

## Chapter 2

### Concluded matters

1.1 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.

1.2 Correspondence relating to these matters is available on the committee's website.<sup>1</sup>

### Disability Discrimination Regulations 2019 [F2019L01186]<sup>2</sup>

<b>Purpose</b>	The regulations set out the exemptions from prohibition of disability discrimination in prescribed Commonwealth and State laws as well as an exemption in relation to combat duties and peacekeeping services
<b>Portfolio</b>	Attorney-General
<b>Authorising legislation</b>	<i>Disability Discrimination Act 1992</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the Senate and House of Representatives on 16 September 2019).
<b>Rights</b>	Equality and non-discrimination; effective remedy; education; work; rights of persons with disabilities
<b>Status</b>	Concluded examination

2.1 The committee requested a response from the Attorney-General in relation to the instrument in [Report 6 of 2019](#).<sup>3</sup>

#### Exemptions from disability discrimination law

1.3 These regulations remake the Disability Discrimination Regulations 1996 which sunsetted on 1 October 2019. The *Disability Discrimination Act 1992* (DDA) provides that discrimination on the basis of disability is unlawful in certain identified

1 See [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports).

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Disability Discrimination Regulations 2019 [F2019L01186], *Report 2 of 2020*; [2020] AUPJCHR 33.

3 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019) pp. 24-38.

areas of public life. Section 47(2) of the DDA sets out specific exemptions from the prohibitions on disability discrimination in relation to anything done by a person in direct compliance with a prescribed law.<sup>4</sup>

1.4 Schedule 2 of the regulations prescribes a number of Commonwealth and State laws for the purposes of section 47(2) of the DDA (as set out below). Section 53(1) of the DDA provides an exemption from the prohibition on disability discrimination in relation to combat duties, combat-related duties and peacekeeping services. The terms 'combat duties' and 'combat-related duties' are defined in section 53(2) of the DDA to mean such duties as declared by the regulations. The regulations declare two duties to be combat-related duties (as set out below).

## **Summary of initial assessment**

### ***Preliminary international human rights legal advice***

#### ***Directions that a child be enrolled at a special school***

1.5 The regulations prescribe sections 75(3) and 75A of the *Education Act 1972* (South Australia) (Education Act) for the purposes of section 47(2) of the DDA (thereby exempting these from the prohibitions on disability discrimination under the DDA). These sections provide that where, in the opinion of the Director-General, it is in the best interests of a child that the child be enrolled at a special school, the Director-General may nominate and direct that the child be enrolled at a special school.

#### ***Right to equality and non-discrimination, and the best interests of the child***

1.6 By allowing the Director-General to be able to direct that a child be enrolled at a special school and enabling an educational authority to refuse to enrol a student on the basis of disability, the measure engages the right to equality and non-discrimination, as it facilitates the exclusion of children with disabilities from mainstream education rather than promoting inclusion.

1.7 The right to equality and non-discrimination 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 equal and non-discriminatory protection of the law. Discrimination under articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) encompasses a distinction based on a personal attribute, such as, in this case, on the basis of disability,<sup>5</sup> which has either the purpose ('direct' discrimination), or the effect

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4 *Disability Discrimination Act 1992*, section 47(2).

5 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'.

('indirect' discrimination), of adversely affecting human rights.<sup>6</sup> Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also prohibits discrimination specifically in relation to the human rights contained in that Convention, such as the right to education.

1.8 The rights to equality and non-discrimination for people with disabilities are also provided for under the Convention on the Rights of Persons with Disabilities (CRPD). The UN Committee on the Rights of Persons with Disabilities has emphasised that the fundamental principles of equality and non-discrimination interconnect with human dignity and that the Convention on the Rights of Persons with Disabilities is based on the principle of 'inclusive equality'.<sup>7</sup>

### *Right to education*

1.9 By allowing the Director-General to direct that a child be enrolled at a special school,<sup>8</sup> the measure also engages the right to education, and risks limiting the right by facilitating the exclusion of children with disabilities from mainstream education rather than promoting inclusion.

