her] country', without distinction based on grounds such as race, colour, sex, language and other status (which includes disability) 'and without unreasonable restrictions'.[12] Under the CRPD States parties undertake to safeguard and realise the right of persons with disabilities to work and agree to take appropriate measures, including through legislation, to employ persons with disabilities in the public sector without discrimination.[13]

1.145 The committee recognises that setting targets for the employment of particular groups of citizens in the public service may give rise to concerns about

8 Explanatory memorandum, p 1.

9 Explanatory memorandum, p 1.

10 Statement of compatibility, p 1.

11 Statement of compatibility, p 1.

12 ICCPR, article 25(c)

13 CRPD, articles 27(g), 5 and 6.

equality and non-discrimination. In general, the guarantees of equality and non-discrimination contained in the relevant UN human rights treaties require persons to be treated equally without regard to national or ethnic origin, linguistic background or disability. However, under international human rights law, States are permitted, and in some cases required, to take positive measures to redress the disproportionate and unreasonable exclusion of members of such groups from opportunities enjoyed by others, including employment in the public service.[14] This may include temporary special measures as understood under treaties such as the ICERD[15] and the ICCPR.[16]

1.146 This committee and its predecessor committee have noted that where differential treatment based on grounds such as race, national or ethnic origin, linguistic background or disability is proposed, such treatment may be permissible if it can be justified as an objective and reasonable measure adopted in pursuit of a legitimate goal. Our predecessor committee has also set out the approach that has been adopted nationally and internationally in assessing the permissibility of measures based on such grounds where these measures are sought to be justified as 'special measures' under international law.[17]

1.147 Where a measure is proposed in order to redress the under-representation in a particular sector of members of a group protected against discrimination, the committee would normally expect such measures to be supported by statistical information which sets out the disparities in level of participation by the protected groups, as well as other relevant historical or contextual material. Such information has been provided in relation to a number of bills this committee and its predecessor have examined. The committee considers that such information is important not only for the committee's consideration of compatibility, but also because it is an indication that the proper human rights analysis has taken place in the process of formulating the relevant policy and legislation.

1.148 The committee accepts that the goals of having the composition of the APS broadly representative of the Australian community is a legitimate goal, as is ensuring that particular sectors of the community are not discriminated against in access to employment in the public service. As noted above, the statement of compatibility merely states that certain groups are under-represented, without

14 See CRPD, article 5(4)

15 See UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination (2009).

16 See UN Human Rights Committee, General comment 18(37)(1989), para 10.

17 PJCHR, *Eleventh Report of 2013*, pp 21-31. See also PJCHR, *Second Report of the 44th Parliament*, p 145, at paras 2.186-2.187 (discussion of the Aboriginal Land Rights (Northern Territory) Amendment (Delegation) Regulation 2013).

providing further details of the disparity between the percentage of those groups in the overall population eligible for employment in the APS and the percentage of those groups employed in the APS. The bill proposes setting a figure of a 100% increase in employment of members of those groups by 1 July 2019. The statement of compatibility does not indicate whether, if this goal were achieved, this would fully redress the disparity.

1.149 However, the second reading speech delivered by Mr Bandt addresses these issues in general terms and also provides some relevant figures. It states that '[a]s far as unemployment goes, research has shown that officially, amongst people from non-English-speaking backgrounds, the unemployment rate is at least twice the national average,' and that '[w]hat we know from the research is that the workforce participation rate is around 30 per cent lower for people with a disability. The second reading speech also states:

> We know that almost 20 per cent of Australians identify as having a disability, but the number of people with a disability employed by the APS dropped to 2.9 per cent of the entire workforce in 2012. Similarly, one in four people in Australia identify as being from a non-English-speaking background but account for only 5.1 per cent of the APS workforce.

1.150 The committee considers that it would have been helpful if this information had been included in the statement of compatibility.

1.151 The committee considers that, in light of the information provided in the second reading speech, the bill does not appear to give rise to human rights concerns.

The committee has deferred its consideration of the following bill

Fair Work Amendment Bill 2014

Portfolio: Employment
Introduced: House of Representatives, 27 February 2014

Overview

1.152 This bill seeks to amend the *Fair Work Act 2009* to implement elements of the *Coalition's Policy to Improve the Fair Work Laws*, including to respond to a number of outstanding recommendations from the *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (June 2012) review into the operation of the Fair Work Act by the Fair Work Review Panel.

1.153 The bill proposes a range of measures, including changes to the right of entry framework, new processes relating to the negotiation of single-enterprise greenfields agreements, changes to rules around individual flexibility arrangements, and a number of other measures implementing recommendations of the Fair Work Review Panel.

1.154 The committee considers that the bill may give rise to significant human rights concerns. It has therefore decided to defer its consideration of this bill to allow for closer examination of the issues.

Part 2

Legislative instruments received
1 – 21 February 2014

The committee has sought further comment in relation to the following instruments

Australian Jobs (Australian Industry Participation) Rule 2014

FRLI: F2014L00125
Portfolio: Industry
Tabled: House of Representatives and Senate, 11 February 2014

Summary of committee concerns

2.1 The committee seeks clarification whether the instrument is compatible with the right to privacy.

Overview

2.2 This instrument is made under the authority of the *Australian Jobs Act 2013*. The Act mandates the application of Australian Industry Participation plans for all major projects with capital expenditure of $500 million or more in Australia, and establishes a statutory position, the Australian Industry Participation Authority.

2.3 The instrument provides for exceptions under the Act, information required for compliance and notification, and further functions for the Australian Industry Participation Authority.

Compatibility with human rights

Statement of compatibility

2.4 The instrument is accompanied by a statement of compatibility that states that the instrument does not engage any human rights.

Committee view on compatibility

Right to privacy

2.5 The instrument lists the required information that a project proponent or a facility operator must provide as part of their compliance report under the Act.[1] The instrument also sets out the required information that a project proponent must provide when they notify the Australian Industry Participation Authority of a preliminary trigger day for a major project.[2]

2.6 It is not clear whether the range of information required to be disclosed may include personal information about individuals. If so, the provisions may engage the right to privacy in article 17 of the International Covenant on Civil and Political Rights. The statement of compatibility makes no reference to the possible impact of the

1 See rules 7 and 8.

2 See rule 10.

instrument on the right to privacy and whether any limitation on the right is justifiable, that is, whether the limitation is reasonable, necessary and proportionate to a legitimate objective.

2.7 The committee intends to write to the Minister for Industry to seek clarification whether the information that is required to be provided for compliance reports or for notification purposes could include personal information about individuals, and if so, the justification for any limitations on the right to privacy.

National Gambling Reforms (Administration of ATM measure) Directions 2014

FRLI: F2014L00107
Portfolio: Social Services
Tabled: House of Representatives and Senate, 11 February 2014

Summary of committee concerns

2.8 The committee seeks further information on how this instrument relates to proposed amendments to the *National Gambling Reform Act 2012* (the Act) currently before the Parliament and what impacts the instrument will have on the right to health and the right to an adequate standard of living.

Overview

2.9 This instrument is made under the Act[1] for the purposes of providing regulatory guidance and general requirements in relation to the approach to be taken by the National Gambling Regulator in the first six months of administering the ATM measure under the Act.

2.10 According to the explanatory statement, '[t]he ATM measure is the first that applies under the Act from 1 February 2014, and requires ATM providers and venues to introduce a $250 limit to cash withdrawals from ATMs at gaming venues, in any 24 hour period'.[2]

2.11 The instrument implements an educative and cooperative approach by:

- specifying priorities based on the Regulator's functions with respect to the ATM measure relevant to an educative approach;
- prescribing procedural requirements to ensure genuine applications for exemption are settled before responding to potential non-compliance; and
- establishing a mandatory process for 'cooperative engagement' which must be followed before responding to any potential non-compliance.

1 *National Gambling Reform Act 2012*, section 110.

2 Explanatory statement, p 1.

Compatibility with human rights

Statement of compatibility

2.12 The statement of compatibility accompanying the instrument states that the instrument engages the right to privacy (in that the Act involves the collection, storage, security, use and disclosure of personal information) and the right to be presumed innocent (in that the Act provides for a number of civil penalty and criminal offences, which, in a number of cases, include reverse burdens of proof). The statement of compatibility concludes that the instrument 'is compatible with human rights because to the limited extent it may impact on human rights, those impacts are reasonable, necessary and proportionate'.[3]

Committee view on compatibility

2.13 According to the explanatory statement, the purpose of the Act is 'to provide measures to reduce the harm caused by gaming machines to problem gamblers, and their families and communities'.[4]

2.14 The committee notes that relevant to this instrument are proposed amendments to the Act currently before the Parliament. The Social Services and Other Legislation Amendment Bill 2013 proposes to amend the Act to repeal the powers and functions of the National Gambling Regulator and a number of other measures under the Act, including the ATM withdrawal limit measure.[5]

2.15 The committee has previously commented on the amendments proposed by this bill.[6] The committee noted that the risks and harms which result from problem gambling which the Act was intended to address 'relate directly to the promotion of human rights, including in particular the right to an adequate standard of living, and the right to health'.[7] The committee sought further information as to whether the effect of the measures is to remove measures that promote human rights and whether they would be replaced with measures which address the problems targeted by the Act.

2.16 The Minister's response stated that the measures in the bill constitute the first step of a new and different policy approach to problem gambling, through

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3 Statement of compatibility, p 3.

4 Explanatory statement, p 1.

5 See Schedule 1 to the Social Services and Other Legislation Amendment Bill 2013.

6 See Parliamentary Joint Committee on Human Rights (PJCHR), *First Report of the 44th* Parliament, 10 December 2013, p 51 and *Second Report of the 44th Parliament*, 11 February 2014, p 159.

7 See PJCHR, *First Report of the 44th* Parliament, 10 December 2013, p 53.

expressing the Government's commitment to developing and implementing appropriate measures in the near future. The committee recommended that the government's actions be accompanied by appropriate mechanisms to monitor the effectiveness of the replacement measures in promoting human rights, in particular the rights to health and to an adequate standard of living.

2.17 It appears to the committee that the purpose of this instrument is to delay implementation of the enforcement provisions with respect to the ATM measure under the Act. It prioritises an approach of 'cooperative engagement' over compliance activities. As the committee as previously noted, the purpose of the measures in the Act, including the ATM measure and its associated enforcement provisions, is to address the harms caused by gaming machines to individuals, their families, and communities.

2.18 The committee intends to write to the Minister for Social Services to seek further information as to:

- **how this instrument relates to the amendments to the Act currently before the Parliament in the Social Services and Other Legislation Amendment Bill 2013; and**
- **what impact the 'cooperative engagement' approach implemented by this instrument will have on the right to health and the right to an adequate standard of living.**

Part 3

Responses to the committee's comments on bills and legislative instruments

Consideration of responses

Environment Legislation Amendment Bill 2013

Portfolio: Environment
Introduced: House of Representatives, 14 November 2013
Status: Before Senate
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 12 February 2014

Information sought by the committee

3.1 Among other things, this bill was introduced to address the implications arising from the Federal Court's decision in *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694, which invalidated a decision to approve an iron ore mine because the Minister had failed to comply with a mandatory requirement to consider approved conservation advice regarding the Tasmanian devil.

3.2 The committee sought clarification on whether the retrospective validation of decisions that would otherwise have been invalid due to a failure to consider approved conservation advice was consistent with the right to a fair hearing in article 14(1) of the International Covenant on Civil and Political Rights (ICCPR).

3.3 The committee also sought clarification on whether the proposed amendments to increase the maximum penalty for the civil penalty provision in the Great Barrier Reef Marine Park Act 1975 (GBRMP Act) were consistent with the right to a fair trial in article 14 of the ICCPR.

3.4 The Minister's response is attached.

Committee's response

3.5 The committee thanks the Minister for his response. In particular, the committee is grateful for the timely and detailed way in which the Minister has responded to the committee's concerns, as this has greatly assisted the committee to finalise its consideration of this bill while it is still before the Parliament.

Retrospective validation of decisions

3.6 The committee sought clarification whether the bill's proposal to retrospectively validate decisions that would otherwise have been invalid would affect any related proceedings currently before the courts; or the rights and obligations of the parties in the *Tarkine* case. The committee noted that, in general, legislation should not deprive individuals of their right to benefit from the judgments they obtain in proceedings brought under an earlier law, or to continue proceedings asserting rights and obligations under that law. Such legislative interventions, particularly in cases in which government is one of the litigants, raise issues of compatibility with article 14(1) of the ICCPR.

3.7 In his response, the Minister stated that, 'there are no related proceedings currently before the courts which would be affected by the retrospective application [of these provisions]'. Further, the Minister advised that 'there are no related proceedings to the [*Tarkine* case], nor are there any other current proceedings where the failure to consider an approved conservation advice is specified as a ground for review.' The Minister also confirmed that these changes would not affect the rights and obligations of the parties in the *Tarkine* case.

3.8 In light of this information, the committee makes no further comment on these provisions. The committee notes that it would have been helpful to have included this information in the statement of compatibility.

Increased penalty for civil penalty provision

3.9 The bill proposes to amend a civil penalty provision in the GBRMP Act to triple its maximum penalty from 5,000 to 15,000 penalty units for an individual (and from 50,000 to 150,000 penalty units for a body corporate), where that conduct involves the taking of, or injury to, dugong or turtles that are protected species under the GBRMP Act.

3.10 The committee sought clarification whether the civil penalty provision should be considered 'criminal' for the purposes of human rights law. In particular, the committee requested the following information:

- whether the penalty had a punitive or deterrent purpose;
- whether the penalty was of general application (in other words, was it intended to apply to the general population or was it restricted to a group of persons in a specific regulatory capacity); and
- whether particular protections, such as the presumption of innocence, the prohibition against double jeopardy and the privilege against self-incrimination, would apply to the relevant enforcement proceedings.

3.11 The Minister's response provides the following clarification:

- The civil penalty provision is intended to have a deterrent purpose.
- While the civil penalty provision is of general application, it may be viewed as regulating particular kinds of behaviour by those in a place of particular environmental significance. The Minister argues that, in practice, therefore, the proposed maximum penalties 'apply to a group of persons in a specific regulatory capacity (persons who undertake activities in the Great Barrier Reef Marine Park)'.
- The civil penalty provision does not carry a sanction of imprisonment for non-payment of the penalty.

3.12 The committee notes the Minister's view that the provision should not be characterised as 'criminal', 'despite the nature and severity of the penalty, [because] there is no sanction of imprisonment for non-payment of the penalty.'

The committee notes, however, that while imprisonment is a key indicator of criminality, it is not an exclusive factor for the purposes of determining the severity of a penalty.

3.13 The committee notes the suggestion in the Minister's response that it may be possible to view the offence provision as applying to a specific group of people (persons who undertake activities in the Great Barrier Reef Marine Park) and that this would tend to support characterisation of the offence as 'regulatory'. However, the committee notes that the legislation applies generally to any person and that provisions considered regulatory on this basis tend to apply to specific groups identified by criteria other than engagement in the prohibited conduct.

3.14 The committee considers that, even if the civil penalty provision were to be viewed as applying to a particular group of persons in a specific regulatory capacity, the committee remains concerned that the significant penalties involved – up to $2,550,000 for an individual – suggest that the civil penalty provision in question should be considered as 'criminal' for the purposes of human rights law. The committee therefore considers that appropriate procedural protections should be applied to the relevant enforcement proceedings.

3.15 The Minister's response acknowledges that the committee may take the view that the proposed new maximum penalties may result in the civil penalty provision being considered as 'criminal' for human rights purposes. Accordingly, the response goes on to consider whether particular protections would apply to the relevant enforcement proceedings.

3.16 *Presumption of innocence*: The response states that the standard of proof for civil penalty proceedings is on the balance of probabilities. While acknowledging that this is a lower standard than the criminal standard of proof required under article 14(2) of the ICCPR, the response argues that the effectiveness of the enforcement regime would be undermined if it were necessary for the prosecution to prove the offence beyond reasonable doubt.

3.17 The committee notes the Minister's view that any limitation of the right to be presumed innocent arising from the enforcement of the civil penalty provision is 'reasonable, necessary and proportionate to preventing the illegal taking of or injury to dugong and turtles' as it is 'aimed at achieving the legitimate objective of protecting species that are of great importance to the World Heritage Listed Great Barrier Reef and for acting as a deterrent for the illegal poaching and trade of these iconic species.'

