Chapter 2

Concluded matters

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

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

Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016

Purpose	This bill enables departure prohibition orders (DPO) to prevent social welfare payment recipients who have outstanding debts and have failed to enter into a repayment arrangement from leaving the country
Portfolio	Social services
Introduced	House of representatives, 2 March 2016
Rights	Freedom of movement (see **Appendix 2**)
Previous report	*Thirty-sixth Report of the 44th Parliament* (16 March 2016)

Background

2.3 The committee examined the bill in its *Thirty-sixth Report of the 44th Parliament* (16 March 2016) and requested a response from the minister by 1 April 2016. The bill lapsed at the prorogation of parliament on 17 April 2016. The measures in this bill were reintroduced in Schedule 13 of the Budget Savings (Omnibus) Bill 2016.

2.4 The minister's response to the committee's inquiries was received on 2 May 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

Departure prohibition orders

2.5 The bill inserts provisions into the *Social Security Act 1991*, *A New Tax System (Family Assistance) (Administration) Act 1999*, *Paid Parental Leave Act 2010* and the *Student Assistance Act 1973*, which empower the Secretary of the Department of Social Services (the secretary) to make a Departure Prohibition Order (DPO) if:

- a person has one or more debts to the Commonwealth under a relevant Act;
- the person does not have satisfactory arrangements in place to repay the debt; and

- the secretary believes on reasonable grounds that it is desirable to make the order to ensure the person does not leave Australia without having paid the debt(s) or having satisfactory repayment arrangements in place.

2.6 Before making a DPO, the secretary must have regard to the following matters:

- the capacity of the person to pay the debt(s);
- whether any recovery action has been taken to recover any such debt(s), and the outcome of that action;
- the length of time for which any debt has remained unpaid after the day on which it became due and payable; and
- such other matters as the secretary considers appropriate.[1]

2.7 A person in respect of whom a DPO has been issued may not leave Australia unless authorised by the secretary or until the DPO has been revoked or set aside by a court.

2.8 The previous human rights analysis of the bill noted that, by prohibiting persons with social security debts from leaving Australia, the bill engages and limits the right to freedom of movement.

2.9 That analysis noted that the measure pursued a legitimate objective, being to encourage the repayment of social security debts by people who are no longer recipients of social welfare, and was rationally connected to that objective.

2.10 However, the analysis of the bill raised questions in relation to the proportionality of the proposed measures. In particular, notwithstanding the matters to which the secretary must have regard before making a DPO (see paragraph [2.6] above), it expressed concerns regarding the lack of minimum thresholds on the amount of outstanding debt or the length of time a debt remains unpaid before a DPO could be made.

2.11 Accordingly, the committee sought the advice of the minister as to whether the limitation is a reasonable and proportionate measure for the achievement of its stated objective, in particular whether the power to make a DPO is sufficiently circumscribed to ensure it operates in the least rights restrictive manner.

Minister's response

2.12 The minister acknowledges that DPOs engage and limit the right to freedom of movement, but states that he considers that the restriction on the right is both proportionate and reasonable to ensure a fair and sustainable welfare system. The minister states that the Australian Government will only target people with a social welfare payment debt who refuse to enter into, or honour, an acceptable repayment arrangement, and who have the means to repay their debts to the Commonwealth.

1 See proposed section 102A(2).

2.13 The minister notes that the secretary will not make a DPO unless they believe, on reasonable grounds, that it is desirable to make the order to ensure the person does not leave Australia for a foreign country without having wholly paid the debt, or there are satisfactory arrangements in place to repay the debt.

2.14 The minister also advises that procedures will be put in place for the issuing of a Departure Authorisation Certificate (DAC) to allow a person subject to a DPO to travel overseas in certain circumstances, including on humanitarian grounds.

2.15 The minister states that, while the bill does not set minimum thresholds on the amount of outstanding debt or the length of time that a debt remains unpaid, these factors will be considered. In relation to the matters to which the secretary must have regard before making a DPO, the minister notes:

- capacity to pay the debt: people with debts are encouraged to talk to Centrelink about their ability to pay off their debt over time. In cases of severe financial hardship, a thorough review of a debtor's capacity to repay will be undertaken, and debtors will be given a reasonable amount of time to repay their debt;
- whether any debt recovery action has been taken and the outcome of the recovery action: the making of a DPO will be a debt recovery method of last resort (as is the case with child support debts) once other viable debt recovery mechanisms have been exhausted and the debtor has continually, without reasonable grounds, failed to make a satisfactory arrangement;
- the length of time the debt has remained unpaid: as previously indicated, a DPO will be issued as a last resort and it is therefore anticipated that the debt will have been overdue for a considerable amount of time; and
- any other matters the secretary considers appropriate: these matters are not defined, and relate to the circumstances of the particular case. It is expected that the value of the debt would be a key factor for consideration. It is expected than any factors considered relevant to the decision, and the impact it has on the decision, would be clearly documented.

