

# Human Rights Submission

on:

## *Strengthening economic relations between Australia and New Zealand*

By David Faulkner, 5<sup>th</sup> of October 2012

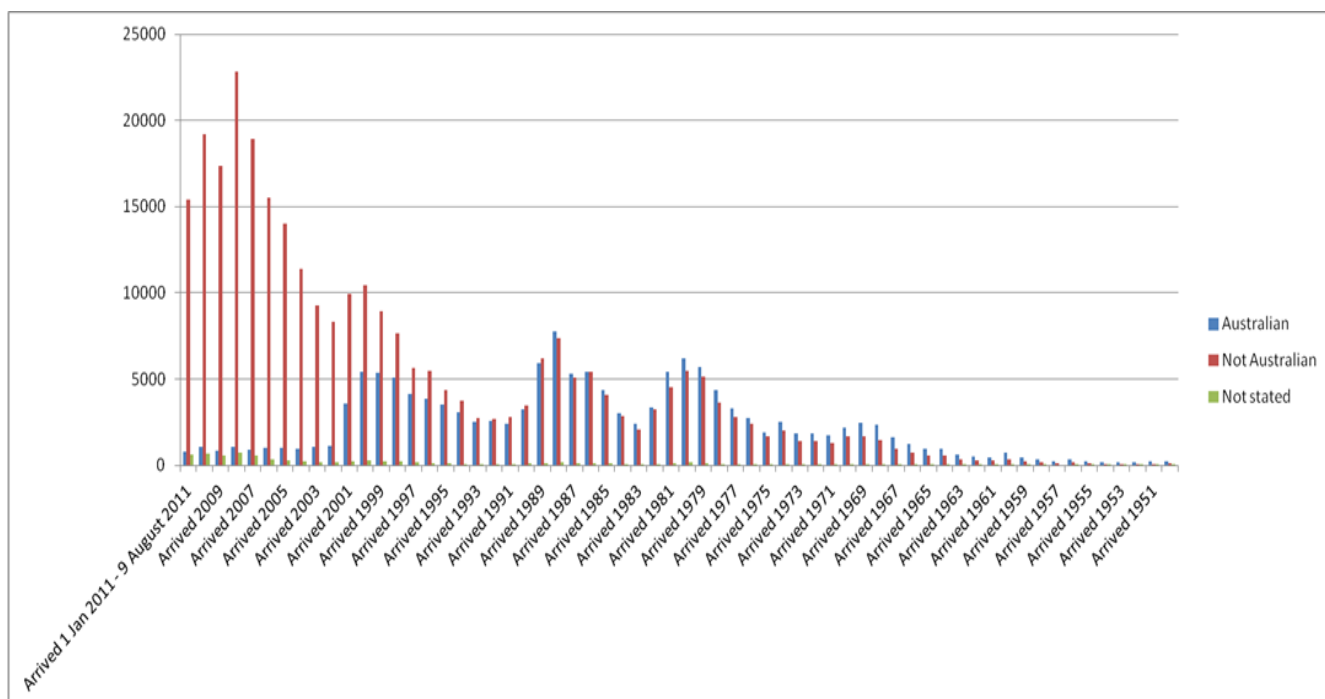
(with special thanks to Paul Hamer of Victoria University for all of his assistance)

This submission offers answers to the questions raised in Box Q-4.7 of the Discussion Draft in light of Australia’s binding obligations under international human rights law. In particular, the legality of treating New Zealanders unequally due to concerns of so-called ‘back door’ immigration and government transfer shopping is explored in detail.

One of the opportunities for further trans-Tasman integration raised in the Discussion Draft concerns the ‘fourth freedom’ - cross border movement of people.

In particular, the Discussion Draft raises concerns about the fairness of current Australian laws that deny citizenship and social security to New Zealand citizens who are permanently residing in Australia but who arrived post 2001 and are therefore classed as non-protected SCV holders under social security law<sup>1</sup>.

The following graph visualises the magnitude of this inequality:



Population of NZ-Born residents by year of arrival and Australian citizenship status<sup>2</sup>:

<sup>1</sup> See s. 7(2) of the Social Security Act 1991 (Cth) for the full definition of ‘protected SCV holder’

<sup>2</sup> Data supplied by Paul Hamer of Victoria University, Wellington (source: ABS Census 2011).