3.18 The committee notes that it may be open for the courts to apply the civil standard of proof flexibly, and to take account of the seriousness of the alleged contravention and the potential consequences to the person if it is proved.[1] This

1 *Briginshaw v Briginshaw* (1938) 60 CLR 336, [1938] ALR 334. See also *Evidence Act 1995*, section 140.

approach, however, does not represent a third standard of proof, and the standard remains one of proof on the balance of probabilities.[2] The committee, therefore, remains concerned that the application of a civil standard of proof in such proceedings to determine an individual's liability for such penalties may not meet the requirements of the right to be presumed innocent under article 14(2) of the ICCPR.[3]

3.19 *Prohibition against double jeopardy*: The response acknowledges that criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting the contravention of a civil penalty provision (regardless of whether a declaration of contravention and a pecuniary penalty order has been made against the person). The Minister, however, states:

> [I]n my view the likelihood of this occurring in practice is low. This is because there is typically a decision made at the outset of a matter as to what form of appropriate enforcement action should be taken (i.e. either pursuit of a civil penalty or criminal proceedings). This decision will turn on the circumstances of each case and will be made consistently with relevant Australian Government policies, guidelines and agency enforcement policy

3.20 The committee notes the Minister's view that it would be rare for criminal proceedings to be brought against a person for substantially the same conduct that had given rise to civil enforcement proceedings. However, the committee does not consider that an option not to bring criminal proceedings is a sufficient response to ensure consistency with the prohibition against double jeopardy. The committee remains concerned that the legislation as currently drafted permits such proceedings to be brought, and therefore risks being inconsistent with article 14(7) of the ICCPR.

3.21 *Privilege against self-incrimination*: The response explains that GBRMP Act and Regulations include powers to compel a person to provide certain information to the GBRMP Authority, however, these powers are considered to be 'so restricted as to not limit article 14(3) of the ICCPR'.

3.22 The response argues that the information that is required to be recorded and supplied to GBRMP Authority relates to logbook recordings of tourist visitation numbers and details of sewage discharges, and therefore:

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2 See, *Witham v Holloway* (1995) 183 CLR 525; and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66, (1992) 110 ALR 449.

3 See, for example, *Koon Wing Yee v Insider Dealing Tribunal* [2008] HKCFA 21, para 104-106 (rejecting the argument that an enhanced civil standard satisfies the requirements of article 14(2) of the ICCPR). See also the alternate view of the UK House of Lords in the case of *Clingham v Royal Borough of Kensington and Chelsea*; *R v McCann* [2002] UKHL 39 (in which the court held that the equivalent right in article 6(2) of the European Convention on Human Rights could be satisfied by an enhanced civil standard, which 'will for all practical purposes be indistinguishable from the criminal standard' (para 83)).

> The likelihood of information being provided by an individual to the GBRMP Authority which contains evidence that the individual contravened the civil penalty provision is … considered very low.

3.23 The response also explains that the power to compel information under the relevant GBRMP Regulations only apply to the holders of chargeable permissions. The response argues that:

> Such persons voluntarily participate in regulated activities, such as the operation of tourist programs, and it is therefore considered justifiable to expect such persons to have accepted that the information they are required to record and provide to the GBRMP [Authority] could be used as evidence in proceedings against them where such information shows that they have contravened [the civil penalty provisions].

3.24 The response also notes that the 'section 61AIL of the GMRMP Act provides that in most cases evidence of information given or documents produced is not admissible in [any subsequent] criminal proceedings' dealing with substantially the same conduct.

3.25 The committee notes that the nature and scope of the power to compel information under the GMRMP Act and Regulations goes some way towards ensuring that any limitation on the right not to self-incriminate is relatively confined. However, the right not to incriminate oneself will generally require at least explicit protection against the use of information or answers produced under compulsion. The committee, therefore, remains concerned that without the provision of appropriate immunities, consistency with article 14(3) of the ICCPR cannot be guaranteed.

3.26 The committee thanks the Minister for his detailed response on these issues.

Strict liability offences

3.27 In its initial comments on the bill, the committee had noted its expectation that statements of compatibility should identify and justify each strict liability offence in proposed legislation.

3.28 The Minister's response provides a justification for increasing the financial penalties for the relevant strict liability offences relating to listed dugong and turtles.

3.29 The committee thanks the Minister for providing these comprehensive explanations and notes that it does not consider that these strict liability offences raise any issues of incompatibility with the right to be presumed innocent in article 14(2) of the ICCPR.

The Hon Greg Hunt MP

Minister for the Environment

PDR: MC14-002973

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

12 FEB 2014

Dear Senator Smith Dean

I refer to your letter of 10 December 2013, concerning the report by the Parliamentary Joint Committee on Human Rights (the **Committee**) on the Environment Legislation Amendment Bill 2013 (the **Bill**). I apologise for the delay in responding.

I understand that the Committee has requested clarification on a number of matters set out in its *First Report of the 44th Parliament*. Please see my response against each request below.

1. *The Committee seeks clarification as to whether the amendments relating to approved conservation advice in Schedule 1 of the Bill limits the right to a fair hearing in article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), including whether their retrospective application would affect:*

   a. *any related proceedings currently before the courts; or*

   b. *the rights and obligations of the parties in the Tarkine case.*

Firstly, I note that since the Committee's *First Report of the 44th Parliament*, the Bill has been amended in the House of Representatives to remove the prospective application of the conservation advice amendment. Schedule 1 of the Bill (Amendments relating to approved conservation advice) provides that a failure to have regard to an approved conservation advice will not invalidate a relevant decision under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) made prior to 31 December 2013.

Further to this, I note that Article 14(1) of the *International Covenant on Civil and Political Rights* (**ICCPR**) protects the right to a fair and public hearing by a competent, independent and impartial tribunal established by law and ensures that all persons shall be equal before the courts and tribunals. I am of the view that the right to a fair hearing in Article 14(1) is not unduly limited by the amendments in Schedule 1 of the Bill relating to approved conservation advice.

I am advised that there are no related proceedings currently before the courts which would be affected by the retrospective application of Schedule 1 of the Bill. Specifically, there are no related proceedings to *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 (the ***Tarkine* case**), nor are there any other current proceedings where the failure to consider an approved conservation advice is specified as a ground for review.

In relation to the rights and obligations of the parties in the *Tarkine* case, the matter before the Court is finalised. The Court ordered on 17 July 2013 that the decision to approve the taking of the action was invalid and set aside that decision. As a result, a decision as to whether to approve the action under the EPBC Act was required to be made. The former Minister for the Environment, Heritage and Water, the Hon Mark Butler MP, made the decision to approve the proposed action (EPBC referral 2011/5846) on 29 July 2013.

The Statement of Reasons, dated 27 August 2013, for approval under the EPBC Act regarding the action (EPBC referral 2011/5846) details the approved conservation advices which were considered in the making of the decision on 29 July 2013. The making of this decision has not been challenged. Schedule 1 of the Bill does not affect the rights and obligations of the parties in the *Tarkine* case.

In the event that the Committee considers the right to a fair hearing is limited by the approved conservation advice provision, I am of the view that the limitation is aimed at achieving a legitimate objective. That is, as a result of the *Tarkine case* there is genuine legal risk and uncertainty to relevant EPBC Act approvals since January 2007 (when amendments to the EPBC Act made it mandatory to consider relevant approved conservation advice in certain circumstances). The Bill is reasonable and necessary in order to provide the assurance to stakeholders that previous decisions under the EPBC Act will not be invalid because of a technicality, that is, the Department did not attach approved conservation advices to a decision brief.

2. *The Committee notes that, in this instance, the strict liability offences in the Bill are unlikely to raise issues of incompatibility with article 14(2) of the ICCPR. However, the Committee emphasises its expectation, as set out in its Practice Note 1, that statements of compatibility should include sufficient detail of relevant provisions in a bill which impact on human rights to enable the committee to assess their compatibility. This includes identifying and providing a justification for each strict liability offence and reverse onus provision in bills.*

I note the Committee's expectation that the statement of compatibility should identify and provide a justification for each strict liability offence.

As stated in the statement of compatibility, the Bill does not create new offence provisions under either the EPBC Act or the *Great Barrier Reef Marine Park Act 1975* (Cth)(**GBRMP Act**). Rather, the Bill increases the maximum financial penalties for specific existing offences where the prohibited conduct concerns dugong or turtles.

The Bill amends the strict liability offences in sections 196A, 196C, 196E, 211A, 211C, 211E, 254A, 254C, 254E of the EPBC Act. The justification provided for in the statement of compatibility and explanatory memorandum for the increases in penalties applies for each of these strict liability offences. That is, the tripling of the penalty units for the relevant offences under the EPBC Act is considered necessary and appropriate to ensure there is an effective deterrence to the illegal killing, injuring, taking, trading, keeping or moving of turtles and dugong and thereby providing additional protection for these species and addressing community concerns about illegal poaching and trade of these species.

The justification for the tripling of penalty units for the GBRMP Act strict liability offences in sections 38BA and 38GA is also that the increase in penalty units is to deter conduct that involves the taking of or injury to dugong, marine turtles or leatherback turtles that are protected species under the GBRMP Act. As with the amendments to the EPBC Act, the increase in penalty units in the GBRMP Act is intended to address community concerns about illegal poaching and trade of these species, in this case in relation to activity in the Great Barrier Reef Marine Park.

The amendments to the EPBC Act and the GBRMP Act form one element of the Government's broader Dugong and Turtle Protection Plan which also includes an Australian Crime Commission investigation into the illegal killing, poaching and transportation of turtle and dugong meat; a specialised Indigenous ranger programme to strengthen enforcement powers for Indigenous rangers; and working with Indigenous leaders toward an initial two year moratorium on the taking of dugong.

3. *The Committee seeks clarification as to whether the proposed amendments to increase the maximum penalty for the civil penalty provision in the GBRMP Act are consistent with the right to a fair trial in article 14 of the ICCPR. In particular, the committee requests the following information:*

   a. *whether the penalty has a punitive or deterrent purpose;*

   b. *whether the penalty is of general application (in other words, is it intended to apply to the general population or is it restricted to a group of persons in a specific regulatory capacity?); and*

   c. *whether particular protections, such as the presumption of innocence, the prohibition against double jeopardy and the privilege against self-incrimination, would apply to the relevant enforcement proceedings.*

I note that the Committee, in its interim practice note on civil penalties (**Practice Note 2**), has acknowledged that civil penalty provisions raise complex human rights issues and that the implications for existing practice are potentially significant.

I understand that for the purposes of assessing compatibility with the ICCPR, the Committee is required to ascertain whether the civil penalty amendment in the Bill amounts to a 'criminal' penalty for the purposes of human rights law. I further understand that the Committee will consider the classification, nature and severity of the penalty that attaches to a particular civil penalty provision to assess whether the provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

Whilst I understand that the Committee will in general place little weight on how the penalty is described, for the sake of completeness, the provision is characterised as a civil penalty provision.

As stated in the statement of compatibility, the Bill does not create new civil penalty provisions under the GBRMP Act. Rather, the Bill increases the maximum financial penalty for the specific existing civil penalty provision where the prohibited conduct concerns dugong or turtles.

b) The nature of the penalty

If item 53 of the Bill is enacted, a person who engages in conduct of a kind that contravenes section 38BB(1) or (2) of the GBRMP Act and that resulted in the taking of or injury to an animal that is a member of a protected species, and the animal is a dugong, marine turtle or leatherback turtle, the civil penalty for that aggravated contravention is triple that which would have otherwise applied for the aggravated contravention.

The increased penalty is intended to have a deterrent purpose. Proceedings would be instituted by a public authority with statutory powers of enforcement, in this case the Great Barrier Reef Marine Park Authority (**GBRMPA**). The penalty would be imposed following a finding of culpability.

The increased penalty at item 53 of the Bill is of general application, however, only to the extent that it regulates behaviour in the Great Barrier Reef Marine Park. The Great Barrier Reef Marine Park is established by section 30 of the GBRMP Act. In establishing the Great Barrier Reef Marine Park, and providing for the prohibition and regulation of activities in the Great Barrier Reef Marine Park, the GBRMP Act gives effect to its main object, namely 'to provide for the long term protection and conservation of the environment, biodiversity and heritage values of the Great Barrier Reef Region' (section 2A(1) of the GBRMP Act).

The proposed amendments are therefore directed at regulating particular kinds of behaviour by those in a place of particular environmental significance. In this light, in practice, the proposed maximum penalties apply to a group of persons in a specific regulatory capacity (persons who undertake activities in the Great Barrier Reef Marine Park).

c) The severity of the penalty

I note that in assessing whether a pecuniary penalty is sufficiently severe as to amount to a 'criminal' penalty, the Committee will have regard to the matters set out in Practice Note 2.

It is my view that the provision should be characterised as not being 'criminal' as, despite the nature and severity of the penalty, there is no sanction of imprisonment for non-payment of the penalty. If a term of imprisonment were felt to be an appropriate sanction in a particular circumstance there are separate offence provisions within the GBRMP Act which could be relied upon regarding offences in relation to turtles and dugongs. However, should the Committee come to the view that the proposed new maximum penalties should be characterised as 'criminal' for the purposes of human rights law, the following considers the particular protections which would apply to the relevant enforcement proceedings.

Presumption of Innocence

I note that the standard of proof that applies to civil proceedings is proof on the balance of probabilities, but that the Committee considers that article 14(2) of the ICCPR requires that the case against a person be demonstrated on the criminal standard of proof, namely proof beyond reasonable doubt (paragraph 1.19 of Practice Note 2). In this instance, the effectiveness of the enforcement regime would be undermined if it were necessary for the prosecution to prove the offence beyond reasonable doubt. This limitation is aimed at achieving the legitimate objective of protecting species that are of great importance to the World Heritage Listed Great Barrier Reef and for acting as a deterrent for the illegal poaching and trade of these iconic species. This is therefore considered reasonable, necessary and proportionate to preventing the illegal taking of or injury to dugong and turtles.

Prohibition against double jeopardy

I note that Article 14(7) of the ICCPR involves the prohibition against double jeopardy. I note again, as above, that the civil penalty amendment does not seek to amend the existing operation of the GBRMP Act more broadly.

The existing section 61AII of the GBRMP Act precludes the Federal Court from making a declaration of contravention or a pecuniary penalty order against a person in relation to a civil penalty provision if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention. Further, section 61AIJ requires proceedings for a declaration of contravention or a pecuniary penalty order against a person for contravention of a civil penalty provision to be stayed if criminal proceedings are or have started against the person for an offence constituted by substantially the same conduct alleged to constitute the contravention, and may resume if the person is not convicted of the offence.

Whilst section 61AIK of the GBRMP Act provides that criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting the contravention of a civil penalty provision (regardless of whether a declaration of contravention and a pecuniary penalty order has been made against the person), in my view the likelihood of this occurring in practice is low. This is because there is typically a decision made at the outset of a matter as to what form of appropriate enforcement action should be taken (i.e. either pursuit of a civil penalty or criminal proceedings). This decision will turn on the circumstances of each case and will be made consistently with relevant Australian Government policies, guidelines and agency enforcement policy.

I also note that, section 61AIL of the GBRMP Act provides that in most cases evidence of information given or documents produced is not admissible in criminal proceedings if:

'(a) the individual previously gave the evidence or produced the documents in proceedings for a pecuniary penalty order against the individual for a contravention of a civil penalty provision (whether or not the order was made); and

(b) the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the contravention.'

Further, should the Committee consider that Article 14(7) of the ICCPR is limited by the amendments, it is my view that the limitation is reasonable, necessary and proportionate to deter and prevent the illegal taking of or injury to dugong and turtles.

Privilege against self-incrimination

I note that Article 14(3)(g) of the ICCPR involves the privilege against self-incrimination.

The GBRMPA has powers to compel a person to provide certain information. Pursuant to section 39P of the GBRMP Act, Regulation 167 of the GBRMP Regulations requires the holder of a chargeable permission to provide the GBRMPA with certain information. However, the information that is required to be recorded and supplied to GBRMPA pursuant to section 39P relates to logbook recordings of tourist visitation numbers and details of sewerage discharges. The likelihood of information being provided by an individual to the GBRMPA pursuant to section 39P which contains evidence that the individual contravened section 38BB (1) or (2) is considered very low.

Further, the Regulations made pursuant to section 39P only apply to the holders of chargeable permissions. Such persons voluntarily participate in regulated activities, such as the operation of tourist programs, and it is therefore considered justifiable to expect such persons to have accepted that the information they are required to record and provide to the GBRMPA could be used as evidence in proceedings against them where such information shows that they have contravened sections 38BB (1) or (2).

The scope of this power is considered to be so restricted as to not limit Article 14(3) of the ICCPR. However, should this be interpreted as a possible limitation, it is considered reasonable, necessary and proportionate to preventing the illegal taking of or injury to dugong and turtles. Again, the amendment is aimed at achieving the legitimate objective of protecting turtles and dugong.

I trust that the above information meets the Committee's requirements and that my response will be considered by the Committee in its next report.

