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**.

National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018 [F2018L00633]

National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018 [F2018L00634]

Purpose	[F2018L00633]: prescribes the requirements for NDIS providers to implement and maintain incident management systems to record reportable incidents, and for inquiries by the NDIS Quality and Safeguards Commissioner in relation to reportable incidents. [F2018L00634]: prescribes the requirements for the resolution of complaints relating to NDIS providers, complaints to and inquiries by the NDIS Quality and Safeguards Commissioner
Portfolio	Social Services
Authorising legislation	*National Disability Insurance Scheme Act 2013*
Last day to disallow	15 sitting days after tabling (tabled Senate 18 June 2018)
Rights	Privacy; fair hearing; rights of persons with disabilities (see **Appendix 2**)
Previous report	7 of 2018
Status	Concluded examination

Background

2.3 The committee first reported on the rules in its *Report 7 of 2018*, and requested a response from the Minister for Social Services by 29 August 2018.[1]

2.4 The minister's response to the committee's inquiries was received on 28 August 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Disclosure of information relating to complaints

2.5 The National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018 (the Complaints Management Rules) set out the rules governing the resolution of complaints about NDIS providers that have been made to the Commissioner.

2.6 Section 25 of the Complaints Management Rules provides that the Commissioner may give information, including about any action taken in relation to an issue raised in a complaint, to any person or body that the Commissioner considers has a sufficient interest in the matter.

Compatibility of the measure with the right to privacy

2.7 Article 22 of the Convention on the Rights of Persons with Disabilities (CRPD) guarantees that no person with disabilities shall be subjected to arbitrary or unlawful interference with their privacy.[2] The right to privacy includes respect for private and confidential information, particularly the storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.

2.8 The statement of compatibility addresses the right to privacy in relation to a different aspect of the Complaints Management Rules,[3] but does not specifically address whether section 25 engages and limits the right to privacy. However, as stated in the initial human rights analysis, it would appear that the provision of 'information' could include personal information, including information about complainants or persons the subject of a complaint. If this is the case, then the provision would engage and limit the right to privacy.

2.9 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

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1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018* (14 August 2018) pp. 23-31.

2 See also Article 17 of the International Covenant on Civil and Political Rights.

3 See Statement of compatibility (SOC) to the Complaints Management Rules, pp. 33-34.

2.10 The statement of compatibility describes the overall objective of the Complaints Management Rules as being to 'ensure providers are responsive to the needs of people with disability and focussed on the timely resolution of issues and that, when things go wrong, something is done about it'.[4] While this is capable of being a legitimate objective for the purposes of international human rights law, no information is provided as to the importance of this objective in the context of the particular measure. The initial analysis stated that further information as to the purpose of the particular measure (that is, the purpose of allowing the Commissioner to give information to 'any person or body that the Commissioner considers has a sufficient interest in the matter') would assist in determining whether the measure pursues a legitimate objective.

2.11 As to proportionality, the statement of compatibility explains that any personal information collected by the Commissioner in the performance of their functions is 'protected Commission information' under the *National Disability Insurance Scheme Act 2013* (the NDIS Act). It states that therefore:

> [protected Commission information] will be handled in accordance with the limitations placed on the use and disclosure of protected Commission information under the Act, the *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018,* the *Privacy Act 1988,* and any other applicable Commonwealth, State or Territory legislation. Information will only be dealt with where reasonably necessary for the fulfilment of the Commissioner's lawful and legitimate functions.[5]

2.12 However, this general description of the safeguards does not assist in determining whether the measure is a proportionate limitation on the right to privacy. In order to be proportionate, limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure, and be accompanied by adequate safeguards to protect the right to privacy. Further information as to the specific safeguards in the NDIS Act, the National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018 and the *Privacy Act 1988* that would protect personal and confidential information which may disclosed pursuant to section 25 of the Complaints Management Rules would assist in determining whether the measure is proportionate.

2.13 It was also not clear from the information provided what is meant by a person having a 'sufficient interest' in the information. The explanatory statement states that a person may have 'sufficient interest' in the matter 'if the Commissioner is satisfied that, in relation to the purpose of disclosure, the proposed recipient has a

4 SOC, p. 32.

5 SOC, p. 34.

genuine and legitimate interest in the information'.[6] The explanatory statement further states:

> Other persons or bodies that may have a sufficient interest in the matter may include:
>
> - with the consent of the person with disability affected by an issue raised in a complaint, independent advocates or representatives;
> - with the consent of a person with disability affected by an issue raised in a complaint, their family members, carers or other significant people.
>
> In providing information, the Commissioner must comply with his or her obligations under the *Privacy Act 1988,* and should consider whether providing the information is appropriate or necessary for the proper handling of the complaint.[7]

2.14 However, beyond the reference to these safeguards in the explanatory statement, it was not clear from the information provided whether these safeguards and limitations on the meaning of 'sufficient interest' (such as the requirement to provide information with the consent of the person with disability, or the requirement that the Commissioner should consider whether providing information is appropriate or necessary for the proper handling of the complaint) are required as matters of law, or whether they are matters of discretion for the Commissioner.

2.15 The committee therefore sought the advice of the minister as to:

- whether the measure is aimed at pursuing a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including information as to the specific safeguards in the NDIS Act, the National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018 and the *Privacy Act 1988* that protect personal and confidential information when the Commissioner exercises their power under section 25 of the rules).

Minister's response

2.16 The minister's response states that the purpose of section 25 is, in effect, to facilitate the closure of a complaint. The response emphasises that section 25 is situated within the subdivision of the Complaints Management Rules that relate to the outcome of the resolution process. The response repeats the information

6 Explanatory Statement (ES) to the Complaints Management Rules, p. 25.

7 ES to the Complaints Management Rules, p. 25.

provided in the explanatory statement as to the requirement for the commissioner to comply with their obligations under the Privacy Act and also reiterates the information about examples of the types of persons who may have a sufficient interest in the matter, including:

- persons or bodies who have the consent of a person with disability affected by an issue raised in a complaint, independent advocates or representatives;
- persons or bodies who have the consent of a person with disability affected by an issue raised in a complaint, their family members, carers or other significant people.

2.17 While not identified in the minister's response, the requirement that the person's consent be sought before disclosing information to the persons identified in the minister's response is contained in section 67E(1)(b)(ii) of the NDIS Act, which allows the Commissioner to disclose information to a person who has the express or implied consent of the person to whom the information relates.

2.18 The minister's response does not respond to the committee's inquiries as to whether the measure pursues a legitimate objective or is rationally connected to the objective. Nevertheless, the context of the measure means that sharing information about complaints to those with a sufficient interest may be capable of pursuing a legitimate objective and be rationally connected to that objective. It would have been useful if this had been explicitly addressed by the minister.

2.19 As to proportionality, the minister explains that the commissioner is required under section 19 of the Complaints Rules to ensure that a request by a complainant for confidentiality is complied with unless the Commissioner considers that doing so will, or is likely to, place the safety, health or well-being of the complainant, a person with disability affected by an issue raised in a complaint or any other person. The response also explains that, pursuant to section 19 of the complaints rules, before deciding not to keep information confidential, the Commissioner must take all reasonable steps to notify the complainant. This indicates that, where a complainant requests confidentiality, that request must be respected subject to the exceptions identified in the rules.

2.20 However, the information provided by the minister does not address the committee's inquiries as to the specific safeguards in the NDIS Act and the National Disability Insurance Scheme (Protection and Disclosure of Information - Commissioner) Rules 2018 (Commissioner Protection and Disclosure Rules) that protect personal and confidential information which may be disclosed pursuant to section 25. Instead, the minister's response repeats the information in the explanatory statement that in general terms section 25 is subject to the protections in the NDIS Act and the Commissioner Protection and Disclosure Rules.

2.21 In the absence of specific guidance from the minister as to what safeguards are provided in the NDIS Act, it appears that the minister may be referring to section

67E(1)(b) of the NDIS Act. This section relevantly provides when the commissioner may disclose information:

> (i) to the Secretary of a Department of State of the Commonwealth, or to the head of an authority of the Commonwealth, for the purposes of that Department or authority; or
>
> (ii) to a person who has the express or implied consent of the person to whom the information relates to collect it; or
>
> (iii) to a Department of State of a State or Territory, or to an authority of a State or Territory, that has responsibility for matters relating to people with disability, including the provision of supports or services to people with disability; or
>
> (iv) to the chief executive (however described) of a Department of State of a State or Territory, or to the head of an authority of a State or Territory, for the purposes of that Department or authority.

2.22 The Commissioner Protection and Disclosure Rules outline further safeguards when disclosing information under section 67E(1)(b)(i), (iii) and (iv).[8] In broad terms, those rules require that the Commissioner, so far as reasonably practicable, de-identify any personal information,[9] consult with the affected individual,[10] notify the recipient that they are receiving NDIS information (including limitations on how they can use that information),[11] and maintain records of that disclosure. The NDIS Act also includes a number of offence provisions for unauthorised disclosure of protected commission information.[12]

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8 These safeguards do not apply where the person has given express or implied consent to the disclosure (that is, they do not apply to information disclosed pursuant to section 67E(1)(b)(ii): see section 10(1), 11(1), 12(1) and 13(1) of the Commissioner Protection and Disclosure Rules).

9 Section 10(1) of the Commissioner Protection and Disclosure Rules. This is subject to the exception that de-identification is not required if the Commissioner is satisfied that the disclosure is necessary to prevent or lessen a serious threat to an individual's life, health or safety; compliance would result in unreasonable delay or compliance would frustrate the purpose of disclosure: section 10(3). Personal information is also not required to be de-identified where the affected individual has consented to the proposed disclosure: section 10(2).

10 Section 11 of the Commissioner Protection and Disclosure Rules. 'Consultation' includes notifying any affected individual about disclosure, seeking the consent of the affected individual to the proposed disclosure and providing a reasonable opportunity for the affected individual to comment on the proposed disclosure: section 11(1). There are several exceptions to the consultation requirements, including those similar to the requirements in section 10(3). See section 11(5)-(7).

11 Section 12 of the Commissioner Protection and Disclosure Rules.

12 See sections 67B-67D of the NDIS Act.

2.23 To the extent that these safeguards in the NDIS Act and Commissioner Protection and Disclosure Rules apply, there would appear to be sufficient safeguards in place to ensure that the measure is compatible with the right to privacy. However, it would have been useful if more specific information had been provided in the statement of compatibility and the minister's response to assist the committee with its analysis.

Committee response

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

2.25 The preceding analysis indicates the measure may be compatible with the right to privacy.

2.26 The committee draws the minister's attention to its *Guidance Note 1* which sets out the committee's expectations in relation to drafting statements of compatibility.

Record keeping and incident and complaint management requirements

2.27 Section 10(2) of the Complaints Management Rules states that appropriate records of complaints received by the NDIS provider must be kept and include information about complaints, any action taken to resolve complaints, and the outcome of any action taken. Those records must be kept for 7 years from the day the record is made.[13] The complaints management system must also provide for the collection of statistical and other information relating to complaints made to the provider to review issues raised in complaints, identify and address systemic issues raised through the complaints management and resolution process, and report information relating to complaints to the Commissioner if requested to do so.[14]

2.28 Similarly, section 12 of the National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018 (Reportable Incidents Rules) sets out the documentation, record keeping and statistics requirements in relation to the incident management systems. An NDIS provider must provide specified information in the record of each incident that occurs, including a description of the incident, the names and contact details of the persons involved in the incident, the names and contact details of any witnesses to the incident, the name and contact details of the person making the record of the incident, and the details and outcomes of any investigations into the incident.[15] These records must also be kept for 7 years from

13 Section 10(3) of the Complaints Management Rules.

14 Section 10(4) of the Complaints Management Rules.

15 See section 12(2) and (3) of the Reportable Incidents Rules.

the day the record is made and the incident management system must also provide for the collection of statistical and other information relating to incidents.[16]

Compatibility of the measure with the right to privacy

2.29 As the provisions in the Complaints Management Rules and Reportable Incidents Rules relate to the storing, use and sharing of information (including personal information), the provisions engage and limit the right to privacy.

2.30 The statement of compatibility to the Complaints Management Rules discusses the right to privacy in general terms (discussed above), but does not specifically address the record keeping requirements in those rules. The statement of compatibility to the Reportable Incidents Rules does not acknowledge that the rules may engage and limit the right to privacy.

2.31 The explanatory statement to the Reportable Incidents Rules states that it is 'crucial that the incident management system is documented so that compliance with the system can be monitored and enforced, including by quality auditors and the Commissioner'.[17] Similarly, the explanatory statement to the Complaints Management Rules states that the documentation and record keeping requirement 'is fundamental to the proper functioning of a complaints management and resolution system as it ensures that persons with disability and their families and carers are aware of their rights and can advocate for their needs and safety where appropriate'.[18] The explanatory statement to each of the instruments explains that the collection of statistics and other information is for the purpose of identifying any systemic issues that may exist.[19] The initial analysis stated that each of these objectives appear to be legitimate objectives for the purposes of international human rights law, and the measures appear to be rationally connected to this objective.

2.32 As to proportionality, as noted above, limitations on the right to privacy must be accompanied by adequate safeguards. There is limited information in the explanatory statement or statement of compatibility as to the safeguards that apply to the information stored pursuant to the record keeping requirements, such as requirements for keeping records secure and confidential, or penalties for unauthorised disclosure.