It should be noted that approximately 7% of those who arrived after 2007 claim to have citizenship. Due to the 4 year residency requirement for citizenship eligibility introduced in 2007, these people could not have obtained citizenship by grant – even if they had obtained permanent visas. Therefore, it can be assumed that approximately 7% of arrivals either acquired citizenship by descent or filled in the Census Form incorrectly. If this figure of 7% is also assumed for those arriving between 2001 and 2007, then less than 3% of these New Zealanders have taken out Australian citizenship. This is an incredibly low figure when compared to those born elsewhere.

DIAC reports that only a small number of New Zealand nationals have been granted a permanent visa – roughly 10,000 as of 2011. It is reasonable to assume that all such permanent visa grants were made to New Zealand nationals who arrived after the 2001 changes, as there is no reason for a New Zealand national with ‘protected’ status to make such an application. Even assuming that all 10,000 grants were made to New Zealand-born (which is highly unlikely), then this still leaves at least 150,000 New Zealand-born residents (or 34% of New Zealand-born in Australia) who arrived post-2001 and who do not hold a permanent visa – which makes them entitled to reside indefinitely, but nonetheless, ineligible for citizenship.

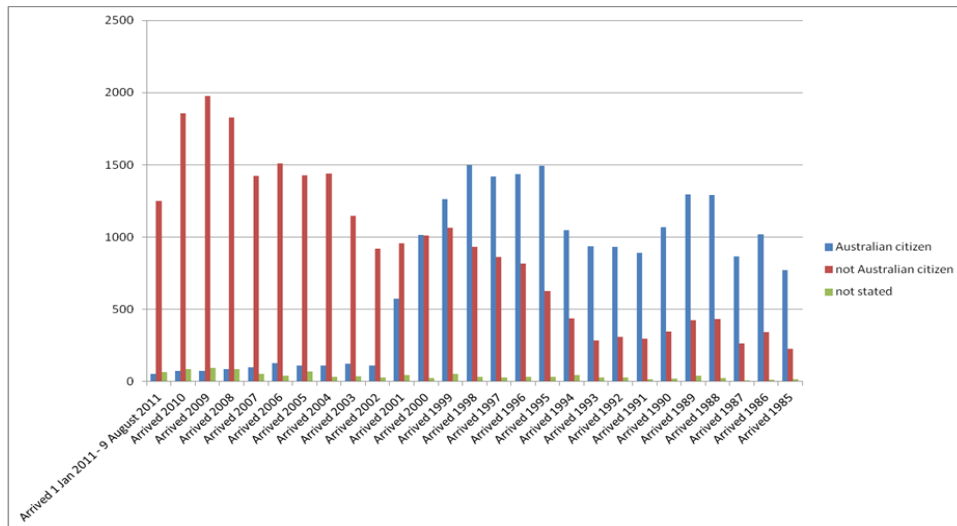
In order to ascertain whether indirect discrimination based on national origin is in play, we must now compare the situation of New Zealand-born residents with those in similar circumstances who are born elsewhere. The only such group in similar circumstances (namely, with the right to remain indefinitely but who are permanently ineligible for citizenship) are those non-New Zealand-born who have entered Australia as New Zealand citizens.

DIAC reports that, as at 31 March 2012, there were 627,000 New Zealand citizens present in Australia<sup>3</sup>. As approximately 95% of the population (or around 20 million people) are either citizens or permanent residents, then - even if it assumed that every New Zealand citizen in Australia was not born in New Zealand - such people would represent no more than 3.1% of the non-New Zealand-born population of Australia. In other words, a significantly higher proportion of permanently-resident New Zealand-born (>34%) are excluded from access to Australian citizenship relative to those born in other countries (<3.1%).

---

<sup>3</sup> See p.3, Temporary entrants and New Zealand citizens in Australia as at 31 March 2012, DIAC

This striking pattern of curtailment for New Zealand-born who have arrived post-2001 is similarly evident for people of Samoan, Cook Islands, Niue, and Tokelau national origin. This is to be expected, as these people commonly use New Zealand citizenship as the means to enter Australia:



**Population of Samoan, Cook Islands, Niue, and Tokelau born by year of arrival and Australian citizenship status<sup>4</sup>**

As can be clearly seen, people of New Zealand and Pacific Island origin are no longer becoming Australian citizens. This is hardly a surprising outcome of the 2001 changes to citizenship law. Restrictions to social security are based upon virtually identical conditions to those used to restrict access to citizenship. Therefore, the above graphs also provide an accurate depiction of ineligibility for social security amongst the New Zealand and Pacific Islands born.

