

Chapter 1¹

New and continuing matters

1.1 In this chapter the committee has examined the following for compatibility with human rights:

- government amendments made to the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021; and
- legislative instruments registered on the Federal Register of Legislation between 28 October and 13 November 2021.²

1.2 The committee has commented on amendments to the above bill and two legislative instruments in this chapter, and in one instance seeks further information from the relevant minister. It has deferred its consideration of six legislative instruments as set out in Appendix 1.

1.3 The committee has determined not to comment on the remaining legislative instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, *New and continuing matters, Report 14 of 2021*; [2021] AUPJCHR 136.

2 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.

Bills

Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021¹

<p>Purpose</p>	<p>This bill seeks to amend various Acts relating to aged care, health and aged care pricing, and information sharing in relation to veterans and military rehabilitation and compensation</p> <p>Schedule 1 would enable the introduction of the Australian National Aged Care Classification, to replace the Aged Care Funding Instrument as the residential aged care subsidy calculation model from 1 October 2022</p> <p>Schedule 2 would establish nationally consistent pre-employment screening for aged care workers of approved providers to replace existing police checking obligations</p> <p>Schedule 3 would allow the Aged Care Quality and Safety Commissioner (Commissioner) to make and enforce a Code of Conduct that applies to approved providers and their workers, including governing persons</p> <p>Schedule 4 would extend the Serious Incident Response Scheme from residential care to home care and flexible care delivered in a home or community setting from 1 July 2022</p> <p>Schedule 5 would introduce new governance and reporting responsibilities for approved providers</p> <p>Schedule 6 would increase information sharing between Commonwealth bodies across the aged care, disability and veterans' affairs sectors in relation to non-compliance of providers and their workers</p> <p>Schedule 7 would enable the Secretary or Commissioner to request information or documents from a provider or borrower of a loan made using a refundable accommodation deposit or bond</p> <p>Schedule 8 would expand the functions of the Independent Health and Aged Care Pricing Authority to include the provision of advice on health and aged care pricing and costing matters, and the performance of certain functions</p>
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¹ This entry can be cited as: Parliamentary Joint Committee on Human Rights, Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021, *Report 14 of 2021*; [2021] AUPJCHR 137.

Portfolio	Health
Introduced	House of Representatives, 1 September 2021
Rights	Rights of persons with disabilities

Background

1.4 This bill seeks to make numerous amendments to implement eight measures in response to recommendations of the Royal Commission into Aged Care Quality and Safety. The committee previously commented on the provisions in the bill which sought to require the Aged Care Quality and Safety Commissioner to establish and maintain a register of all individuals against whom a banning order has been made at any time.² On 25 October 2021 the government introduced amendments to the bill (which were agreed to in the House of Representatives). These included amendments in relation to the use of restrictive practices.³ The committee has previously inquired into, and commented, on the regulation of the use of restrictive practices in aged care.⁴

Consent to restrictive practices and immunity from liability

1.5 The amendments seek to allow the Quality of Care Principles to make provision for persons or bodies who may give informed consent to the use of a restrictive practice on a person in aged care, if the care recipient lacks capacity to give consent. The amendments also provide that if such consent was given and the restrictive practice was used in approved circumstances, the aged care provider and staff member who used the restrictive practice are immune from any civil or criminal liability in relation to the use of the restrictive practice.⁵

International human rights legal advice

Rights of persons with disabilities

1.6 Setting out requirements relating to when restrictive practices can be used by aged care providers engages and may promote and limit a number of human rights, as

2 Parliamentary Joint Committee on Human Rights, [Report 11 of 2021](#) (16 September 2021) pp. 2–6.

3 House of Representatives, Government [[sheet ZB120](#)].

4 See Parliamentary Joint Committee on Human Rights, [Quality of Care Amendment \(Minimising the Use of Restraints\) Principles 2019](#) (13 November 2019), and most recently Parliamentary Joint Committee on Human Rights, [Report 10 of 2021](#) (25 August 2021) pp. 63–90.