Yours sincerely,

Greg Hunt

Higher Education Support Amendment (Savings and Other Measures) Bill 2013

Portfolio: Education
Introduced: House of Representatives, 21 November 2013
Status: Before Senate
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 13 February 2014

Information sought by the committee

3.30 This bill proposes to amend the Higher Education Support Act 2003 to remove the existing HECS-HELP up-front payment discount of 10%; to remove the HELP voluntary repayment bonus; and to apply an 'efficiency dividend' of 2 per cent in 2014 and 1.25 per cent in 2015 to Commonwealth contribution amounts under the Commonwealth Grant Scheme.

3.31 The committee sought clarification from the Minister for Education of:

- the likely impact of the removal of the up-front payment discount and voluntary repayment bonus on university students; and
- the impact of the proposed changes on the enjoyment of the right to education and, to the extent that they involve limitations of that right or are retrogressive measures, to request a clear statement of justification for the measures.

3.32 The Minister's response is attached.

Committee's response

3.33 The committee thanks the Minister for his response.

Removal of the upfront payment discount and the voluntary repayment bonus

3.34 The committee raised concerns as to whether the changes were a retrogressive measure or limitation on the enjoyment of the right to education, insofar as they involved an increase in fees for some students as a result of the removal of the discount and the voluntary repayment options. The committee noted that such measures need to be carefully scrutinised and justified.

3.35 The Minister's response explains that the purpose of the removal of the up-front payment discount and voluntary repayment bonus on university students is to achieve savings in order restore the budget to balance.

3.36 The committee notes that, while this will generally be a legitimate objective, any reduction in public spending may be justified by reference to that goal. However, a human rights compatibility assessment of a specific reduction in support or of a withdrawal of access to a benefit which is one of a number of measures undertaken to reduce government expenditure in a given sector or across government, may

require consideration of the other choices made or available and the impact of the measure, especially on groups who are socially disadvantaged. Elsewhere in this report the committee has commented on the importance of human rights impact assessment in the budgetary process.

3.37 While neither the statement of compatibility nor the Minister's response provides information about expenditure decisions in the education sector, the Minister's response states that the elimination of the upfront payment discount and the voluntary repayment bonus will not impede access to tertiary education, since 'any student who earns a place in tertiary education may take up that place, as student contributions amounts and tuition fees may still be deferred under the HELP loans scheme' and upfront payments 'may still be made by a student who wishes to do so'.

3.38 Insofar as the cost of fees may be increased for some students, the Minister's response notes that 'of the students who paid upfront and received the discount in 2011, the vast majority (86.3 per cent) come from a medium to high socio-economic status (SES) background.'

3.39 The committee notes it would have been useful for the information provided in this response to have been included on the statement of compatibility. The committee considers that on the basis of this information it is arguable that any retrogression or limitation on the right to education might be viewed as justifiable, although information about the range of measures taken in the education area would have assisted the committee in assessing compatibility.

Reductions in previously budgeted funding for universities (the 'efficiency dividend')

3.40 The Minister's response notes that the 'efficiency dividend' will involve a reduction in funding provided to universities of $902.7 million over the period 2013-2017. The Minister notes that the measures 'will not result in an increase to student contribution amounts or other amounts paid by students for which [sic] HELP loans are available'. The committee also understands that there will be no reduction to Australian Postgraduate Awards, or ARC and NHMRC grant programs. The Minister states that the measure:

> will require higher education providers to closely manage their internal budgets without impeding their flexibility to take into account their own operational circumstances and strategies.

3.41 The committee finds it difficult to understand from this explanation how the government anticipates the measure will not affect the quality of the learning and teaching environment experienced by students. The committee noted in its earlier comments that there did not appear to be any reduction in student numbers contemplated in order to offset any of the reduction of $900 million in resources, and that this disparity might have an adverse impact on students' educational experience if it led to reduction in staff or facilities. The Minister's response does not provide any further information on this matter.

3.42 The Minister notes that the measure will contribute 'to addressing the Budget deficit which will help to ensure that the current demand driven higher education funding system, which has greatly increased opportunities for study, remain affordable.'

3.43 The committee accepts that the goal of reducing government expenditure may in principle be viewed as a legitimate objective. However, as noted above, an assessment of the human rights compatibility of any specific reduction will normally require information about the context in which the decision was made and what choices were available to government (including what expenditures were maintained and whether other resources were reasonably available to it).

3.44 On the basis of the information provided to the committee, the impact of the 'efficiency dividend' is not clear, and the committee does not consider that it is in a position to make a fully informed assessment of whether the 'efficiency dividend' can be justified as compatible with the government's obligations under the ICESCR relating to the right to education.

THE HON CHRISTOPHER PYNE MP
MINISTER FOR EDUCATION
LEADER OF THE HOUSE
MEMBER FOR STURT

Our Ref: MC13-011122

13 FEB 2014

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for the opportunity to respond to the Committee's *First Report of the 44th Parliament* insofar as it relates to the *Higher Education Support (Savings and Other Measures) Bill 2013* (the Bill).

The measures in the Bill are compatible with human rights. These savings measures are necessary to bring the budget back to surplus for the long term so that the current Government can ensure the sustainability of funding for the higher education sector. They were announced by the previous government and included in the 2013-14 Budget.

The impact of the removal of the HECS-HELP discount and the HELP voluntary repayment bonus on university students

Currently, a 10 per cent discount is applied to up-front student contribution payments of $500 or more. The amount of the discount is paid by the Government to the student's higher education provider. The voluntary repayment bonus currently reduces a person's HELP debt by an additional five per cent of the payment amount when the person makes a voluntary repayment of $500 or more through the Australian Taxation Office. As at the time of the 2013–14 Budget, it was estimated that removing the up-front discount and voluntary repayment bonus would provide $276.7 million in savings over four years (2013–2014 to 2016–2017).

The removal of the HECS-HELP discount and the HELP voluntary repayment bonus is a legitimate source of savings necessary to restore the Budget to balance. The HECS-HELP upfront discount provides an additional Government subsidy towards the cost of study for students who have the financial means to pay for their student contribution upfront. It does not increase opportunities to study at university or improve accessibility for any student unable to pay their contribution upfront. Analysis of the Socio-Economic Indexes for Areas (SEIFA) Education and Occupation Index shows that of the students who paid upfront and received the discount in 2011, the vast majority (86.3 per cent) come from a medium to high socio-economic status (SES) background.

This measure is proportionate to the policy objective of ensuring that Australia has an affordable and accessible higher education system. It does not affect students' access to higher education. Any student who earns a place in tertiary education may take up that place, as student contribution amounts and tuition fees may still be deferred under the HELP loans scheme. Upfront payments may still be made by a student who wishes to do so.

Furthermore, given the differential between the earnings of tertiary-educated people compared with those who have not had a tertiary education, it is not unreasonable to expect that students repay the full amount of their student contribution to the Commonwealth. The abolition of the bonus for voluntary repayments will only affect people who can afford to make voluntary repayments above what are required when annual taxation returns are assessed.

Impact of the introduction of an efficiency dividend

The efficiency dividend will reduce the rate of growth of Commonwealth contributions towards the cost of study for all Commonwealth supported students. As at the time of the 2013–14 Budget, it was estimated that this measure will provide savings of $902.7 million over four years (2013–14 to 2016–17).

This measure is proportionate to the policy objective of contributing to repairing the Budget. Funding to universities will continue to grow, albeit at a slower rate than would be the case without the efficiency dividend. The efficiency dividend will not result in an increase to student contribution amounts or other amounts paid by students for which HELP loans are available. It will require higher education providers to closely manage their internal budgets without impeding their flexibility to take into account their own unique operational circumstances and strategies.

The measure will contribute to addressing the Budget deficit which will help to ensure that the current demand driven higher education funding system, which has greatly increased opportunities for study, remains affordable.

I trust the information provided is helpful.

Yours sincerely

Christopher Pyne MP

Migration Amendment Regulation 2013 (No. 4)

FRLI: F2013L01014
Portfolio: Immigration and Border Protection
Tabled: House of Representatives, 18 June 2013 and Senate, 19 June 2013
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 20 January 2014

Information sought by the committee

3.45 The committee sought further information on this instrument, including whether the amendments apply to persons currently in immigration detention and why the cohort to which the instrument applies is considered to pose a security risk, to determine whether the instrument is compatible with human rights.

3.46 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

3.47 The committee thanks the Minister for his response but notes that the response has not addressed the matters regarding which the committee sought clarification.

3.48 The instrument prescribes a new class of persons to whom a Subclass 070 Bridging (Removal Pending) visa may be granted by the Minister. The new class of persons include a person who, being a non-citizen:

- is an unlawful non-citizen;
- section 195A of the *Migration Act 1958* is not available to the Minister in relation to the grant of a visa to the non-citizen;[2] and
- the Minister is satisfied that the non-citizen's removal from Australia is not reasonably practicable at that time.

3.49 The instrument inserts a range of new visa conditions into the *Migration Regulations 1994*, which the Minister must impose on a bridging visa granted to a person in the new class of eligible non-citizens and may impose on a bridging visa

1 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 13.

2 Section 195A of the *Migration Act 1959* provides the Minister the power to grant a person who is in detention under section 189 of the Act a visa where he thinks that it is in the public interest to do so.

granted to a detainee under section 195A of the Act. Such conditions include, for example, requiring approval by the Minister for employment in certain industries or for changes in employment, refraining from engaging in certain activities, and not communicating or associating with certain entities.

3.50 The Minister's response simply states that the conditions will apply to 'individuals who have been assessed to be a security risk', without explaining the basis for such an assessment. For example, it is not clear who will conduct the assessment or if such assessments will be subject to appeal or review.

3.51 The Minister's response further states that:

> The amendments apply to detainees who are currently in immigration detention and to persons whose current immigration detention has been found to be unlawful. It is government policy that the amendments will only be applied to persons whose current immigration detention has been found to be unlawful by a court.[3]

3.52 In its initial examination of this instrument, the committee noted that the instrument imposes limitations on a range of rights, including the right to privacy, the right to freedom of movement, the right to freedom of association and the right to work. However, the committee was unable to assess the compatibility of this instrument due to an absence of information about the cohort of persons to whom the amendments are intended to apply and the basis for the conclusion that this class of persons poses a security risk.[4]

3.53 The Minister's response has not provided any further elucidation on these issues. It remains unclear to whom the amendments will apply and why it is necessary to impose such conditions on this cohort. In particular, it is unclear:

- On what basis the detention of this cohort has been (or will be) found to be unlawful by a court;
- If, as the response states, the amendments apply to persons currently in immigration detention and to persons whose current immigration detention has been found to be unlawful, why section 195A of the Migration Act is not available to the Minister;
- If, as the response states, it is government policy that the amendments will only be applied to persons whose current immigration detention has been found to be unlawful by a court, why the amendments also apply to persons who are currently in immigration detention (and whose detention has presumably not been found to be unlawful);

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3 Minister's response, p 13.

4 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, p 123.

- On what basis and by what process a person will be 'assessed to be a security risk' and made subject to the conditions imposed by the amendments; and
- Why persons who fall within the new class of persons must have such conditions imposed and why other detainees may have such conditions imposed.

3.54 The committee acknowledges that the amendments may promote the right not to be arbitrarily detained in so far as they result in the release of persons from immigration detention.

3.55 However, as a result of the conditions subsequently imposed on such persons, the instrument also limits a range of rights. Such limitations must be justified as reasonable, necessary and proportionate to a legitimate objective.

3.56 As the committee stated previously in relation to this instrument, without understanding the above matters, the committee is unable to assess why the amendments are necessary on security grounds and accordingly whether they are reasonable and proportionate to achieving the objective sought. The committee therefore remains unable to assess whether the instrument is compatible with human rights.

3.57 The committee intends to write to the Minister for Immigration and Border Protection to again seek further clarification on the effect of these provisions, in particular clarification as to the matters set out above. If the Minister is unable to provide such information, the committee requests that the Minister provide the committee with details of why he is unable to provide the information.

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Response to questions received from Parliamentary Joint Committee on Human Rights

Thank you for your letter of 10 December 2013 in which further information was requested on the following legislative instruments:

- *Migration Act 1958 – Determination under subsection 262(2) – Daily Maintenance Amounts for Persons in Detention – October 2013* [F2013L01785];
- *Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013* [F2013L01218];
- *Migration Amendment (Temporary Protection Visas) Regulation 2013* [F2013L01811];
- *Migration Amendment Regulation 2013 (No. 4)* [F2013L01014]; and
- *Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern* [F2013L01185].

My responses in respect of the above-named legislative instruments are attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
20 / 1 /2014

***Migration Amendment Regulation 2013 (No. 4)* [F2013L01014]**

Migration Amendment Regulation 2013 (No.4) (the amendment regulation) was made on 13 June 2013 to prescribe a new class of persons as eligible non-citizens for the purpose of the grant without application of a Subclass 070 (Bridging (Removal Pending)) visa, being a non-citizen who:

- is an unlawful non-citizen; and
- section 195A of the Act is not available to me in relation to the grant of a visa to the non-citizen; and
- I am satisfied that the non-citizen's removal from Australia is not reasonably practicable at that time.

The amendment regulation also inserts new visa conditions into the *Migration Regulations 1994* that I must impose on a Subclass 070 (Bridging (Removal Pending)) visa granted to a person in the new class of eligible non-citizens and that I may impose on a Subclass 070 (Bridging (Removal Pending)) visa if I have granted the visa to a detainee under section 195A of the Act.

Application of amendment to persons who are currently in immigration detention

The amendments apply to detainees who are currently in immigration detention and to persons whose current immigration detention has been found to be unlawful. It is government policy that the amendments will only be applied to persons whose current immigration detention has been found to be unlawful by a court.

Security risk of cohort

The conditions will apply to individuals who have been assessed to be a security risk.

Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern

FRLI: F2013L01185
Portfolio: Immigration and Border Protection
Tabled: House of Representatives, 12 November 2013 and Senate, 28 June 2013
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 20 January 2014

Information sought by the committee

3.58 The committee sought clarification as to whether the instrument is compatible with the right to work and the right to equality and non-discrimination.

3.59 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

3.60 The committee thanks the Minister for his response.

3.61 The purpose of this instrument is to specify the chemicals of security concern referred to in the Migration Amendment Regulation 2013 (No. 4). The regulation allows for certain conditions to be imposed on persons to whom a Subclass 070 (Bridging (Removal Pending)) visa is granted by the Minister. Such conditions include requirements that the Minister approve employment involving chemicals of security concern and the acquisition of certain goods relating to chemicals of security concern. The committee has also considered the regulation in this report.

3.62 The Minister's response states that the limitation which results from this instrument (in combination with the regulation) on the right to work is necessary for:

> the protection of the Australian community and national security. Persons subject to this limitation will have been assessed to be a risk to security. For this reason, this measure is both lawful and legitimate within the meaning of [the right to work].

1 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, pp 14-15.

3.63 Similarly, the Minister's response states that the instrument (in combination with the regulation) is compatible with the right to equality and non-discrimination because:

> persons subject to the requirement to seek my approval prior to commencing specified occupations have been assessed as a security risk. Further, the protection of the Australian community and Australia's national security is a purpose which is legitimate under the objectives of the Covenant. The requirement is proportionate to the aim of protecting the Australian community and Australia's national security because it allows me to assess each request individually and does not automatically prevent all members of the cohort from taking up employment in the occupations specified.

3.64 The committee notes that this instrument raises the same issues as those raised by the regulation. In relation to the regulation, the committee has set out a range of matters in relation to which it needs further information before being able to assess whether the regulation is compatible with human rights. This includes information on the particular cohort to which the regulation applies and the basis for, and process by which, such persons are assessed as posing a security risk.

3.65 Without this information, the committee is unable to assess whether the limitations on the rights to work and equality and non-discrimination imposed by this instrument (in combination with the regulation) are necessary, reasonable and proportionate to achieving a legitimate objective (that is, the protection of the community and Australia's national security).

***Migration Regulations 1994 – Specification under subclasses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern* [F2013L01185]**

Legislative Instrument IMMI 13/083 Definition of Chemicals of Security Concern (Subclauses 8551(2) and 8560(2)) (the legislative instrument) commenced on 1 July 2013 and specifies the chemicals of security concern referred to in *Migration Amendment Regulation 2013 (no.4)*.

The legislative instrument is an important element of the Government's strategy to manage the immigration status of illegal maritime arrivals and to protect the Australian community and Australia's national security.

Right to work

Article 6.1 of the ICESCR requires that:

> 1. *The States Parties to the ...Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

However, article 4 of the ICESCR provides that:

> *...the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in democratic society.*

For the purposes of article 4 of the ICESCR, the requirement that the visa holder seek my approval before commencing a specified occupation is lawful by virtue of the registration of the legislative instrument on the Federal Register of Legislative Instruments. Further, the purpose of the limitation on the recognition of the right to work is the protection of the Australian community and national security. Persons subject to this limitation will have been assessed to be a risk to security. For this reason, this measure is both lawful and legitimate within the meaning of article 4 of ICESCR.