It is important to note at this point that Article 1(1) of the *International Convention on the Elimination of all forms of Racial Discrimination* (CERD) defines the term “racial discrimination” to mean:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life

It is clear from the above graphs that the 2001 restrictions placed upon New Zealand citizens has had the unambiguous effect of restricting access to citizenship and social security for Australian residents of New Zealand and Pacific Island national origin to a far greater extent than for those born elsewhere.

The CERD Committee clarified its position on indirect discrimination resulting from nationality and immigration status discrimination in its 2009 concluding observations on China:

27. The Committee expresses its concern about the definition of racial discrimination given in the Hong Kong SAR Race Discrimination Ordinance, which is not completely consistent with article 1 of the Convention as it does not clearly define indirect discrimination with regard to language, and it does not include immigration status and nationality among the prohibited grounds of discrimination. (art. 1 (1))

<sup>4</sup> Data supplied by Paul Hamer of Victoria University, Wellington (source: ABS Census 2011).

The Committee recommends that indirect discrimination with regard to language, immigration status and nationality be included among the prohibited grounds of discrimination in the Race Discrimination Ordinance. In this regard it recalls its General Recommendation No. 30.

Nationality and immigration status are not included among the prohibited grounds of discrimination in Australia's *Racial Discrimination Act 1975* concerning the right to equality before the law (see s. 10). This is in stark contrast to New Zealand, UK, and Australian state laws - which generally prohibit nationality discrimination to varying degrees. It is this very legal loophole that facilitated the introduction of the 2001 changes for New Zealand nationals. Of course, the very existence of this loophole puts Australia in breach of its obligations under the CERD.

It is important to note that New Zealand citizens who are non-protected SCV holders are not only deprived of access to citizenship and social security, but are also now denied a raft of other federal and state government services as a result – including disability services and medical aids (including wheelchairs), social and emergency housing, and student loans, scholarships and concessional travel, to name but a few. Last, but by no means least, our children no longer automatically acquire Australian citizenship by birth. The inequality experienced by New Zealanders in Australia is therefore far more systemic and widespread than is revealed in the Discussion Draft.

In particular, inequitable access to higher education is creating a cycle of intergenerational poverty amongst New Zealanders. This has become particularly noticeable amongst those of Pacific Island origins – as noted by Dr. Kearney of Griffith University in her paper *“Unlucky in a lucky country”*:

Government complacency now is deferring the social and economic costs of university exclusion for this group and the wider community. A response mindful of the national and personal benefits of social inclusion is urgently needed. Certainly, there are economic reasons for restoring HECS-HELP eligibility to our Pacific Island heritage residents from New Zealand, but more important are the strong moral grounds that should compel this restorative action. Entitlement to higher education must not be reduced to a matter of luck.<sup>5</sup>

It is little surprise therefore to hear of spiralling youth crime amongst Pacific Islanders given that Australian law effectively denies them the education required for meaningful employment, and then denies them social assistance for being unemployed.

For example, in Queensland it is reported as common practice for youth shelters to turn away homeless children who are non-protected New Zealanders on the ground that they are ineligible for a benefit. Instead, these homeless children are provided with a tent, but given no safe place to pitch it<sup>6</sup>.

---

<sup>5</sup> See p. 133, Journal of Social Inclusion 2012 <http://www104.griffith.edu.au/index.php/inclusion/>

<sup>6</sup> Source: Vicky Va'a, Centre Co-ordinator, Nerang Neighbourhood Centre

## The Principle of Equal Treatment

The Discussion Draft raises the notion of establishing a framework of principles, including the principle of equal treatment :

*“Equal Treatment — subject to the relevant waiting periods or other initial conditions, individuals should have the same rights and obligations as citizens or permanent residents in the host country.”<sup>7</sup>*

Of course, a legally-binding framework of principles is already in place - namely, the numerous international human rights treaties that have been ratified by both Australia and New Zealand.

The right to equality before the law is already enshrined in Article 26 of *the International Covenant on Civil and Political Rights* (ICCPR):

### Article 26

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 opinion, national or social origin, property, birth or other status.

The ICCPR has been ratified by Australia and New Zealand, and is therefore legally binding. In addition, both Australia and New Zealand have made declarations under Article 41, which enables the ICCPR Human Rights Committee to hear claims by one State Party that another State Party is not fulfilling its obligations under the present Covenant.