1.10 The right to education is guaranteed by article 13 of the ICESCR, under which parties to the Convention recognise the right of everyone to education, and agree that education shall be directed to the full development of the human personality and sense of dignity, and shall strengthen respect for human rights and fundamental freedoms. Article 24 of the CRPD also guarantees the right of persons with disabilities to education through an inclusive education system, at all levels, without discrimination and on the basis of equality of opportunity.<sup>9</sup> Achieving this requires that persons with disabilities are not excluded from the general education system on the basis of disability.<sup>10</sup>

1.11 In explaining the importance of inclusive education, the UN Committee on the Rights of Persons with Disabilities states that:

the right to non-discrimination includes the right not to be segregated and to be provided with reasonable accommodation and must be understood in the context of the duty to provide accessible learning environments and reasonable accommodation.<sup>11</sup>

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6 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

7 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination* [4] and [11].

8 *Education Act 1972* (SA), sections 75(3) and 75A.

9 Convention on the Rights of Persons with Disabilities (CRPD), article 24.

10 CRPD, article 24(2)(a).

11 UN Committee on the Rights of Persons with Disabilities, *General Comments No. 4, Article 24: Right to inclusive education* (2016) [11] and [13].

1.12 This is supported by the Office of the High Commissioner on Human Rights, which states that inclusive education fulfils the guarantee of universality and non-discrimination in the right to education.<sup>12</sup>

1.13 Under the ICESCR, Australia has immediate obligations to ensure that people enjoy economic, social and cultural rights without discrimination.<sup>13</sup> It also has obligations to progressively realise the right to inclusive education using the maximum of resources available.<sup>14</sup> The UN Committee on the Rights of Persons with Disabilities has stated:

progressive realisation means that States parties have a specific and continuing obligation “to move as expeditiously and effectively as possible” towards the full realization of article 24. This is not compatible with sustaining two systems of education: mainstream and special/segregated education systems.<sup>15</sup>

#### *Right to an effective remedy*

1.14 Further, by protecting a decision of the Director-General to refuse a student's application for enrolment from an unlawful discrimination claim, the right to an effective remedy may be limited. Article 2(3) of the ICCPR protects the right to an effective remedy for any violation of rights and freedoms recognised by the ICCPR (such as the right to equality and non-discrimination). This includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. Effective remedies should be appropriately adapted to take account of the special vulnerabilities of certain categories of persons, including children. 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.<sup>16</sup> It is not permissible to offer no remedy for a violation of the rights protected by the ICCPR.

#### ***Lower rates of pay for persons with disability***

1.15 The regulations also provide that regulation 10 of the Fair Work (General) Regulations 2009 (South Australia) is a prescribed law for the purposes of s 47(2) of the DDA. Regulation 10 excludes wages and salaries payable to 'assisted persons'

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12 Office of the High Commissioner on Human Rights, *Thematic Study of the Rights of Persons with Disabilities to Education*, A/HRC/25/29 (2013), para 3.

13 International Covenant on Economic, Social and Cultural Rights (ICESCR), article 2(2).

14 ICESCR, article 2(1); CRPD, article 4(2).

15 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 4, Article 24: Right to inclusive education* (2016) [39].

16 See UN Human Rights Committee, *General Comment 29: States of Emergency (Article 4)* (2001) [14].

from award regulations (pursuant to section 113 of the *Fair Work Act 1994* (SA) (Fair Work Act)). By providing for lower rates of pay for individuals with disabilities who are employed by recognised organisations for the purposes of section 113 of the Fair Work Act, this measure engages and potentially limits a number of human rights.

#### *Right to equality and non-discrimination*

1.16 By providing for different work conditions for people with disability, these measures engage and limit the right to equality and non-discrimination, see discussion of this right above at paragraphs [2.7].

#### *Right to work and right to an effective remedy*

1.17 By providing for lower rates of pay for individuals with disabilities who are employed by recognised organisations this measure also engages and potentially limits the right to work.

1.18 The rights to work and to just and favourable conditions of work are protected by articles 6(1), 7 and 8(1)(a) of the ICESCR.<sup>17</sup> The right to work requires that parties to the ICESCR provide a system of protection that guarantees access to employment. The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of parties to the ICESCR in relation to the right to just and favourable conditions of work includes the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.<sup>18</sup> Under article 2(1) of the ICESCR, Australia has obligations to ensure the right to work is made available in a non-discriminatory manner and to take steps within its available resources to progressively realise the broader enjoyment of the right.