5 House of Representatives, Government [[sheet ZB120](#)], amendment 14 to Schedule 9 of the bill.

set out by the committee in previous report entries.⁶ Enabling consent to be given on behalf of a person who lacks capacity to give consent engages and limits the rights of persons with disabilities, including the right of persons with disabilities to consent to medical treatment. Article 12 of the Convention on the Rights of Persons with Disabilities provides that in all measures that relate to the exercise of legal capacity, there should be appropriate and effective safeguards to prevent abuse. Such safeguards must ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by an independent and impartial body.⁷ The United Nations (UN) Committee on the Rights of Persons with Disabilities has confirmed that there can be no derogation from article 12, which describes the content of the general right to equality before the law under the International Covenant on Civil and Political Rights.⁸ In other words, 'there are no permissible circumstances under international human rights law in which this right may be limited'.⁹ The denial of legal capacity to care recipients by enabling a substituted decision-maker to consent to the use of a restrictive practice would therefore engage this right.¹⁰

1.7 The UN Committee on the Rights of Persons with Disabilities has stated that substituted decision-making should be replaced by supported decision-making.¹¹ Supports may include peer support, advocacy, assistance with communication or advance planning, whereby a person can state their will and preferences in advance

6 See most recently Parliamentary Joint Committee on Human Rights, [Report 10 of 2021](#) (25 August 2021) pp. 63–90.

7 Convention on the Rights of Persons with Disabilities, article 12(4). See also article 17.

8 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [1], [5].

9 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [5].

10 The Committee on the Rights of Persons with Disabilities has made clear that practices that deny the right of people with disabilities to legal capacity in a discriminatory manner, such as substituted decision-making regimes, must be 'abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others': *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [7]. For a discussion of the academic debate regarding the interpretation and application of article 12, particularly in relation to substituted decision-making, see, eg, Bernadette McSherry and Lisa Waddington, 'Treat with care: the right to informed consent for medical treatment of persons with mental impairments in Australia', *Australian Journal of Human Rights*, vol. 23, issue no. 1, pp. 109–129.

11 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15]–[16], [21]. The features of a supported decision-making regime are detailed in paragraph [29].

should they be unable to do so at a later point in time. The Committee on the Rights of Persons with Disabilities has noted that 'where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations'.¹² States are also required to create appropriate and effective safeguards for the exercise of legal capacity to protect persons with disabilities from abuse.¹³

1.8 In addition, the Convention on the Rights of Persons with Disabilities requires health professionals to provide care of the same quality to persons with disabilities as to others including on the basis of free and informed consent.¹⁴ It also provides persons with disabilities must be protected from all forms of exploitation, violence and abuse.¹⁵

1.9 Further, granting immunity from liability to aged care providers and their staff for the use of restrictive practices on those who lack the capacity to give consent, where consent is provided by a substituted decision-maker, engages and may limit the rights of persons with disabilities to equal recognition before the law and access to justice. The right to equal recognition before the law includes the right to enjoy legal capacity on an equal basis with others in all aspects of life, and the right to equal and effective legal protection against discrimination on all grounds.¹⁶ The Convention on the Rights of Persons with Disabilities also provides that there should be effective access to justice for persons with disabilities on an equal basis with others.¹⁷

1.10 The government amendments to the bill would allow delegated legislation to be made listing persons or bodies who may give consent on behalf of a care recipient if the 'care recipient lacks capacity to give that consent'. The stated aim of these amendments is to address 'unexpected outcomes in relation to the interaction with State and Territory guardianship and consent laws'.¹⁸ It states that it will authorise a person to consent on a care recipient's behalf, even where state and territory laws currently do not provide for a person to be given authority to consent to the use of

12 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [21].

13 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [20]; Convention on the Rights of Persons with Disabilities, article 12(4).

14 Convention on the Rights of Persons with Disabilities, article 25(d).

15 Convention on the Rights of Persons with Disabilities, article 16.

16 Convention on the Rights of Persons with Disabilities, articles 5(2) and 12.

17 Convention on the Rights of Persons with Disabilities, article 13.

18 Statement of compatibility in the [Supplementary Explanatory Memorandum](#), p. 8.

restrictive practices.¹⁹ The supplementary explanatory memorandum states that without clear consent arrangements in place across all jurisdictions, restrictive practices cannot be used in certain circumstances where it might otherwise be appropriate, which could result in harm to care recipients and others.²⁰ It states that these are interim arrangements until the relevant state and territory laws are amended, and to support this the amendments include an immunity provision where approved providers have relied on the consent given by the restrictive practices substitute decision maker.²¹