The jurisprudence of the ICCPR Human Rights Committee reveals that Article 26 prohibits discrimination based upon nationality/citizenship save for the political rights in Article 25 that can be reserved only for citizens (see, for example, *Gueye v. France* (196/1985), ICCPR, A/44/40 (3 April 1989) at para. 9.4).

Additionally, the right of *everyone* to social security is enshrined in Article 9 of the International Covenant on Civil and Political rights:

### Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

In *General Comment 19 (2009) - The right to Social Security* - the ICESCR Committee clarified the obligations of signatories to this Covenant (which includes Australia and New Zealand) concerning the right to social security for resident non-nationals:

#### 6. Non-nationals (including migrant workers, refugees, asylum-seekers and stateless persons)

36. Article 2, paragraph 2, prohibits discrimination on grounds of nationality and the Committee notes that the Covenant contains no express jurisdictional limitation. Where non-nationals, including migrant workers, have

---

<sup>7</sup> See p. 138: Australian and New Zealand Productivity Commissions 2012, *Strengthening Trans-Tasman Economic Relations*, Discussion Draft, September.

contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country. A migrant worker's entitlement should also not be affected by a change in workplace.

37. Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable. All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.

38. Refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals and groups, should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards.

The ICESCR Committee's position is supported by a 2004 report prepared for the South African Treasury – which concluded that lawfully-resident non-citizens were entitled to equality before the law with citizens concerning the right to social security regardless of whether or not they were residing on a temporary or permanent basis:

The right of lawfully residing immigrants to social security does not infer[sic] that separate entitlements to benefit have to be created for this group. It simply means that lawful residents cannot be treated less favorably than national citizens who are otherwise in comparable circumstances. This is the consequence of applying the non-discrimination principle.<sup>8</sup>

The right to equal access to higher education is similarly protected in ICESCR Article 13:

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education

The Convention on the Rights of the child contains the following binding obligations:

- “recognize for every child the right to benefit from social security, including social insurance” (Article 26)
- “make higher education accessible to all on the basis of capacity by every appropriate means” (Article 28).
- assistance to a disabled child “shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child”.
- “A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State” (Article 20).

These rights are to be ensured “to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”.

---

<sup>8</sup> See s. 12, p. 70, Conclusion – Findings, Comparative review of the position of non-citizen migrants in social security M. Olivier; G.Vonk (eds.); report for the South African Treasury 2004

Australia appears to be breaching all of the abovementioned articles of international human rights law concerning the unequal treatment of New Zealanders in Australia.

### *Is the inequality reasonable and objective?*

The ICCPR Human Rights Committee has stated that a difference in treatment does not constitute unlawful 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”<sup>9</sup>.

Similarly, the *Victorian Charter of Human Rights and Responsibilities Act* (which is based upon the ICCPR) states that human rights can only be subject to “reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom”. The New Zealand Human Rights Act contains a similar requirement. (Australia has no human rights act despite ratifying the same international human rights treaties as New Zealand)

The systemic denial of services to disabled New Zealanders, and the effective denial of a meaningful future to many of our children hardly appear to meet any thresholds of human dignity and equality that I am familiar with. However, the Discussion Draft goes further than merely raise questions as to whether Australia’s concerns about so-called ‘backdoor immigration’ constitutes a reasonable and justifiable limitation of the right to equality before the law – it explicitly states that the right to equality is dependent upon New Zealand ceding (to some degree) control of its migration and citizenship programs to Australia :

*“equal treatment could only be implemented if there were effectively full alignment of the two countries’ migration and citizenship programs with respect to nationals from third countries”<sup>10</sup>*

Of course, it was the very unwillingness of New Zealand to cede such sovereignty that sparked Australia to implement the 2001 laws that removed equal treatment from New Zealanders:

*“Rather than contemplating greater harmonisation of immigration policy to meet Australian concerns, we have opted to maintain the sovereignty of our own immigration programme. Control over immigration goes to the heart of what sort of country we want here”*  
*Phil Goff<sup>11</sup>*

The Discussion Draft qualifies this justification as follows

This is because migration is the key point of entry to the labour markets for both countries. Seeking to maintain an integrated labour market between two countries with a growing gap in incomes per person will inevitably push the focus of attention in this direction. Lloyd (sub. 5) observed:

Differences in immigration criteria and assessment methods mean that there is a possibility of “people deflection” analogous to trade deflection. This occurs if potential immigrants wanting to emigrate to one Tasman country are prevented to do so by that country’s assessments but are able to enter the other Tasman country and after acquiring residence and citizenship to then move to their country of

---

<sup>9</sup> See ICCPR General Comment No. 18: Non-discrimination at [13]

<sup>10</sup> Ibid

<sup>11</sup> The Trans-Tasman Relationship: A New Zealand Perspective by the Hon Phil Goff, New Zealand Minister of Foreign Affairs and Trade, 2001, p5.

first choice. Because of its higher per capita incomes and larger established immigrant population, this means in practice emigrants going first to New Zealand then to Australia.

