

Dissenting Report by Labor and Greens members¹

1.1 Australian Labor Party and Australian Greens members (dissenting members) of the Parliamentary Joint Committee on Human Rights (committee) seek to issue dissenting remarks in relation to three bills on which the committee has concluded, namely the:

- Australian Citizenship Amendment (Citizenship Cessation) Bill 2019;
- Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019; and
- Social Services Legislation Amendment (Drug Testing Trial) Bill 2019.

1.2 The dissenting members consider it regrettable that it has again become necessary to prepare yet another dissenting report for this previously non-partisan committee.

1.3 However, the important mandate of this committee to examine bills for compatibility with the rights and freedoms recognised or declared by the seven core international human rights treaties that Australia is a signatory to must be discharged by its members.

1.4 As members of this committee, we must never lose sight of the committee's important mandate. This committee does not exist to be partisan; and it does not exist to rubber-stamp government policy, irrespective of the political party occupying the Treasury benches. The legislation scrutinised in this report deserves to be properly considered by this committee through a human rights framework, that appropriately applies international human rights law.

Australian Citizenship Amendment (Citizenship Cessation) Bill 2019

1.5 This bill seeks to provide the Minister for Home Affairs (the minister) with the discretionary power to determine that a person ceases to be an Australian citizen in certain broad circumstances. As set out in the international human rights legal advice contained in the concluding comments of the report, citizenship cessation engages and limits the rights to freedom of movement and liberty and the rights of the child and the protection of the family. While these rights may be subject to permissible limitations under international human rights law, the dissenting members consider it has not been demonstrated that these proposed measures are sufficiently certain such that people would understand the circumstances under which the minister may restrict the exercise of their rights.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Advice Only, *Report 1 of 2020*; [2020] AUPJCHR 26.

1.6 In addition, noting that the government considers it can adequately deal with any threat posed by Australian citizens who are not dual nationals without the need to cease their Australian citizenship, the dissenting members consider it has not been established that the measures are strictly necessary as a matter of international human rights law, and as such, on the information provided by the minister, it is not possible to conclude that the measures pursue a legitimate objective for the purposes of international human rights law.

1.7 The dissenting members consider that questions also remain as to whether the measures are necessarily rationally connected to the stated objectives, or are a proportionate means of achieving those objectives. In particular, it does not appear that the measures are sufficiently circumscribed, noting in particular the breadth of the minister's powers. Nor do they appear to contain sufficient safeguards, particularly to ensure adequate consideration is given to the best interests of the child and protection of the family and to ensure adequate rights of review. The dissenting members note that permanently ceasing the citizenship of a child as young as 10 or 14² would subject the child to an irrevocable decision, which could adversely impact their short to long term development and heighten their vulnerability. The dissenting members consider that it may be inconsistent with Australia's obligations to treat other considerations as of equal weight to the obligation to consider the best interests of the child. The dissenting members also consider the measures do not appear to constitute the least rights restrictive approach to achieve the stated objectives, noting that there already exist a range of other methods to protect national security and the amendments apply retrospectively.

1.8 In addition, the citizenship cessation determination outlined in this bill could cause a person, whose ex-citizen visa would be cancelled on character grounds, to be classified as an unlawful non-citizen and liable for removal from the country. As such, the measures engage Australia's obligations of non-refoulement and the right to an effective remedy. As set out in the international human rights law advice, pursuant to Australia's non-refoulement obligations under international law,³ Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.⁴ Non-refoulement obligations are absolute and may not be subject to any limitations. In addition, the obligation of non-refoulement and the right to an

2 As the power to make a determination under proposed section 36B would apply to persons aged 14 or over, and proposed section 36D could apply to those aged 10 or over.

3 International Covenant on Civil and Political Rights; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

4 Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (9 February 2018).

effective remedy require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.⁵ It is not clear how the minister would consider the absolute prohibition against non-refoulement in the context of these determinations, noting that such consideration is not currently included in the matters to which the minister must have regard pursuant to proposed section 36E. There is no right to merits review of a decision that is made personally by the minister to refuse or cancel a person's visa on character grounds, or of the original decision to cancel the person's citizenship.⁶ As set out in the international human rights law advice, judicial review in the Australian context is not likely to be sufficient to fulfil the international standard required of 'effective review' of non-refoulement decisions,⁷ as judicial review is only available on a number of restricted grounds and represents a limited form of review. Accordingly, the availability of merits review would likely be required to comply with Australia's obligations under international law.