1.11 It does not appear that in listing persons or bodies that are empowered to provide consent on behalf of a care recipient that there is any legislative requirement that the care recipient be supported or assisted to make their own decisions. Rather, it appears that the persons or bodies listed would become substituted decision-makers. This would appear to be contrary to the requirements in article 12 of the Convention on the Rights of Persons with Disabilities as set out above. Of particular concern is the proposed amendment that provides that the aged care provider and person using the restrictive practice are not subject to *any* civil and criminal liability in relation to the use of the restrictive practice if consent was given by one of the listed persons or bodies. This immunity does not apply where a person who has capacity gives informed consent. It appears from the explanatory materials accompanying the amendments that this is necessary because under certain state and territory laws some guardians or advocates are not empowered to provide consent to the use of restrictive practices.²² However, it is not clear what the full effect of this amendment would be. For example, if a restrictive practice was used in accordance with the Quality of Care Principles and after consent had been provided, but due to negligence the care recipient was injured, it would appear that a care recipient who lacked capacity to consent would not be able to bring an action for negligence, whereas a care recipient with capacity may be able to. This differential treatment does not appear to be compatible with the rights of persons with disabilities to be treated equally or with the requirement that there should be effective access to justice for persons with disabilities on an equal basis with others. It would also appear that even if a care recipient could successfully challenge the lawfulness of the consent provided on their behalf, no action could be brought against the provider or their staff if they used the restrictive practice after gaining informed consent by one of the listed persons or bodies.

1.12 The statement of compatibility accompanying the government amendments does not recognise that the rights of persons with disabilities is engaged by this

19 Statement of compatibility in the [Supplementary Explanatory Memorandum](#), p. 8.

20 [Supplementary Explanatory Memorandum](#), p. 4.

21 [Supplementary Explanatory Memorandum](#), p. 4.

22 [Supplementary Explanatory Memorandum](#), p. 18.

measure, and so no information is provided as to the compatibility of this measure with these rights.

1.13 As such, further information is required to assess the compatibility of this measure with the rights of persons with disabilities, including:

- (a) how these proposed amendments are compatible with the rights of persons with disabilities, particularly the right of persons with disabilities to enjoy legal capacity on an equal basis with others;
- (b) the necessity and appropriateness of providing immunity to aged care providers and their staff for *any* civil and criminal liability, including claims of negligence;
- (c) noting that civil and criminal liability is not excluded when restrictive practices are used on a person with capacity who has given their consent, why is it appropriate that all civil or criminal action is excluded where the person against whom the restrictive practice is used lacks capacity to give consent, and how is this compatible with the right to effective access to justice for persons with disabilities on an equal basis with others; and
- (d) why is there no legal requirement setting out a model of supported, rather than substituted, decision-making in relation to obtaining informed consent for the use of a restrictive practice.

Committee view

1.14 The committee notes government amendments to this bill seek to enable the Quality of Care Principles to make provision for persons or bodies who may give informed consent to the use of a restrictive practice on a person in aged care, if the aged care recipient lacks capacity to give consent. The amendments also provide that if such consent is given and the restrictive practice was used in approved circumstances, the aged care provider and staff member who used the restrictive practice are immune from any civil or criminal liability in relation to the use of the restrictive practice.

1.15 The committee considers these measures engage and may limit the rights of persons with disabilities, in particular the requirement to obtain the free and informed consent of persons with disabilities prior to the provision of medical treatment or health care, and the right to effective access to justice for persons with disabilities on an equal basis with others.

1.16 The committee notes that the statement of compatibility with human rights that accompanied these government amendments does not acknowledge that the rights of persons with disabilities are engaged by this measure, and as such provides no information as to the compatibility of these measures with these rights.

1.17 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of these government amendments, and as such seeks the minister's advice as to the matters set out at paragraph [1.13].

Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2021 [F2021L01484]¹

Purpose	This legislative instrument requires individuals who are entering Australia to provide a written statement declaring their COVID-19 vaccination status
Portfolio	Health
Authorising legislation	<i>Biosecurity Act 2015</i>
Last day to disallow	This legislative instrument is exempt from disallowance (see subsection 44(3) of the <i>Biosecurity Act 2015</i>)
Right	Privacy

Declaration of vaccination status and other personal information

1.18 This legislative instrument provides that individuals who are older than 12 years and three months, and who are entering Australia on an international flight, must provide a written statement to a relevant official declaring their COVID-19 vaccination status.² The individual must declare:

- whether they have received a course of one or more of the accepted COVID-19 vaccines,³ that they received the last vaccine in that course at least seven days before the flight was scheduled to commence, and that they can produce evidence of this;
- whether they have a medical contraindication to COVID-19 vaccines and can produce evidence of this from a medical practitioner; or
- that neither of these matters apply.⁴

1.19 If the individual provides this information on paper, the individual must also provide their name, date of birth, passport number, phone number while in Australian

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2021 [F2021L01484], *Report 14 of 2021*; [2021] AUPJCHR 138.