2.33 Further, in relation to the collection of statistical and 'other information', the initial analysis noted that this appears to be very broad and, according to the explanatory statement to the Reportable Incidents Rules, would allow disclosure of

16 Section 12(4) and (5) of the Reportable Incidents Rules.

17 SOC to the Reportable Incident Rules, p. 10.

18 SOC to the Complaints Management Rules, p. 10.

19 SOC to the Complaints Management Rules, p. 11; SOC to the Reportable Incidents Rules, p. 12.

'who is involved in incidents (for example, whether particular workers and/or people with disability are involved in multiple incidents)'.[20] No information is provided in the explanatory statements or statements of compatibility as to the safeguards that would apply to protect the right to privacy of those persons whose information is disclosed pursuant to the statistical collection requirements.

2.34 The committee therefore sought the advice of the minister as to the proportionality of the limitation on the right to privacy. In particular, the committee sought information as to the safeguards that would apply to protect the right to privacy.

Minister's response

2.35 In response to the committee's inquiries, the minister's response reiterates the objectives of the record keeping requirements and explains that section 10(2) of the Complaints Management Rules and section 12 of the Reportable Incidents Rules are also designed to ensure that a registered NDIS provider complies with its obligation in relation to complaints and incident management and is accountable to people with disability in working to improve the quality and safety of services as a result of complaints and incidents. As noted in the initial analysis, these are likely to be legitimate objectives for the purposes of international human rights law.

2.36 In relation to safeguards, the minister's response provides the following information:

> In relation to safeguards, it is a requirement under paragraph 6(b) of the *National Disability Insurance Scheme (Code of Conduct) Rules 2018* that an NDIS provider respect of the privacy of people with disability. A contravention of the NDIS Code of Conduct can attract a penalty of up to 250 penalty units. An NDIS provider is also obliged to adhere to privacy laws and other applicable laws which protect the privacy and confidentiality of information.
>
> Any personal information which the Commissioner collects as part of the performance of his or her functions is 'protected Commission information' under the Act. As such, it will be handled in accordance with the limitations placed on the use and disclosure of protected Commission information under the Act, the *National Disability Insurance Scheme (Protection and Disclosure of Information - Commissioner) Rules 2018*, the *Privacy Act 1988*, and any other applicable Commonwealth, State or Territory legislation. Information will only be dealt with where reasonably necessary for the fulfilment of the Commissioner's lawful and legitimate functions.

2.37 This information, and in particular the information as to the penalties for disclosure in breach of the NDIS Code of Conduct, assists in determining the

20 ES to the Reportable Incidents Rules, p. 12.

proportionality of the measure. Having regard to the safeguards in the NDIS Act and the Commissioner Protection and Disclosure Rules discussed above as to the use and disclosure of protected commission information, on balance the measure is likely to be compatible with the right to privacy.

Committee response

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

2.39 The preceding analysis indicates the measure is likely to be compatible with the right to privacy.

Inquiry powers and procedural fairness requirements relating to complaints and incident management

2.40 Section 9 of the Complaints Management Rules provides that the complaints management and resolution system of a registered NDIS provider must ensure that people are afforded procedural fairness when a complaint is dealt with by a provider. Similarly, section 11 of the Reportable Incidents Rules provides that incident management systems of registered NDIS providers must require that people are afforded procedural fairness when an incident is dealt with by a provider. The Commissioner must have due regard to the rules of procedural fairness when taking action in relation to a reportable incident,[21] and must give due regard to procedural fairness when considering any complaints.[22] For each of these provisions, the Commissioner may make guidelines relating to procedural fairness.[23]

2.41 The Complaints Management Rules also give the Commissioner powers to authorise inquiries in relation to issues connected with complaints, a series of complaints or about support or services provided by NDIS providers.[24] The Reportable Incidents Rules allow for the Commissioner to authorise inquiries in relation to reportable incidents.[25]

Compatibility of the measure with the right to a fair hearing

2.42 Article 14(1) of the ICCPR requires that in the determination of a person's rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

21 Section 28 of the Reportable Incident Rules.

22 Section 30 of the Complaints Management Rules.

23 Section 9(2) of the Complaints Management Rules; Section 11(2) of the Reportable Incidents Rules; see also the note to section 28 of the Reportable Incidents Rules and section 30 of the Complaints Management Rules.

24 Section 29 of the Complaints Management Rules.

25 Section 27 of the Reportable Incidents Rules; pursuant to section 73Z of the NDIS Act.

Australia also has obligations to ensure effective access to justice for persons with disabilities on an equal basis with others.[26]

2.43 The concept of 'suit at law' encompasses judicial procedures aimed at determining rights and obligations, equivalent notions in the area of administrative law and also extends to other procedures assessed on a case-by-case basis in light of the nature of the right in question.[27]

2.44 It was not clear from the information provided the extent to which the processes in relation to incident and complaints management by NDIS providers and the Commissioner would involve the determination of rights and obligations of persons subject to the complaints (such as persons employed or engaged by NDIS providers) such as to constitute a 'suit at law'. However, it was noted that some of the outcomes of resolving incidents by NDIS providers appear to include corrective action,[28] the Commissioner may refer incidents to authorities with responsibility in relation to incidents (such as child protection authorities),[29] or 'take any other action that the Commissioner considers reasonable in the circumstances'.[30] In relation to complaints management, the Commissioner must undertake a resolution process in relation to complaints which appears to include the ability to make adverse findings against persons employed or engaged by NDIS providers.[31] Similarly in relation to inquiries the Commissioner may 'prepare and publish a report setting out his or her findings in relation to the inquiry'.[32]

2.45 To the extent that these processes may involve the determination of rights and obligations, fair hearing rights may apply. This matter was not addressed in the statement of compatibility. The instruments and the explanatory statement refer to the development of the National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018. A copy of these guidelines would assist in determining whether the procedural fairness requirements afforded are consistent with fair hearing rights.

2.46 Another relevant factor in determining compatibility with fair hearing rights is the availability of independent review of decisions. The explanatory statement states that decisions of the Commissioner may be the subject of complaint to the

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26 Article 13 of the CRPD.

27 See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [16].

28 Section 10(1)(g) of the Reportable Incidents Rules.

29 Section 26(1)(a) of the Reportable Incidents Rules.

30 Section 26(1)(f) of the Reportable Incidents Rules.

31 Section 16(3) and (5) of the Complaints Management Rules.

32 Section 24(6) of the Reportable Incidents Rules; section 29 of the Complaints Management Rules.

Commonwealth Ombudsman.[33] This would be a relevant safeguard. However, further information, including information as to any external review of decisions of the Commissioner (such as merits review), would assist in determining whether these review options are sufficient for the purposes of the right to a fair hearing.

2.47 The committee therefore sought the advice of the minister as to the compatibility of the measures with this right, including:

- a copy of the National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018 (or if a copy is not available, a detailed overview of the guidelines having regard to the matters discussed above including any relevant safeguards); and
- safeguards to protect fair hearing rights (including information as to any external review of decisions).

Compatibility of the measure with the right to privacy

2.48 The ability of the Commissioner to prepare and publish reports setting out their findings in relation to an inquiry may also engage and limit the right to privacy, insofar as those reports may contain personal and confidential information. The privacy implications of the inquiry process were not specifically addressed in the statements of compatibility to either the Reportable Incidents Rules or the Complaints Management Rules.

2.49 The explanatory statements to the Reportable Incidents Rules and the Complaints Management Rules explain that the inquiry function is 'intended to determine or define potential matters including any systemic issues which may be connected with support services provided under the NDIS'. This is likely to be a legitimate objective for the purposes of international human rights law, and the ability to publish reports on such matters appears to be rationally connected to this objective.

2.50 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to privacy and, in particular, information as to the safeguards in place to protect personal and confidential information.

Minister's response

2.51 The minister's response attaches a final consultation draft of the *National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018.* These guidelines outline detailed procedural fairness requirements that apply, and assist in determining the proportionality of the limitation on human rights. The response explains that:

> These Guidelines have been developed in close consultation with stakeholders including representatives of workers. Following feedback

33 SOC to the Complaints Management Rules, p. 27.

> from stakeholders, they have been drafted to apply principally to the management of complaints by NDIS providers and the Commission. In the context of responding to incidents, feedback indicated that it was not appropriate or necessary to apply specific guidelines outside of the existing common law requirements for procedural fairness. Further guidance will be developed to support the implementation of the Guidelines which will be subject to regular review.

2.52 As to the compatibility of the measure with fair hearing rights, the minister's response provides a detailed explanation of the extent to which the provisions of the Complaints Management Rules and Incident Management Rules may involve the determination of rights and obligations such as to constitute a 'suit at law' within the meaning of Article 14 of the ICCPR, by reference to the provisions discussed in the committee's analysis above at [2.31]:

> a) paragraph 10(1)(g) of the Incident Management Rules — this is part of the incident management system to be established by a registered NDIS provider and the example provided in the Explanatory Statement is: if system failure or worker actions contributed to an incident, the incident management system should set out a process for addressing those issues. In this context general employment law and associated review rights as well as ordinary principles of procedural fairness would apply to any action taken by a provider in respect of conduct by a worker which was found to have contributed to an incident.
>
> b) paragraph 26(1)(a) of the Incident Management Rules - the referral of matters to other regulatory bodies including the police or child protection authorities would not involve a determination of rights and would be subject to the protections afforded to personal information under the Act and the *National Disability Insurance Scheme (Protection and Disclosure of Information - Commissioner) Rules 2018*.
>
> c) paragraph 26(1)(f) of the Incident Management Rules - this may include a decision to refer the matter to an authorised officer for the purposes of determining whether to conduct an investigation under the Act or to take other compliance or enforcement action under the Act in respect of which rights of review are available (Part 6 of the [NDIS] Act).
>
> d) subsections 16(3) and (5) of the Complaints Management Rules - in the event that the resolution of a complaint included making adverse findings against a person, the process would be subject to that outlined in the attached Procedural Fairness Guidelines. Any compliance or enforcement action taken by the Commission would be subject to the review rights outlined in Part 6 of the [NDIS] Act.
>
> e) in respect of any inquiries conducted by the Commissioner under the Complaints or Incident rules, the Commissioner must comply with procedural fairness and the protections and limitations on the use of personal information outlined in the Act and the *National Disability Insurance Scheme (Protection and Disclosure of Information -*

> *Commissioner) Rules 2018*. The Commissioner's inquiry power is not intended to determine the rights or interests of parties to a complaint or incident. The Commissioner has other investigation powers under the Act that could be used for that purpose.
>
> As stated above, the Commissioner's inquiry power is not intended to determine the rights or interests of parties to a complaint or incident. The Commissioner has other investigation powers under the Act that could be used for that purpose.

2.53 Based on this information, to the extent that some of the provisions may involve the determination of rights and obligations, the measures are likely to be compatible with fair hearing rights.

2.54 In addition to the information discussed above, the minister's response also provides the following information in relation to the compatibility of the measure with the right to privacy.

> In the course of conducting enquiries, the protections and limitations on the use of personal information are outlined in the Act and the *National Disability Insurance Scheme (Protection and Disclosure of Information - Commissioner) Rules 2018*.

2.55 The provisions referred to in the minister's response appear to be a reference to the provisions of the NDIS Act and the Commissioner Protection and Disclosure rules discussed above in relation to the commissioner's disclosure power. On balance and in light of this information the measures also appear to be compatible with the right to privacy.

Committee response

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

2.57 Based on the information provided, the measures are likely to be compatible with the right to a fair hearing and the right to privacy.

National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018 [F2018L00635]

Purpose	Provides for the disclosure of information in certain circumstances by the NDIS Quality and Safeguards Commissioner
Portfolio	Social Services
Authorising legislation	*National Disability Insurance Scheme Act 2013*
Last day to disallow	15 sitting days after tabling (tabled Senate 18 June 2018)
Right	Privacy (see **Appendix 2**)
Previous report	7 of 2018
Status	Concluded examination

Background

2.58 The committee first reported on the National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018 (Disclosure Rules) in its *Report 7 of 2018*, and requested a response from the Minister for Social Services by 29 August 2018.[1]

2.59 The minister's response to the committee's inquiries was received on 28 August 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

2.60 The National Disability Insurance Scheme (NDIS) Quality and Safeguards Commission and Commissioner (commissioner) were established by the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (the NDIS Amendment Act). The committee considered the human rights compatibility of the NDIS Amendment Act in *Report 7 of 2017.*[2] In that report, the committee noted that there were questions as to the compatibility of that Act with the right to privacy in light of the broad disclosure power of the commissioner in section 67E(1) of the *National Disability Insurance Scheme Act 2013* (NDIS Act).

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018* (14 August 2018) pp. 32-38.

2 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) pp. 27-30.