1.19 In relation to the rights to work and to just and favourable conditions of work for persons with disabilities, article 27(1) of the Convention on the Rights of Persons with Disabilities provides that:

States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work ... by taking appropriate steps, including through legislation, to ... (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work,

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17 Related provisions relating to such rights for specific groups are also contained in article 5(i) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the CRC and article 27 of the CRPD.

18 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016).

including equal opportunities and equal remuneration for work of equal value...

1.20 Article 27(1) of the CRPD also requires that parties:

- (g) Employ persons with disabilities in the public sector;
- (h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures; and
- (i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace.

1.21 These obligations are further supported by article 5(3) of the CRPD, which creates a duty to provide reasonable accommodations. Relevantly, the UN Committee on the Rights of Persons with Disabilities has found that the combination of articles 5(3) and 27(1) means that parties to the CRPD should 'ensure that persons with disabilities are paid no less than the minimum wage'.<sup>19</sup>

### ***Involuntary care and treatment of persons with a mental illness***

1.22 The regulations provide that the *Mental Health Act 2007* (New South Wales) (Mental Health Act) and the *Mental Health Regulation 2013* (New South Wales) (Mental Health Regulation) are prescribed laws. The Mental Health Act provides, amongst other things, for the involuntary care and treatment of involuntary mental health patients, and the Mental Health Regulation sets out the procedural and administrative requirements for the purposes of the Mental Health Act.

#### ***Right to equality and non-discrimination and right to an effective remedy***

1.23 Prescribing these laws as exempt from the DDA has the effect that the provision of treatment to involuntary mental health patients cannot attract an unlawful discrimination complaint, and so engages and potentially limits the right to equality and non-discrimination, which is outlined above at paragraph [2.7], and the right to an effective remedy.

### ***Issuing, cancelling, suspending or varying drivers' licences***

1.24 The regulations also provide that specific regulations in the *Road Transport (Driver Licencing) Regulation 2017* (New South Wales) and section 80 of the *Motor Vehicles Act* (South Australia) are prescribed laws for the purposes of section 47(2) of the DDA. These 'licence provisions' cover the circumstances around when a driver's licence can be issued, cancelled, suspended or varied.

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19 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination* [67].

*Right to equality and non-discrimination and right to an effective remedy*

1.25 Prescribing these licence provisions as exempt from the DDA has the effect that a person cannot bring an unlawful discrimination complaint against the Authority in New South Wales, or the Registrar of Motor Vehicles in South Australia, on the basis that they were treated less favourably due to disability. This thereby engages and potentially limits the right to equality and non-discrimination, see discussion of this right above at paragraph [2.7].

**Combat duties**

1.26 The regulations define the terms 'combat duties' and 'combat-related duties' for the purposes of the exemption to the DDA provided under section 53(1). 'Combat duties' are declared to be duties which require, or which are likely to require, a person to commit, or participate directly in the commission of, an act of violence in the event of armed conflict.<sup>20</sup> 'Combat-related duties' are declared to be (a) duties which require, or which are likely to require, a person to undertake training or preparation for, or in connection with, combat duties; and (b) duties which require, or which are likely to require, a person to work in support of a person performing combat duties.<sup>21</sup>

*Right to equality and non-discrimination*

1.27 These broad declarations that people with disabilities may be excluded from a wide range of roles on the basis of disability, and may not be able to challenge that exclusion under the DDA, engage and potentially limit the right to equality and non-discrimination, see discussion of this right above at paragraph [2.7].

*Right to work and right to an effective remedy*

1.28 The result of these broad declarations is that people with disabilities may be excluded from a wide range of roles on the basis of disability, and may not be able to challenge that exclusion under the DDA, thereby engaging and potentially limiting the right to work and the right to an effective remedy. As set out at paragraphs [2.18] to [2.21], the right to work requires that parties to the CRPD provide a system of protection that guarantees access to employment.

1.29 Limitations on the rights to equality and non-discrimination, education and work may be permissible where a measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and is proportionate to that objective. The initial analysis raised a number of concerns as to whether the measures were rationally connected to and proportionate to the stated objectives. The full initial legal analysis is set out at [Report 6 of 2019](#). The initial

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20 Statement of compatibility, p. 5.