The primary question at hand is therefore whether such a rationale can be considered reasonable and objective. Obviously, the above rationale provides a reason for the inequality; but does it provide a reason in light of the objectives of human rights law – such as freedom from discrimination, the rights to education, social security and care for the disabled, for example?

Before I address this important question, I would like to entertain the hypothetical situation in which the shoe is on the other foot. What if New Zealand's per capita income were to exceed Australia's in the future? What if the so-called 'people deflection' of third country nationals were found to be occurring in the other direction? For example, it was recently reported that the co-founder of Apple, Steve Wozniak, is seeking Australian citizenship - but only so he can live in New Zealand.<sup>12</sup>

It is an interesting question indeed as to whether Australia would regard it as reasonable for human rights to be stripped from its own nationals should New Zealand become concerned with aspects of Australia's own migration and citizenship programs.

It is also an interesting question as to which human rights are reasonable to rescind in such circumstances. Why stop with just citizenship, social security, and higher education? Why not also remove the right to equal wages for example? If people were forced to work for the same wages as they would receive in their own country then surely this would deter "people deflection".

### **A Legitimate Objective?**

On the 8<sup>th</sup> of March 2001, the then leader of the Opposition in the Senate, Senator Chris Evans, announced:

*"This bill, the Family and Community Services Legislation Amendment (New Zealand Citizens) Bill 2001, gives effect to the new bilateral social security arrangements between Australia and New Zealand announced in a joint prime ministerial communique on 26 February this year."<sup>13</sup>*

The Discussion Draft similarly claims that the current unequal treatment of New Zealand citizens was agreed to by New Zealand:

Over time and incrementally, in response to various developments and with the agreement of New Zealand, the Australian Government has limited the access of various cohorts of New Zealand migrants to social security and Australian permanent residency and citizenship.<sup>14</sup>

In terms of the above statement, a representative of the Australian Productivity Commission later claimed in correspondence with me on the subject:

*"evidence for the then New Zealand Government's agreement to the Australian Government's 2001 decision is apparent in former Prime Minister Clark's discussion at the joint press conference with Prime Minister Howard"<sup>15</sup>*

---

<sup>12</sup> See Apple founder eyes life in NZ: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10837295](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10837295)

<sup>13</sup> Senator Evans, Senate Hansard, p22800

<sup>14</sup> See p. 134: Australian and New Zealand Productivity Commissions 2012, *Strengthening Trans-Tasman Economic Relations*, Discussion Draft, September.



Such a conclusion seems difficult to substantiate given the following unambiguous statement given by Prime Minister Clark in this joint press conference:

*“It is up to Australia to set the rules for eligibility for social security for New Zealanders who choose to live there”<sup>16</sup>*

The mere recognition of a sovereign nation’s right to make its own laws does not constitute a bilateral agreement. It is perhaps more accurate to describe New Zealand’s position at the time as one of acquiescence under duress, rather than that of agreement.

The Australian Government included an attachment to the joint communiqué entitled “New Australia/New Zealand Social Security Agreement and Associated Australian National Measures”. This attachment included the following text:

***Access to other social security payments in Australia under new permanent residence and citizenship arrangements***

Australia will continue to welcome New Zealanders who wish to move to Australia, whether to live and work on a temporary or permanent basis. In parallel with the new agreement, Australia is announcing on a national basis that from today access in Australia to social security payments other than those covered by the old and new bilateral agreements will in future be available to any New Zealand citizen who can meet normal migration criteria and become an Australian permanent resident.

In reality, the Bill did not give effect to the 2002 Social Security Treaty announced in the joint Prime Ministerial Communiqué, but to the ‘associated Australian national measures’ announced by the Australian Government in an attachment appended to this joint communiqué.

The 2002 Social Security Treaty is a cost-sharing agreement in connection with aged and disability benefits. It was signed in April 2001 and entered into force on the 1<sup>st</sup> of July 2002.