Equality and non-discrimination

Article 2.1 of the ICCPR requires that:

> 1. *Each State Party to the present Covenant undertakes to respect and ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Article 26 of the ICCPR similarly states that:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other option, national or social origin, property, birth or other status.*

However, not all treatment that differs among individuals or groups on any of the grounds mentioned above will amount to prohibited discrimination. The UN Human Rights Committee has recognised that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".

As noted above, persons subject to the requirement to seek my approval prior to commencing specified occupations have been assessed as a security risk. Further, the protection of the Australian community and Australia's national security is a purpose which is legitimate under the objectives of the Covenant. The requirement is proportionate to the aim of protecting the Australian community and Australia's national security because it allows me to assess each request individually and does not automatically prevent all members of the cohort from taking up employment in the occupations specified. As such, the measure does not offend the principles of equality and non-discrimination as articulated in articles 2.1 and 26 of the ICCPR.

National Disability Insurance Scheme (Nominees) Rules 2013

FRLI: F2013L01062
Portfolio: Social Services
Tabled: House of Representatives and Senate, 20 June 2013
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 3 February 2014

Information sought by the committee

3.66 The committee wrote to the Minister to inquire whether a more explicit statement could be provided in the National Disability Scheme Rules (NDIS) Rules to reflect the desirability that the appointment of a nominee should be for the shortest time possible and subject to regular review by a competent, independent and impartial authority as provided for in the Convention on the Rights of Persons with Disabilities.

3.67 The committee's concerns were referred to the Assistant Minister for Social Services as the matters fall within his portfolio responsibilities. The response appears as part of the overall response to the concerns raised by the committee in relation to the National Disability Insurance Scheme Legislation Amendment Bill 2013, the DisabilityCare Australia Fund Bill 2013 (and related bills) and a number of other legislative instruments relating to the NDIS. The relevant extract from the Assistant Minister's response is attached.[1]

Committee's response

3.68 The committee thanks the Assistant Minister for his response.

3.69 The Assistant Minister's response refers to the *Operational Guidelines* adopted for the purposes of the NDIS in relation to nominees.[2] The committee appreciates the information provided as to the contents of the relevant *Guidelines on Nominees.* While these appear in large to protect the interests of a person for whom a nominee has been appointed, the committee notes that the response does not specifically address the committee's suggestion that an explicit statement be included in the Rules relating to the length of appointment of a nominee and the need for regular review by a competent independent and impartial tribunal.

1 Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, Chair PJCHR, 3 February 2014, Attachment, pp 3-4.

2 *Operational Guidelines on Nominees*.

3.70 The committee also notes that much of the detailed regulation is provided for under these and other *Operational Guidelines*, but that the *Operational Guidelines* do not appear to be legislative instruments.

3.71 The committee intends to write to the Assistant Minister to seek clarification as to:

- **the legal status of the *Operational Guidelines* and the details of the power under which they have been made;**
- **whether the *Operational Guidelines* may be amended without parliamentary scrutiny; and**
- **whether any restrictions on rights carried out pursuant to the operational guidelines would be considered to be authorised by 'law'.**

SENATOR THE HON MITCH FIFIELD
ASSISTANT MINISTER FOR SOCIAL SERVICES

MN13-002278

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Dean Senator

Thank you for your letter of 10 December 2013 to the Hon Kevin Andrews MP, Minister for Social Services, in which you seek clarification on behalf of the Parliamentary Joint Committee on Human Rights, on aspects of:

- the National Disability Insurance Scheme Rules;
- the National Disability Insurance Scheme Legislation Amendment Bill 2013; and
- the DisabilityCare Australia Fund Bill 2013 and eleven related bills.

Your letter was referred to me as this matter falls within my portfolio responsibilities.

I am pleased provide the attached responses to issues the Committee has raised.

Yours sincerely

MITCH FIFIELD

Encl.

3/2/14

PARLIAMENT HOUSE CANBERRA ACT 2600 TELEPHONE: (02) 6277 7280 EMAIL: MINISTER.FIFIELD@DSS.GOV.AU

Guideline 17 requires a child's representative to consult, wherever practicable, with the child's guardian (if any) and any person with parental responsibility and any other person who assists the child to manage their day-to-day activities and make decisions.

Guideline 18 refers to principles in the NDIS Act that guide those making decisions for children requiring that they are aware that the best interests of the child are paramount and that full consideration is given to the need to protect the child from harm, promote the child's development and strengthen, preserve and promote positive relationships between the child and the child's parents, family members and other people who are significant in the life of the child.

Guideline 12 permits a delegate to revoke a determination that a person is to represent a child where the delegate is satisfied that it is no longer appropriate for the determination to remain in effect. A revocation may occur following a request by the child.

Any decision to appoint a person as a child's representative is open to review at the request of the child or any other affected person (NDIS Act sections 99(i) and (k)). This is internally reviewable under section 100(2) and externally reviewable by the Administrative Appeals Tribunal under section 103 if the child is dissatisfied with the internal review decision.

The limitations on rights referred to by the statement of compatibility and the justification for those limitations

Although there are no explicit limits on the rights of children in the rules, the phrase "any limitation imposed by the instrument are reasonable, necessary and proportionate" was used in the statement of compatibility to cover the situation where the CEO would need make balanced decisions about children's supports under the NDIS. Any such decision that might be seen as limiting the rights of the child would be reasonable, necessary and proportionate.

National Disability Insurance Scheme (Nominees) Rules 2013

2.173 The committee intends to write to the Minister for Social Services to inquire whether a more explicit statement could be provided in the NDIS Rules to reflect the desirability that the appointment of a nominee should be for the shortest time possible and subject to regular review by a competent, independent and impartial authority as provided for in the CRPD.

The Operational Guidelines on nominees contain guidance for decision makers when appointing nominees.

In the *Operational Guideline – Nominees – Overview,* guideline 8 stresses that appointments of nominees will be justified only when it is not possible for participants to be assisted to make decisions for themselves. Where a nominee is appointed and it later appears that the participant no longer requires a nominee and requests removal of the nominee, a delegate may cancel the appointment of the nominee.

In the *Operational Guideline – Nominees – Duties and Removal of Nominee,* guideline 24(a) states that the delegate is required to cancel an appointment of a nominee as soon as practicable if the nominee was appointed at the request of a participant and the participant requests the delegate to cancel the appointment.

In *Operational Guideline – Nominees – Appointing a Nominee,* guideline 15 states:

> Setting a term for the appointment can be an important safeguard for the participant in appointing a nominee. Some examples of circumstances where the delegate may wish to limit the term of an appointment are:
>
> a. The delegate considers that it would be desirable to review the appointment of a nominee after a period to see whether the participant still needs a nominee.

This has the effect that planners understand that appointments may not be indefinite and delegates are made aware that the ongoing need for a nominee is a matter for active consideration.

A participant may request the cancellation of a nominee at any time. Under section 89 of the NDIS Act the CEO must, as soon as practicable, cancel the appointment of a nominee if the participant had requested the nominee and now requests the cancelation of the appointment. If the appointment was on the initiative of the CEO and the participant requests the cancellation of the appointment the CEO must decide within 14 days whether to cancel the appointment. If the CEO decides not to cancel the appointment they must provide the participant with a written notice of their decision.

When cancelling the appointment of a nominee the CEO is to have regard to the following:

(a) any breach of a duty of the nominee to the participant under the Act or the Rules;
(b) the previous conduct of the nominee in relation to the participant;
(c) the results of any review of the participant's plan;
(d) the views of the participant, and of any person who cares for or supports the participant;
(e) the impact on the participant of any cancellation or suspension of appointment;
(f) whether the nominee has been convicted of a criminal offence that is reasonably likely to compromise the ability of the person to act as nominee;
(g) whether the participant still needs a nominee, having regard to the considerations mentioned in paragraph 3.14(b) of the *National Disability Insurance Scheme (Nominees) Rules 2013*.

If the CEO decides not to cancel the appointment then the participant can seek an internal review of that decision under section 100, and then if necessary, external review by the Administrative Appeals Tribunal (AAT). The AAT is a competent, independent and impartial authority. It has a dedicated division for NDIS cases and it has appointed disability experts to provide a lead in determining NDIS reviews.

National Disability Insurance Scheme (Supports for Participants – Accounting for Compensation) Rules 2013

FRLI: F2013L01414
Portfolio: Social Services
Tabled: House of Representatives and Senate, 12 November 2013
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 3 February 2014

Information sought by the committee

3.72 The committee sought further specific information on whether the rules relating to compensation payments are compatible with the right to equality and non-discrimination, the right to an adequate standard of living, and the right to social security.

3.73 The committee's concerns were referred to the Assistant Minister for Social Services as the matters fall within his portfolio responsibilities. The response appears as part of the overall response to the concerns raised by the committee in relation to the National Disability Insurance Scheme Legislation Amendment Bill 2013, the DisabilityCare Australia Fund Bill 2013 (and related bills) and a number of other legislative instruments relating to the NDIS. The relevant extract from the Assistant Minister's response is attached.[1]

Committee's response

3.74 The committee thanks the Assistant Minister for his response. The response provides detailed and helpful answers to the majority of the issues raised by the committee. However, the committee retains the concerns detailed below.

3.75 The Minister’s response states that under rule 3.10, where a participant has unreasonably given up a right to seek compensation, ‘there is a further safeguard to prevent the participants falling below the minimum enjoyment of the right to an adequate a standard of living’. This is because the CEO is empowered to waive a reduction in supports if the CEO thinks 'it is appropriate to do so in the special circumstances of the case (which may include financial hardship suffered by the participant)'.

3.76 This would appear to give discretion to the CEO to take financial hardship into account and does not appear to impose a duty on the CEO to waive the

1 Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, Chair PJCHR, 3 February 2014, Attachment, pp 9-11.

reduction in supports if reducing the supports would mean that the participant's right to a minimum adequate standard of living was not realised. The committee considers that there should be a *duty* on the CEO not to take steps that would result in a person falling below minimum levels necessary to fulfil the right to an adequate standard of living.

3.77 The committee also notes that where the CEO has required a person to seek compensation under other laws and the participant has not done so, resulting in the suspension of the participant's plan, the plan is suspended even if the participant seeks a review of the decision. The plan is suspended until the original decision is varied or set aside. The effect of this appears to be that if there is a disagreement between the participant and the CEO about the reasonableness of a decision not to seek compensation under another law or scheme, the CEO's view prevails. This results in a potential restriction on the right to an adequate standard of living, with the possibility that a person will fall below the minimum levels required during the time that the decision is under review.

3.78 The committee will write to the Assistant Minister to seek clarification on:

- **why it is not appropriate to impose a *duty* on the CEO under rule 3.10 to take into account financial hardship to ensure that supports are not reduced or withdrawn if that may lead to a participant falling below the minimum level of enjoyment of the right to an adequate standard of living; and**
- **why it is necessary to suspend the provision of supports to a participant pending the resolution of a dispute over whether it is reasonable for the participant not to seek compensation under another law or scheme and how this is compatible with the obligation to ensure the right to an adequate standard of living.**

2.219 The committee intends to write to the Minister for Social Services to seek clarification:

- **whether the rules relating to compensation payments are compatible with the right to equality and non-discrimination;**
- **whether the recovery of compensation amounts may exceed the difference between compensation amounts and the sum of amounts payable under the NDIS;**
- **whether the rules are compatible with the right to an adequate standard of living and the rights to social security and social protection, including whether there are safeguards in place to ensure that a person who has compensation amounts deducted does not fall below the minimum level of enjoyment of these rights;**
- **whether provision is made for the CEO's decisions to be appealed or subject to external merits review; and**
- **whether a participant's supports will be suspended while seeking a review of the CEO's decision.**

Whether the rules relating to compensation payments are compatible with the right to equality and non-discrimination

The compensation provisions are designed to ensure that participants have adequate access to reasonable and necessary supports while preventing cost shifting from insurers of personal injury (such as insurers for workers compensation or motor accidents) to the NDIS.

The rules prevent cost shifting by providing a mechanism by which the supports provided by the NDIS can be reduced in relation to the entitlement of a participant to other systems of obtaining support (such as a claim for compensation). If the participant decides not to pursue support from those other systems, and the CEO of the NDIA is not satisfied that it was a reasonable decision, then the forfeited entitlement could still be taken into account and result in a reduction in the supports provided by the NDIA.

When considering whether the person's decision not to pursue support from other systems was reasonable the CEO must consider the impact on the person and their circumstances and family, including in a financial sense, the reasons given by the participant, the impact of the person's disability on their decision, and the circumstances giving rise to the possible entitlement. These aspects provide safeguards against any consideration of unequal treatment or discrimination of participants who may be able to access compensation payments from other schemes.

When determining the reasonableness of the decision there are number of factors that the CEO must take into account. The CEO must consider:

(a) the disability of the participant or prospective participant, including whether the disability affected his or her ability to reasonably assess the terms of the agreement;
(b) the circumstances which gave rise to the entitlement or possible entitlement to compensation;
(c) any reasons given by the participant or prospective participant as to why he or she entered into the agreement;

(d) the impact (including any financial impact) on the participant or prospective participant and his or her family that would have occurred if the claim for compensation had been pursued or continued;
(e) any other matter the CEO considers relevant, having regard to the objects and principles set out in Part 2 of Chapter 1 of the Act.

The requirement on the CEO to consider these factors safeguards against the decision being deemed unreasonable when an understanding of the participant's personal situation would have led to a conclusion that the decision was indeed reasonable.

In the unlikely event that the participant decides to give up a right to seek compensation in a manner that the CEO cannot be convinced is reasonable then there is a further safeguard to prevent the participant falling below the minimum enjoyment of the right to an adequate standard of living. Under rule 3.10 the CEO is empowered to waive a reduction in the supports given to a participant if they think it is appropriate to do so in the special circumstances of the case (which may include the financial hardship suffered by the participant).

These safeguards ensure that the compensation provisions are a reasonable, necessary and proportionate approach to ensuring the financial viability of the NDIS. The rules are therefore compatible with the right to an adequate standard of living and the rights to social security and social protection.

Whether the recovery of compensation amounts may exceed the difference between compensation amounts and the sum of amounts payable under the NDIS

The recovery of compensation amounts, or reduction in NDIS payments for reasonable and necessary supports, cannot exceed the difference between compensation amounts and the sum of amounts payable under the NDIS. In other words, a participant cannot be required to pay money to the NDIA because a compensation reduction amount exceeds the participant's allocation of NDIS funds for reasonable and necessary supports. Rules 3.12(a), 3.16 and 3.21 of the Compensation Rules are relevant.

Whether the rules are compatible with the right to an adequate standard of living and the rights to social security and social protection, including whether there are safeguards in place to ensure that a person who has compensation amounts deducted does not fall below the minimum level of enjoyment of these rights

The NDIS promotes rights to an adequate standard of living by providing support to participants with a permanent and significant disability where they cannot rely on existing rights to obtain that support.

The NDIS is not designed to provide income support for participants. The NDIS provides reasonable and necessary supports so that persons with disability are able, despite the effects of that disability, to participate in society and achieve their goals and aspirations to the extent that funding for this purpose is not available from another source such as a statutory compensation scheme.

The *National Disability Insurance Scheme (Accounting for Compensation) Rules 2013* ('the rules') provides rules for how the NDIS will treat participants whose impairment was caused by a personal injury that has given rise to an entitlement to compensation.

To ensure the financial sustainability of the scheme the rules provide the capacity for the NDIA to reduce the amount of support given to a participant by taking into account the support the individual is already entitled to under another scheme. This is referred to as the compensation reduction amount, and is only intended to consider the care and support component of a compensation payment.

For example, where the participant has an entitlement to compensation under a Commonwealth, State or Territory statutory insurance scheme the support provided by the NDIA will be reduced by identifying the care and support component to be provided under that other scheme.

The NDIS is not intended to replace existing compensation entitlements. If a participant decides to give up a right to seek compensation in respect of the relevant injury the NDIA retains the capacity to reduce the participant's supports in line with their forgone entitlement. However, this can only occur if the CEO cannot be satisfied that the decision to give up a right to seek compensation was taken reasonably. If the decision to forgo a right to seek compensation was taken reasonably then there is no effect on the reasonable and necessary supports provided under the scheme.

Whether provision is made for the CEO's decisions to be appealed or subject to external merits review

The CEO's decisions on compensation are reviewable decisions under sections 99(o), (oa), (ob), and (oc) of the NDIS Act and so are subject to internal review under section 100(2) and further review by the Administrative Appeals Tribunal under section 103 of the NDIS Act.