21 Statement of compatibility, p. 5.

analysis stated that in order to assess whether the measures are proportionate to, and likely to achieve, the stated objectives, further information was required as to:

- whether providing a blanket exemption from the DDA for each of these measures is the least rights restrictive way of achieving the stated objectives (noting that other states and territories appear not to have equivalent exemptions);
- what safeguards are in place to ensure that each of the exemptions from the DDA are not disproportionate, including whether there are rights of review of decisions made under the prescribed laws or monitoring of the exercise of these powers; and
- whether a child's right to inclusive education will be considered by the Director-General when determining whether it is in the child's best interest to attend a special school.

1.30 The regulations also engage and may limit the right to an effective remedy, as these exemptions mean that a number of acts are protected from claims of unlawful discrimination. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), Australia must comply with the fundamental obligation to provide a remedy that is effective.

1.31 Therefore, the initial analysis stated that further information was required as to whether there are other mechanisms by which a person whose rights to equality and non-discrimination are violated, may seek a remedy, and if not, how the measure is capable of being compatible with the right to an effective remedy.

### ***Committee's initial view***

1.32 The committee noted the legal advice on the bill. In order to assess whether the measures are proportionate to, and likely to achieve, the stated objectives, the committee sought the Attorney-General's advice as to the matters set out at paragraphs [2.29] and [2.31].

### **Attorney-General's response**

1.33 The Attorney-General advised:

a. Blanket exemption

I note the Committee's comments that other states and territories appear not to have equivalent exemptions. The approach taken by the Commonwealth in this case is to rely on the states and territories to identify any laws that need to be prescribed, and to provide justification, including an assurance that it has consulted with the community and other relevant stakeholders in its jurisdiction. I consider that each jurisdiction is best placed to determine the risk of their own laws creating a situation where unlawful discrimination may occur under the *Disability Discrimination Act 1992* (Cth) (DDA). However upon receiving a request to



prescribe a law, the Commonwealth conducts a separate assessment of the request and consults with the Australian Human Rights Commission.

I consider prescription to be an appropriate means for determining when the DDA should give way to other laws, noting in particular that the process for prescribing laws provides for scrutiny through parliamentary disallowance as well as through consultation with relevant governments.

The prescription of the particular laws provides reasonable certainty to decision-makers that they can appropriately make decisions in the interests of public safety and be protected from an unlawful discrimination complaint based on that decision. In forming my view, I considered that the requirements a person must meet under each of the prescribed laws in order to ensure public safety were reasonable, necessary and proportionate. I considered that the potential risk to the public may be significant if these laws were not prescribed, particularly in relation to those laws that deal with motor vehicles and firearms.

b. Safeguards and monitoring available

The Regulations are subject to the review and consultation provisions of the *Legislative Instruments Act 2003* (Legislative Instruments Act). A review of the Regulations was undertaken in accordance with these provisions to determine whether they were still current and fit-for-purpose. In forming my views on these Regulations I was provided with advice by a panel which conducted a public consultation process. This process provided an opportunity for stakeholders, including disability advocates, to make submissions on the existing prescribed laws and to identify any concerns about the operation of the regulations. While no submissions were received from disability advocates, the panel carefully considered all the exempted laws in the regulations and sought further advice from the relevant jurisdictions before making their recommendations to me.

In implementing this review of the Regulations, a number of previously prescribed laws have been removed. This was because I considered that compliance with those prescribed laws may not constitute unlawful conduct under the DDA and therefore they did not need to be prescribed.

In the case of the Fair Work (General) Regulations 2009 (Fair Work Regulations), I wrote to the relevant jurisdiction seeking further information to support the prescription of regulation 10, including further consultation with affected organisations. I proposed to repeal the prescribed law in 12 months' time pending further information being provided. Upon further consideration, the jurisdiction has advised that the Fair Work Regulations do not need to be prescribed and that there are no individuals employed under the regulation. The exemption will therefore be allowed to lapse as scheduled. As no individuals are currently affected by the exemption and are not expected to be affected within the next 12 months, I do not consider that it is necessary to bring forward the repeal of this exemption.

