

Trade Support Loans Bill 2014

Trade Support Loans (Consequential Amendments) Bill 2014

Portfolio: Industry

Introduced: House of Representatives, 4 June 2014

Purpose

1.477 The Trade Support Loans Bill 2014 and Trade Support Loans (Consequential Amendments) Bill 2014 (the bill) seeks to establish the Trade Support Loans Program to provide concessional, income-contingent loans of up to \$20 000 over four years to certain apprentices. The loans will be repayable when the individual's income reaches the Higher Education Loan Program repayment threshold.

Committee view on compatibility

Right to education

1.478 The right to education is guaranteed by article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), under which States parties recognise the right of everyone to education, and agree that education shall be directed to the full development of the human personality and sense of dignity, and shall strengthen the respect for human rights and fundamental freedoms.

1.479 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to social security. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

1.480 Under article 4 of the ICESCR, economic, social and cultural rights may be subject only to such limitations as are determined by law and compatible with the nature of those rights, and solely for the purpose of promoting the general welfare in a democratic society. Such limitations must be proportionate to the achievement of a legitimate objective, and must be the least restrictive alternative where several types of limitations are available.

Support for apprentices through the institution of concessional income contingent loan scheme

1.481 As outlined above, the proposed legislation introduces a voluntary loan scheme for concessional, income-contingent loans of up to \$20 000 over four years

to certain apprentices. The statement of compatibility for the bill notes that the bill engages and promotes the right to education. It states:

[The bill] will promote an individual's right to education by providing access to financial assistance, under the loans, during an apprenticeship. The loans are designed to help apprentices with the everyday living expenses associated with training (technical and vocational education). This will improve the accessibility of technical and vocational education, as individuals need not miss out on enrolment due to the prospect of financial difficulties in undertaking an apprenticeship. The Bills will therefore expand the accessibility of technical and vocational education.¹

1.482 However, the committee notes that the trade support loan scheme is intended to supersede the 'Tools for Your Trade Program' (which was to cease from 1 July 2014) as a form of financial support for apprentices.²

1.483 Where a bill seeks to repeal or replace existing arrangements, the committee's usual expectation is that the statement of compatibility provide an assessment of whether the repeal or replacement of those arrangements may limit or remove human rights protections, and whether remaining or proposed arrangements in place of the repealed or replaced measures may offer equivalent or greater protection of human rights.³

1.484 The committee notes that the statement of compatibility does not provide a human rights assessment of the proposed scheme with reference to any programs or measures, such as the 'Tools for Trade Program', which it is intended to replace.

1.485 The committee therefore seeks the advice of the Minister for Industry as to the compatibility of the bill with the right to education.

Rights to equality and non-discrimination

1.486 The rights to equality and non-discrimination are guaranteed by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR). These are fundamental human rights that are essential to the protection and respect of all human rights. They provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.487 For human rights purposes, 'discrimination' is impermissible differential treatment among persons or groups that result in a person or a group being treated

1 Explanatory memorandum (EM), p. 6.

2 Australian Apprenticeships (Australian Government) website, 'Tools for Trade Payment', <http://www.australianapprenticeships.gov.au/program/tools-your-trade-payment> (accessed 10 July 2014).

3 See, for example, Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament*, 25 March 2014, 'Omnibus Repeal Day (Autumn 2014) Bill 2014', p. 9.

less favourably than others, based on one of the prohibited grounds for discrimination.⁴

1.488 Discrimination may be either direct or indirect. Indirect discrimination may occur when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups. Articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) further describes the content of these rights, describing the specific elements that States parties are required to take into account to ensure the rights to equality for women.

Availability of loans to qualifying apprenticeships on the trade support loans priority list

1.489 The bill provides that, to qualify for a concessional, income-contingent loan, a person must be undertaking a qualifying apprenticeship in an occupation or qualification on the Trade Support Loans (TSL) priority list (the list),⁵ which must be established and maintained by the minister.

1.490 The committee notes that the requirement for the minister to specify particular occupations or qualifications on the list may, in practice, operate to indirectly discriminate against certain groups. For example, if occupations or qualifications specified on the list are predominantly those in which apprentices are traditionally male, this may be regarded as indirectly discriminating against women, who would have less access to the scheme.

1.491 The committee notes that, while the statement of compatibility identifies the rights to equality and non-discrimination as being engaged, it does not provide an assessment of the compatibility of the proposed list with the rights to equality and non-discrimination.⁶

1.492 The committee therefore seeks the Minister for Industry's advice as to whether the qualification requirement for the loan through the TSL Priority List is compatible with the rights to equality and non-discrimination.

Right to privacy

1.493 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

4 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

5 Trade Support Loans Bill 2014, proposed section 8.

6 See EM, p. 6.

1.494 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Powers to obtain certain information

1.495 The bill would provide a number of powers to the Secretary of the Department of Industry to obtain certain information in connection with a trade support loan.⁷

1.496 The statement of compatibility for the bill notes that this aspect of the scheme engages the right to privacy. In concluding that the secretary's powers to obtain information are compatible with human rights, it states:

Given the importance placed on confidentiality and that loans are claimed on a voluntary basis, the requirements do not restrict any persons right to privacy.⁸

1.497 However, the committee notes that, while the statement of compatibility notes generally that the information collected will be protected by the *Privacy Act 1988*, it contains no assessment of whether the limitation is compatible with the right to privacy.

1.498 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary and proportionate to achieving a legitimate objective.

1.499 The committee notes that information regarding the associated offences provided for in the bill (discussed below) is particularly relevant to an assessment of the bill's compatibility with the right to privacy.

1.500 **The committee therefore seeks the Minister for Industry's advice as to whether the powers to obtain certain information are compatible with the right to privacy and particularly:**

- **whether the limitation is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

7 See Trade Support Loans Bill 2014, proposed sections 59-61.

8 EM, p. 6.

Right to a fair trial and fair hearing rights

1.501 The right to a fair trial and fair hearing are contained in article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

1.502 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence and minimum guarantees in criminal proceedings, which include the right to not to incriminate oneself (article 14(3)(g)). The ICCPR also provides a guarantee against retrospective criminal laws and the right not to incriminate oneself (article 14(3)).

Creation of new offences with respect to obtaining information

1.503 The bill proposes the creation of new offences under proposed sections 63 and 73. Proposed section 63 provides that it is an offence if a person refuses or fails to comply with a requirement to give information or produce a document. The penalty for this offence is 12 months' imprisonment. Proposed section 73 creates the offence of failing to inform the secretary of a change of circumstances which may affect the qualification for a Trade Support Loan. The penalty for this offence is six months' imprisonment. These provisions provide for a 'reasonable excuse' defence in relation to which the defendant bears an evidential burden of proof. In order to rely on the defence, the defendant is required to adduce or point to evidence 'that suggests a reasonable possibility that the [reasonable excuse] exists or does not exist'.⁹

1.504 The committee considers that the proposed provisions may engage the right to be presumed innocent, to the extent that they may be potentially regarded as creating a reverse burden of proof in the context of the particular offences. The committee notes that the statement of compatibility for the bill makes no reference to these provisions.

1.505 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provides an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective.

1.506 The committee notes that the nature of the offence, the requirement for the defendant to establish the 'excuse' and the severity of the proposed penalties may be particularly relevant to an analysis of whether the proposed measures are compatible with the right to be presumed innocent.

9 Criminal Code, section 13.3.

1.507 The committee therefore seeks the advice of the Minister for Industry as to whether the new offences are compatible the right to a fair trial and fair hearing rights, and particularly:

- **whether the measures are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**