2 Section 5.

3 'Accepted COVID-19 vaccine' is a COVID-19 vaccine recognised by the Therapeutic Goods Administration and, at the time the instrument was made, includes AstraZeneca Vaxzevria, AstraZeneca COVISHIELD, Pfizer/Biontech Comirnaty, Moderna Spikevax, Sinovac Coronavac and Janssen-Cilag COVID Vaccine.

4 Subsection 5(3).

territory, intended address while in Australian territory, email address and flight number.⁵ If the individual provides this information electronically, individuals may use an electronic system maintained by the Department of Home Affairs (the type of information to be provided is not specified in this instrument).⁶

1.20 If requested to do so by a relevant official,⁷ individuals who have declared they have received an accepted COVID-19 vaccine course or have a medical contraindication to COVID-19 vaccines must produce evidence of this.⁸ Individuals who fail to provide a written statement, or who fail to provide evidence on request, face a civil penalty of up to 30 penalty units (\$6,660).⁹

1.21 The confidentiality of the personal information provided under this instrument is managed under the *Biosecurity Act 2015* (Biosecurity Act). The Biosecurity Act sets out the circumstances in which a person may make a record of, disclose or otherwise use protected information, and provides for an offence for use or disclosure of protected information that is not authorised by the Biosecurity Act.

Preliminary international human rights legal advice

Right to privacy

1.22 Requiring individuals entering Australia to provide a written statement declaring their vaccination status and other personal information and, on request, evidence to support this, engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.¹⁰ It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.23 This instrument is exempt from disallowance by the Parliament, and therefore it is not required to be accompanied by a statement of compatibility with human

5 Subsection 5(2).

6 Subsection 5(4).

7 Section 4 provides that a 'relevant official' means a biosecurity officer, a chief human biosecurity officer, a human biosecurity officer, an APS employee in the Agriculture Department or an APS employee in the Home Affairs Department.

8 Subsection 5(7).

9 *Biosecurity Act 2015*, section 46(1).

10 International Covenant on Civil and Political Rights, article 17.

rights.¹¹ As such, no assessment of the compatibility of this measure with the right privacy has been provided.

1.24 The explanatory statement notes that the requirements in the instrument align with 'the easing of restrictions as Australia gradually reopens international borders in accordance with public health advice'. Broadly, it appears the measure is designed to assist in the management of COVID-19 in Australia, which is likely to be considered a legitimate objective. Requiring information from individuals entering Australia about their vaccination status is likely to be rationally connected to (that is, effective to achieve) that objective.

1.25 In considering whether the measure is proportionate to the objective sought to be achieved, it is necessary to consider whether the measure is sufficiently circumscribed and whether it is accompanied by sufficient safeguards. Information required to be collected under the instrument is managed under the Biosecurity Act.¹² The Act provides that a person¹³ (usually a health officer) may make a record of, disclose or otherwise use protected information (which includes personal information) for a permissible purpose in performing the person's functions or duties, or exercising the person's powers, under the Biosecurity Act.¹⁴ A 'permissible purpose' is a purpose of promoting the objects of the Biosecurity Act.¹⁵ Additionally, the Biosecurity Act confers a power on the Director of Human Biosecurity or the Director of Biosecurity to authorise persons to make a record of, or use, protected information, or disclose the information to a specified person or class of persons, for a permissible purpose that is specified in the authorisation.¹⁶ Recording, using or disclosing information under these provisions will not breach any other law of the Commonwealth or state or territory, and will not contravene medical or other professional standards.¹⁷ This confers a broad discretion as to how information collected under this instrument is recorded or used, and to whom it may be disclosed. As there is nothing in the instrument or the Biosecurity Act that appears to limit this discretion, and as there is no statement of

11 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

12 *Biosecurity Act 2015*, Chapter 11, Part 2.