2.61 The statement of compatibility for the NDIS Amendment Act explained that the proposed information gathering and disclosure powers were proportionate to achieving a legitimate objective because, amongst other factors, the commissioner would first need to satisfy the relevant NDIS rules,[3] which would 'enumerate specific bodies and purposes' for which the commissioner could disclose information in the public interest and 'include limitations on the further use and disclosure of such information'.[4] The committee noted that without a copy of these rules it was unclear whether the rules would sufficiently constrain the exercise of the commissioner's disclosure powers, such that the disclosure powers would constitute a permissible limitation on the right to privacy. Consequently, the committee advised that it would revisit the matters raised in its assessment when reviewing the rules once they were made.[5]

Information sharing – disclosure powers

2.62 Part 3 of the Disclosure Rules prescribe the rules and guidance regarding the commissioner's disclosure powers in section 67E(1) of the NDIS Act.

2.63 Division 1 sets out the rules which the commissioner must follow in disclosing any 'NDIS information',[6] where:

- the commissioner is satisfied on reasonable grounds that it is in the public interest to do so;[7] or
- the NDIS information is being disclosed to:
  - the head of a Commonwealth, state or territory department or authority for the purposes of that department or authority;[8] or
  - a state or territory department or authority with responsibility for matters relating to people with disabilities.[9]

2.64 Subject to a number of exceptions,[10] in these circumstances the commissioner must:

3 NDIS Amendment Bill, addendum to the explanatory memorandum, p. 2.

4 NDIS Amendment Bill, statement of compatibility (SOC), p. 13.

5 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) p. 30.

6 Section 8 of the Disclosure Rules defines 'NDIS information' as information acquired by a person in the performance of a person's functions or duties or in the exercise of the person's powers under the NDIS Act.

7 NDIS Act, section 67E(1)(a).

8 NDIS Act, section 67E(1)(b)(i), (iv).

9 NDIS Act, section 67E(1)(b)(iii).

10 See discussion at [1.21].

- de-identify personal information included in NDIS information, where doing so would not adversely affect the purpose for which the information is disclosed;[11]
- notify and seek the consent of the affected individual about the proposed disclosure prior to disclosure, and provide them with a reasonable opportunity to comment;[12]
- notify the recipient of the NDIS information about the purpose of and limitations on the disclosure, and state that the information may only be used in accordance with the purpose of the disclosure;[13] and
- ensure a record of the disclosure is made, containing prescribed information.[14]

2.65 Division 2 of part 3 of the Disclosure Rules outlines matters to which the commissioner must have regard in determining whether there are reasonable grounds on which to disclose NDIS information in the public interest under section 67E(1) of the NDIS Act. Section 14 of the Disclosure Rules requires the commissioner to have regard to:

- whether the affected individual would be likely to be in a position to seek assistance themselves or notify the proposed recipient of the information of their circumstances;
- the purpose for which the information was collected, including any information provided to the affected individual at that time about how the information would or would not be used or disclosed;
- whether the affected individual would reasonably expect the commissioner to disclose the information for the proposed purpose and to the proposed recipient;
- whether the disclosure would be contrary to a request by a complainant under section 15(3) of the National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018;
- whether the proposed recipient has 'sufficient interest' in the information;[15]

11 Disclosure Rules, section 10.

12 Disclosure Rules, section 11.

13 Disclosure Rules, section 12.

14 Disclosure Rules, section 13.

15 Under section 14(2) of the Disclosure Rules, a person will have a 'sufficient interest' in the information if the Commissioner is satisfied that they have a 'genuine and legitimate interest' in the information or if they are a Commonwealth, State or Territory Minister.

- whether the proposed recipient could reasonably obtain the information from a source other than the commissioner; and
- whether sections 15 to 19 of the Disclosure Rules apply.

2.66 Sections 15 to 19 set out additional matters about which the commissioner must be satisfied if the proposed disclosure is for one of the following purposes:

- enforcement of laws and related circumstances;[16]
- briefing the minister;[17]
- missing or deceased persons;[18]
- assisting child welfare agencies;[19] and
- assisting professional bodies;[20]

2.67 For example, where the proposed disclosure is to assist a 'professional body',[21] the commissioner must be satisfied that:

- the commissioner holds information about a person employed or otherwise engaged by an NDIS provider; and
- the disclosure is necessary to assist a professional body to consider whether the person's conduct meets the standards required to attain or maintain membership of the professional body.[22]

Compatibility of the measure with the right to privacy

2.68 The right to privacy includes respect for private and confidential information, particularly the storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.[23]

2.69 Allowing for the disclosure of NDIS information (including personal information) under section 67E of the NDIS Act engages and limits the right to privacy. By setting out the factors that the commissioner must consider in

16 Disclosure Rules, section 15.

17 Disclosure Rules, section 16.

18 Disclosure Rules, section 17.

19 Disclosure Rules, section 18.

20 Disclosure Rules, section 19.

21 Section 19(2) of the Disclosure Rules defines 'professional body' as 'an organisation that is responsible, nationally or in one or more States or Territories, for registering members of a particular profession and monitoring their compliance with specified standards of behaviour'.

22 Disclosure Rules, section 19.

23 Article 17 of the International Covenant on Civil and Political Rights; Article 22 of the Convention on the Rights of Persons with Disabilities; article 16 of the Convention on the Rights of the Child (CRC)

determining whether to disclose NDIS information, the statement of compatibility acknowledges that the Disclosure Rules engage this right.[24]

2.70 The right to privacy 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 rationally connected (that is, effective to achieve) and proportionate to that objective.

2.71 In relation to whether the measure pursues a legitimate objective, the statement of compatibility explains that the objective of permitting the commissioner to disclose NDIS information is to enhance system-level oversight of serious incidents involving the abuse, neglect or exploitation of people with disabilities, by facilitating coordination with the family or carers of people with disabilities and relevant professional bodies and government departments and agencies.[25] Regarding the importance of this objective, the statement cites three inquiries in 2014-2015 into abuse in the disability sector, which emphasised the need for system-level oversight to adequately identify and address systemic issues in the sector.[26]

2.72 As acknowledged in the committee's assessment of the primary legislation, this is likely to constitute a legitimate objective for the purposes of international human rights law.[27]

2.73 The statement of compatibility provides further information about the individual measures in division 2 of part 3 (summarised at [2.65] above), which assists in determining how each disclosure power is effective to achieve (that is, rationally connected to) the stated objective. For example, the statement of compatibility notes that section 16, which permits disclosures to brief the minister, is designed 'to enable matters to be escalated and managed appropriately' by the relevant minister.[28] The initial human rights analysis noted that, in light of the minister's oversight role, the escalation and management of issues by the minister is likely to be rationally connected to the legitimate objective of promoting effective system-level oversight of, and response to, the abuse of people with disabilities. For this reason, and having regard to the committee's previous conclusions in relation to the primary legislation, the measures appear to be rationally connected to this objective.

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24 Statement of compatibility (SOC), p. 13.

25 SOC, p. 15.

26 SOC, p. 15.

27 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) p. 28.

28 SOC, p. 16.

2.74 As noted by the committee in its analysis of the NDIS Amendment Act,[29] the extent to which the Disclosure Rules constrain the commissioner's exercise of the disclosure powers in section 67E(1) of the NDIS Act is key to determining whether the disclosure powers are a proportionate limitation on the right to privacy.

2.75 The statement of compatibility highlights a number of provisions in division 2 of the Disclosure Rules which are intended to 'limit the scope of the exercise of the [commissioner's] decision making power'.[30] For example, amongst other factors, the statement of compatibility notes that the commissioner must consider whether the proposed recipient of the information could reasonably obtain the information from another source,[31] and whether the person requesting the information has 'sufficient interest' in the information.[32] Section 14(2) of the Disclosure Rules imposes an additional limitation on this threshold by prescribing that a person has a 'sufficient interest' if they have a 'genuine and legitimate interest in the information', or are a Commonwealth, state or territory minister. Section 14 also requires the commissioner to consider whether a person about whom information would be disclosed is likely to be in a position to seek assistance themselves or give notice to the proposed recipient of the information, where the information concerns their life, health or safety.[33] The statement of compatibility explains that this provision is:

> …intended to insure that, as far as possible, the Commissioner takes into account the interests of the person concerned and…is a further protection against arbitrary interference with the privacy of a person…[34]

2.76 The statement of compatibility also identifies some specific further restrictions on the disclosure of information for the purposes defined in sections 15 to 19 of the Disclosure Rules, summarised above at [2.66]. For example, disclosure of information to brief the minister is limited to the prescribed purposes of enabling the minister to consider complaints, incidents or issues, and if necessary respond to the affected person; informing the minister about an error or delay on the part of the Commission; or alerting the minister to an anomalous or unusual operation of the Act, regulations or rules.[35] Such restrictions are relevant to the proportionality of the measure and assist to ensure that disclosure is sufficiently circumscribed.

2.77 However, sections 15, 17, 18 and 19 of the Disclosure Rules may permit the disclosure of personal information to bodies that are not constrained by the *Privacy*

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29 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017), p. 29.

30 Disclosure Rules, SOC, p. 15.

31 Disclosure Rules, section 14(1)(f).

32 Disclosure Rules, section 14(1)(e).

33 Disclosure Rules, section 14(1)(a).

34 Disclosure Rules, SOC, p. 16.

35 Disclosure Rules, section 16.

Act 1988 (Privacy Act). The initial analysis stated that, while compliance with the Privacy Act is not a complete answer to concerns about the right to privacy, it may provide relevant safeguards that assist in determining whether a limitation on the right to privacy is proportionate. Noting this potential gap in coverage, the relevant sections do not require the commissioner to be satisfied of how bodies that are not subject to the Privacy Act will collect, store and disclose personal information that is disclosed to them. The statement of compatibility does not provide any additional information about this issue. The potential for information to be disclosed to bodies that are not constrained by the Privacy Act raises a question as to whether there are other, relevant safeguards in place to protect the right to privacy.

2.78 The initial analysis noted that there are also a number of exceptions to the safeguards in division 1, which may restrict the effectiveness of the safeguards. For example, under section 10(3)(b), the commissioner is not required to de-identify personal information if they are satisfied that to do so would result in an unreasonable delay. A similar exception applies to the consent and consultation requirements in section 11.[36] Neither the Disclosure Rules nor the statement of compatibility explain what constitutes an 'unreasonable delay' or how this is determined. Further information as to how this threshold is determined would assist the committee to assess whether the limitation on the right to privacy is proportionate to the legitimate objective sought.

2.79 Finally, the Disclosure Rules do not appear to make decisions made by the commissioner under part 3 of the rules reviewable, nor does the NDIS Act make decisions under section 67E reviewable. This raised concerns about the sufficiency of the safeguards in place to protect the right to privacy. These matters were not fully addressed in the statement of compatibility for the Disclosure Rules.

2.80 Accordingly, while part 3 of the Disclosure Rules significantly constrains the commissioner's disclosure powers under section 67E(1) of the NDIS Act, some questions remained as to the proportionality of the measures, such as whether the exceptions to the safeguards in division 1 are the least rights restrictive approach to achieving the legitimate objective and whether the safeguards in division 2 for public interest disclosures are sufficient to constitute a proportionate limitation on the right to privacy.

2.81 The committee therefore sought the advice of the minister as to whether the Disclosure Rules ensure that the limitation on the right to privacy in section 67E(1) of the NDIS Act is proportionate to achieve the relevant objective, in particular:

- whether information may be disclosed to organisations that are not covered by the Privacy Act and, if so, the sufficiency of other relevant safeguards to protect the right to privacy;

36 Disclosure Rules, section 11(7)(b).

- whether the exceptions to the safeguards on the commissioner's disclosure powers in division 1 are the least rights restrictive approach to pursue the legitimate objective; and
- whether decisions made by the commissioner in part 3 of the Disclosure Rules are reviewable.

Minister's response

2.82 The minister's response contains the following information about the sufficiency of safeguards to protect the right to privacy in circumstances in which sections 15, 17, 18 and 19 permit the disclosure of personal information to organisations that are not covered by the Privacy Act:

> In the event that sections 15, 17, 18 and 19 of the Information Rules do enable disclosure to organisations that are not covered by the Privacy Act or other applicable laws protecting the privacy and confidentiality of information, they remain subject to the protections and offences outlined in Part 2 of Chapter 4 of the Act in respect [to] the use of protected or personal information. In addition, the disclosure notice that must be completed by the Commissioner pursuant to section 12 of the Information Rules can stipulate limitations on how the organisation can use, record or disclose information.

2.83 This is a relevant safeguard and assists with determining the proportionality of the limitation on the right to privacy.

2.84 The minister's response also refers to additional safeguards in Division 2 of part 2 of chapter 4 of the NDIS Act. These provisions contain the following offences regarding protected information held by the commission:

- unauthorised use or disclosure of protected commission information;[37]
- soliciting disclosure of protected commission information;[38] and
- offering to supply protected commission information.[39]

2.85 The offences apply to any person, and the penalty for each offence is imprisonment for 2 years or 120 penalty units, or both.[40] These offences constitute significant safeguards to protect against unauthorised disclosure of personal information.

37 NDIS Act, section 67B.

38 NDIS Act, section 67C.

39 NDIS Act, section 67D.

40 NDIS Act, sections 67B, 67C and 67D. Under section 4AA of the *Crimes Act 1914*, the current amount of a penalty unit is $210.