1.9 As such, the dissenting members consider there is a significant risk that the cessation of citizenship provisions as set out in the bill, as currently drafted, could result in a person being denied their right to freedom of movement, including their right to enter, remain in, or return to their 'own country'. There is also a risk that the cessation of a person's citizenship, making them a non-citizen, could result in them being placed in mandatory immigration detention, which could result in an impermissible limitation on their right to liberty. Further, as the bill would allow the minister to cease the citizenship of a child as young as 10 or 14, with the best interests of the child only to be considered alongside a list of other considerations, and without any specific requirement that the minister consider the importance of protecting the right to family, the dissenting members consider there is a significant risk that the rights of the child and the protection of the family will not be adequately protected.

1.10 The dissenting members also consider that the measures which provide the minister with the discretionary power to cease a person's citizenship, resulting in a loss of a right to remain in Australia (noting that any ex-citizen visa is highly likely to be cancelled on character grounds), risk resulting in such persons being subject to removal to countries where they may face persecution. As such, the dissenting members consider the measures may not be consistent with Australia's non-refoulement obligations and the right to an effective remedy. The dissenting

5 International Covenant on Civil and Political Rights, article 2 (the right to an effective remedy). See, for example, *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]-[8.9]; *Alzery v Sweden*, UN Human Rights Committee Communication No. 1416/2005 (20 November 2006) [11.8].

6 Australian Citizenship Act, section 52.

7 See *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]-[8.9].

members consider this risk may be reduced if proposed section 36E included a specific requirement that the minister must consider whether the person, if removed from Australia following loss of citizenship, would be at risk of persecution or other forms of serious harm (and independent merits review of this decision were available).

1.11 We draw these human rights concerns to the attention of the minister and the Parliament.

Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019

1.12 This bill seeks to extend the date for existing Cashless Debit Card trials (currently in Ceduna, East Kimberly, the Goldfields, and the Bundaberg and Hervey Bay region) to 30 June 2021.⁸ It also seeks to establish the Northern Territory and Cape York areas as Cashless Debit Card trial areas⁹ (transitioning all current income management regime participants in those areas to the Cashless Debit Card scheme).¹⁰

1.13 This bill engages and limits the rights to privacy, social security, and equality and non-discrimination. As set out in the international human rights legal advice contained in the concluding comments of the report, the measures associated with this bill significantly intrude into the freedom and autonomy of individuals to organise their private and family lives by making their own decisions about the way in which they use their social security payments. They also appear to have a disproportionate impact on First Nations People.¹¹

8 Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 (the bill), item 17.

9 Items 10, 11 and 15 of the bill. The minister would be granted the power to make a notifiable instrument to exclude any part of the Northern Territory from the trial area, reflecting the power the minister also has to make such a notifiable instrument in relation to Cape York.

10 The Cashless Debit Card would be trialled in the Northern Territory to 30 June 2021 and in the Cape York area until 31 December 2021, see item 17 of the bill.

11 As set out in the Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2020), pp. 39-53, at March 2017, 75 per cent of participants in the Ceduna trial area, and 80 per cent of participants in the East Kimberley, were Aboriginal and/or Torres Strait Islander. In 2019, 43 per cent of participants in the Goldfields trial site were Indigenous. In 2016, approximately 90 per cent of people subject to income management in the Northern Territory were indigenous. See *Report 6 of 2019*, (5 December 2019) p. 43.

1.14 While the expansion of the cashless debit card trial appears to seek to achieve a number of legitimate objectives,¹² the dissenting members consider it is unclear whether the proposed cashless welfare scheme expansion is rationally connected with (that is, effective to achieve) those objectives, noting the mixed results outlined in the trial evaluations completed to date.¹³ Additionally, the dissenting members consider it does not appear that the proposed measures are proportionate to the objectives sought to be achieved. In particular, there appears to be extremely limited capacity for flexibility to treat different cases differently, as the scheme applies to all persons on particular welfare payments in trial locations, and not only those deemed to be at risk. A human rights compliant approach requires that any such measures must be effective, subject to monitoring and review and genuinely tailored to the needs and wishes of the local community. The dissenting members consider the current approach, with its apparent lack of genuine consultation, amendments to the evaluation process and lack of legislative requirement to respect community wishes before amending the amount of restrictable income, falls short of this standard.