Where I considered that a law should continue to be prescribed in the Regulations, the general approach was taken to prescribe specific provisions to ensure the exemption was limited in scope and proportionate. However, in the case of the *Mental Health Act 2007* (NSW) (Mental Health Act) and the *Mental Health Regulation 2013* (NSW) (Mental Health Regulation) I agreed with the request from NSW that these laws needed to be prescribed in their entirety given the nature of the laws and the importance of ensuring that they could operate effectively. This is because the definition of 'disability' could arguably include mental illnesses and provisions of the DDA, particularly section 24, could apply to care and treatment provided under the Mental Health Act and the Mental Health Regulation. For the avoidance of doubt and to ensure clinicians can appropriately provide care and treatment to patients with a mental illness, I considered that the Mental Health Act and the Mental Health Regulation should be prescribed in their entirety.

I note the Committee's concern that ongoing monitoring of the exemptions be considered. As you would be aware, the functions of the Australian Human Rights Commission include, pursuant subsections 67(i) and U) of the DDA, examining and monitoring the operation of other laws and reporting to the Minister on their consistency with the DDA.

The Regulations will be required to be reviewed again in 10 years' time, in accordance with relevant provisions in the Legislative Instruments Act. In addition, states and territories can identify any laws that need to be added, removed or amended at any time.

c. Right to inclusive education

The Committee has asked whether a child's right to inclusive education is considered by the relevant Director-General. While there is no explicit obligation to consider the right to inclusive education, subsection 75(3) of the *Education Act 1972* (South Australia) requires the Director-General to consider the best interests of the child when making a direction that a child should attend a special school. This requirement could arguably be considered a special measure within the meaning of subparagraph 45(1)(b)(i) of the DDA (affording people with disability access to opportunities to meet their special needs in relation to education). However, whether compulsory enrolment at a special school could be a special measure would be dependent on the specific circumstances of each individual case, and would need to be assessed on a case by case basis.

d. Other remedies available

The prescription of these laws under the DDA does not affect any other existing review mechanisms or remedies that a person is entitled to seek in relation to decisions under the prescribed laws. The existing review rights under the prescribed laws are as follows:

- The Mental Health Act and Mental Health Regulation provide that a person can seek a review of, or appeal a decision to, the Mental Health Review Tribunal. If a person remains dissatisfied with the decision, the person can appeal to the Supreme Court against a determination of the Tribunal ( or if the Tribunal was unable to reach a determination, against that decision);
- Part 3E of the *Motor Vehicles Act 1959* (SA) provides any person who is aggrieved or dissatisfied with a decision with a right of review by the Registrar and a subsequent right of appeal to the District Court;
- Part 7.8 of the *Road Transport Act 2013* (NSW) provides a person with the right to appeal a decision of the Authority made under the Road Transport (Driver Licensing) Regulation 2017 (NSW); and
- Subsection 75(c) of the *Education Act 1972* (SA) provides that parents have the right to appeal a direction or decision through the Administrative and Disciplinary Division of the District Court provided.

## Concluding comments

### ***International human rights legal advice***

#### *Whether a blanket exception is the least rights-restrictive means of achieving stated objectives*

1.34 In relation to whether providing a blanket exception is the least rights restrictive way of achieving the stated objectives, the Attorney-General offers a general justification of the particular laws that have been prescribed, but not in relation to each measure. The Attorney-General states that the federal government relies on the states and territories to identify any laws that need to be prescribed as each jurisdiction is 'best placed to determine the risk of their laws creating a situation where unlawful discrimination may occur under the *Disability Discrimination Act 1992*'. The Attorney-General adds that prescription is 'an appropriate means for determining when the DDA should give way to other laws', and that it 'provides reasonable certainty to decision-makers that they can appropriately make decisions in the interests of public safety'. Without information provided in relation to each exemption from the *Disability Discrimination Act 1992*, and whether in each instance it is the least rights restrictive way of achieving the stated objectives, it is not possible to assess whether the blanket exemptions are sufficiently circumscribed. It is noted that the Attorney-General's response did not address the question as to why the exemptions exist in some states and territories and are not considered necessary in others.

#### *Safeguards and monitoring available*

1.35 In relation to what safeguards are in place to ensure the exemptions are not disproportionate, including any rights of review or monitoring, the Attorney-General outlined that the regulations are subject to review and consultation requirements.