The unambiguous legislative scope of the 2002 Treaty is defined in art. 2(1)(a):

Except as provided under paragraph 2, this Agreement shall apply to the following laws, as amended at the date of signature of this Agreement, and to any legislation that subsequently amends, supplements, consolidates or replaces them:

- a. in relation to Australia: the Acts forming the social security law in so far as those Acts provide for, apply to or affect the following benefits:
  - i. age pension;
  - ii. disability support pension;
  - iii. carer payment in respect of the partner of a person who is in receipt of a disability support pension

It is clear from the wording of Article 2 that the 2002 Social Security Treaty does not cover working-age benefits such as sickness or unemployment benefit, nor does it scope citizenship, higher education, or immigration law.

The then Foreign Minister, Phil Goff, puts the issue beyond any doubt:

*To be honest, I do have my doubts about the fairness of the situation for future taxpaying Kiwi migrants who lack Permanent Residence in Australia. If they fall on hard times assistance will be limited to one-off temporary access to the unemployment benefit if they have been here 10 years. The equity of this approach is, of course, an issue*

---

<sup>15</sup> Source: Email from the Australian Productivity Commission dated 21 September 2012

<sup>16</sup> Excerpt from the joint Prime Ministerial press conference, Wellington NZ, 26 February 2001.

*that falls outside our bilateral Agreement. But it is something Australia may find it has to grapple with down the track.*<sup>17</sup>

Thus, the New Zealand Government has made it clear from the outset that the 2001 changes to social security and citizenship law are entirely unilateral. Although the Australian Government confirmed on the 26<sup>th</sup> of February 2001 that the changes were made on a national basis in parallel with the new agreement, it is only the Australian Government that continues to purport otherwise.

In *van Oord vs The Netherlands*<sup>18</sup>, the Human Rights Committee decided that an international agreement could provide reasonable justification for a difference in treatment based on nationality. However, the mere *pretence* of an agreement is highly unlikely to be similarly accepted – particularly where there is such overwhelming evidence to the contrary.

As there is no evidence of any bilateral agreement concerning the 2001 social security and citizenship law changes, then the unequal treatment of New Zealand nationals relative to Australian nationals implemented by these changes cannot be justified as being reasonable and objective in terms of merely implementing an international agreement.

The Explanatory Memorandum accompanying the *Family and Community Services Legislation Amendment (New Zealand Citizens) Bill 2001* justified the purported fairness of the Bill as follows:

It will place New Zealand citizens taking up residence in Australia on the same basis as other migrants by restricting access to social security payments unless the person meets normal migration selection criteria or the payment is covered by a social security international agreement.

That is, the Australian Government purported that the changes are legitimate as they now make New Zealanders more equal with an already deprived minority of temporary residents. This is in stark contrast to the Discussion Draft's notion of equal treatment with the majority of the population after a waiting period.

The Discussion Draft's notion of equality is aligned with that of the ICESCR Committee in *General Comment 19 - The Right to Social Security*, which in essence states that all non-nationals are entitled to non-contributory social security, and that waiting periods must be reasonable and proportionate (see para. 37). Violations of these principles constitute discrimination based upon nationality (see para. 36).

In light of the abovementioned excerpt from ICESCR *General Comment 19*, The Australian Government's justification of equal deprivation of rights can be seen as nothing short of farcical, as making one minority equal to another group who is already being discriminated against simply makes both minorities victims of the same violation.

The Trans-Tasman Travel Arrangement allows New Zealanders to enter and remain in Australia without the need to first obtain a permanent visa. Therefore, in the case of New Zealanders, Australia is using migration selection criteria for a non-migration purpose – namely, as a direct condition of social security.

---

<sup>17</sup> The Trans-Tasman Relationship: A New Zealand Perspective by the Hon Phil Goff, New Zealand Minister of Foreign Affairs and Trade, 2001, p5.

<sup>18</sup> See CCPR/C/60/D/658/1995

In the case of *Martinez Sala v Freistaat Bayern*<sup>19</sup> the European Court of Justice found that Germany had similarly used migration selection criteria to effect discrimination between citizens and non-citizens. Ms. Sala had been refused a social security benefit on the ground that she was not a German national and did not hold the required residence permit. However, as a result of an international treaty, Ms. Sala was not required to hold a residence permit in order to be lawfully resident in Germany because she was a Spanish national. The Court determined that the requirement for Ms. Sala to produce a permanent residence permit was therefore not a legitimate residence test, but was instead a direct condition of the benefit in question that German nationals were not required to meet. Consequently, the Court decided that this denial of social security represented direct discrimination based on nationality because, in Ms. Sala's case, Germany had illegitimately used migration criteria as a condition of social security:

For the purposes of recognition of the right of residence, a residence permit can only have declaratory and probative force<sup>20</sup>. However, the case-file shows that, for the purposes of the grant of the benefit in question, possession of a residence permit is constitutive of the right to the benefit.