1.15 As such, the dissenting members consider it has not been clearly demonstrated that the extension of the cashless debit card trial is a justifiable limit on the rights to social security and privacy or, to the extent that the trial has a disproportionate impact on First Nations People, that it is a reasonable and proportionate measure and therefore not discriminatory.

1.16 We draw these human rights concerns to the attention of the minister and the Parliament.

Social Services Legislation Amendment (Drug Testing Trial) Bill 2019

1.17 The bill seeks to establish a two year trial of mandatory drug-testing in three regions, involving 5,000 new recipients of Newstart Allowance and Youth Allowance. Under this scheme, recipients who test positive would be subject to income management for 24 months and be subject to further random drug tests. Recipients who test positive to more than one test during the 24 month period would be referred to a contracted medical professional for assessment.¹⁴ If the medical professional recommends treatment, the recipient would be required to complete

12 The statement of compatibility lists the objectives as: 'reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour and reducing the likelihood that welfare payment recipients will remain on welfare and out of the workforce for extended periods of time', statement of compatibility, p. 19.

13 The full analysis of these trial evaluations are outlined in the preliminary international human rights legal advice.

14 Explanatory memorandum, p. 29.

certain treatment activities, such as counselling, rehabilitation or ongoing drug testing, as part of their employment pathway plan.¹⁵ Recipients who do not comply with their employment pathway plan, including drug treatment activities, would be subject to a participation payment compliance framework, which may involve the withholding of payments.

1.18 As set out in the international human rights law advice contained in the concluding comments of the report, the mandatory drug testing of welfare recipients, subjecting persons to income management and suspending welfare payments, engages and limits a number of human rights, including the rights to privacy, social security, adequate standard of living and equality and non-discrimination.

1.19 The dissenting members consider that while the measures seek to achieve the legitimate objectives of the early treatment of harmful drug use to prevent drug dependency and to address barriers to employment created by drug dependency, it has not been demonstrated that the proposed measures are rationally connected (that is, effective to achieve) those objectives, as no evidence was provided from any international trials to indicate if the drug-testing of welfare recipients is likely to be effective to achieve the stated objectives. It remains unclear that the testing for the single use of an illicit drug, which does not measure a person's level of impairment, abuse or dependency,¹⁶ demonstrates that a person is likely to have barriers to employment or dependency.¹⁷ It also remains unclear whether income management and, in certain circumstances, reducing the payments of persons who fail to undertake treatment activities, would be an effective or proportionate means of ensuring job seekers get the support they need to address drug dependency issues.

1.20 The dissenting members also consider that it has not been demonstrated that the measures are a proportionate means of achieving the stated objectives. The dissenting members note that the government has not explained how individuals who have their payments suspended will be able to meet their basic needs for food and housing, which raises questions as to whether this measure would comply with

15 An employment pathway plan sets out particular activities certain recipients must do in order to receive their Newstart Allowance or Youth Allowance payments.

16 See the definition of 'positive drug test' in Schedule 1, item 1, which relevantly means an indication by a drug test that a testable drug was present in a sample of the person's saliva, urine or hair.

17 See, Scott Macdonald et al, 'Drug testing and mandatory treatment for welfare recipients', *International Journal on Drug Policy*, vol. 12, 2001, pp. 249-257. See also, Australian National Council on Drugs, 'Position Paper: Drug Testing', August 2013, p. 2.

the obligation to provide an adequate standard of living.¹⁸ It also appears that the process to remove income quarantining where it is not necessary or appropriate to an individual's circumstances is limited, as is the availability of independent review. It is also not clear that other, less rights restrictive, methods have been trialled to improve a job seeker's capacity to find employment, participate in education or training, and receive medical treatment.

1.21 Consequently, the dissenting members consider there is a significant risk that the measures proposed by the bill would unjustifiably limit the rights to privacy, social security, adequate standard of living and equality and non-discrimination.

1.22 We draw these human rights concerns to the attention of the minister and the Parliament.

Graham Perrett MP
Deputy Chair
Member for Moreton

Steve Georganas MP
Member for Adelaide

Senator Nita Green
Senator for Queensland

Senator Pat Dodson
Senator for Western Australia

Senator Nick McKim
Senator for Tasmania

18 The right to an adequate standard of living is set out in article 11(1) of the International Covenant on Economic, Cultural and Social Rights. It requires that the State party take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.