2.86 The minister's response also provides further information about how the threshold of 'unreasonable delay' will be determined in the exceptions to the safeguards on the disclosure of protected information in sections 10 and 11 of the NDIS rules:

> The assessment and determination of whether adhering to the de-identification or consultation requirements in Division 1 of the Information Rules would result in an unreasonable delay would need to be determined on a case by case basis. Generally speaking, it is unlikely that the de-identification of information would result in an unreasonable delay. In relation to the consultation requirements, an unreasonable delay will generally be determined in circumstances where an affected person has been given a reasonable opportunity to comment on a proposed disclosure and has not responded.

2.87 The advice that de-identification is unlikely to result in unreasonable delay under section 10(3)(b) of the NDIS Rules, combined with the clarification that the exception in section 11(7)(b) will generally only apply in situations in which 'an affected person has been given a reasonable opportunity to comment on a proposed disclosure and has not responded', further indicates that the limitation on the right to privacy imposed by the exceptions to the safeguards on the commissioner's disclosure powers is likely to be proportionate.

2.88 Finally, in response to the committee's inquiries about the availability of review, the minister's response explains that decisions made under Part 3 of the Rules will not be reviewable, because:

> The rules attempt to strike a balance between, on the one hand, protecting the privacy of individuals and, on the other hand, enabling the Commission to be a responsive regulator and work effectively with other bodies to prevent harm to people with disability arising from unsafe or poor quality NDIS supports or services.

2.89 In light of the further information contained in the minister's response, despite the absence of merits review, there would appear to be sufficient safeguards in place to ensure that the rules and guidance in the NDIS rules regarding the commissioner's disclosure powers in section 67E(1) of the NDIS Act are compatible with the right to privacy.

Committee response

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

2.91 Based on the information provided, the measure is likely to be compatible with the right to privacy.

National Redress Scheme for Institutional Child Sexual Abuse Bill 2018

National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018

National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 [F2018L00975]

National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 [F2018L00969]

National Redress Scheme for Institutional Child Sexual Abuse Direct Personal Response Framework 2018 [F2018L00970]

Purpose	Seeks to establish a national redress scheme for survivors of institutional child sexual abuse
Portfolio	Social Services
Bills introduced	House of Representatives, 10 May 2018
Instruments made under legislation	Last day to disallow for F2018L00975: 15 sitting days after tabling (tabled Senate 13 August 2018) F2018L00970, F2018L00969: non-disallowable
Rights	Equality and non-discrimination; privacy; effective remedy; fair hearing (see **Appendix 2**)
Previous report	5 of 2018
Status	Concluded examination

Background

2.92 The committee first reported on the bills in its *Report 5 of 2018*, and requested a response from the Minister for Social Services by 4 July 2018.[1] The minister's response to the committee's inquiries was received on 9 July 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

1 Parliamentary Joint Committee on Human Rights, *Report 5 of 2018* (19 June 2018) pp. 16-40.

2.93 The National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 (the 2018 Bill) and the National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018 (the 2018 Consequential Amendments Bill) passed both Houses of Parliament on 19 June 2018 and received Royal Assent and became Acts on 21 June 2018 (2018 Act and the 2018 Consequential Amendment Act).

2.94 The committee has previously considered the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (the 2017 Bill) and the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 (the 2017 Consequential Amendments Bill) in its *Report 13 of 2017* and *Report 2 of 2018.*[2] Those bills sought to establish a Commonwealth redress scheme for survivors of institutional child sexual abuse absent a referral power from states to establish a national redress scheme.

2.95 Following referral of powers by states,[3] the 2018 Acts establish a national redress scheme (the scheme) for survivors of institutional child sexual abuse.

2.96 Following the committee's initial analysis, the National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 (redress scheme rules), the National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 and the National Redress Scheme for Institutional Child Sexual Abuse Direct Personal Response Framework 2018 were tabled in the House of Representatives and the Senate on 13 August 2018. The redress scheme rules, which were foreshadowed in the previous analysis, are relevant to the human rights compatibility of the 2018 Acts and are addressed in this analysis where relevant.[4]

Previous analysis of the proposed Commonwealth Redress Scheme

2.97 In *Report 2 of 2018,* the committee noted that the minister had foreshadowed the introduction of the 2018 Bill, and that the minister had also

2 See, Parliamentary Joint Committee on Human Rights, *Report 13 of 2017* (5 December 2017) pp. 2-16; Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 73-96.

3 The statement of compatibility refers to the assistance of New South Wales, Victoria and the Australian Capital Territory: see Statement of compatibility (SOC) p. 113. See the National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 (NSW) which passed both houses in New South Wales on 16 May 2018, and the National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 (Victoria) which passed both houses in Victoria on 7 June 2018.

4 The committee has assessed the National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 and the National Redress Scheme for Institutional Child Sexual Abuse Direct Personal Response Framework 2018 and considers that the compatibility of these instruments with the right to an effective remedy will depend on how the instruments operate in practice on a case by case basis.

indicated that a number of the human rights issues raised by the committee in relation to the 2017 Bill would be considered when developing the 2018 Bill.[5]

2.98 A number of aspects of the 2017 Bill are replicated in the 2018 Bill. As such, in *Report 5 of 2018*, the human rights analysis noted that where there is overlap and no substantive change to the provision, the committee's previous human rights analysis of the measures in the 2017 Bill applies equally to the 2018 Bill (now 2018 Act). In particular:

- *Eligibility to receive redress under the scheme for non-citizens and non-permanent residents*: The human rights analysis of the 2017 Bill noted that the restriction on non-citizens' and non-permanent residents' eligibility for redress engaged and limited the right to equality and non-discrimination on the basis of nationality or national origin.[6] Following correspondence from the minister, the committee concluded that while the measure pursues a legitimate objective, there were concerns that the breadth of the restriction on the eligibility of all non-citizens and non-permanent residents may not be proportionate.[7] However, the committee further stated that allowing for rules to prescribe further classes of persons who may be eligible, including those who would otherwise be excluded due to not being citizens or permanent residents, may be capable of addressing these concerns.[8] This same eligibility criterion is also present in the 2018 Bill (now 2018 Act).[9]
- *Power to determine entitlement, eligibility and ineligibility by rules:* The previous human rights analysis stated that the proposed power in the 2017 Bill to prescribe eligibility and ineligibility by way of rules raised concerns as to compatibility with the right to an effective remedy.[10] This was because, in the absence of sufficient safeguards, the broad scope of the power to determine eligibility or ineligibility could be exercised in such a way as to be

5 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 73, 79, 83, 93.

6 See Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 74.

7 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 78.

8 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 78; see section 13(2) and (3) of the 2018 Bill.

9 See section 13(1)(e) of the 2018 Bill; see statement of compatibility (SOC) 117-118. While the redress scheme rules do not prescribe any further classes of persons who would be eligible pursuant to section 13(2) of the bill, the redress scheme rules do provide that certain institutions are equally responsible for the abuse of certain child migrants from the United Kingdom and Malta: see section 10 of the redress scheme rules.

10 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 79-83.

incompatible with this right.[11] The committee noted, however, that the proposed discretion of the scheme operator to determine eligibility of survivors if they are otherwise ineligible may be capable of addressing some of these concerns.[12] The power to determine eligibility and ineligibility by way of rules is also present in the 2018 Bill (now 2018 Act), as well as a broad power to determine entitlement to redress by way of rules.[13] To that extent the concerns expressed in the previous human rights analysis apply equally here. However, there are also additional issues relating to entitlement, eligibility and ineligibility under the scheme that are discussed in further detail below.

- *Power to determine by rules whether an institution is responsible for abuse:* The 2017 Bill contained a provision that allowed for rules to be made prescribing circumstances in which a participating institution is not responsible for sexual or non-sexual abuse.[14] The committee noted the broad scope of this power may give rise to human rights concerns as to its operation. This was because its scope was such that it could be used in ways that may risk being incompatible with the right to an effective remedy.[15] The 2018 Bill (now 2018 Act) also includes a provision that allows for rules to be made to prescribe whether an institution is responsible, primarily responsible or equally responsible for abuse.[16] The concern as to the potential operation of this rule-making power in a manner incompatible with the right to an effective remedy also applies to the 2018 Bill (now 2018 Act).[17]
- *Bar on future civil liability of participating institutions and associates:* The 2017 Bill provided that where an eligible person receives an offer of redress and chooses to accept the offer, the person releases and forever discharges all institutions participating in the scheme from civil liability for abuse, and

11 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 80.

12 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 83.

13 Section 12(3) and (4) of the 2018 Bill, section 13(2) and (3) of the 2018 Bill.

14 See section 21(7) of the 2017 Bill.

15 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 83-85.

16 Section 15(4)(f),(5) and (6) of the 2018 Bill.

17 The redress scheme rules contain provisions relating to circumstances in which institutions (section 11) and government authorities (section 12) will not be held responsible for abuse, including where an institution has already been ordered by a court to pay damages or compensation. While these sections of rules do not raise specific human rights concerns, the broad power in the 2018 Bill to enact rules to prescribe when institutions are or are not responsible for abuse remains a concern for the reasons discussed above.

the eligible person cannot bring or continue any claim against those institutions in relation to that abuse.[18] The committee considered that this bar on future civil liability of participating institutions may engage and limit the right to an effective remedy.[19] However, the committee noted that the proposed rules governing the provision of legal services under the redress scheme may operate as a sufficient safeguard so as to support the human rights compatibility of the measure.[20] The 2018 Bill (now 2018 Act) also requires survivors who accept redress to forever release from civil liability all institutions providing them with redress, and additionally extends this release to 'officials of those responsible institutions and associates (other than an official who is an abuser of the person)'.[21] The 2018 Bill (now 2018 Act) also provides further detail as to the effect of accepting the release on civil liability.[22] The concern as to compatibility of the bar on future civil liability with the right to an effective remedy also applies to the 2018 Bill (now 2018 Act).[23]

- *Absence of external merits review and removal of judicial review:* The 2017 Bill provided for a system of internal review of determinations made under the scheme.[24] The 2017 Consequential Amendments Bill also exempted decisions made under the scheme from judicial review under the

18 Sections 39 and 40 of the 2017 Bill.

19 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 85-88.

20 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 88.

21 Section 42(2)(c) of the 2018 Bill; see also sections 39, 42 and 43 of the 2018 Bill; see also SOC 122-123. The SOC explains (at 123) the rationale for expanding the release to 'associates' as follows: ' organisations comprising multiple institutions are likely to opt-in to the Scheme as one, forming a 'participating group' (institutions are then known as 'associates' of one another). In order to form a participating group, institutions must be sufficiently connected and appoint a representative for the group. That representative will then be jointly and severally liable with each associate for funding contributions. Attaching the release to all associates of responsible participating institution(s) for sexual abuse and related non-sexual abuse within the scope of the Scheme is therefore reflective of their joint financial liability, and is a necessary component of ensuring that institutions will opt-in to the Scheme together, therefore ensuring maximum coverage for survivors'.

22 Section 43 of the 2018 Bill.

23 The redress scheme rules do not address the provision of legal services. The committee will therefore consider the compatibility of the proposed rules governing the provision of legal services, and whether they offer adequate safeguards, when they are received. The committee also notes that it is preferable for details of proposed rules to be available for consideration in conjunction with the related bill prior to its passage.

24 Part 4-3 of the 2017 Bill.

Administrative Decisions (Judicial Review) Act 1977 (ADJR Act).[25] The committee considered that these measures raised concerns as to compatibility of the review scheme with the right to a fair hearing.[26] However, having regard to the information provided by the minister and the particular context in which the review scheme operated, the committee considered that the internal review mechanism may be capable of ensuring that survivors have adequate opportunities to have their rights and obligations determined in a manner compatible with the right to a fair hearing. The committee recommended that the operation of the internal review mechanism be monitored to ensure that survivors have sufficient opportunities to have their rights and obligations determined by an independent and impartial tribunal.[27] The 2018 Bill (now 2018 Act) also establishes an internal review mechanism,[28] and the 2018 Consequential Amendments Bill (now Act) excludes the scheme from judicial review under the ADJR Act.[29] Therefore, the conclusions relating to the right to a fair hearing in the 2017 Bill apply equally to the 2018 Bill. As to review of the internal review mechanism, it is noted that the statement of compatibility to the 2018 Bill further advises that:

> The Government intends to monitor the Scheme's internal review mechanism, including through broader reviews of the Scheme's implementation. General information relevant to internal review may also be detailed in the Scheme's annual report to the Minister (for presentation to the Parliament) and also has the capacity to be scrutinised through the Scheme's governance arrangements.[30]

2.99 The matters discussed in the remainder of this human rights analysis relate to matters in the 2018 Bill (now 2018 Act) and National Redress Consequential Amendments Bill (now 2018 Consequential Amendments Act) that raise additional or new issues to the 2017 Bill that required further advice from the minister.

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25 Schedule 3 of the 2017 Consequential Amendments Bill.

26 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 93-96.

27 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 96.

28 Part 4-1 of the 2018 Bill.

29 Schedule 3 to the National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018.

30 SOC, p. 127.

Information sharing provisions

Compatibility of the measures with the right to privacy

Public interest disclosure power of the scheme operator

2.100 The 2017 Bill set out the circumstances in which the scheme operator may disclose protected information in the public interest.[31] Following the further information provided by the minister, the committee considered that disclosure in such circumstances may be sufficiently circumscribed such that the measure would be a proportionate limitation on the right to privacy.