He also advised that a review of the regulations was undertaken to determine whether they were still current and fit-for-purpose, which involved being advised by a panel that conducted a public consultation process and that in implementing this review 'a number of previously prescribed laws have been removed', while others continued to be prescribed. The Attorney-General further advised that in the case of the authorisation of the lower rates of pay for persons with a disability who are employed by recognised organisations in South Australia under the *Fair Work (General) Regulations 2009* there is no longer a need for the regulations to be prescribed as no individuals are currently affected by the exemption and that this exemption will lapse in the next 12 months. The Attorney-General concluded by stating that the regulations 'will be required to be reviewed again in 10 years' time' and that 'in addition, states and territories can identify any laws that need to be added, removed or amended at any time'.

1.36 However, while the Attorney-General's response addresses the process by which the regulation was made, it does not address the question of what safeguards are in place to ensure that each of the exemptions from the *Disability Discrimination Act 1992* are not disproportionate, including whether there is any monitoring of the exercise of these powers. Absent this information, it is difficult to conclude that each of the exemptions are proportionate means to achieve their stated objectives.

#### *Directions that a child be enrolled at a special school*

1.37 In relation to whether a child's right to inclusive education will be considered by the Director-General when determining whether it is in the child's best interests to attend a special school, the Attorney-General stated that while there is no explicit obligation to consider the right to inclusive education, the Director-General must consider the best interests of the child when making such a direction. The Attorney-General concludes by arguing that 'compulsory enrolment at a special school could be a special measure' within the meaning of the *Disability Discrimination Act 1992* (which provides that it is not unlawful to afford persons who have a disability access to facilities, services or opportunities to meet their special needs in relation to education).<sup>22</sup> However, as a matter of international human rights law, compulsory enrolment in a special school cannot constitute a special measure, in light of the right to inclusive education and the right to equality and non-discrimination, and the related state obligation to provide reasonable accommodation for children with disabilities.

1.38 As a matter of international human rights law, differential treatment 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 objective and is a proportionate means of achieving that

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22 See paragraph 45(1)(b) of the *Disability Discrimination Act 1992*.

objective.<sup>23</sup> Article 5(4) of the CRPD also provides that specific measures are not to be regarded as discrimination if they can be characterised as positive or affirmative measures that aim to accelerate or achieve de facto equality of persons with disabilities. However, segregated schooling cannot be argued to be a 'special measure'. The UN Committee on the Rights of Persons with Disabilities have affirmed:

The right to non-discrimination includes the right not to be segregated and to be provided with reasonable accommodation and must be understood in the context of the duty to provide accessible learning environments and reasonable accommodation.<sup>24</sup>

1.39 Further, reasonable accommodation or special measures cannot be inconsistent with the Convention as a whole:

Specific measures adopted by States parties under article 5(4) of the Convention must be consistent with all its principles and provisions. In particular, they must not result in perpetuation of isolation, segregation, stereotyping, stigmatization or otherwise discriminate against persons with disabilities.<sup>25</sup>

1.40 There are also questions as to whether separating children with disabilities from the general education system can be legitimately characterised as being in the best interests of the child (and therefore rationally connected to the stated objective). Relevantly, article 23(3) of the Convention on the Rights of the Child states that assistance must be provided to ensure that a child with disability has 'effective access to and receives education...in a manner conducive to the child's achieving the *fullest possible social integration* and individual development'.<sup>26</sup> The UN Committee on the Rights of Persons with Disabilities has also cautioned:

The concept of the 'best interests of the child' contained in article 3 of the Convention on the Rights of the Child should be applied to children with disabilities with careful consideration of their circumstances. States parties should promote the mainstreaming of disability in general laws and policies on childhood and adolescence.<sup>27</sup>

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23 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

24 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 4 (2016) on the right to inclusive education* [13].

25 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination* [29].

26 CRC, article 23(3) [emphasis added].

27 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination* [37].