13 For these purposes, a 'person' is an officer or employee of the Commonwealth or state or territory; a person engaged by the Commonwealth, state or territory to perform public health work or to manage biosecurity risks in relation to plant or animal health; the National Focal Point; or a biosecurity industry participant or a survey authority, or an officer or employee of a biosecurity industry participant or a survey authority; see *Biosecurity Act 2015*, subsection 580(2).

14 *Biosecurity Act 2015*, subsection 580(2).

15 *Biosecurity Act 2015*, section 9.

16 *Biosecurity Act 2015*, subsection 580(3).

17 *Biosecurity Act 2015*, subsection 581.

compatibility to explain how this power may be used, it is unclear whether the measure is sufficiently circumscribed and how it will be applied in practice. 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.¹⁸ This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights.

1.26 Whether a measure is accompanied by sufficient safeguards is also an important consideration in determining the proportionality of a measure. The Biosecurity Act provides for an offence for unauthorised use of protected information punishable by imprisonment for up to two years or 120 penalty units (\$26,640),¹⁹ however there are some exceptions to this offence including where the person makes a record of, discloses or otherwise uses the information in good faith in performing or exercising their functions or duties under the Biosecurity Act.²⁰ As there is no statement of compatibility accompanying this instrument, it is unclear whether sufficient safeguards exist in the instrument to ensure that any limitation on the right to privacy is proportionate.

Committee view

1.27 The committee notes that the instrument requires that individuals who are older than 12 years and three months, and who are entering Australia on an international flight, must provide a written statement to a relevant official declaring their COVID-19 vaccination status and other personal information.

1.28 The committee notes this requirement, and the confidentiality of the information collected, engages and limits the right to privacy. This right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. However, as there is no statement of compatibility accompanying this instrument, which we note is not required in relation to this instrument,²¹ some questions remain as to whether the measure is accompanied by sufficient safeguards to ensure any limitation on the right to privacy is proportionate.

18 *Hasan and Chaush v Bulgaria*, European Court of Human Rights App No.30985/96 (2000) [84].

19 *Biosecurity Act 2015*, section 585.

20 *Biosecurity Act 2015*, section 586.

21 The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9, provides that only legislative instruments subject to disallowance under the *Legislation Act 2003* require a statement of compatibility.

1.29 Given the human rights implications of legislative instruments dealing with the COVID-19 pandemic, the committee reiterates²² that it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility.

1.30 The committee draws this matter to the attention of the minister and the Parliament.

22 The committee first stated this in Parliamentary Joint Committee on Human Rights, *Report 5 of 2020: Human rights scrutiny of COVID-19 legislation*, 29 April 2020. The committee also wrote to all ministers advising them of the importance of having a detailed statement of compatibility with human rights for all COVID-19 related legislation in April 2020 (see media statement of 15 April 2020, available on the committee's website).

Social Security (Administration) Amendment (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2021 [F2021L01473]¹

Purpose	This legislative instrument provides for a new financial institution with which a welfare restricted bank account may be held, and specifies additional terms and conditions relating to the ongoing maintenance and closure of a welfare restricted bank account. It also specifies two additional kinds of businesses in relation to which transactions, involving money in a welfare restricted bank account, may be declined by a financial institution
Portfolio	Social Services
Authorising legislation	<i>Social Security (Administration) Act 1999</i>
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 22 November 2021). Notice of motion to disallow must be given by the 7 th sitting day in 2022 in both Houses ²
Rights	Privacy; social security; equality and non-discrimination

Additional business types precluded from cashless welfare scheme

1.31 This determination specifies an additional two business types in relation to which transactions involving money in a welfare restricted bank account may be declined by a financial institution.³ As such, welfare recipients subject to the cashless

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2021 [F2021L01473]*, Report 14 of 2021; [2021] AUPJCHR 139.

2 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

3 Item 7 of this determination amends Schedule 2 of the *Social Security (Administration) (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2019 [F2019L00911]*. The effect of the listing (made under section 124PQ(2) of the *Social Security (Administration) Act 1999*) is to ensure that Part IV of the *Competition and Consumer Act 2010*, relating to restrictive practices, does not apply to such transactions.

welfare scheme would not be able to purchase goods at such businesses using their cashless debit card. The two newly listed business types are:

- businesses where there are reasonable grounds for believing the business engages in transactions that facilitate access by a cashless welfare participant to cash or cash-like products; and
- businesses that would, if the business were operating under the correct code, be a kind of business which has already been declared as one to which financial transactions may be declined.