2.101 The 2018 Bill (now 2018 Act) also provides under section 95 that the National Redress Scheme Operator (operator)[32] may disclose protected information[33] in the public interest if certain circumstances are satisfied, including where the operator certifies that disclosure is necessary in the public interest.[34] As with the 2017 Bill, this measure engages and limits the right to privacy.[35] The provision in the 2018 Bill (now 2018 Act) is substantively identical to the provision in the 2017 Bill, and to that extent the committee's comments on the 2017 Bill apply equally.

2.102 However, it was noted that the statement of compatibility for the 2018 Bill provided the following information:

> The Committee also noted that the (former) Minister has indicated he will consider including a positive requirement that the Operator must have regard to the impact the disclosure may have on a person to whom the information relates in any future legislation developed for a National Redress Scheme. This has now been reflected in the Bill.[36]

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31 See section 77 of the 2017 Bill.

32 National Redress Scheme Operator is defined in section 6 to mean the person who is the Secretary of the Department in the person's capacity as operator of the scheme. 'Department' is not defined in the bill and pursuant to section 19A of the *Acts Interpretation Act 1901* means the department that is administered by the minister or ministers administering that provision in relation to the relevant matter, and that deals with that matter.

33 'Protected Information' is defined in section 92(2) of the 2018 Bill as '(a) information about a person or an institution that: (i) was provided to, or obtained by, an officer of the scheme for the purposes of the scheme; and (ii) is or was held in the records of the Department or the Human Services Department; or (b) information to the effect that there is no information about a person or an institution held in the records of a Department referred to in subparagraph (a)(ii)'.

34 Section 95 of the 2018 Bill.

35 For the relevant principles relating to the right to privacy, see Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 89.

36 SOC, p. 125.

2.103 Yet, there is no requirement in section 95 of the 2018 Bill (which relates to public interest disclosure) that requires the operator to have regard to the impact the disclosure may have on a person to whom the information relates.

2.104 The committee therefore sought clarification from the minister, having regard to the statement on page 125 of the statement of compatibility, as to whether the public interest disclosure power in section 95 of the 2018 Bill could be amended so as to include a positive requirement that the scheme operator must have regard to the impact the disclosure may have on a person to whom the information relates.

Disclosure by employees and officials of government institutions

2.105 Section 97 provides an additional authorisation for employees or officers of government institutions to whom protected information is disclosed to obtain, record, disclose or use the information for certain permitted purposes including the enforcement of criminal law; the safety or wellbeing of children; investigatory, disciplinary or employment processes related to the safety or wellbeing of children; or for a purpose prescribed by the rules. As this provision involves the disclosure of protected information (including personal information), this provision also engages and limits the right to privacy.

2.106 The previous human rights analysis of the 2018 Bill noted that, like the scheme operator's public interest disclosure power, this provision does not require the employee or officer of the institution to consider the impact the disclosure may have on the person to whom the information relates. This raised concerns as to whether, with respect to the proportionality of the measure, the measure is the least rights restrictive approach. The statement of compatibility does not address this specific new provision and its compatibility with the right to privacy.

2.107 It was also noted that the provision allows for rules to introduce new purposes for which employees or officers of government institutions may disclose information. This also raised concerns as to proportionality. This is because international human rights law jurisprudence states that laws conferring discretion or rule-making powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.[37] Without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. Further information from the minister would therefore assist in determining whether this additional disclosure power is a proportionate limitation on the right to privacy.

37 See the discussion of the human rights implications of expressing legal discretion of the executive in overly broad terms in *Hasan and Chaush v Bulgaria,* European Court of Human Rights application no 30985/96 (26 October 2000) [84].

2.108 The committee therefore sought the advice of the minister as to the compatibility of additional disclosure authorisations for employees or officers of government institutions in section 97 with the right to privacy.

Minister's response

Public interest disclosure power of the scheme operator

2.109 In relation to the public interest disclosure power in section 95 of the bill, the minister states:

> Section 95 of the National Act provides that the Scheme Operator may disclose protected information if the Scheme Operator certifies that the disclosure is necessary in the public interest. In certifying the disclosure in the public interest, the Scheme Operator must also act in accordance with the Rules, which set out detailed requirements for this certification. In particular, rule 42 expressly requires the Scheme Operator to have regard to the impact that the disclosure might have on the person to whom the information relates.

2.110 The further information provided by the minister - that the redress scheme rules contain an explicit requirement in section 42 that the operator must have regard to the impact disclosure might have on the person to whom the information relates - assists in determining the proportionality with the right to privacy.

2.111 The redress scheme rules also set out the various circumstances in which a public interest certificate may be given by the operator for the purposes of disclosure under section 95 of the 2018 Act. Purposes for which a public interest disclosure certificate can be given include disclosure necessary for: protecting public revenue;[38] protecting the Commonwealth, States and Territories;[39] proceeds of crime orders;[40] extradition;[41] international assistance in criminal matters;[42] correcting a mistake of fact;[43] ministerial briefings;[44] locating missing persons;[45] locating a relative or beneficiary of deceased persons;[46] research, statistical analysis and policy development;[47] and contacting persons about possible entitlement to

38 Redress scheme rules, section 44.

39 Redress scheme rules, section 45.

40 Redress scheme rules, section 46.

41 Redress scheme rules, section 47.

42 Redress scheme rules, section 48.

43 Redress scheme rules, section 49.

44 Redress scheme rules, section 50.

45 Redress scheme rules, section 51.

46 Redress scheme rules, section 52.

47 Redress scheme rules, section 53.

compensation.[48] Noting the offence provisions for unauthorised disclosure under the 2018 Bill,[49] and the requirement discussed above that the scheme operator must have regard to the impact of disclosure on the person to whom the information relates, on balance and in the context of this particular measure, the measure may be a proportionate limitation on the right to privacy. However, given the broad scope of some of the purposes for which a public interest disclosure certificate can be given, much may depend on how the rules are applied in practice, and in particular how the potential impact of disclosure on the person is assessed and applied (for example, whether consideration of the impact of the disclosure on the person means that personal information is redacted in appropriate cases).

Disclosure by employees and officials of government institutions

2.112 In relation to the additional disclosure authorisations for employees or officers of government institutions in section 97 of the bill, the minister states:

> These disclosure arrangements were included after significant consultation with the states and territories and key non-government institutions, who strongly advocated that such disclosure provisions were essential to enable them to comply with existing state or territory mandatory reporting laws or reportable conduct scheme requirements, and necessary to support states to opt in to the Scheme.
>
> Using the Rules to prescribe other permitted purposes rather than incorporating all elements of the Scheme in the National Act provides appropriate flexibility and enables the Scheme to respond to matters as they arise in a timely manner through adapting and modifying the Rules. The Rules do not currently prescribe any additional permitted purposes and any adaptations or modifications to the Rules will be agreed by participating states and territories.

2.113 The minister's response suggests that the purpose of section 97 is to ensure compliance with existing state or territory mandatory reporting laws. In the context of this particular measure, and in light of the broader purposes of disclosure identified in section 97 (enforcement of criminal law and safety and well-being of children), the measure is likely to pursue a legitimate objective for the purposes of international human rights law. Enabling disclosure by employees of the applicable institution also appears to be rationally connected to these objectives.

2.114 As to proportionality, the minister's response explains that the broad rule-making power is necessary so as to be able to respond to matters as they arise and clarifies that any new rules would be required to be agreed by participating states and territories. These matters suggest that the power to introduce further purposes of disclosure by way of rules may be capable of operating in a manner which is

48 Redress scheme rules, section 54.

49 See sections 99-101 of the 2018 Bill.

necessary and proportionate in this particular case. However, it is recommended that the disclosure power be monitored to ensure that any limitation on the right to privacy be no more extensive than what is strictly necessary.

2.115 Further, the minister's response does not specifically address the committee's inquiry as to whether section 97 could be amended to include a positive requirement that the operator must have regard to the impact the disclosure may have on a person to whom the information relates. However, having regard to the stated purposes for which disclosure may be permitted and the accompanying offence provisions for unauthorised disclosure,[50] on balance and in the context of this particular measure the limitation on the right to privacy appears to be sufficiently circumscribed.

Committee response

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

2.117 The committee notes the further information from the minister that rule 42 of the National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 requires the scheme operator to have regard to the impact disclosure might have on the person to whom the information relates when determining whether disclosure is necessary in the public interest.

2.118 In light of the further information from the minister and having regard to the committee's conclusion at [2.174] of *Report 2 of 2018* and the redress scheme rules, the committee considers that, on balance, the public interest disclosure power in section 95 of the 2018 Bill may be a proportionate limitation on the right to privacy.

2.119 In light of the further information from the minister, the committee considers section 97 of the 2018 Bill may be a proportionate limitation on the right to privacy.

2.120 The committee recommends that the operator's disclosure powers be monitored by government to ensure that any limitation on the right to privacy is no more extensive than what is strictly necessary.

Entitlement to receive redress under the national redress scheme: special rules for persons with serious criminal convictions

2.121 Section 63 of the 2018 Bill introduces a special assessment procedure for persons with 'serious criminal convictions', which applies when a person has been sentenced to imprisonment for five years or longer for an offence against a law of

50 See sections 99-101 of the 2018 Bill.

the Commonwealth, a State, a Territory or a foreign country.[51] Section 63(2) provides that a person is not entitled to redress under the scheme unless there is a determination by the scheme operator that the person is not prevented from being entitled to redress. Section 63(5) provides:

> (5) The Operator may determine that the person is not prevented from being entitled to redress under the scheme if the Operator is satisfied that providing redress to the person under the scheme would not:
>
> (a) bring the scheme into disrepute; or
>
> (b) adversely affect public confidence in, or support for, the scheme.

2.122 As soon as practicable after becoming aware of the person's sentence, the scheme operator is required to consider whether to make a determination and give a written notice to the relevant 'specified advisor'[52] from the Commonwealth or participating State or Territory, requesting that the specified advisor provide advice about whether a determination should be made and setting a timeframe within which to provide that advice.[53]

2.123 Section 63(6) additionally provides that, when making a determination, the Operator must take into account:

> (a) any advice given by a specified advisor in the period referred to in the notice; and
>
> (b) the nature of the offence; and
>
> (c) the length of the sentence of imprisonment; and
>
> (d) the length of time since the person committed the offence; and

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51 The minister foreshadowed in his response to the 2017 Bill that the 2018 Bill would limit the eligibility of persons with certain criminal convictions to obtain redress: see Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 80-83. The committee noted that there are human rights concerns in relation to the proposed exclusion of persons with certain criminal convictions from being eligible for the scheme: 83.

52 'Specified advisor' is defined in section 64(3)(b) as the following: (i) if the abuse of the persons occurred inside a participating state or a participating territory – the Attorney-General of the state or territory, or another person nominated by that Attorney-General in writing; (ii) if the abuse of the person occurred outside a participating state or participating territory – the Commonwealth Attorney-General; (iii) if the offence was against a law of a participating state or participating territory – the Attorney-General of the state or territory, or another person nominated by that Attorney-General in writing; (iv) if the offence was against a law covered by subparagraph (iii) – the Commonwealth Attorney-General.

53 The written notice must also include sufficient information to enable the specified advisor to provide that advice. The period in which the specified advisor may provide the advice must be at least 28 days starting on the date of the notice: see section 63(4) of the 2018 Bill.

(e) any rehabilitation of the person; and

(f) any other matter that the Operator considers is relevant.

2.124 Section 63(7) provides that, when taking into account the matters referred to above, the operator must give greater weight to any advice that is given by a specified advisor from the jurisdiction in which the abuse occurred, in the period referred to in the notice, than to any other matter.

Compatibility of the measure with the right to equality and non-discrimination

2.125 The right to equality and non-discrimination in the International Covenant on Civil and Political Rights (ICCPR) provides 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.[54] Articles 1, 2, 4 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) further describe the content of this right and the specific elements that state parties are required to take into account to ensure the elimination of discrimination on the basis of race, colour, descent, or national or ethnic origin.

Racial discrimination

2.126 'Racial discrimination' is defined in article 1(1) of ICERD 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.

2.127 Thus, racial discrimination can be direct (that is, have a discriminatory purpose) or indirect (that is, have a discriminatory effect on the enjoyment of rights).[55] Accordingly, treatment which disproportionately affects members of a particular racial group will amount to differential treatment based on race for the purpose of international human rights law.

2.128 As acknowledged in the statement of compatibility, Aboriginal and Torres Strait Islander peoples are over-represented in the criminal justice system and are sentenced to custody at a higher rate than non-Indigenous defendants.[56]

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54 The prohibited grounds of discrimination 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. The prohibited grounds of discrimination are often described as 'personal attributes'.

55 Committee on the Elimination of Racial Discrimination, *General Recommendation 14* (1993); see also *Althammer v Austria*, HRC 998/01 (2003) para 10.2.

56 SOC, p. 118.

The measure may therefore indirectly discriminate on the basis of race due to the disproportionate negative impact of the measure on Aboriginal and Torres Strait Islander peoples.[57]

Criminal record

2.129 The United Nations Human Rights Committee has not considered whether having a criminal record is a relevant personal attribute for the purposes of the prohibition on discrimination in Article 26 of the ICCPR. However, relevantly, the European Court of Human Rights has interpreted the prohibition on discrimination on the grounds of 'other status' to include an obligation not to discriminate on the basis of a criminal record.[58] While this jurisprudence is not binding on Australia, the case law from the Court is useful in considering Australia's obligations under similar provisions in the ICCPR.[59] Limiting the entitlement to redress for persons with a criminal record accordingly may also engage and limit the right to equality and non-discrimination on this basis.