2.16 The consideration of the matters underlined above in the making of a DPO is likely to aid the proportionality of the operation of the proposed scheme and to assist with ensuring that DPOs are used in a least rights restrictive manner. A DPO is a severe measure for debt recovery, and accordingly it is appropriate that, as the minister has clarified, the making of a DPO is a measure of last resort, and that the value of the debt is a key factor in the secretary's consideration, in addition to the mandatory considerations set out in the legislation.

2.17 It is also noted that procedures are to be in place for departure to be authorised in certain circumstances, including humanitarian ones. In this regard, it will be important that travel in compassionate circumstances, or for reasons of work, be authorised in order for the measure to operate in a reasonable and proportionate manner. The minister has not provided the detail of the specific procedures for when

authorisation is to be granted, however the expectation is that, and in order for this authorisation to be meaningful to a person subject to a DPO it is vital that, the authorisation will be granted promptly and reasonably in advance of the necessary travel, which may in some circumstances be urgent.

2.18 However, in relation to the minister's advice regarding the likely or expected application or relevance of the matters set out in paragraph [2.15] to the making of a DPO, and the availability of DACs, it is noted that these factors are elements of the intended operation of the measure administratively that have not been made express legislative requirements. For example, while the stated intention is to rely on DPOs only as a last resort, this safeguard is not contained in the proposed legislation itself.

2.19 Therefore, while the legislative and administrative safeguards explained by the minister taken together may ensure that the measure operates in a manner that is proportionate and compatible with human rights, there is a risk that, in some cases DPOs may be applied in circumstances where they are not the least rights restrictive way to achieve the objective of encouraging the repayment of social security debts. Accordingly, to ensure compatibility with the right to freedom of movement, the bill could be amended to add a wider range of specific safeguards.

Committee comment

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

2.21 **Noting the preceding legal analysis, the committee acknowledges the scope for reasonable differences of opinion as to whether there are sufficient legislative safeguards to ensure that DPOs are proportionate as a matter of international human rights law.**

2.22 **The committee notes that, on the one hand, it may be thought that the matters which the secretary is required to consider in making a DPO, with the benefit of the clarification provided by the minister regarding the intended application of proposed section 102A of the bill, are likely to provide a sufficient safeguard on the use of DPOs, along with the use of DACs allowing people subject to a DPO to travel overseas in certain circumstances. On this view, the measure is likely to be proportionate and therefore to be a permissible limitation on the right to freedom of movement.**[2]

2.23 **On the other hand, notwithstanding that the minister's response has provided useful information regarding the likely or expected considerations and discretionary safeguards that will be applied in the making of DPOs, and these factors could mean that a DPO imposes a proportionate limit on the right to freedom of movement in individual cases, these factors are elements of policy or**

2 This view was preferred by Mr Ian Goodenough MP; Mr Russell Broadbent MP; Mr Julian Leeser MP; Senator James Paterson; and Senator Linda Reynolds.

administrative practice rather than legislatively based safeguards relating to the making of DPOs. On this view, it could be reasonably said that there is a real risk that DPOs may not in all cases be the least rights restrictive way of achieving the legitimate objective of encouraging the repayment of social security debts. To address this concern and ensure the proportionality of the measure, the bill could be amended to insert a requirement that, before making a DPO, the secretary must have regard to (a) the size of the debt and (b) whether the DPO is a measure of last resort in the particular case.[3]

3 This view was preferred by Mr Graham Perrett MP; Senator Nick McKim; and Senator Claire Moore.

Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015 [F2015L00551]

Purpose	The regulation makes a number of amendments consequential to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*
Portfolio	Immigration and Border Protection
Authorising legislation	*Migration Act 1958*
Disallowance	Disallowance date has passed
Rights	Freedom of movement (see **Appendix 2**)
Previous reports	*Twenty-fourth Report of the 44th Parliament*; *Thirty-sixth Report of the 44th Parliament*

Background

2.24 This regulation implements aspects of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (RALC Act).[1]

2.25 The committee reported on the regulation in its *Twenty-fourth Report of the 44th Parliament* and *Thirty-sixth Report of the 44th Parliament*.[2] In that last report, the committee considered a response from the minister, and sought a further response by 1 April 2016.

2.26 The minister's response to the committee's inquiries was received on 28 April 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

Safe haven enterprise visas

2.27 Safe haven enterprise visas (SHEVs) were created by the RALC Act. These visas may be granted to persons who are found to be owed protection obligations

1 The committee reported on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (RALC bill) in its *Fourteenth Report of the 44th Parliament* and *Thirty-sixth Report of the 44th Parliament*. The bill finally passed both Houses of Parliament on 5 December 2014 and received Royal Assent on 15 December 2014.