Whether a participant's supports will be suspended while seeking a review of the CEO's decision

Where the CEO has required a person to seek compensation from a scheme of compensation under a Commonwealth, state or territory law and the participant has not done so, the participant's plan is suspended. Under section 100(7) of the NDIS Act, if the participant seeks a review of the decision to suspend the plan, that suspension will remain until such times as the original decision is varied or set aside.

National Disability Insurance Scheme (Supports for Participants) Rules 2013

FRLI: F2013L01063
Portfolio: Social Services
Tabled: House of Representatives and Senate, 20 June 2013
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 3 February 2014

Information sought by the committee

3.79 The committee reiterated the concerns of its predecessor committee about the adequacy of assistance provided to individuals with disability who may wish to request a review of a decision, in order to ensure they are able to exercise their rights of review effectively, and sought further information from the Minister on this issue.

3.80 The committee's concerns were referred to the Assistant Minister for Social Services as the matters fall within his portfolio responsibilities. The response appears as part of the overall response to the concerns raised by the committee in relation to the National Disability Insurance Scheme Legislation Amendment Bill 2013, the DisabilityCare Australia Fund Bill 2013 (and related bills) and a number of other legislative instruments relating to the NDIS. The relevant extract from the Assistant Minister's response is attached.[1]

Committee's response

3.81 The Assistant Minister's response notes that the government has provided funding to the Department of Social Services to assist individuals with disability who may wish to request a review of a National Disability Insurance Agency decision. The response refers to the designated NDIS division of the Administrative Appeals Tribunal (AAT), a fee waiver for applicants, and support services. These support servicers may include 'assistance from a skilled disability advocate to navigate the process of AAT review and legal services in cases determined by the Department of Social Services to be complex or novel'.

3.82 The committee takes notes of these forms of assistance and procedures for review. While it appreciates that these may assist many persons with disability to exercise their right to seek review, it remains concerned that limiting the provision of legal services to cases that are complex or novel, while generally appropriate, may

1 Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, Chair PJCHR, 3 February 2014, Attachment, p 12.

not be sufficient to ensure that all persons with disability get access to the legal support that they need to exercise their right to seek review of adverse decisions.

3.83 The committee recommends that the Department closely monitor the issues with a view to assessing whether the restrictive test for the provision of legal services is appropriate to ensure the exercise by persons with disability of their right to effective independent review of decisions that adversely affect them.

National Disability Insurance Scheme (Supports for Participants) Rules 2013

2.229 The committee re-iterates the concerns expressed by the Parliamentary Joint Committee on Human Rights in the 43rd Parliament and intends to write to the Minister for Social Services to seek information about the provision of assistance to individuals with disability who may wish to request a review of a decision to exercise their rights of review effectively.

The Australian Government has provided funding to the Department of Social Services to assist individuals with disability who may wish to request a review of a National Disability Insurance Agency (NDIA) decision. Under the External Merits Review system a number of measures have been established. These include a designated National Disability Insurance Scheme (NDIS) division of the Administrative Appeals Tribunal (AAT), which acts as the external merits review body for the NDIS, a fee waiver for applicants seeking a review of NDIA decisions, and support services. The type of support services that may be provided include assistance from a skilled disability advocate to navigate the process of AAT review, and legal services in cases determined by the Department of Social Services to be complex or novel.

National Disability Insurance Scheme Legislation Amendment Bill 2013 **and** ***DisabilityCare Australia Fund Bill 2013*** **and eleven related bills**

3.26 The committee intends to seek clarification from the Minister as to whether the government had considered this option [temporary or otherwise limited exemptions to the *Age Discrimination Act 2004*] and if so, why it was not considered suitable.

The Australian Government supports the protections provided by the federal anti-discrimination legislation and understands the concern of the Parliamentary Joint Committee in relation to the breadth of a general exemption from the *Age Discrimination Act 2004*. As the previous Government advised the Committee, a number of alternatives, including limited exemptions, were considered but it was concluded that these alternatives were not able to adequately achieve the policy objectives of the Government.

Without a general exemption from the Age Discrimination Act, any new temporary age-based restrictions in trial sites could constitute unlawful age discrimination. New trial sites have been negotiated since the commencement of the trials and the flexibility created by the legislation has allowed those negotiations to take place. The Government will continue to require this flexibility in the context of continuing negotiations with State and Territory governments about trials leading to transition and full implementation, until the point that the scheme has been fully implemented.

The Australian Government does not envisage undertaking any additional acts which would fall within the exemption in the Age Discrimination Act, except those analogous to the existing exemptions in establishing trial sites. The Government notes that the general exemption from the Age Discrimination Act only applies to acts done in direct compliance with the NDIS Act. Any other acts of unlawful discrimination carried out through the course of administering the scheme and Act, and which are not in direct compliance with the Act itself, are still prohibited under the Age Discrimination Act.

National Disability Insurance Scheme Legislation Amendment Bill 2013 and DisabilityCare Australia Fund Bill 2013 and eleven related bills

Portfolio: Social Services
Introduced: House of Representatives, 15 May 2013
Status: Act, received Royal Assent 28 May 2013
PJCHR comments: Seventh Report of 2013, tabled 5 June 2013 and First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 3 February 2014

Information sought by the committee

3.84 In its *First Report of the 44th Parliament* the committee raised two concerns in its second round of comments on the National Disability Scheme Legislation Amendment Bill 2013 and related legislation. These involved:

- the inclusion of a general exemption in the NDIS legislation from the *Age Discrimination Act 2004*; and
- the question of whether the exclusion from the NDIS of long-term New Zealand residents of Australia who are not Australian citizens or permanent residents or protected SCV holders, was based on objective and reasonable criteria or was discriminatory within the meaning of the applicable human rights treaties.

3.85 These concerns had previously been raised by the predecessor committee to this committee in its *Seventh Report of 2013*.

3.86 In relation to the second point, the position of non-protected New Zealand SCV holders, the committee also noted that the Joint Report of the Australian and New Zealand Productivity Commissions had drawn attention to the difficulties that such persons experienced and made a number of recommendations to alleviate those difficulties. The committee sought information about the government's response to those recommendations.

3.87 The committee's concerns were referred to the Assistant Minister for Social Services as the matters fall within his portfolio responsibilities. The response appears as part of the overall response to the concerns raised by the committee in relation to this bill and a number of other legislative instruments relating to the NDIS. The relevant extract from the Assistant Minister's response is attached.[1]

1 Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, Chair PJCHR, 3 February 2014, Attachment, pp 12-13.

Committee's response

3.88 The committee thanks the Assistant Minister for his response.

Exemption from the Age Discrimination Act 2004

3.89 Our predecessor committee raised concerns about a general exemption of the NDIS from the *Age Discrimination Act 2004* in its *Seventh Report of 2013*.[2] In response, the former Minister stated that the former government had 'considered whether a more limited exemption would achieve its policy objective but considered that it would not and chose instead to seek a general exemption from the Age Discrimination Act'. The response did not provide any information as to the nature of the other exemption(s) that were considered. According to the former Minister:

> Developing launch sites for DisabilityCare Australia requires the Commonwealth to negotiate with the States and Territories. A general exemption is necessary in order to facilitate the introduction of any additional launch sites negotiated with jurisdictions that involve temporary restrictions on the basis of age in order to ensure their success. …
>
> All of these restrictions are or will be temporary except for the limitation on access for people over the age of 65. … [T]hese temporary age-based restrictions for launch sites have a legitimate aim (to test the effectiveness of supports under DisabilityCare for particular sub-groups of people with disabilities) and are reasonable and proportionate means of achieving this. …
>
> The Australian Government does not envisage undertaking any additional acts which would fall within the exemption in the Age Discrimination Act, except those analogous to the existing exemptions in establishing launch sites.

3.90 This committee considered the former Minister's response in its *First Report of the 44th Parliament*.[3] The committee accepted that temporary age-based restrictions for the purpose of establishing launch sites were likely to be consistent with the rights to equality and non-discrimination. However, the committee was concerned that the amendments had instead introduced a general and permanent exemption from the Age Discrimination Act, which was not restricted to the temporary purpose of establishing launch sites.

3.91 The Assistant Minister's response notes the committee's concerns and states that '[a]s the previous Government advised the committee, a number of alternatives, including limited exemptions, were considered but it was concluded

2 PJCHR, *Seventh Report of 2013*, 5 June, 2013, pp 17-20.

3 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, pp 187-192.

that these alternatives were not able to adequately achieve the policy objectives of the Government.' The response continues:

> Without a general exemption from the Age Discrimination Act, any new temporary age-based restrictions in trial sites could constitute unlawful age discrimination. New trial sites have been negotiated since the commencement of the trials and the flexibility created by the legislation has allowed those negotiations to take place.

3.92 The response repeats in substance a passage contained in the former Minister's earlier response:

> The Australian Government does not envisage undertaking any additional acts which would fall within the exemption in the Age Discrimination Act, except those analogous to the existing exemptions in establishing trial sites. The government notes that the general exemption from the Age Discrimination Act only applies to acts done in direct compliance with the NDIS Act. Any other acts of unlawful discrimination carried out through the course of administering the scheme and Act, and which are not in direct compliance with the Act itself, are still prohibited under the Age Discrimination Act.

3.93 The committee notes the statement that 'a number of alternatives, including limited exemptions, were considered but it was concluded that these alternatives were not able to adequately achieve the policy objectives of the Government.' The committee is not aware of the specific alternatives that were considered by government, as there is no specific discussion of these in the responses provided to the committee. The committee itself suggested that one alternative might be for the government to apply the Australian Human Rights Commission for an exemption from the operation of the legislation, as is provided for under the Age Discrimination Act. In its *First Report of the 44th Parliament* the committee sought clarification from the Minister 'as to whether the government had considered this option and if so, why it was not considered suitable.'[4] The Assistant Minister's response has not responded to this request.

3.94 The committee notes that further alternatives might be a specific exclusion for the purposes of establishing trial sites rather than a general exemption, and a sunset clause on the exemption to reflect what the government maintains is its temporary nature (other than in relation to the cut-off eligibility age of 65, which could be explicitly reflected in the legislation if it is considered that this cut-off is consistent with the Convention on the Rights of Persons with Disabilities (CRPD) and other treaty obligations).

3.95 The committee is of the view that general exemptions to the provisions of the anti-discrimination statutes are in general to be avoided, unless there is a

4 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, p 189, para 3.26.

compelling case that such an exemption is needed. The committee recognises that partial or temporary exemptions may be necessary and accepts that this may be so in relation to the establishment of trial sites for the NDIS. However, the committee considers that there appear to be ways of achieving the legitimate goal of ensuring that the NDIS can be phased in without adopting the general exemption which the legislation contains.

3.96 The committee regrets the fact that the approach adopted has been use of a general exemption, unlimited as to time, to advance a goal which is said to be limited and temporary, without any substantive engagement with the committee on the issue of whether a more limited exemption or exclusion would serve those goals equally well.

Concerns about the cut-off age of 65 and the supports offered by the aged care system

3.97 This committee (and its predecessor committee) raised concerns about the cut-off eligibility age of 65 for the NDIS. The government has stated that persons with disability aged 65 and above will receive appropriate services and support within the aged care system. However, as the committee noted in its *First Report of the 44th Parliament*:

> [I]t has … been brought to the committee's attention that the types and level of supports and services provided by DisabilityCare may be inadequately reflected in the aged care system, even taking into account the recent reforms to the system.[5]

3.98 The committee concluded that 'there may be substantial differences between the supports provided to individuals in the aged care system compared to those on the NDIS, which could result in the inequitable treatment of people over 65 years old who acquire a disability.'[6] It accordingly recommended that the 'issue should be evaluated when the *National Disability Insurance Scheme Act 2013* is reviewed after two years in accordance with section 208 of the Act.[7]

3.99 The committee notes that the Assistant Minister's response did not respond to this recommendation. The committee intends to write again to the Assistant Minister to draw his attention to the committee's recommendation and to request a response.

The position of New Zealand citizens who are non-protected SCV holders

3.100 The committee has sought clarification from the former Minister and the current Minister of the situation of New Zealand citizens who are non-protected SCV

5 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, p 189, para 3.22.

6 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, p 189, para 3.27.

7 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, p 189, para 3.28.

holders, in particular whether their exclusion from access to certain benefits and from the NDIS, is consistent with the non-discrimination requirements of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

3.101 This group of long-term residents in Australia does have access to a range of welfare and other benefits. This access is less extensive than that available to Australian citizens or non-citizens who are permanent residents of Australia. The access of non-protected SCV holders is more extensive than persons of other nationalities who are resident in Australia but who are neither citizens nor permanent residents. The current situation reflects the preferential treatment given to New Zealand citizens in Australia (Australian citizens enjoy similar preferential treatment in New Zealand, though they enjoy access to a wider range of benefits). While New Zealand non-protected SCV holders still enjoy greater benefits than other non-citizen residents who are not permanent residents, the benefits are less extensive than they once were, with major changes having taken place in 2001.

3.102 The committee has previously raised the question of whether the exclusion of New Zealand non-protected SCV holders, who are long-term residents of Australia and required to pay the NDIS levy, from access to the NDIS is consistent with the guarantee of non-discrimination under the ICCPR, ICESCR and ICERD.

3.103 The response received in response to the committee's comments in its *Seventh Report of 2013* reiterated the explanation that the difference in treatment is based on the different immigration status of the SCV visa holder compared with that of an Australian citizen or a non-citizen permanent resident.[8] It also stated that limiting access to the NDIS for non-protected SACV holders was:

> for the legitimate objective of ensuring the sustainability of DisabilityCare Australia by providing consistency of access with the social security system consistent with the recommendations of the Productivity Commission, and is reasonable and proportionate to achieving this objective.[9]

3.104 The committee notes the explanation that there is a difference in immigration status between non-protected SCV holders, and Australian citizens and permanent residents. However, under the ICCPR and ICESCR, non-citizens are entitled to the enjoyment of the human rights guaranteed by the Covenants without discrimination;[10] the CRPD also guarantees persons with disabilities the equal enjoyment of human rights without discrimination.[11] Exclusion from access to certain

8 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, pp 195-196.

9 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, pp 195-196.

10 Articles 2 and 26 of the ICCPR; and article 2 of the ICESCR. See also, UN Human Rights Committee, *General comment No 15: The position of aliens under the Covenant* (1986).

11 Article 5 of the CRPD.

benefits on the ground of immigration status may therefore amount to discrimination, unless the distinction can be shown to be based on reasonable and objective criteria in pursuit of a legitimate objective.

3.105 The committee accepts that, among other matters, the following may be relevant to determining whether such arrangements are justified or discriminatory: (i) the goal of ensuring the financial sustainability of social welfare and other programs (though the committee also notes that the group affected will be subject to the NDIS levy while being excluded from access to the NDIS); (ii) obligations under reciprocal social security agreement with other countries; and (iii) the goal of encouraging long-term residents to apply for permanent residence or citizenship. Thus far, although there have been general references to these factors, the committee does not consider that a clear justification for the differential treatment has been clearly put forward.

3.106 The committee intends to write again to the Assistant Minister to seek information on the question of whether the exclusion of non-protected SCV holders from the NDIS is differential treatment amounting to discrimination under the ICCPR, ICESCR and ICERD, or whether the exclusion is based on objective and reasonable justification in pursuit of a legitimate goal. In particular, the committee would appreciate the following specific information:

- **In relation to the claim that exclusion is a reasonable and proportionate measure to ensure the financial sustainability of the NDIS, details of the additional costs that would be involved if access to the NDIS were extended to non-protected SCV holders and the amount of revenue that their contributions by way of the NDIS levy would raise;**
- **Whether there is a disparity in the numbers of Australian citizens receiving welfare and other benefits in New Zealand compared with the number of New Zealand citizens receiving such benefits in Australia; what the net cost to Australia is; and whether there is any transfer of funds between the two governments to reflect this; and**
- **Whether all non-protected SCV holders are eligible to apply for Australian permanent residence or citizenship, or whether age requirements or other conditions may prevent some of those, in particular those affected adversely by the 2001 changes, from doing so, and whether the number of those who might be ineligible is known.**

Response to the Joint Report of the Productivity Commissions

3.107 In its *First Report of the 44th Parliament* the committee stated that it:

> would welcome the Minister's response to the recommendations made by the two Productivity Commissions in relation to the situation faced by New Zealand non-protected SCV holders who are long-term residents of Australia but who are not eligible to apply for permanent residence in Australia or for Australian citizenship because they do not satisfy the age

> requirement or requirements applicable under the skilled migration program.[12]

3.108 The Assistant Minister's response states that the government 'is currently considering' recommendations from the Australian and New Zealand Productivity Commissions' Joint Report. The Assistant Minister's response also points out that non-protected SCV visa holders 'have greater entitlements than other temporary residents', noting that they have access to a number of tax, health and welfare benefits and to concession cards such as Commonwealth seniors and health cards. The response also notes that there is a bilateral social security agreement between Australia and New Zealand that can help such visa holder access social security payments by counting periods of working age residence in New Zealand toward residence qualifications for Australian aged pensions, disability support pensions, and carer payments.