Limitations on the right to equality and non-discrimination

2.130 Differential treatment will not constitute discrimination if it can be shown to be justifiable, that is, if it can be shown to be based on objective and reasonable grounds such that it is rationally connected to, and proportionate in pursuit of, a legitimate objective. The statement of compatibility states that the restriction on eligibility of persons with serious criminal convictions is permissible on the following basis:

> restricting eligibility on the basis of criminal history is necessary to achieve the legitimate aim of the Scheme aligning with community expectations around who should receive redress payments from Government, with flexibility to make relevant persons entitled to redress on a case-by-case basis, where appropriate to do so. There is a risk the public would not support a Scheme that paid redress to perpetrators of serious crimes. In particular, victims of those crimes may strongly object to redress payments being made to people who have committed crimes against them.
>
> Furthermore, the restriction on survivors with serious criminal convictions was developed in consultation with State and Territory Attorneys-General,

57 SOC, p. 118.

58 See *Thlimmenos v Greece*, European Court of Human Rights Application No. 34369/97 (6 April 2000).

59 See also the *Australian Human Rights Commission Act 1986* (Cth) which considers preventing discrimination in employment on the basis of a criminal record as part of Australia's obligations under International Labour Organisation Convention 111, the Discrimination (Employment and Occupation) Convention 1958*,* which prohibits discrimination in employment. See Australian Human Rights Commission*, 'On the Record: Discrimination in Employment on the basis of Criminal Record under the AHRC Act'* (2012).

> who were almost unanimous that reasonable limitations on applications is necessary to uphold public faith and confidence in the Scheme, and a necessary part of the framework for states to opt-in to the Scheme (ensuring nationwide access to redress).[60]

2.131 The overall objectives of the redress scheme are to 'recognise and alleviate the impact of past institutional child sexual abuse and related abuse' and 'to provide justice for survivors of that abuse'.[61] The previous analysis stated that these are undoubtedly legitimate objectives for the purposes of international human rights law. However, the objective of limiting entitlements to persons with serious criminal convictions is narrower and is stated to be to align this scheme with 'community expectations'. To be a legitimate objective, the objective must be one that is pressing and substantial and not one that simply seeks an outcome that is desirable or convenient. On this basis, the previous analysis raised questions as to whether 'aligning the scheme with community expectations' would be a legitimate objective for the purposes of international human rights law.

2.132 Further, noting the overall purpose of the scheme to 'recognise and alleviate the impact of past institutional child sexual abuse' and provide justice for survivors, the previous analysis also raised questions as to whether limiting the entitlement of certain persons based on their subsequent conduct was rationally connected to this objective. It was noted that the *Final Report* of the Royal Commission stated the impact of child sexual abuse on a survivor may manifest itself in 'interconnected and complex ways', including the development of 'addictions after using alcohol or other drugs to manage the psychological trauma of abuse, which in turn affected their physical and mental health, sometimes leading to criminal behaviour and relationship difficulties'.[62]

2.133 There were also concerns as to whether the measure is proportionate. Important factors in determining whether a measure is proportionate include whether there is sufficient flexibility to treat individual cases differently and whether there are less rights restrictive approaches reasonably available. Section 63 contains a number of provisions that allow a person's individual circumstances to be taken into account and to provide persons who may have a serious criminal conviction to be entitled to redress where the operator so determines. This is an important safeguard and allows for matters such as a person's rehabilitation to be taken into account.

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60 SOC, pp. 118-119.

61 Section 3 of the 2018 Bill.

62 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Impacts,* Volume 3 (2017) 11. See also, James RP Ogloff, Margaret C Cutajar, Emily Mann and Paul Mullen, 'Child sexual abuse and subsequent offending and victimisation: A 45 year follow-up study' (2012) *Trends & Issues in Crime and Criminal Justice No.440*.

2.134 However, the starting point for persons who have serious criminal convictions is that they are *not* entitled to redress *unless* a determination is made by the scheme operator.[63] Even where a scheme operator is satisfied that providing redress to the person would not bring the scheme into disrepute or adversely affect public confidence in or support for the scheme, the 2018 Bill (now 2018 Act) provides only that the operator *may* determine the person is not prevented from being entitled.[64] Further, a person's individual circumstances (namely, the nature of the offence, the length of the sentence of imprisonment, the length of time since the commission of the offence, and any rehabilitation) are given lesser weight than advice of the specified advisor.[65] The previous analysis noted that there would appear to be other, less rights restrictive, measures available.

2.135 Another relevant factor in determining whether safeguards are sufficient includes whether there is a possibility of monitoring and access to review.[66] It was not clear from the information provided whether determinations by the scheme operator under section 63(5) are capable of being reviewed either internally or externally.[67]

2.136 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to equality and non-discrimination, in particular:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available, and whether determinations by the scheme operator under section 63 are able to be reviewed).

Minister's response

2.137 The minister's response provides the following information in this regard:

> The limitations on applications from people who have committed serious offences have been included in the National Act [2018 Act] to ensure integrity of and public confidence in the Scheme, and to prevent further

63 Sections 63(2) and 63(5) of the 2018 Bill.

64 Section 63(5) of the 2018 Bill.

65 Section 63(6) and 63(7) of the 2018 Bill.

66 See Parliamentary Joint Committee on Human Rights, *Guidance Note 1* (2014) 2.

67 The review provisions of the 2018 Bill appear to apply to determinations made under section 29: see section 73.

> traumatising victims or survivors of serious or harmful crimes. These arrangements were developed in consultation with state and territory Redress Ministers, who agreed that reasonable limitations on such applications are necessary to have public confidence in the Scheme, and a necessary part of the framework for the states and territories to opt in to the Scheme. The participation of the states, territories and non-government institutions is integral to ensuring nationally consistent and equal access to effective remedy for those who have experienced institutional child sexual abuse.
>
> Before being entitled to redress, those with serious criminal convictions will go through a special, case-by-case assessment under section 63 of the National Act. Determining eligibility by way of special assessment (including consideration of the nature of the crime committed, the duration of the sentence, rehabilitation outcomes of the person and broader public interest issue factors), provides assurance that only those who have committed very serious, heinous crimes will be prevented from being entitled to redress.

2.138 As noted in the previous analysis, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.

2.139 Ensuring that persons who have experienced institutional child sexual abuse have access to an effective remedy is a legitimate objective for the purposes of international human rights law. However, there remains a concern insofar as the limitation on the right to equality and non-discrimination is stated to be for the purpose of ensuring 'public confidence' in the scheme. As noted in the previous analysis, international human rights jurisprudence has held that tolerance and broadmindedness are the hallmarks of a democratic society, and so restrictions on rights of persons purely based on what might offend public opinion is not generally considered a legitimate objective.[68] Insofar as the minister indicates that an additional objective of the measure is to 'prevent further traumatising victims or survivors of serious or harmful crimes', this could be capable of constituting a legitimate objective. However, it would have been useful if the minister's response had provided specific evidence as to the extent to which this is a pressing and substantial concern in the context of the specific measure.

2.140 As to proportionality, the minister's response does not address the committee's specific inquiries as to the availability of review of determinations of the minister made under section 63(5), and by what mechanism.

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68 See *Hirst v the United Kingdom (No. 2)*, European Court of Human Rights App No. 74025/01, (Grand Chamber, 6 October 2005) [69]-[71]; *Dickson v United Kingdom,* European Court of Human Rights App No. 44362/04 (Grand Chamber, 4 December 2007) [68] and [72].

2.141 Further, while the minister's response states that 'only those who have committed very serious, heinous crimes will be prevented from being entitled to redress', the language of the 2018 Bill (now 2018 Act) is broader. 'Serious criminal conviction' is broadly defined to mean a sentence of five years or longer. As noted in the previous analysis, the starting point for persons who have serious criminal convictions is that they are *not* entitled to redress *unless* a determination is made by the scheme operator. The operator's decision to determine that the applicant is not prevented from being entitled to redress is discretionary, and the applicant's circumstances are given lesser weight than advice of the specified advisor.[69] Noting the potential disproportionate negative impact that the measure may have on Aboriginal and Torres Strait Islander people (discussed above at [2.128]), there remain concerns that the measure may be insufficiently circumscribed.

2.142 Further, in order to be proportionate, the measure must be the least rights restrictive way of achieving a legitimate objective. There would appear to be other, less rights restrictive measures available in relation to the measure. This includes: making it a requirement that a person with a serious criminal conviction *is* entitled to redress *unless* a determination is made that the person receiving redress would bring the scheme into disrepute, or providing that the operator *must* determine a person with a serious criminal conviction is entitled to redress if satisfied that providing redress under the scheme would not bring the scheme into disrepute, or providing that an individual's personal circumstances be given equal weight to the submissions of the specified advisors. Therefore, while in practice the provision for the scheme operator to determine a person with a serious criminal conviction is nevertheless entitled to redress may address this concern for some individuals, there remain concerns as to the proportionality of the measure as it is drafted.

Committee response

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

2.144 The preceding analysis indicates that the measure may be incompatible with the right to equality and non-discrimination. However, it is noted that the provision for the scheme operator to determine that a person with a serious criminal conviction is nevertheless entitled to redress may, in practice, address this concern for a number of individuals.

2.145 Noting the potential disproportionate negative impact that the measure may have on particular groups, the committee recommends the special assessment process for persons with serious criminal convictions be monitored by government to ensure that it operates in a manner compatible with the right to equality and non-discrimination.

69 Section 63(5) of the 2018 Bill; Section 63(6) and 63(7) of the 2018 Bill.

Compatibility of the measure with the right to an effective remedy

2.146 Article 2(3) of the ICCPR requires states parties to ensure that persons whose human rights under the ICCPR have been violated have access to an effective remedy. States parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law, and to make reparation to individuals whose rights have been violated. Effective remedies can involve restitution, rehabilitation and measures of satisfaction – such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices – as well as bringing to justice the perpetrators of human rights violations. Such remedies should be appropriately adapted to take account of the special vulnerabilities of certain categories of persons, including, and particularly, children.

2.147 The redress scheme seeks to provide remedies in response to historical failures of the Commonwealth and other government and non-government organisations to uphold human rights obligations, including the right of every child to protection by society and the state,[70] and the right of every child to protection from all forms of physical and mental violence, injury or abuse (including sexual exploitation and abuse).[71] Insofar as persons with serious criminal convictions may be precluded from accessing redress, restrictions on the entitlement of survivors with serious criminal convictions engages the right to an effective remedy.

2.148 The statement of compatibility does not specifically address the entitlement of survivors with serious criminal convictions from the perspective of the right to an effective remedy. For the same reasons as those discussed above in relation to the right to equality and non-discrimination, the previous analysis raised questions as to whether restricting the entitlement to redress of survivors with serious criminal convictions is compatible with the right to an effective remedy.

2.149 The committee therefore sought the advice of the minister as to the compatibility of the special assessment process for persons with serious criminal convictions with the right to an effective remedy.

Minister's response

2.150 In response, the minister states:

> These arrangements do not contravene the right to effective remedy, as people with serious criminal convictions will still have the opportunity to apply for redress under the Scheme. The Scheme Operator will determine the person's application on a case-by-case basis and only prevent entitlement to redress where the person would bring disrepute to the Scheme or affect the public's confidence in the Scheme. This balances the

70 Article 24 of the International Covenant on Civil and Political Rights: see SOC, p. 122.

71 Articles 19 and 34 of the Convention on the Rights of the Child: see SOC, p. 117.

need to allow everyone to apply to the Scheme, with the need to give integrity and public confidence to the Scheme by placing some limitations on applications from people who themselves have committed serious and harmful offences.

2.151 While it is acknowledged that persons who are survivors of institutional child sexual abuse will still be able to apply for redress, as noted earlier concerns remain insofar as the default position under the bill is that such persons will not be entitled to redress unless the operator exercises their discretion in accordance with section 63. A person's entitlement to redress being a matter of discretion of the operator raises concerns as to compatibility with the right to an effective remedy. This is particularly so as the UN Human Rights Committee has stated that while limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states parties must comply with the fundamental obligation to provide a remedy that is effective.[72] However, it is acknowledged that the provision for the scheme operator to determine a person with a serious criminal conviction is nevertheless entitled to redress may, in practice, address this concern for a number of individuals.

Committee response

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

2.153 In light of the preceding analysis and noting that survivors of institutional child sexual abuse with serious criminal convictions will not be entitled to redress unless the operator makes a determination, there is a risk that the measure may operate in a manner that may be incompatible with the right to an effective remedy. However, it is acknowledged that the provision for the scheme operator to determine that a person with a serious criminal conviction is nevertheless entitled to redress may, in practice, address this concern for a number of individuals.