Consequently, for a Member State to require a national of another Member State who wishes to receive a benefit such as the allowance in question to produce a document which is constitutive of the right to the benefit and which is issued by its own authorities, when its own nationals are not required to produce any document of that kind, amounts to unequal treatment.

Since the unequal treatment in question thus comes within the scope of the Treaty, it cannot be considered to be justified: it is discrimination directly based on the appellant's nationality and, in any event, nothing to justify such unequal treatment has been put before the Court.

For similar reasons, the requirement for New Zealanders to produce a permanent visa in order to receive a benefit can also be seen as direct discrimination based upon nationality, as it is not a legitimate residence test and Australians are not required to meet the same or a similar condition.

In light of the above, the purported objective of equality can therefore be seen to be entirely illegitimate.

This leaves us with only those objectives raised in the Discussion Draft itself to consider. Namely, the prevention/mitigation of 'back door' migration and government transfer shopping.

### **Government Transfer Shopping**

In principle, it can be seen as legitimate for a government to seek to attract migrants who will contribute towards the economy rather than those who will be a burden on the state. However, any limitations to the human rights of residents in order to achieve this aim must be:

1. justifiable (i.e.: evidence-based)
2. reasonable and proportionate in light of the aim (e.g.: reasonable waiting periods),
3. non-discriminatory (e.g.: applied equally to citizens and non-citizens)

It is the principle of non-discrimination between citizens and non-citizens that is the key to good policy making in this area; as governments are more likely to implement reasonable temporary

---

<sup>19</sup> *Martinez Sala v Freistaat Bayern*, ECJ Case C-85/96, 12 May 1998

<sup>20</sup> see, to this effect, *Case 48/75 Royer* [1976] ECR 497, paragraph 50

restrictions if they must also be applied to their own citizens. A policy that deters non-citizens from migrating in order to become a burden on the state, whilst simultaneously encouraging expatriate citizens to do so, can be seen as inherently discriminatory.

For example, a New Zealand citizen who has lived, worked, and paid taxes for many years in Australia is permanently ineligible for social security, scholarships, and higher education loans - whilst an Australian citizen by descent who has never lived in Australia will have immediate access to these same services upon arrival.

In juxtaposition, the UK generally applies waiting periods for such government services to both citizens and non-citizens alike. New Zealand similarly applies the two year residency condition for social security to its own citizens.

The lack of any legally enforceable protections against such discrimination has caused Australia's treatment of New Zealanders to become hopelessly unjustifiable and discriminatory. A two year social security waiting period was applied to New Zealanders in 2000, less than a year before the 2001 changes were introduced – hardly ample time to gather evidence that restrictions needed to be tightened even further. In fact, I have never seen any evidence produced to show that government transfer shopping is actually a significant issue at all. To the contrary, the significant increase in migration from New Zealand since rights and entitlements have been stripped suggests that social security was not a significant pull factor.

### **'Back door' Migration**

As with government transfer shopping, any limitation of human rights in order to deter backdoor immigration must be justifiable, reasonable and proportionate, and non-discriminatory.

Fundamentally, by entering into the Trans-Tasman Travel Arrangement (TTTA), both countries have ceded some degree of control over their migration programs. Citizens of both countries can use their nationality to bypass normal migration criteria such as skills, age, and even health. Both countries have relatively high migrant populations.

Restricting entry based upon the national origin of an Australian or New Zealand citizen would constitute direct racial discrimination. The removal of human rights in order to deter people who are of third country origin entering as New Zealand citizens can similarly be seen as inherently racist, as it is a distinction based directly upon race (national origin).

In other words, the very aim of attempting to deter New Zealand citizens who are not born in New Zealand is illegitimate in terms of the objectives of international human rights law – regardless of how it is to be achieved. Unlike a preference for those who are less likely to become a burden on the state, a preference based upon race is fundamentally prohibited under international law. Such a blanket prohibition is known as *Jus Cogens* (Higher Law) - a peremptory principle from which no derogation is permitted.