3.109 The committee notes that the Prime Ministers of Australia and New Zealand met in early February 2014 and issued a joint statement following that meeting. That statement included the following:

> Underlining their commitment to making sure the economic relationship [between the two countries] fulfils its potential, the two governments have agreed on a way to take forward the joint Productivity Commissions' report on strengthening trans-Tasman economic relations. The Prime Ministers said this work would boost productivity, increase competitiveness and deepen economic integration between the two countries. Breaking down barriers to trans-Tasman commerce and travel has the potential to free businesses and citizens to pursue opportunities in both markets and the broader Indo-Pacific region. The Prime Ministers committed to review progress on implementing the report's recommendations at the next Leaders' meeting in 2015.[13]

3.110 No document indicating how the report of the two Productivity Commissions was to be taken forward appears to be publically available, and the joint statement makes no specific reference to the recommendations of the Joint Report relating to non-protected SCV holders.

3.111 The committee intends to write to the Assistant Minister to request information as to whether the Australian government has adopted a position in relation to the recommendations of the two Productivity Commissions addressed to the Australian government relating to SCV visa holders, and how the report of the two Productivity Commissions is to be taken forward in that regard as indicated in the joint statement of 7 February 2014 by the Prime Ministers of the two countries.

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12 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, p 192, para 3.39.

13 Joint Statement by Prime Minister Abbott and Prime Minister Key, Sydney, 7 February 2014.

National Disability Insurance Scheme (Supports for Participants) Rules 2013

2.229 The committee re-iterates the concerns expressed by the Parliamentary Joint Committee on Human Rights in the 43rd Parliament and intends to write to the Minister for Social Services to seek information about the provision of assistance to individuals with disability who may wish to request a review of a decision to exercise their rights of review effectively.

The Australian Government has provided funding to the Department of Social Services to assist individuals with disability who may wish to request a review of a National Disability Insurance Agency (NDIA) decision. Under the External Merits Review system a number of measures have been established. These include a designated National Disability Insurance Scheme (NDIS) division of the Administrative Appeals Tribunal (AAT), which acts as the external merits review body for the NDIS, a fee waiver for applicants seeking a review of NDIA decisions, and support services. The type of support services that may be provided include assistance from a skilled disability advocate to navigate the process of AAT review, and legal services in cases determined by the Department of Social Services to be complex or novel.

National Disability Insurance Scheme Legislation Amendment Bill 2013 **and** ***DisabilityCare Australia Fund Bill 2013*** **and eleven related bills**

3.26 The committee intends to seek clarification from the Minister as to whether the government had considered this option [temporary or otherwise limited exemptions to the *Age Discrimination Act 2004*] and if so, why it was not considered suitable.

The Australian Government supports the protections provided by the federal anti-discrimination legislation and understands the concern of the Parliamentary Joint Committee in relation to the breadth of a general exemption from the *Age Discrimination Act 2004*. As the previous Government advised the Committee, a number of alternatives, including limited exemptions, were considered but it was concluded that these alternatives were not able to adequately achieve the policy objectives of the Government.

Without a general exemption from the Age Discrimination Act, any new temporary age-based restrictions in trial sites could constitute unlawful age discrimination. New trial sites have been negotiated since the commencement of the trials and the flexibility created by the legislation has allowed those negotiations to take place. The Government will continue to require this flexibility in the context of continuing negotiations with State and Territory governments about trials leading to transition and full implementation, until the point that the scheme has been fully implemented.

The Australian Government does not envisage undertaking any additional acts which would fall within the exemption in the Age Discrimination Act, except those analogous to the existing exemptions in establishing trial sites. The Government notes that the general exemption from the Age Discrimination Act only applies to acts done in direct compliance with the NDIS Act. Any other acts of unlawful discrimination carried out through the course of administering the scheme and Act, and which are not in direct compliance with the Act itself, are still prohibited under the Age Discrimination Act.

3.38 The committee draws the attention of the Minister to the *Joint Report* of the two Productivity Commissions and the hardship that the Commissions identify as arising for some groups from the 2001 changes and the difficulties that some long-term New Zealand residents have in applying for permanent residence and citizenship. The hardship identified by the two Commissions has implications for the enjoyment of a number of human rights to which New Zealand nationals who are residents of Australia are entitled and may be relevant to a consideration as to whether the differential treatment involved in excluding long-term NZ nonprotected SCV holders is justifiable.

The committee would welcome the Minister's response to the recommendations made by the two Productivity Commissions in relation to the situation faced by New Zealand non-protected SCV holders who are long-term residents of Australia but who are not eligible to apply for permanent residence in Australia or for Australian citizenship because they do not satisfy the age requirement or requirements applicable under the skilled migration program.

The Government is currently considering recommendations from the Australia-New Zealand Productivity Commissions' Report on 'Strengthening Trans-Tasman Economic Relations'.

New Zealand Non-Protected Special Category Visa holders, while not having free access to all social security payments, have greater entitlements than other temporary residents.

New Zealand Non-Protected Special Category Visa holders have access to Australian Family Tax Benefits Parts A and B, the Baby Bonus, Maternity Immunisation Allowance, Child Care Benefit and Child Care Rebate, Paid Parental Leave, Double Orphan Pension and concession cards such as the Low Income, Commonwealth Seniors and Health Care cards.

There is also a Social Security Agreement between Australia and New Zealand that can help Non Protected Special Category Visa holders access social security payments by counting periods of working age residence in New Zealand towards residence qualification for Australian Age Pension, Disability Support Pension (severely disabled) and Carer Payment for the partner of a severely disabled Disability Support Pension recipient.

Responses requiring no further comment

Clean Energy Legislation (Carbon Tax Repeal) Bill 2013

Portfolio: Environment
Introduced: House of Representatives and Senate, 13 November 2013
Status: Before Senate
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 29 January 2014

Information sought by the committee

3.112 The committee noted that the statement of compatibility did not include a justification for the limitation on the right to freedom of expression imposed as a result of the prohibition in new section 60K of the bill.

3.113 The committee also noted the detailed analysis of the compatibility of new civil penalty provisions inserted into the *Competition and Consumer Act 2010* by Schedule 2 of the bill. The committee was pleased to note that certain minimum guarantees applicable to criminal proceedings are protected, but expressed concern that the application of a civil standard of proof in such proceedings to determine an individual's liability to for such penalties may not meet the requirements of the right to be presumed innocent.[1]

3.114 The committee wrote to the Minister for the Environment and the Treasurer to draw their attention to the committee's expectation that statements of compatibility will contain an explicit articulation of a legitimate objective, the rational connection of the measure the achievement of that purpose and why the measure is a reasonable and proportionate one.

Committee's response

3.115 The committee thanks the Minister for the Environment for his advice that he will endeavour to ensure that separate statements of compatibility are prepared for each individual bill in a legislative package in the future.

3.116 The committee notes the Minister's advice that he has referred the committee's comments on amendments to the *Competition and Consumer Act 2010* to the Treasurer.

1 Article 14(2) of the International Covenant on Civil and Political Rights.

The Hon Greg Hunt MP

Minister for the Environment

MS14-000144

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

29 JAN 2014

Dear Senator Smith Dean

I refer to your letter of 10 December 2013 concerning the Parliamentary Joint Committee on Human Rights' comments on the Clean Energy Legislation (Carbon Tax Repeal) Bill 2013.

The Committee's comments on the form and content of the Human Rights Impact Statement have been noted. In particular, I note the Committee's preference that separate statements of compatibility are prepared for each individual bill in a legislative package and will endeavour to ensure that this protocol is followed in the future.

Thank you for bringing these issues to my attention. As the Committee's report includes discussion of amendments to the *Competition and Consumer Act 2010*, a copy of this correspondence has also been sent to the Treasurer.

Yours sincerely

Greg Hunt

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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 the 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 detention[2] 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.

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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.

Migration Act 1958 – Determination under subsection 262(2) – Daily Maintenance Amounts for Persons in Detention – October 2013 **[F2013L01785]**

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.

National Disability Insurance Scheme (Children) Rules 2013

FRLI: F2013L01070
Portfolio: Social Services
Tabled: House of Representatives and Senate, 20 June 2013
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 3 February 2014

Information sought by the committee

3.132 The committee sought further information regarding:

- the assistance to be provided to children with disabilities to exercise their right to have their views heard and the guidance that is to be provided to the CEO of the National Disability Insurance Scheme (NDIS) and the child's representative when having regard to the preferences of the child; and
- the limitations on rights referred to by the statement of compatibility and the justification for those limitations.

3.133 The committee's concerns were referred to the Assistant Minister for Social Services as the matters fall within his portfolio responsibilities. The response appears as part of the overall response to the concerns raised by the committee in relation to the National Disability Insurance Scheme Legislation Amendment Bill 2013, the DisabilityCare Australia Fund Bill 2013 (and related bills) and a number of other legislative instruments relating to the NDIS. The relevant extract from the Assistant Minister's response is attached.[1]

Committee's response

3.134 The committee thanks the Assistant Minister for his response.

3.135 The Assistant Minister's response sets out the general principles that will govern the operation of the NDIS and the rights of participants (including children) set out in the Act. The response also refers to the guidance contained in the relevant *Operational Guidelines* adopted for the operation of the NDIS.[2] The committee notes that these *Operational Guidelines* are available on the NDIS website.[3]

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1 Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, Chair PJCHR, 3 February 2014, Attachment, pp 1-3.

2 *Operational Guideline – Children – Determining the Child's Representative* (v 1.01).

3 http://www.ndis.gov.au/about-us-1 (accessed 19 February 2014).

3.136 On the issue of limitations on rights, the Minister's response notes:

> Although there are no explicit limits on the rights of children in the rules, the phrase 'any limitation[s] imposed by the instrument are reasonable, necessary and proportionate', was used in the statement of compatibility to cover the situation where the CEO would need [to] make balanced decisions about children's supports under the NDIS. Any such decision that might be seen as limiting the rights of the child would be reasonable, necessary and proportionate.

3.137 It is not clear to the committee that it is possible to state in advance that decisions yet to be taken will necessarily be reasonable limitations on rights. However, the committee accepts that as a matter of statutory interpretation and policy intention that any decision to limit a right will need to be justified as a reasonable and proportionate measure and be authorised by the legislation.

3.138 In the light of the information provided, the committee makes no further comment on this instrument.

RESPONES TO THE SPECIFIC ISSUES RAISED BY THE COMMITTEE

National Disability Insurance Scheme (Children) Rules 2013

2.163 The committee intends to write to the Minister for Social Services to seek further information regarding:

- **the assistance to be provided to children with disabilities to exercise their right to have their views heard and the guidance that is to be provided to the CEO and the child's representative when having regard to the preferences of the child; and**
- **the limitations on rights referred to by the statement of compatibility and the justification for those limitations.**

As a starting point, the National Disability Insurance Agency (NDIA) will engage with child participants in all decision making processes that affect them. This underlying proposition reflects a number of general principles at the core of the National Disability Insurance Scheme (NDIS) (see sections 4 and 5 of the NDIS Act), including that:

(a) people with disability have the right to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decision that will affect their lives, to the full extent of their capacity;
(b) people with disability should be involved in decision making processes that affect them, and where possible make decisions for themselves; and
(c) if the person with disability is a child – the best interests of the child are paramount, and full consideration should be given to the need to protect the child from harm, promote the child's development and strengthen, preserve and promote positive relationships between the child and the child's parents, family members and other people who are significant in the life of the child.

Ordinarily, a child participant will have a representative to undertake actions and make decisions on his or her behalf. However, consistently with the general principles set out above, the NDIA will still engage with child participants in all decision making processes that affect them, including when they have a representative appointed to act on their behalf.

While a child will generally have a representative appointed, under the NDIS Act, a child who is a participant will be able to do things for his or herself if a delegate makes a determination under section 74(5). To make a determination under section 74(5), a delegate must:

(a) be satisfied that the child is capable of making their own decisions;
(b) be satisfied that, in the circumstances, it is appropriate that things that are to be done under the NDIS Act in relation to the child be done by the child rather than by the person or people who have parental responsibility for the child or the person a delegate has determined under section 74(1)(b) is to have parental responsibility; and
(c) be satisfied that, in the circumstances, it is appropriate that the child make the plan management request rather than the request being made by the person or people who have parental responsibility for the child or the person a delegate has determined under section 74(1)(b) is to have parental responsibility.

In determining whether the child is capable of making their own decisions, the delegate must:

(a) consult with the child's guardian (if any) and any other person with parental responsibility for the child; and

(b) have regard to the following:

- whether the child:
  - is able to understand the kind of information relevant to decisions that need to be made under the National Disability Insurance Scheme (NDIS);
  - is able to use information of that kind when making decisions;
  - is able to understand the consequences of decisions that need to be made under the NDIS; and
  - is able to communicate decisions in some way, and
- whether there are people in the child's life who can support them to make their own decisions.

In determining whether it is appropriate for the child to do things for his or herself, the delegate must:

(a) consult with the child's guardian (if any) and any other person with parental responsibility for the child; and

(b) have regard to the following:

- whether there are other people in the child's life who would be willing and able to assist them in carrying out actions and making decisions under the NDIS;
- the need to preserve existing family relationships; and
- any existing arrangements in place under Commonwealth, state and territory schemes.

Most children will have arrangements in place for people to either undertake actions on their behalf or support them to make decisions themselves. NDIA officers are sensitive to these existing support networks and the important role they play and take them into consideration in determining whether it is appropriate for a child to act on his or her own behalf.

A child's capacity for making decisions as well as the appropriateness of their acting for themselves will evolve over time. NDIA officers will be aware of the evolving nature of a child's capacity and take account of this in making determinations about whether a child can represent themself.

NDIA officers will also be aware that the child's decision-making capacity may vary according to the environment in which the child makes the decisions. NDIA officers should, wherever possible, make their assessment of whether the child is capable of making decisions in the environment in which the child feels most comfortable and having given the child ample time and support.

Where a person has parental responsibility and represents a child, it is clear from the NDIS Act that the person must act in the best interests of the child (section 76(2)(b)). This is reiterated in the *National Disability Insurance Scheme (Children) Rules 2013* (**Children Rules**) (rules 6.2(b) and 6.3).

The Operational Guidelines of the NDIA also contain material in support of the position of a child participant affected by a decision. In *Operational Guideline – Children – Determining Parental Responsibility for a Child*, guideline 15 emphasises that a child's representative has a duty under the NDIS Act to ascertain the wishes of the child and act in a manner that is in the best interests of the child.

Guideline 17 requires a child's representative to consult, wherever practicable, with the child's guardian (if any) and any person with parental responsibility and any other person who assists the child to manage their day-to-day activities and make decisions.

Guideline 18 refers to principles in the NDIS Act that guide those making decisions for children requiring that they are aware that the best interests of the child are paramount and that full consideration is given to the need to protect the child from harm, promote the child's development and strengthen, preserve and promote positive relationships between the child and the child's parents, family members and other people who are significant in the life of the child.

Guideline 12 permits a delegate to revoke a determination that a person is to represent a child where the delegate is satisfied that it is no longer appropriate for the determination to remain in effect. A revocation may occur following a request by the child.

Any decision to appoint a person as a child's representative is open to review at the request of the child or any other affected person (NDIS Act sections 99(i) and (k)). This is internally reviewable under section 100(2) and externally reviewable by the Administrative Appeals Tribunal under section 103 if the child is dissatisfied with the internal review decision.

The limitations on rights referred to by the statement of compatibility and the justification for those limitations

Although there are no explicit limits on the rights of children in the rules, the phrase "any limitation imposed by the instrument are reasonable, necessary and proportionate" was used in the statement of compatibility to cover the situation where the CEO would need make balanced decisions about children's supports under the NDIS. Any such decision that might be seen as limiting the rights of the child would be reasonable, necessary and proportionate.

National Disability Insurance Scheme (Nominees) Rules 2013

2.173 The committee intends to write to the Minister for Social Services to inquire whether a more explicit statement could be provided in the NDIS Rules to reflect the desirability that the appointment of a nominee should be for the shortest time possible and subject to regular review by a competent, independent and impartial authority as provided for in the CRPD.

The Operational Guidelines on nominees contain guidance for decision makers when appointing nominees.

In the *Operational Guideline – Nominees – Overview,* guideline 8 stresses that appointments of nominees will be justified only when it is not possible for participants to be assisted to make decisions for themselves. Where a nominee is appointed and it later appears that the participant no longer requires a nominee and requests removal of the nominee, a delegate may cancel the appointment of the nominee.

In the *Operational Guideline – Nominees – Duties and Removal of Nominee,* guideline 24(a) states that the delegate is required to cancel an appointment of a nominee as soon as practicable if the nominee was appointed at the request of a participant and the participant requests the delegate to cancel the appointment.