Access to redress under the national redress scheme for persons in gaol

2.154 Section 20(1)(d) of the 2018 Bill (now 2018 Act) provides a person cannot make an application for redress under the scheme if the person is in gaol.[73] Sections 20(2) and (3) provide that the restriction on applying for persons in gaol does not apply if the operator determines in accordance with requirements prescribed by the

72 See UN Human Rights Committee, *General Comment No.29: States of Emergency (Article 4)* (2001) [14].

73 'In gaol' in the 2018 Bill is defined by reference to section 23(5) of the *Social Security Act 1991* which provides that a person is in gaol if (a) the person is being lawfully detained (in prison or elsewhere) while under sentence for conviction of an offence and not on release on parole or licence; or (b) the person is undergoing a period of custody pending trial or sentencing for an offence.

rules that there are 'exceptional circumstances justifying the application being made'.

2.155 Section 14 of the redress scheme rules sets out the requirements for determining exceptional circumstances justifying an application when a person is in gaol. The rules provide that, before making a determination that there are exceptional circumstances justifying the making of an application, the operator must give a notice to the relevant state or territory Attorney-General[74] requesting advice and information about whether the operator should make a determination. The operator is required to consider any advice from the relevant Attorneys-General and 'any other matter that the Operator considers is relevant to the question of whether the determination should be made'.[75] The operator must give greater weight to advice of the Attorney-General of the state or territory in which the abuse occurred than any other matter.[76] Section 14(2) of the rules provides that the requirements do not apply if the person is so ill that it is reasonable to expect the person will not be able to apply for redress after ceasing to be in gaol or is expected to remain in gaol after the scheme sunset day.[77]

Compatibility of the measure with the right to equality and non-discrimination and the right to an effective remedy

2.156 Persons who are in prison continue to enjoy all of the rights and freedoms guaranteed under international human rights law except for those that are demonstrably necessitated by the fact of incarceration (such as the right to liberty).[78] The matters discussed above in relation to the limitation on persons with serious criminal convictions applying for redress apply equally to persons who are incarcerated. That is, the overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system means that precluding persons who are incarcerated from making an application is likely to disproportionately negatively affect Aboriginal and Torres Strait Islander survivors of sexual abuse, raising concerns as to the compatibility of the measure with the right to equality and non-discrimination. By precluding persons who are incarcerated from applying for redress, the measure may also discriminate on the basis of criminal record. The UN Committee on Economic, Social and Cultural Rights has specifically noted that the

74 This includes the Attorney-General of the state or territory in which the person is in gaol, and if the person claims to have suffered abuse in another state or territory, the Attorney-General of that state or territory: see section 14(3) of the redress scheme rules.

75 Section 14(5) of the redress scheme rules.

76 Section 14(6) of the redress scheme rules.

77 Section 14(2) of the redress scheme rules.

78 *Hirst v the United Kingdom (No. 2)*, European Court of Human Rights App No. 74025/01, (Grand Chamber, 6 October 2005); *Basic Principles for the Treatment of Prisoners,* General Assembly Resolution 45/111 (14 December 1990) Principle 5.

denial of a person's legal capacity because she or he is in prison may constitute discrimination on the basis of 'other status'.[79] The measure also engages the right to an effective remedy by limiting the ability of persons who are incarcerated to access redress under the scheme.

2.157 The statement of compatibility emphasises that persons will be able to make an application for redress if they are not in gaol at some point during the 10 years of the redress scheme.[80] Section 20 therefore does not remove a person's entitlement or eligibility for redress but rather precludes that person from making an application during their period of incarceration, and to this extent for most incarcerated survivors otherwise entitled and eligible for redress the measure would be a practical limitation on the right to equality and non-discrimination and the right to an effective remedy during their period of incarceration.

2.158 The statement of compatibility does not specifically address this aspect of the 2018 Bill in light of the right to equality and non-discrimination and the right to an effective remedy. However, the statement of compatibility does provide some information as to why the restriction is necessary and permissible:

> This restriction is necessary as the Scheme will be unable to deliver appropriate Redress Support Services to incarcerated survivors, which may make it more difficult for those survivors to write an application, or for those survivors to understand the implications of releasing responsible participating institutions from liability for sexual abuse and related non-sexual abuse within the scope of the Scheme. Additionally, institutions may not be able to deliver an appropriate direct personal response to a survivor if that survivor is incarcerated. As the Scheme will run for 10 years, survivors who are incarcerated for a short period of time will be able to apply when they are no longer incarcerated. In a closed institutional setting there will also be greater difficulty maintaining survivor privacy and confidentiality.
>
> Additionally, survivors who are incarcerated for longer periods of time (i.e. five or more years) may not be entitled to redress as a result of their custodial sentence (detailed above) in the first instance.[81]

2.159 The initial analysis acknowledged that there may be practical issues associated with delivering appropriate support services to incarcerated survivors. However, while the statement of compatibility identifies some of the challenges associated with providing redress to incarcerated survivors, the statement of

79 UN Committee on Economic, Social and Cultural Rights, *General Comment No.20: Non-discrimination in economic, social and cultural rights* (2009) [27].

80 SOC, p. 119.

81 SOC, pp. 119-120.

compatibility does not otherwise identify how the restriction pursues a legitimate objective for the purposes of international human rights law.

2.160 There may also be concerns as to proportionality. In particular, while section 20 allows the operator to override the restriction on incarcerated persons applying, this may only occur in 'exceptional circumstances'. The statement of compatibility provides examples of what constitutes an exceptional circumstance for overriding this provision, including 'because they will be in gaol during the last two years of the Scheme, or they are terminally ill'.[82] However, this was not apparent from the bill itself which refers only to requirements prescribed by the rules.[83] The content of the rules, described above, was not available at the time of the committee's initial consideration.

2.161 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to equality and non-discrimination, in particular:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available, and whether determinations by the scheme operator under section 20 are able to be reviewed).

2.162 The committee also sought the advice of the minister as to the compatibility of the measure with the right to an effective remedy.

Minister's response

2.163 In relation to the compatibility of the measure with the right to equality and non-discrimination, the minister states:

> The restriction on applications from people in gaol has been included in the National Act as the ability to deliver appropriate Redress Support Services to incarcerated survivors is limited. Limited access to support services may make it more difficult for those survivors to write an application, or for those survivors to understand the implications of releasing responsible participating institutions from liability for sexual abuse and related non-sexual abuse within the scope of the Scheme. Additionally, institutions may not be able to deliver an appropriate direct personal response to a survivor if that survivor is incarcerated. In a closed

82 SOC, p. 119.

83 Section 20(2) and (3) of the 2018 Bill. At the time of the initial analysis, the redress scheme rules were not yet available.

> institutional setting there will also be greater difficulty maintaining survivor privacy and confidentiality, particularly considering the Scheme's content matter.
>
> The Scheme includes important safeguards not to discriminate against those in gaol. People who cannot make an application because they are in gaol will be able to apply once they are released. As the Scheme will run for 10 years, many people will be able to apply once they are released, with the full support of the Redress Support Services. The Scheme Operator can also determine that there are exceptional circumstances that justify an application being made from a person in gaol. These exceptional circumstances may include where a person will be in gaol beyond the Scheme sunset day, or if the person is so ill or frail that they would not be able to make an application when they are released.

2.164 In relation to the compatibility of the measure with the right to an effective remedy, the minister states:

> This measure does not contravene the right to effective remedy, as people will be able to apply for redress once they are released from gaol. For those who will not have the opportunity to apply when they are released, either because they are so ill that they may not be able to make an application when they are released, or if they are expected to remain in gaol after the Scheme sunset day, the Scheme Operator can determine that exceptional circumstances apply that justify the application from gaol being made.

2.165 The minister's response provides further information as to the purpose of limiting a person's ability to apply for redress while in gaol, and on balance the purpose of ensuring that survivors receive appropriate support services during the application process is likely to be a legitimate objective for the purposes of international human rights law. Precluding a person from applying during their period of incarceration (but otherwise not precluding their entitlement or eligibility to redress) also appears to be rationally connected to this objective.

2.166 As to proportionality, the effect of section 20 is not to remove a person's entitlement or eligibility for redress but rather to preclude that person from making an application during their period of incarceration. As a result, for most individuals the measure will be only a practical limitation on the right to equality and non-discrimination and effective remedy during their period of incarceration.

2.167 For persons who have 'exceptional circumstances', the minister's response indicates that such persons will be able to apply for redress if the operator makes a determination to that effect. In particular, the explanatory statement to the redress scheme rules explains that it is the policy intent of the rules that where one of the circumstances of subsection 14(2) of the redress scheme rules is satisfied (that is, where the person will be too ill to apply for redress upon release from gaol or will remain in gaol until after the scheme sunset day), the operator will determine that exceptional circumstances exist which would allow the person to make an

application for redress. On balance, the information provided by the minister and in the explanatory materials indicates that the measure may be compatible with the right to equality and non-discrimination and the right to an effective remedy. However, noting that the operator is not *required* to determine that exceptional circumstances exist where a person is too ill to apply upon release from gaol or will remain in gaol after the scheme sunset day, the practical operation of the measures should be monitored so as to ensure the measure is compatible with human rights in its implementation.

Committee response

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

2.169 The information provided from the minister and in the explanatory materials indicates that the measure may be compatible with the right to equality and non-discrimination and the right to an effective remedy. However, the practical operation of the measures should be monitored so as to ensure the measure is compatible with human rights in its implementation.

Entitlement to receive redress under the national redress scheme: persons subject to a security notice

2.170 The 2018 Bill also introduces special rules excluding entitlement to redress for persons subject to security notices from the Minister for Home Affairs. Section 64 provides that a person is not entitled to redress under the scheme while a security notice is in force in relation to the person. Section 65(1) provides that the Home Affairs Minister may give the minister a written notice (a security notice) if:

> (a) the Foreign Affairs Minister gives the Home Affairs Minister a notice under subsection 66(1) in relation to the person;[84] or
>
> (b) the person's visa is cancelled under section 116 or 128 of the *Migration Act 1958* because of an assessment by the Australian Security Intelligence Organisation that the person is directly or indirectly a risk to security

84 Section 66 allows the foreign minister to give the home affairs minister a written notice if the foreign minister has refused to issue a travel document or cancelled a travel document of a person following a request from a competent authority on the basis the competent authority suspects on reasonable grounds that if an Australian travel document were issued to a person, the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country: see also sections 14(1)(a)(i), 14(2) and 22 of the *Australian Passports Act 2005*.

(within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*);[85] or

(c) the person's visa is cancelled under section 134B of the *Migration Act 1958* (emergency cancellation on security grounds) and the cancellation has not been revoked because of subsection 134C(3) of that Act; or

d) the person's visa is cancelled under section 501 of the *Migration Act 1958* and there is an assessment by the Australian Security Intelligence Organisation that the person is directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*).

2.171 Before giving a security notice, the Minister for Home Affairs must have regard to the extent (if any) that payments to the person under the scheme have been or may be used for a purpose that might prejudice the security of Australia or a foreign country, if the Minister for Home Affairs is aware of that extent.[86] Security notices must be reviewed annually,[87] and the home affairs minister may revoke a security notice.[88]

2.172 Section 20(b) of the 2018 Bill additionally provides that a person cannot make an application for redress under the scheme if a security notice is in force against the person.

Compatibility of the measure with the right to an effective remedy

2.173 Restrictions on the entitlement of survivors who are subject to a security notice engage the right to an effective remedy as such persons may be precluded from obtaining redress.

2.174 The statement of compatibility does not address whether this measure is compatible with the right to an effective remedy. However, it provides the following information about why precluding persons subject to security notices is necessary:

85 'Security' is defined in section 4 of the *Australian Security Intelligence Organisation Act 1979* to mean: (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from: (i) espionage; (ii) sabotage; (iii) politically motivated violence; (iv) promotion of communal violence; (v) attacks on Australia's defence system; or (vi) acts of foreign interference; whether directed from, or committed within, Australia or not; and (aa) the protection of Australia's territorial and border integrity from serious threats; and (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

86 Section 65(2) of the 2018 Bill.

87 Section 69 of the 2018 Bill.

88 Section 70 of the 2018 Bill.

> This limitation is necessary to ensure that redress funds are not given to persons who may prejudice Australia's national security interests, or may use funds for purposes against Australia's security interests.[89]

2.175 The explanatory memorandum further explains that:

> These provisions ensure that those individuals assessed to be engaged in politically motivated violence overseas, fighting or actively supporting extremist groups, or that the individual would be likely to engage in conduct that might prejudice the security of Australia or a foreign country, would not be entitled to redress under the scheme.[90]

2.176 However, while national security may generally constitute a legitimate objective to limit human rights, Australia is still obliged to provide an effective remedy for breaches of the ICCPR. The committee therefore sought the advice of the minister as to the compatibility of the restriction with the right to an effective remedy.

Compatibility of the measure with the right to a fair trial and fair hearing

2.177 Article 14(1) of the ICCPR requires that in the determination of a person's rights and obligations in a 'suit at law', everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

2.178 The concept of 'suit at law' encompasses judicial procedures aimed at determining rights and obligations, equivalent notions in the area of administrative law and also extends to other procedures assessed on a case-by-case basis in light of the nature of the right in question.[91]

2.179 As acknowledged in the statement of compatibility to the 2018 Bill, a determination of a person's entitlement to redress as a result of sexual abuse, and a finding of responsibility on the part of institutions for such abuse, involves the determination of rights and obligations and is likely to constitute a 'suit at law'.[92] In relation to a security notice, removing a person's entitlement to redress while a security notice is in force in relation to the person[93] may similarly engage fair trial and fair hearing rights. For example, it is possible that a security notice may be in force in relation to a person for the entire duration of the scheme, removing an otherwise entitled person's entitlement to redress entirely. The application or

89 SOC, pp. 121-122.

90 Explanatory memorandum, p. 55.

91 See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [16].

92 SOC p. 126; See Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) [2.179]-[2.189].

93 Section 64 of the 2018 Bill.

continuance of a security notice may therefore similarly involve a determination of the person's rights and obligations.