2 Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (24 June 2015) 20-24; and *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 19-25.

and who indicate an intention to work or study in regional areas in Australia. The regulation sets out certain criteria for the grant of a SHEV.[3]

2.28 The previous human rights analysis of the regulation noted that people who hold a SHEV, or whose last substantive visa was a SHEV, are barred from making a valid application for a Bridging Visa B (a category of visa which allows overseas travel). As the SHEV class visa has a more restricted travel facility than the Bridging Visa B class, the analysis noted that prohibiting SHEV holders from applying for a Bridging Visa B engages and limits the right to freedom of movement.

2.29 The previous human rights analysis noted that, while the stated objective of protecting the integrity of the protection visa regime may be regarded as a legitimate objective for the purposes of international human rights law, it was unclear how denying a person the right to travel overseas is rationally connected to (that is, effective to achieve) that objective.

2.30 Further, if approved by the minister in writing, the SHEV regime allows a visa holder to travel in compassionate and compelling circumstances to places other than the country in respect of which protection was sought.[4] It is unclear why it is necessary to require written approval before the applicant is able to travel to *any* country rather than just to the country in respect of which protection was sought. Travel to other countries would not appear to indicate, in and of itself, that a person is not in need of protection.

2.31 The minister's first response did not fully explain how the measure is rationally connected or proportionate to its stated objective. Instead, the minister argued that the measure was not a limit on the right to freedom of movement as SHEV and former SHEV holders could leave Australia if they wished.

2.32 However, this view fails to acknowledge that if a SHEV holder left Australia without the minister's approval they would be prevented from returning to Australia. The previous human rights analysis noted that the right to leave a country encompasses both the legal right and practical ability to leave a country. It applies not just to departure for permanent emigration but also for the purpose of travelling abroad. States are required to provide necessary travel documents to ensure this

3 The main criteria for the grant of a SHEV were introduced by an amendment to the RALC bill (see section 1404 set out in the bill). The committee therefore did not examine the human rights compatibility of the SHEV regime in full during its initial consideration of the RALC bill. However, many of the concerns outlined in the human rights assessment of the RALC bill, in respect of Temporary Protection Visas (TPVs), also apply to the SHEV regime, particularly in relation to Australia's non-refoulement obligations (see Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 70-92).

4 See clause 8570 of Schedule 8 to the Migration Regulations 1994.

right can be realised.[5] Being prevented from returning to Australia at the conclusion of travel is a clear limit on a person's ability leave Australia.

2.33 The committee therefore sought the further advice of the minister as to whether there is a rational connection between the limitation and its stated objective.

2.34 In particular, the committee inquired as to how denying access to travel to SHEV holders to *any* country furthers the objective of maintaining the integrity of the protection visa regime; whether the limitation is a reasonable and proportionate measure for the achievement of that objective; and why it is necessary to prohibit access entirely to Bridging Visa B for all SHEV, or former SHEV, holders.

Minister's response

2.35 The minister's response does not provide any additional information addressing the rational connection or proportionality of restricting SHEV holders, or former SHEV holders, from being able to apply for a Bridging Visa B. Instead, the minister maintains the previously stated position that the removal of such access is not a restriction of the right to freedom of movement.

2.36 In relation to the concerns regarding the ability of SHEV holders to obtain travel documents, the minister's response notes the ability of anyone in Australia or its territories to apply for a travel document to allow that person to leave Australia. However, it also notes that this would not confer a right to return to Australia.

2.37 As set out above, the previous human rights analysis noted that the right to leave a country encompasses both the legal right and practical ability to leave a country. It applies not just to departure for permanent emigration but also for the purpose of travelling abroad; and applies to every person lawfully within Australia, including those who have been recognised as refugees. States are therefore required to provide necessary travel documents to ensure this right can be realised.[6] A person who has been recognised as a refugee, but does not have the necessary travel documents to allow them to travel (and return to Australia at the conclusion of their travel), is not able to practically realise their right to leave the country.

2.38 Without specific information from the minister as to whether there is a rational connection between the limitation and the stated objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective, it cannot be concluded that the measure is a justifiable limit on the right to freedom of movement.

5 See UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999) paragraphs [8] to [10].

6 See UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999) paragraphs [8] to [10].

Committee response

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

2.40 **The introduction of SHEVs engages and limits the right to freedom of movement for SHEV holders; and that the minster has not provided sufficient justification so as to enable a conclusion that the regulation is compatible with this right.**

2.41 **The committee therefore recommends that, in order for the measure to be compatible with the right to freedom of movement, consideration be given to amending the SHEV regime such that :**

- **the restriction on access to Bridging Visa B for SHEV, or former SHEV, holders be lifted; or**
- **the restrictions on travel for SHEV holders are removed.**

Mr Ian Goodenough MP

Chair