National Disability Insurance Scheme (Plan Management) Rules 2013

FRLI: F2013L01064
Portfolio: Social Services
Tabled: House of Representatives and Senate, 20 June 2013
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 3 February 2014

Information sought by the committee

3.139 The committee sought clarification as to whether:

- a National Disability Insurance Scheme (NDIS) participant may seek a review of the CEO's decision regarding self-management of funding supports under a plan or may submit a subsequent request to vary the arrangements for management of funding supports under a plan; and
- the criteria to be considered in determining whether a payment will be made in a single payment or by instalments and in what circumstances the CEO should require the participant to provide information or a document relating to expenditure of previous instalments.

3.140 The committee's concerns were referred to the Assistant Minister for Social Services as they are matters falling within his portfolio responsibilities. The response appears as part of the overall response to the concerns raised by the committee in relation to the National Disability Insurance Scheme Legislation Amendment Bill 2013, the DisabilityCare Australia Fund Bill 2013 (and related bills) and a number of other legislative instruments relating to the NDIS. The relevant extract from the Assistant Minister's response is attached.[1]

Committee's response

3.141 The committee thanks the Assistant Minister for his response.

3.142 The Minister’s response notes that a participant may at any time request a review of his or her plan under the NDIS Act and that a refusal to grant such a request is a reviewable decision that may ultimately be taken to the Administrative Appeals Tribunal. The Minister’s response also explains the requirements that apply before an NDIS amount will be released to the participant, in particular the provision of a completed plan purchases form.

1 Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, Chair PJCHR, 3 February 2014, Attachment, p 5.

3.143 In light of the information provided, the committee makes no further comment on this instrument.

2.187 The committee intends to write to the Minister for Social Services to seek clarification on whether an NDIS participant may seek a review of the CEO's decision regarding self-management of funding supports under a plan or may submit a subsequent request to vary the arrangements for management of funding supports under a plan. The committee also intends to seek clarification of the criteria to be considered in determining whether a payment will be made in a single payment or by instalments and in what circumstances the CEO should require the participant to provide information or a document relating to expenditure of previous instalments.

The management of supports is a matter included in a participant's plan. The NDIS Act provides for this in section 33(2)(d).

A participant may at any time request a review of his or her plan under section 48 of the NDIS Act. If the CEO (or delegate) refuses to grant such a request, the refusal is a reviewable decision under section 99(f) of the NDIS Act. The refusal is thereby reviewable by an NDIA review officer and then by the Administrative Appeals Tribunal if the participant remains dissatisfied.

For participants self-managing the funding of their supports, NDIS amounts are paid by regular instalments into the participant's nominated bank account or into the bank account of the person who receives NDIS amounts on behalf of the participant.

Participants self-managing the funding of their supports are required to provide details to the NDIA on a 'plan purchases claim form'. If a participant has not provided a completed plan purchases claim form, the delegate is to require the participant to provide the details of the previous period's expenditure in the form specified by the NDIA (this could include receipts, bank statement etc). The following period's details of expenditure can be provided by the participant to the NDIA electronically through the NDIA 'Participant Portal'. NDIS amounts are not released until the participant has provided this information in the manner requested by the NDIA.

National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013

FRLI: F2013L01008
Portfolio: Social Services
Tabled: House of Representatives, 18 June 2013 and Senate, 19 June 2013
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 3 February 2014

Information sought by the committee

3.144 The committee sought clarification as to:

- the interaction between the powers of the CEO to disclose information under sections 60 and 66(1)(a) of the *National Disability Insurance Scheme Act 2013* and whether provision should be made in the rules for the de-identification of personal information or to obtain a person's consent prior to its release for research, analysis or policy development; and
- how the instrument engages the right of a child to be registered immediately after birth and the right to a fair trial.

3.145 The committee's concerns were referred to the Assistant Minister for Social Services as the matters fall within his portfolio responsibilities. The response appears as part of the overall response to the concerns raised by the committee in relation to the National Disability Insurance Scheme Legislation Amendment Bill 2013, the DisabilityCare Australia Fund Bill 2013 (and related bills) and a number of other legislative instruments relating to the NDIS. The relevant extract from the Assistant Minister's response is attached.[1]

Committee's response

3.146 The committee thanks the Assistant Minister for his response.

3.147 In relation to the interaction between sections 60 and 66(1)(a) of the NDIS Act, the Minister's response explains that disclosure under section 60(2)(d)(i) is for the purposes of the NDIS Act (further explained in section 60(3)), whereas disclosure under section 66(2)(d)(i) is for the purposes of the public interest. The response also explains that section 60 deals with protected information (information about a person held in the National Disability Insurance Agency's (NDIA) records) and

1 Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, Chair PJCHR, 3 February 2014, Attachment, pp 6-7.

section 66 deals with a broader range of information that goes beyond protected information. The response explains the steps taken to de-identify any personal information that may be disclosed, and that the formal approval of the CEO is required before personal information can be released. The response also notes that participants are asked to consent to the disclosure and use of information and that it is possible for participants to opt out initially or subsequently.

3.148 The response further states that information held by the NDIA may be disclosed where it is necessary for the enforcement of laws, provided that the CEO is satisfied that the information cannot be reasonably obtained from a source other than the NDIA and that the person to whom disclosure is made has a sufficient interest.

3.149 The Assistant Minister's response in relation to the second point explains that the CEO may disclose information held by the NDIA where this is necessary to assist a child welfare agency to contact a parent or relative in relation to a child or to carry out its responsibilities relating to the safety, welfare or wellbeing of a child. While the committee is not persuaded that this engages the right of a child to be registered immediately after birth, the committee recognises that these provisions are likely to promote other rights of the child including rights to life, physical integrity and health.

3.150 In light of the information provided, the committee makes no further comment on this instrument.

2.198 The committee intends to write to the Minister for Social Services to seek clarification as to:

- **the interaction between these provisions and whether provision should be made in the rules for the de-identification of personal information or to obtain a person's consent prior to its release for research, analysis or policy development; and**
- **how the instrument engages the right of a child to be registered immediately after birth and the right to a fair trial.**

The NDIS Act authorises the CEO to disclose information under both section 60 and section 66 of the NDIS Act. The distinction between those two sections is that disclosures under section 60(2)(d)(i) are limited to purposes associated with the NDIS Act whereas disclosures under section 66(2)(d)(i) are authorised for the purposes of the public interest. While certain disclosures of protected information may be authorised under both provisions because they are both for the purposes of the NDIS Act and they have been certified by the CEO as being in the public interest, it is not necessary that this be the case.

Section 60(3) provides further guidance on the exercise of the CEO's power to disclose under section 60(2)(d)(i) by providing three instances where a disclosure will be for the purposes of the NDIS Act (namely, research into matters relevant to the NDIS, actuarial analysis of matters relevant to the NDIS and policy development). Importantly, the NDIS Act's purposes are not limited to those matters and the power in section 66(1)(a) does not interact with these matters.

A further distinction between these two provisions is the information to which each section relates. Section 60 deals specifically with protected information (which is defined in section 9 as information about a person that is or was held in the NDIA's records, including that there is no information) whereas section 66 is concerned with a broader range of information (namely, information acquired by a person in the performance of his or her functions or duties or in the exercise of his or her powers under the NDIS Act).

The NDIA employs a number of steps to de-identify personal information (name, gender and date of birth) before its disclosure. Before personal information is released for the purposes of the NDIS Act (under section 60(2)(d)(i)), formal approval must be sought from the CEO.

People with disability who complete and submit an access request form to become participants in the NDIS are asked for their consent to the disclosure or use of information for the purposes of the NDIS Act. This consent is provided by the participant or their parent/legal guardian and is recorded in the NDIA system against the participant's case record. Participants can effectively opt out of their data being used for research, analysis and policy development by not providing consent initially or by withdrawing consent at a later time.

The right of a child to be registered immediately after birth (Article 7 of the CRC)

The NDIS Act limits the circumstances in which protected information can be lawfully disclosed. One circumstance where disclosure is permitted is where the CEO certifies that the disclosure is in the public interest. The Information Rules provide further guidance on what circumstances may constitute the public interest.

This aspect of the NDIS Act (as elaborated on by the Information Rules) engages the right of a child to be registered immediately after birth because it authorises the CEO to disclose information held by the NDIA where, amongst other reasons, it is necessary to assist a child welfare agency to contact a parent or relative in relation to a child or to carry out its responsibilities relating to the safety, welfare or wellbeing of a child. The NDIA *Operational Guidelines on Information Handling* also provide guidance on the exercise of this discretion by the CEO to enable the CEO to disclose when it is necessary for the public interest.

Although the Information Rules heighten the level of protection generally afforded to the child's right to know and be cared for by his or her parents, there may be circumstances where they may negatively engage this right in the interests of protecting the child's welfare. These possible restrictions are considered proportionate, as they seek to ensure a child's right to privacy remains an important consideration whilst recognising circumstances where this may be outweighed by concern for a child's welfare.

The right to a fair trial (Article 14 of the ICCPR)

The NDIS Act limits the circumstances in which protected information can be lawfully disclosed. One circumstance where information may be disclosed, as set out above, is if the CEO certifies that the disclosure is in the public interest. The Information Rules provide further guidance on what circumstances may constitute the public interest.

This aspect of the NDIS Act (as expanded in the Information Rules) engages the right to a fair trial (in particular the right to protection against self-incrimination) because it authorises the CEO to disclose information held by the NDIA where, amongst other reasons, it is necessary for the enforcement of laws.

There are strict limitations imposed on the disclosure of information for this purpose. Before information can be disclosed for the enforcement of laws, the CEO must be satisfied that the information cannot reasonably be obtained from a source other than the NDIA, and the person to whom the information will be disclosed has sufficient interest in the information.

The disclosure must also be necessary for the enforcement of laws, for example, where information about the whereabouts of a person suspected of committing an offence or breaching a relevant law is required.

The restrictions set out above are reasonable and proportionate because of the safeguards in relation to disclosure of the information and are consistent with accepted best practice in other contexts.

Section 65 of the NDIS Act prevents a court, tribunal or authority from enforcing a requirement to produce documents where that would require disclosure of information acquired by a person in the performance of his or her functions or duties or in the exercise of his or her powers under the NDIS Act.

National Disability Insurance Scheme (Registered Providers of Supports) Rules 2013

FRLI: F2013L01009
Portfolio: Social Services
Tabled: House of Representatives, 18 June 2013 and Senate, 19 June 2013
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 3 February 2014

Information sought by the committee

3.151 The committee sought clarification as to:

- the safeguards that will apply to manage the impact on National Disability Insurance Scheme (NDIS) participants of a revocation of approval of a registered provider; and
- the rights of review that are available to a registered provider whose registration has been revoked.

3.152 The committee's concerns were referred to the Assistant Minister for Social Services as the matters fall within his portfolio responsibilities. The response appears as part of the overall response to the concerns raised by the committee in relation to the National Disability Insurance Scheme Legislation Amendment Bill 2013, the DisabilityCare Australia Fund Bill 2013 (and related bills) and a number of other legislative instruments relating to the NDIS. The relevant extract from the Assistant Minister's response is attached.[1]

Committee's response

3.153 The committee thanks the Assistant Minister for his response.

3.154 The response states that where the registration of a provider is revoked, the National Disability Insurance Agency 'will work with participants who are connected with that provider to assist them to select another provider'. The response also sets out the procedure that must be followed before a registration may be revoked and notes the availability of both internal review and a right of appeal to the Administrative Appeals Tribunal under section 103 of the *National Disability Insurance Scheme Act 2013*.

3.155 In light of the information provided, the committee makes no further comment on this instrument.

1 Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, Chair PJCHR, 3 February 2014, Attachment, p 8.

2.205 The committee intends to write to the Minister for Social Services to seek further clarification as to:

- **what safeguards will apply to manage the impact on NDIS participants of a revocation of approval of a registered provider; and**
- **what rights of review are available to a registered provider whose registration has been revoked.**

Section 72 of the NDIS Act requires that the CEO give 28 days notice of the revocation of a provider's registration. If no submissions are made within 7 days of the end of that period, the CEO may revoke the provider's registration. If, however, submissions are made, the CEO must consider and provide a decision in writing in 28 days of the initial notice period. This provides a minimum of 35 days and a maximum of 56 days before a revocation of a provider takes effect.

The NDIA will work with participants who are connected with that provider to assist them to select another provider in the event that registration is revoked.

A registered provider whose registration has been revoked may seek an internal review of that decision under sections 99(h) and 100(2) of the NDIS Act. If the provider remains dissatisfied after internal review, there is a right of further appeal to the Administrative Appeals Tribunal under section 103 of the NDIS Act.

Parliamentary Service Determination 2013

FRLI: F2013L01201
Sponsor: President of the Senate and Speaker of the House of Representatives
Tabled: House of Representatives and Senate, 12 December 2013
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 13 February 2014

Information sought by the committee

3.156 The committee sought further information as to why it was necessary to publicise employment decisions in the Public Service Gazette, in particular publication of decisions to terminate employment and the grounds for termination, and how this is compatible with the right to privacy and the Convention on the Rights of Persons with Disabilities.

3.157 The Presiding Officers' response is attached.

Committee's response

3.158 The committee thanks the Presiding Officers for their response.

3.159 The committee notes that the Presiding Officers intend to take advice from the Australian Public Service Commissioner on completion of his review whether the requirement for publication of termination decisions, and broader issues around the release of personal information, are in the public interest.

3.160 The committee requests that it be kept apprised of the review's progress and findings once finalised and whether any steps will be taken to address this issue.

PARLIAMENT OF AUSTRALIA

President of the Senate *Speaker of the House of Representatives*

13 FEB 2014

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator

Parliamentary Service Determination 2013 [F2013L01201]

Thank you for your letters of 10 December 2013 on behalf of the Parliamentary Joint Committee on Human Rights in relation to *Parliamentary Service Determination 2013* (the Determination).

The Committee is seeking our views on why it is necessary to publish decisions to terminate employment and the grounds for termination in the Public Service *Gazette*. We note that the Committee has concerns about the compatibility of this requirement with the right to privacy and the Convention on the Rights of Persons with Disabilities.

The Determination is a legislative instrument made under the *Parliamentary Service Act 1999* (the Act). The Act, and the subordinate legislation made under it (principally Determination 2013 at present), follow the framework of the *Public Service Act 1999* and its subordinate legislation except where differences are necessary to reflect the unique character of parliamentary service and the obligation of parliamentary staff to serve the Parliament. In keeping with this principle, the provisions in the Determination governing the publication of employment decisions have the same effect as relevant provisions of the *Australian Public Service Commissioner's Directions* (the APS Commissioner's Directions).

The requirements for gazettal of employment decisions have been in place for many years. However, the concerns the Committee has raised suggest that the requirements for notifying termination decisions warrant further consideration. In this regard, we understand that the Committee has raised similar concerns with the Australian Public Service Commissioner, Mr Stephen Sedgwick, about the APS Commissioner's Directions and that the Commissioner proposes to consult publicly and to review whether the requirements for publication of termination decisions, and broader issues around the release of personal information, are in the public interest.

In the circumstances, we propose to take advice from Mr Sedgwick in his role as Parliamentary Service Commissioner on completion of the review mentioned above. We will advise you of the outcomes.

Yours sincerely

SENATOR THE HON JOHN HOGG

THE HON BRONWYN BISHOP MP

Water and Sewerage Fees and Charges (Christmas Island) Determination 2013

FRLI: F2013L01207
Portfolio: Infrastructure and Regional Development

Water and Sewerage Fees and Charges (Cocos (Keeling) Islands) Determination 2013

FRLI: F2013L01216
Portfolio: Infrastructure and Regional Development
Tabled: House of Representatives and Senate, 12 November 2013
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 15 January 2014

Information sought by the committee

3.161 The committee sought clarification as to whether the power to restrict access to water is compatible with human rights, in particular the right to an adequate standard of living and the right to water.

3.162 The Assistant Minister's response is attached.

Committee's response

3.163 The committee thanks the Assistant Minister for his response. The committee notes that the Assistant Minister states in his response that '[t]he legislative instruments do not engage any applicable rights or freedoms and so are compatible with human rights as they do not raise any human rights issues. The committee considers that these instruments do engage and limit the right to an adequate standard of living and the right to water.

3.164 However, in light of the information provided, the committee makes no further comment on these instruments. It appears that the safeguards set out in the *Water Services Act 2012* and the *Water Services Code of Conduct (Customer Service Standards) 2013*[1] will ensure protection against arbitrary disconnection of water. Accordingly, it appears that the power to restrict water constitutes a justifiable limitation on the above-mentioned rights and is compatible with those rights.