2.180 If the security notice process were to constitute a 'suit at law', there may be fair trial and fair hearing concerns, as it is unclear whether persons subject to the notice have the benefit of any hearing where, for example, they may be able to make representations to the Minister for Home Affairs or the Minister for Foreign Affairs as to whether a security notice should be given, or as part of the annual review process, or in determining whether a security notice should be revoked.

2.181 The committee therefore sought the advice of the minister as to the compatibility of the security notice procedures with fair trial and fair hearing rights under Article 14 of the ICCPR.

Minister's response

2.182 In relation to the compatibility of the restrictions on the entitlement of survivors who are subject to a security notice with the right to an effective remedy, the minister states:

> The National Act [2018 Act] includes provisions that restrict a person's access to redress where it may prejudice the security of Australia or a foreign country. A person's access to redress will only be impacted in circumstances where the receipt of redress is relevant to the assessed security risk posed by the individual and the receipt of redress would adversely impact the requirements of security. It is not intended that every person whose passport or visa has been refused or cancelled would not be entitled to access redress, rather only in cases where it is appropriate or justified on security grounds.
>
> These provisions provide consistent powers for the Australian Government to deal with the threat of terrorism within Australia and that posed by Australians who participate in terrorist activities overseas. These are also standard arrangements that align with Australia's existing counter-terrorism legislative framework by mirroring provisions contained in the *Paid Parental Leave Act 2010* (sections 278A to 278L), *Social Security Act 1991* (sections 38L to 38W) and *A New Tax System (Family Assistance) Act 1999* (sections 57GH to 57GS).
>
> While not entitled to apply for redress, a person subject to a security notice who has suffered sexual abuse may still be able to pursue a civil claim to seek remedy for the abuse suffered. Should that person no longer be subject to a security notice, that person will then be entitled to apply for redress under the Scheme, should they satisfy other entitlement requirements.

2.183 The minister's response identifies that only a narrow category of persons whose passport or visa has been refused or cancelled would fall within the scope of

the security notice provisions (see also [2.170] and [2.171] above).[94] As noted in the initial analysis, while limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), state parties must provide a remedy that is effective where there has been a violation of human rights under the ICCPR. In this case, precluding a person's entitlement to redress where they are subject to a security notice applies to all elements of the redress scheme (the monetary payment, access to counselling and psychological services, and a direct personal response), not merely (for example) removing a person's entitlement to monetary payments. Therefore, while the scope of persons who may be subject to the security notice is very narrow, there remains a small risk that a survivor of institutional child sexual abuse who is subject to a security notice may not receive an effective remedy. However, as noted in the minister's response, such persons may still be able to pursue a civil claim to seek a remedy providing that the claim is not outside the statute of limitations in the relevant jurisdiction.[95]

2.184 As to the compatibility of the security notice procedures with fair trial and fair hearing rights, the minister provides the following information:

> A person subject to a security notice seeking to apply for redress will not be able to seek internal review of their entitlement for redress, as they are not entitled by way of a security notice as determined and decided by the Minister for Home Affairs. However, as section 69 of the National Act [2018 Act] outlines, the Minister for Home Affairs is required to review the application of a security notice every 12 months, and as outlined in section 70 of the National Act, may revoke a security notice.
>
> The right to judicial review of the determination of a security notice is maintained, and is not limited by the National Act. Judicial review under section 75(v) of the Constitution is maintained and where such a suit is initiated, a person will be entitled to a fair and public hearing by an independent and impartial tribunal. A person subject to a security notice will also maintain existing judicial review rights in the Administrative Appeals Tribunal in relation to the issuing of an adverse security assessment or the decision to cancel a passport.

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94 In relation to the minister's reference to consistency between the redress scheme and existing arrangements under social security laws, the committee has previously raised questions as to the compatibility of measures which cancel social security payments of persons as part of the counter-terrorism legislative framework with multiple human rights: See, relevantly, the committee's analysis of the Counter-Terrorism Legislation (Foreign Fighters) Bill 2014 in Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) 56-62; *Thirtieth Report of the 44th Parliament* (10 November 2015) pp. 98-101.

95 While this may be a safeguard in some circumstances, it is noted that a person may be unable to pursue a civil claim due to, for example, statute of limitation periods expiring. Therefore, whether this is a sufficient safeguard will depend on how the measure operates in practice.

2.185 To the extent fair trial and fair hearing rights may be limited by the bill, it appears that any such limitation is pursued on the basis of protecting Australia's national security interests. This would be a legitimate objective for the purposes of international human rights law. In relation to proportionality, noting the requirement to review the security notice every 12 months, the minister's ability to revoke the notice, and the continued availability of judicial review for the determination and for the underlying security notice, on balance and in the context of the particular scheme, the measure appears to be compatible with fair trial and fair hearing rights.

Committee response

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

2.187 In relation to the right to an effective remedy, there remains a small risk that a survivor of institutional child sexual abuse who is subject to a security notice may not receive an effective remedy.

2.188 Based on the further information provided by the minister, the measure appears likely to be compatible with fair trial and fair hearing rights.

Entitlement to receive redress under the national redress scheme: child applicants

2.189 For children who will turn 18 years before the scheme sunset day, who make an application for redress, there is a special process for such applicants to be prescribed by the redress scheme rules.[96] As a result of these provisions, the 2018

96 Section 21 of the 2018 Bill. Section 20(1)(c) provides that a person who is a child who will not turn 18 before the scheme sunset day cannot make an application for redress. The effect of this is that children under eight when the scheme commences will not be able to receive redress under the scheme. Section 20(1)(c) engages the right to equality and non-discrimination and the right to an effective remedy. However, the SOC explains at 120-121 that only around 50 of more than 8,000 survivors that attended private sessions were under the age of 8 years. The SOC explains that, as found by the Royal Commission, while it was possible that some individuals would wish to seek redress while they are still a minor, it is not expected that many minors will apply as it would almost always be within the time limitations to commence proceedings through civil litigation, and an individual would be more than likely to receive larger payment either through settlement or civil litigation than they might during the scheme. The SOC also explains alternative avenues that were considered, such as requiring minors to have a nominee arrangement or paying amounts into a trust account, and explains why this approach was not considered to be appropriate. Based on the information provided (particularly the availability of civil litigation for survivors under the age of 8 and the explanation of less rights restrictive approaches that were considered), this aspect of the measure appears to be compatible with the right to an effective remedy and appears to constitute a permissible limitation on the right to equality and non-discrimination.

Consequential Amendments Bill (now 2018 Consequential Amendments Act) exempts the 2018 Bill (now 2018 Act) from the *Age Discrimination Act 2004*.[97]

Compatibility of the measure with the right to equality and non-discrimination and the right to an effective remedy

2.190 The relevant principles relating to the right to equality and non-discrimination are set out at [2.125] above. While 'age' is not listed as a prohibited ground of discrimination in Article 26 of the ICCPR, the UN Human Rights Committee has stated that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination based on the ground of 'other status'.[98] Additionally, the Convention on the Rights of the Child (CRC) requires states parties to respect and ensure rights under the CRC to each child without discrimination.[99] This includes an obligation to ensure that children are protected against all forms of violence and all forms of sexual abuse without discrimination.[100] The relevant principles relating to the right to an effective remedy are set out above.

2.191 While the statement of compatibility states that the CRC 'does not explicitly exclude different processes based on age',[101] the different application process for child applicants directly engages the right to equality and non-discrimination. By providing for a special application process for children who will turn 18 before the scheme sunset day, the measure also engages the right to an effective remedy.

2.192 The statement of compatibility provides information as to why the different application process is necessary and permissible:

> The restriction on some children applying for redress, and the special process for how children's applications are treated, is necessary to protect those children's interests. As a requirement of the Scheme is to release responsible participating institutions from any liability for sexual abuse and related non-sexual abuse within the scope of the Scheme (restricting their right to later pursue civil litigation), it is necessary to ensure that the effect of the release is fully understood. Survivors who are children are unlikely to be able to fully comprehend the implications of such a decision, especially when the impact of their abuse may not have been fully realised yet.

97 Schedule 5 to the 2018 Consequential Amendments Bill.

98 *Love v Australia* (983/01), UN Human Rights Committee (2003) [8.2].

99 Article 2(1), CRC.

100 Articles 19 and 34 read with Article 2(1) of the CRC. See Committee on the Rights of the Child, *General Comment No.13: The right of the child to freedom from all forms of violence* (2011) [60].

101 SOC, p. 120.

> Furthermore, a component of the application process is for survivors to articulate the impact that the relevant abuse has had on them. As the impact of child abuse in a person's early years may not be realised until later in the person's life, an application submitted as a child may not contain the relevant detail. Similarly, a child survivor's ability to articulate their experience would likely increase with age. While children who will turn 18 years of age before the Scheme sunset day are able to make an application for redress as a child, it is important that they are able to provide the Operator with updated information once they are an adult, which the special process will allow.
>
> Whilst other avenues to include children, such as requiring them to have a nominee arrangement were considered, numerous stakeholders raised concerns about nominees not making decisions in the best interests of the survivor, or not using redress payments for the benefit of the survivor. Additionally, even if the Scheme were to require that payments go into a trust account, the necessary interaction with the minor's parent or guardian would present complexities. Some minors who have been sexually abused in an institutional setting may have fractured relationships with their parents or guardians, and may remain in out of home care. Due to these relationships, the minor may not trust that their parent or guardian will make choices in their best interest.
>
> The special process described strikes the right balance between safeguarding the interests of children whilst allowing them to have some indication of their likely redress entitlement. This will allow these children to pursue a range of different options. Some survivors may wait until they turn 18 in order to access redress, whilst others (supported by their parent/ or guardian/s) may choose to pursue civil litigation.
>
> …
>
> Child survivors and their families, including both those who are unable to access redress under the Scheme and those who have to wait until they are 18 to receive a redress determination, will be able to access the Scheme's community support services, as well as legal support services to receive advice about available options outside of the Scheme.[102]

2.193 The information provided by the minister indicates that the measure has been introduced so as to protect the best interests of the child and has been considered appropriate in light of other, less rights restrictive, options. This is relevant to the compatibility of the measure with the right to equality and the right to an effective remedy.

2.194 However, there were concerns as to whether the broad power to determine the special process for child applicants by way of rules is compatible with these rights. This is because, as discussed earlier, in the absence of sufficient safeguards,

102 SOC, pp. 120-121.

the broad scope of the power to determine a person's entitlement to eligibility or ineligibility could be exercised in such a way as to be incompatible with human rights. Further information was required as to the proposed content of the redress scheme rules as it relates to the special process for child applicants so as to determine whether the application process as it applies to children is compatible with the right to an effective remedy and the right to equality and non-discrimination.[103]

2.195 The committee sought further information as to the proposed process for child applicants, including:

- a copy of the proposed rules prescribing the process for child applicants (or, if no copy was available, a detailed outline of the proposed rules); and
- information as to safeguards in the proposed rules to protect the right to an effective remedy and the right to equality and non-discrimination (including whether the rules will be subject to disallowance or other parliamentary oversight, and whether decisions by the operator pursuant to the rules will be capable of being reviewed).

Minister's response

2.196 In response, the minister provides the following information about the redress scheme rules made under the 2018 Act:

> Section 15 of the Rules deals with applications by a child. The process contained in this section is consistent with the right to an effective remedy and the right to equality and non-discrimination. The intention of this process is to allow the child, in the months prior to turning 18, to provide further detail about the abuse related to their application and the impact of the abuse, which may not have been realised at the time they submitted their application due to their young age. This process also allows the Scheme Operator to make a more fully informed determination regarding the child's eligibility for redress as soon as practicable after they turn 18.
>
> As stated in the human rights statement of compatibility accompanying the National Act [2018 Act], prior to turning 18 child applicants will be given an indication of their likely redress entitlement. The purpose of this is to provide information to the child to pursue a range of different options, if they so choose. Some may wait until they turn 18 in order to access redress, whilst others (supported by their parent/s or guardian/s) may choose to pursue civil litigation. Once a determination to approve, or not approve, the application has been made, child applicants will be able to seek a review of the determination, consistent with all other determinations, as outlined in Chapter 4, Part 4-1 of the National Act.

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103 This includes information as to the extent to which the rules will be subject to parliamentary oversight, noting section 44(1)(a) of the *Legislation Act 2003*.

2.197 The minister's response usefully outlines the rules in place for child applicants and clarifies that such rules do not preclude entitlement or eligibility for redress. Based on the information provided and in light of the content of the redress scheme rules as they relate to applications by children, the measure is likely to be compatible with the right to an effective remedy and the right to equality and non-discrimination.

Committee response

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

2.199 Based on the information provided, the special application process for child applicants is likely to be compatible with the right to an effective remedy and the right to equality and non-discrimination.

Mr Ian Goodenough MP

Chair