1.41 In explaining the importance of inclusive education, the UN Committee on the Rights of Persons with Disabilities states that 'Inclusive education is to be understood as [...] a fundamental right of all learners'.<sup>28</sup>

1.42 This is supported by the Office of the High Commissioner on Human Rights, which states that inclusive education fulfils the guarantee of universality and non-discrimination in the right to education.<sup>29</sup>

1.43 Under the ICESCR, Australia has immediate obligations to ensure that people enjoy economic, social and cultural rights without discrimination.<sup>30</sup> It also has obligations to progressively realise the right to education using the maximum of resources available.<sup>31</sup> The UN Committee on the Rights of Persons with Disabilities has stated:

progressive realisation means that States parties have a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realization of article 24. This is not compatible with sustaining two systems of education: mainstream and special/segregated education systems.<sup>32</sup>

*Right to an effective remedy: other remedies available*

1.44 In relation to whether there are other mechanisms by which a person whose rights to equality and non-discrimination are violated may seek a remedy, and if not, how the measure is capable of being compatible with the right to an effective remedy, the Attorney-General stated that the prescription of these laws does not affect any other existing review mechanisms or remedies that a person is entitled to seek under the prescribed laws. The Attorney-General provides a list of the respective review mechanisms under the prescribed laws, but does not address the review of decisions concerning combat and combat-related duties exempted from the *Disability Discrimination Act 1992*.

1.45 However, while the legislation listed would appear, in some instances, to allow an affected person to seek a review of the decision, it is not apparent that a review could be sought on the grounds that they have been discriminated against. The right to an effective remedy means that parties to the International Covenant on Civil and Political Rights must comply with the fundamental obligation to provide a

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28 UN Committee on the Rights of Persons with Disabilities, *General Comments No. 4, Article 24: Right to inclusive education* (2016) [10(a)].

29 Office of the High Commissioner on Human Rights, *Thematic Study of the Rights of Persons with Disabilities to Education*, A/HRC/25/29 (2013), para 3.

30 International Covenant on Economic, Social and Cultural Rights (ICESCR), article 2(2).

31 ICESCR, article 2(1); CRPD, article 4(2).

32 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 4, Article 24: Right to inclusive education* (2016) [39].

remedy that is effective, and it is not permissible to not offer a remedy for rights violations at all. In this regard, it is not clear whether a person discriminated against as a result of these exemptions would have access to any remedy for such discrimination.

#### *Concluding remarks*

1.46 Exempting a number of acts done under a statutory authority from compliance with the *Disability Discrimination Act 1992* engages and limits the rights to equality and non-discrimination, the right to education, and the right to work. While these rights may be subject to permissible limitations under international human rights law, it has not been demonstrated that these proposed exemptions are, in each instance, a proportionate means of achieving the stated objectives. In order to be proportionate, a limitation on the rights should only be as extensive as is strictly necessary to achieve its legitimate objectives and must be accompanied by appropriate safeguards. In particular, it is not clear that providing a blanket exemption from the *Disability Discrimination Act 1992* is the least rights restrictive way of achieving the stated objectives. Nor do these exemptions appear to contain sufficient safeguards, particularly to ensure adequate rights of review. As such, there is a risk that these exemptions may not be compatible with the rights to equality and non-discrimination, the right to education and the right to work. The exemptions also appear to engage the right to an effective remedy. It has also not been demonstrated that a person who has been discriminated against would always have access to an effective remedy in relation to that discrimination, and as such the measure may not comply with the obligation to provide an effective remedy.

#### *Committee view*

**1.47 The committee thanks the Attorney-General for this response. The committee notes the legal advice these measures engage and limit a number of human rights, including the rights to equality and non-discrimination, the right to inclusive education, the right to work, and may engage the right to an effective remedy.**

**1.48 The committee commends the Attorney-General on conducting further consultation with South Australia regarding the lower rates of pay for persons with disabilities being prescribed in the regulations, which resulted in the exemption being allowed to lapse as scheduled. However, the committee is concerned that it has not been demonstrated that each of the proposed exemptions from the *Disability Discrimination Act 1992* are a proportionate means of achieving the stated objectives. In particular, it is not clear that providing a blanket exemption to the prescribed acts is the least rights restrictive way of achieving the stated objectives, or that there are sufficient safeguards in place. The committee also considers that it has not been demonstrated that a person who has been discriminated against would always have access to an effective remedy in relation to that discrimination.**

**1.49 The committee draws these human rights concerns to the attention of the Attorney-General.**

**Senator the Hon Sarah Henderson  
Chair**