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1 The Assistant Minister's response included a copy of the *Water Services Code of Conduct (Customer Service Standards) 2013*. This can be found online at: http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_13079_homepage.html (accessed 3 March 2014).

3.165 The committee notes it would have been useful for the information provided in this response to have been included in the statement of compatibility.

The Hon Jamie Briggs MP
Assistant Minister for Infrastructure
and Regional Development
Member for Mayo

Reference: 06278-2013

15 JAN 2014

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
PO BOX 6100
PARLIAMENT HOUSE ACT 2600

Dear Senator ~~Smith~~ Dean

Thank you for your letter dated 10 December 2013 to The Hon Warren Truss MP, Minister for Infrastructure and Regional Development about Consideration of Legislative Instruments (First Report of the 44th Parliament) namely:

- **Water and Sewerage Fees and Charges (Christmas Island) Determination 2013 [F2013L01207]**
- **Water and Sewerage Fees and Charges (Cocos (Keeling) Islands) Determination 2013 [F2013L01216]**

As the matters raised fall within my portfolio responsibility, your letter has been forwarded to me for reply.

Under a Service Delivery Arrangement with the Department, the Water Corporation of Western Australia provides water and wastewater services to the communities in the non-governing Territories of Christmas Island and Cocos (Keeling) Islands, also known as the Indian Ocean Territories. Water Corporation operates under the applied *Water Services Act 2012 (WA)(CI)(CKI)* (the Act) and maintains similar standards and conditions that apply to regional WA.

These standards and conditions are listed in the *Water Services Code of Conduct (Customer Service Standards) 2013* (the Code) and is publically available on the Water Corporation's website or can be provided in hard copy upon request by the customer. I have enclosed a copy of the Code for your information.

Parliament House, Canberra ACT 2600
Telephone: 02 6277 7020
Facsimile: 02 6273 4126
www.minister.infrastructure.gov.au

Under certain circumstances the Act enables Water Corporation to cut-off or to restrict the flow of water supply. However it may not cut-off water supply to an occupied dwelling unless the occupier agrees. The Code further limits the rate of restriction not to go below 2.3 litres each minute and only if the debt is greater than $200; the customer is not experiencing 'payment difficulties' or 'financial hardship'; the customer does not have an outstanding complaint in relation to the water service charges; or if the customer requires the water to operate a life support machine or has special needs requiring water.

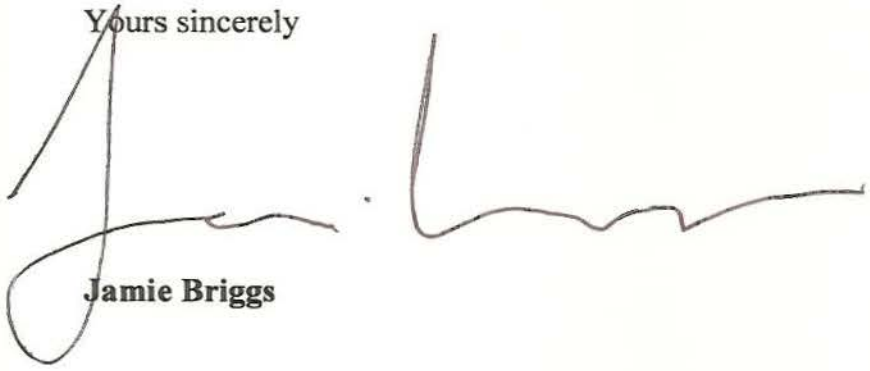
Appeals are currently dealt with by the Department and considered in accordance with current WA guidelines.

These Legislative Instruments set the annual fees and charges for water and sewerage services for the Indian Ocean Territories. The Act and Code protect customers against arbitrary and unlawful disconnection of water and provide access to a minimum amount of safe drinking water to sustain life and health.

The Legislative Instruments do not engage any applicable rights or freedoms and so are compatible with human rights as they do not raise any human rights issues.

I trust this information addresses your concerns.

Yours sincerely



Jamie Briggs

Appendix 1

Full list of Legislative Instruments received between 1 and 21 February 2014

Appendix 1: Full list of Legislative Instruments received by the committee between 1 and 21 February 2014

The committee considers all legislative instruments that come before either House of Parliament for compatibility with human rights. This report considers instruments received by the committee between 1 and 21 February 2014, which usually correlates with the instruments that were made or registered during that period.

Where the committee considers that an instrument does not appear to raise human rights concerns, but is accompanied by a statement of compatibility that does not fully meet the committee's expectations,[1] it will write to the relevant Minister in a purely advisory capacity providing guidance on the preparation of statements of compatibility. This is referenced in the table with an '**A**' to indicate an advisory letter was sent to the relevant Minister.

Where an instrument is not accompanied by a statement of compatibility in circumstances where it was required, the committee will write to the Minister in an advisory capacity. This is referenced in the table with an '**A***' to indicate an advisory letter was sent to the relevant Minister.

Where an instrument is exempt from the requirement for a statement of compatibility this is referenced in the table with an '**E**'.

Where the committee has commented in this report on an instrument, this is referenced in the table with a '**C**'.

Where the committee has deferred its consideration of an instrument, this is referenced in the table with a '**D**'.

Where the committee considers that an instrument does not appear to raise any human rights concerns and is accompanied by a statement of compatibility that is adequate, this is referenced in the table with an unmarked square.

The Federal Register of Legislative Instruments (FRLI) website should be consulted for the text of instruments and explanatory statements, as well as associated information.[2] Instruments may be located on FRLI by entering the relevant FRLI number into the FRLI search field (the FRLI number is shown in square brackets after the name of each instrument listed below).

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1 The committee has set out its expectations with regard to information that should be provided in statements of compatibility in its Practice Note 1, available at: www.aph.gov.au/joint_humanrights.

2 FRLI is found online at www.comlaw.gov.au.

In relation to determinations made under the *Defence Act 1903*, the legislative instrument may be consulted at www.defence.gov.au.

Instruments received week ending 7 February 2014

Aged Care (Living Longer Living Better) Act 2013	
Fees and Payments Principles 2014 [F2014L00108]	
Aged Care Act 1997	
Aged Care Act 1997 - Determination under paragraph 44-19(1)(b) (ACA Ch. 3 No. 5/2007) Revocation Determination 2013 [F2014L00084]	
Home Care Subsidy Amendment (Transitional Workforce Supplement and Various Measures) Determination 2014 [F2014L00096]	
Residential Care Subsidy Amendment (Transitional Workforce Supplement) Principle 2014 [F2014L00099]	
Aged Care (Living Longer Living Better Act 2013 and Aged Care Act 1997	
Aged Care (Maximum Accommodation Payment Amount) Determination 2014 [F2014L00109]	
Anti-Money Laundering and Counter-Terrorism Financing Act 2006	
Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2014 (No. 1) [F2014L00086]	
Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2014 (No. 2) [F2014L00110]	
Australian Prudential Regulation Authority Act 1998	
Australian Prudential Regulation Authority (confidentiality) determination No. 1 of 2014 [F2014L00105]	
Broadcasting Services Act 1992	
Licence Area Plan - Lismore Radio - Variation No. 1 of 2014 [F2014L00083]	
Licence Area Plan - Darwin Radio - Variation No. 1 of 2014 [F2014L00087]	
Licence Area Plan - Gosford Radio - Variation No.1 of 2014 [F2014L00088]	A
Civil Aviation Safety Regulations 1998	
CASA ADCX 002/14 - Revocation of Airworthiness Directives [F2014L00082]	
Commonwealth Inscribed Stock Act 1911	
Direction Relating to Commonwealth Borrowing [F2014L00074]	E
Environment Protection and Biodiversity Conservation Act 1999	
Amendment to the list of threatened species, threatened ecological communities and key threatening processes under sections 178, 181 and 183 of the Environment Protection and Biodiversity Conservation Act 1999 (149) (15/01/2014) [F2014L00081]	
Amendment to the list of threatened species, ecological communities and key threatening processes under sections 178, 181 and 183 of the Environment Protection and Biodiversity Conservation Act 1999 (152) (15/01/2014) [F2014L00085]	

Amendment of List of Exempt Native Specimens - New South Wales Estuary General Fishery (19/12/2013) (inclusion) [F2014L00090]	
Amendment of List of Exempt Native Specimens - New South Wales Estuary General Fishery (19/12/2013) (deletion) [F2014L00091]	
Amendment of List of Exempt Native Specimens - New South Wales Ocean Hauling Fishery (19/12/2013) (inclusion) [F2014L00092]	
Amendment of List of Exempt Native Specimens - New South Wales Ocean Hauling Fishery (19/12/2013) (deletion) [F2014L00093]	
Dent Island Lightstation Heritage Management Plan [F2014L00095]	A
Environment Protection and Biodiversity Conservation Act 1999 - Section 269A - Instrument Adopting and Revoking Recovery Plans (NSW, SA and WA) (17/01/2014) [F2014L00102]	A
Federal Financial Relations Act 2009	
Federal Financial Relations (General Purpose Financial Assistance) Determination No. 53 (August 2013) [F2014L00067]	E
Federal Financial Relations (National Partnership payments) Determination No. 71 (December 2013) [F2014L00068]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 54 (September 2013) [F2014L00069]	E
Federal Financial Relations (National Partnership payments) Determination No. 72 (December 2013) [F2014L00070]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 57 (December 2013) [F2014L00071]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 56 (November 2013) [F2014L00072]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 55 (October 2013) [F2014L00073]	E
Federal Financial Relations (National Partnership payments) Determination No. 73 (January 2014) [F2014L00075]	E
Federal Financial Relations (National Partnership payments) Determination No. 68 (September 2013) [F2014L00076]	E
Federal Financial Relations (National Partnership payments) Determination No. 69 (October 2013) [F2014L00077]	E
Federal Financial Relations (National Partnership payments) Determination No. 70 (November 2013) [F2014L00078]	E
Food Standards Australia New Zealand Act 1991	
Australia New Zealand Food Standards Code — Standard 1.4.2 — Maximum Residue Limits Amendment Instrument No. APVMA 1, 2014 [F2014L00094]	E
Higher Education Support Act 2003	
Higher Education Support Act 2003 - VET Provider Approval (No. 3 of 2014) [F2014L00089]	

Higher Education Support Act 2003 - VET Provider Approval (No. 4 of 2014) [F2014L00100]	
Higher Education Support Act 2003 - VET Provider Approval (No. 5 of 2014) [F2014L00101]	
Higher Education Support Act 2003 - VET Provider Approval (No. 6 of 2014) [F2014L00103]	
Legislative Instruments Act 2003	
Legislative Instruments (Deferral of Sunsetting-Radiocommunications Instruments) Certificate 2013 [F2014L00080]	E
Migration Regulations 1994	
Migration Regulations 1994 - Specification of Specified Place - IMMI 13/143 [F2014L00104]	E
National Gambling Reform Act 2012	
National Gambling Reforms (Administration of ATM measure) Directions 2014 [F2014L00107]	C
National Health Act 1953	
National Health (Efficient Funding of Chemotherapy) Special Arrangement Amendment Instrument 2014 (No. 1) (No. PB 5 of 2014) [F2014L00079]	
National Health Act 1953	
National Health (Highly specialised drugs program for hospitals) Special Arrangement Amendment Instrument 2014 (No. 1) (No. PB 4 of 2014) [F2014L00098]	
Public Service Act 1999	
Public Service Act 1999 - Determination under subsection 24(3) – Non-SES employees - amendment of determination of 18 September 2013 (No. 2) [F2014L00106]	E
Veterans' Entitlements Act 1986	
Amendment Statement of Principles concerning posttraumatic stress disorder No. 19 of 2014 [F2014L00066]	

Instruments received week ending 14 February 2014

Agricultural and Veterinary Chemicals Code Act 1994	
Agricultural and Veterinary Chemicals Code Instrument No. 4 (MRL Standard) Amendment Instrument 2014 (No. 2) [F2014L00133]	E
Australian Broadcasting Corporation Act 1983	
Australian Broadcasting Corporation (Definition of senior political staff member) Instrument 2014 [F2014L00122]	
Australian Jobs Act 2013	
Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125]	C
Australian National University Academic Board Statute 2013	
Academic Board (Election of Members) Order 2014 [F2014L00123]	E
Civil Aviation Safety Regulations 1998	

CASA EX06/14 - Exemption - carriage of cockpit voice recorders and flight data recorders [F2014L00112]	
CASA ADCX 003/14 - Repeal of Airworthiness Directives [F2014L00124]	
Corporations Act 2001	
Accounting Standard AASB 1031 Materiality [F2014L00126]	
ASIC Market Integrity Rules (ASX Market) Amendment 2014 (No. 1) [F2014L00128]	
ASIC Market Integrity Rules (Chi-X Australia Market) Amendment 2014 (No. 1) [F2014L00129]	
ASIC Class Order [CO 14/23] [F2014L00134]	
Currency Act 1965	
Currency (Royal Australian Mint) Determination 2014 (No. 1) [F2014L00132]	
Defence Act 1903	
Defence Determination 2013/61, aide-de-camp allowance - amendment	
Defence Determination 2013/62, Travel on extension of overseas posting - amendment	
Defence Determination 2013/63, Dental officer specialist officer career structure - amendment	
Defence Determination 2014/1, Post indexes - amendment	
Defence Determination 2014/2, Leave credits and travel - amendment	
Defence Determination 2014/3, Interdependent partner and overseas medical costs - amendment	
Defence Determination 2014/4, Posting location and rent contribution - amendment	
Defence Determination 2014/5, Review of housing contributions allowances	
Defence Determination 2014/6, Housing rent band adjustment	
Defence Determination 2014/7, Posting location and housing - amendment	
Defence Determination 2014/8, Post indexes - amendment	
Defence Determination 2014/9, ADF allowances - amendment	
Eastern Tuna and Billfish Fishery Management Plan 2010 and Fisheries Management Act 1991	
Eastern Tuna and Billfish Fishery Total Allowable Commercial Catch and Undercatch/Overcatch Determination 2014 [F2014L00115]	
Environment Protection and Biodiversity Conservation Act 1999	
Amendment - List of Specimens taken to be Suitable for Live Import (4/11/2013) [F2014L00097]	
Threat abatement plan for disease in natural ecosystems caused by Phytophthora cinnamomi, Commonwealth of Australia 2014 [F2014L00111]	
Inclusion of ecological communities in the list of threatened ecological communities under section 181 of the Environment Protection and Biodiversity Conservation Act 1999 - Proteaceae Dominated Kwongkan Shrublands (EC 126) (15/01/2014) [F2014L00113]	

Financial Management and Accountability Act 1997	
FMA Act Determination 2014/01 – Section 32 (Transfer of Functions from Industry to Environment and Foreign Affairs) [F2014L00114]	E
FMA Act Determination 2014/02 — Section 32 (Transfer of Functions from Industry to Education) [F2014L00120]	E
FMA Act Determination 2014/03 – Section 32 (Transfer of Functions from DEEWR to Education and Employment) [F2014L00136]	E
Higher Education Support Act 2003	
Higher Education Support Act 2003 - VET Provider Approval (No. 7 of 2014) [F2014L00131]	
Higher Education Support Act 2003 - VET Provider Approval (No. 9 of 2014) [F2014L00138]	
Higher Education Support Act 2003 - VET Provider Approval (No. 10 of 2014) [F2014L00139]	
Higher Education Support Act 2003 - VET Provider Approval (No. 8 of 2014) [F2014L00140]	
Migration Regulations 1994	
Migration Regulations 1994 - Institutions and Disciplines for Subclass 476 (Skilled - Recognised Graduate) Visas - IMMI 14/010 [F2014L00130]	E
Military Superannuation and Benefits Act 1991	
Military Superannuation and Benefits (Eligible Member) Declaration 2014 [F2014L00119]	E
National Consumer Credit Protection Act 2009	
ASIC Class Order [CO 14/41] [F2014L00135]	
National Health Act 1953	
National Health (Weighted average disclosed price - main disclosure cycle) Amendment Determination 2014 (No. 1) [F2014L00137]	
Private Health Insurance Act 2007	
Private Health Insurance (Complying Product) Amendment Rules 2014 (No. 1) [F2014L00116]	
Private Health Insurance (Prostheses) Rules 2014 (No. 1) [F2014L00127]	
Radiocommunications Act 1992	
Radiocommunications (Spectrum Designation) Notice No. 1 of 2014 [F2014L00118]	
Safety, Rehabilitation and Compensation Act 1988	
Safety, Rehabilitation and Compensation (Licence Eligibility - DHL Supply Chain) Declaration 2014 (No. 1) [F2014L00117]	
Safety, Rehabilitation and Compensation Act 1988 - Section 97E - Premium Determination Guidelines 2013 [F2014L00121]	A

Instruments received week ending 21 February 2014

No instruments were received.

The committee considered 87 legislative instruments.