Therefore, the Discussion Draft's analogy between "people deflection" and "trade deflection" is fundamentally flawed. It is one thing to treat goods differently based upon their national origin, but it is unlawful race discrimination to do so to human beings. Goods do not have human rights, but people do.

Australia attempted to side-step the fundamental prohibition on racial discrimination by directly discriminating against New Zealand nationals instead – amidst a smokescreen that it was all agreed to by New Zealand and that it implemented equal treatment (neither of which are true). Using nationality as a means to directly discriminate instead of national origin may have enabled Australia to side-step the provisions of its *Racial Discrimination Act 1975*, but this does not absolve it of its responsibilities under the *Convention on the Elimination of all forms of Racial Discrimination (CERD)*, nor in terms of the prohibition of nationality discrimination under numerous other international treaties ratified by Australia.

There is a direct causal connection between the prevention of backdoor immigration and a restriction based on race, as it directly pertains to restricting people not born in New Zealand from migrating under the TTTA. Such a restriction based directly upon non-New Zealand national origin would appear to constitute direct racial discrimination. In addition, the 2001 changes have had the effect of disproportionately restricting access to economic and political rights to those born in New Zealand and the Pacific Islands relative to Australian residents born elsewhere, and this can be construed as indirect racial discrimination.

Furthermore, and as alluded to in the Discussion Draft, it appears that there are specific concerns with Pacific Islanders who use New Zealand citizenship to enter Australia. It was suggested at the time that social security was seen by the Australians as a pull factor for these people, and that the 2001 changes were designed as a Pacific Islander 'migration filter':

... former Immigration Minister Aussie Malcolm, a former Australian, described the planned changes to the status of New Zealanders in Australia as a classic example of xenophobia and racism.

"Either we have a common labour market or we don't," he said. "You can't separate out the people working and paying tax from the ones looking for a benefit."

The Australian Government had been whittling away at the trans-tasman travel agreements since the 1970s and the changes were clearly linked to last week's comments from Australian Immigration Minister Philip Ruddock about "backdoor immigration."

This related to people from third countries who used New Zealand citizenship as a stepping-stone to Australia.

Mr Malcolm said Australia did not mind white New Zealanders settling there, but did not want Pacific Islanders or Maori, who were less likely to qualify for the new residency requirements.

(excerpts from the New Zealand Herald Monday December 11, 2000- PM admits tradeoff on Aussie welfare )

JOURNALIST:

*Mr Howard how do you respond to suggestions that the Australian policy could be seen as inherently racist, and that the people that it would look at stopping coming in, say Pacific Island migrants coming to New Zealand and then going on to Australia which [inaudible]? Some commentators have said that is maybe a racist policy?*

PRIME MINISTER HOWARD:

*Well that's preposterous, even offensive.*

(excerpt from the Joint Prime Ministerial press conference on the 26<sup>th</sup> of February 2001)

The claim of racial discrimination does not appear to be so preposterous – with even the Australian Bureau of Statistics now stating as fact that backdoor immigration motivated the 2001 changes:

One of the influencing factors in the development of the 2001 bilateral social security arrangement (see 'Australian and New Zealand Travel Arrangements') was an increasing proportion of NZ citizens who were migrating to Australia being of third-country origin (i.e. people who had initially migrated to NZ, but then migrated to Australia after gaining NZ citizenship). These 'third-country' movements were perceived as a possible way to bypass Australian immigration requirements, which these people may not have met without their New Zealand citizenship.<sup>21</sup>

It should be noted that the removal of social security rights does not prevent people using 'back door migration' in order to access higher wages. Therefore, the changes do not appear to be designed to target skilled 'back door' migrants at all, but rather those who would not meet skilled migration requirements. On page 139, the Discussion Draft emphasises that certain Pacific Islanders are not subject to New Zealand's skilled migration requirements (as are those Pacific Islanders who acquire New Zealand citizenship by birth):

While both countries' arrangements emphasise skilled migration, there remain distinct differences between their immigration policies. In particular, New Zealand has a Samoan quota and the Pacific Access Category (where Samoan citizens and people from Kiribati, Tuvalu and Tonga are invited to apply for residence under these schemes).

The Discussion Draft itself therefore appears to be suggesting that it is indeed the backdoor migration of Pacific Islanders that is the reason the Howard Government made scapegoats out of New Zealand citizens in Australia.

---

<sup>21</sup> see 'Australian Social Trends September 2010: New Zealanders in Australia'