Preliminary international human rights legal advice

Multiple rights

1.32 As the committee has previously reported,⁴ the cashless welfare scheme engages numerous human rights. As previously stated, restricting a substantial portion of a person's welfare payments may, in some instances, promote the right to an adequate standard of living and the rights of the child, to the extent that quarantining welfare means that the money can only be spent on essential goods such as groceries and housing.⁵ However, the cashless welfare scheme also engages and limits a number of other human rights, including the right to privacy,⁶ right to social security,⁷ and the right to equality and non-discrimination.⁸ The cashless welfare scheme engages and limits the rights to privacy and social security as it significantly intrudes into the freedom and autonomy of individuals to organise their private and family lives by making their own decisions about the way in which they use their social security payments. As the cashless welfare scheme disproportionately affects Indigenous

4 See most recently Parliamentary Joint Committee on Human Rights, *Report 1 of 2021* (3 February 2021) pp. 83–102.

5 International Covenant on Economic, Social and Cultural Rights, article 11, and Convention on the Rights of the Child.

6 International Covenant on Civil and Political Rights, article 17.

7 International Covenant on Economic, Social and Cultural Rights, article 9.

8 International Covenant on Civil and Political Rights, articles 2, 16 and 26 and International Covenant on Economic, Social and Cultural Rights, article 2. It is further protected with respect to people with disability by the Convention on the Rights of Persons with Disabilities, article 2.

Australians,⁹ it also engages and limits the right to equality and non-discrimination.¹⁰ This determination, by adding to the list of businesses where a person subject to the cashless welfare arrangements cannot spend the restricted portion of their welfare payments, also engages and limits these rights.

1.33 In general, these rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.34 The statement of compatibility recognises that the determination engages the rights to social security, self-determination and the right to a private life, but states that any limit on rights 'is reasonable and proportionate given the extensive social harm that exists'.¹¹ The explanatory statement explains that the transactions that may be declined include those where a business provides refunds in cash for permitted items purchased using a welfare restricted bank account, e.g. a business may overcharge participants for permitted goods, and then refund the amount of any overpayment in cash. The explanatory statement states that such practices 'undermine the objects of the cashless welfare program by increasing access to cash or cash-like products for program participants and voluntary participants'.

1.35 As previously stated in relation to the proposed continuation of the cashless welfare arrangements,¹² it is likely that combatting social harms caused by the use of harmful products, including alcohol and illicit drugs, would constitute a legitimate

9 The committee's 2016 report, which examined income management in the Northern Territory, noted that around 90 per cent of those subject to income management in the Northern Territory were Indigenous, see Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016), p. 40. At March 2017, 75 per cent of participants in the Ceduna trial area, and 80 per cent of participants in the East Kimberley, were Aboriginal and/or Torres Strait Islander, see ORIMA, *Cashless Debit Card Trial Evaluation – Final Evaluation Report*, August 2017, p. 37. In 2019, 43 per cent of participants in the Goldfields trial site were Indigenous, see University of Adelaide Future of Employment and Skills Research Centre, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, p. 10.

10 International Covenant on Civil and Political Rights, article 26. Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute, see *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. 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.

11 Statement of compatibility, pp. 10–12.

12 See Parliamentary Joint Committee on Human Rights, *Report 1 of 2021* (3 February 2021) pp. 83–102.

objective for the purposes of international human rights law. However, it is not clear that the cashless welfare measures are effective to achieve these objectives, noting in particular, that the evaluations of the cashless welfare scheme have raised questions as to its effectiveness, and whether it has caused or contributed to other harms. Similarly, it is not clear that listing these additional businesses would be effective to achieve the stated objectives. In addition, it is not clear that the cashless welfare scheme constitutes a proportionate limitation on these rights, having regard to the absence of adequate and effective safeguards to ensure that limitations on human rights are the least rights restrictive way of achieving the legitimate objective, and the absence of sufficient flexibility within the scheme to treat different cases differently. In relation to this determination, it is not clear from the explanatory materials whether allowing any transaction with a business believed to be engaged in certain conduct to be declined, could have an adverse impact on the ability of people in remote communities to access certain goods and services. For example, if transactions made at the only grocery store in a remote town were able to be declined, it is not clear how cashless welfare participants could purchase groceries. If listing such businesses did prevent participants from being able to effectively access essential goods this could have implications for the realisation of their right to an adequate standard of living.

1.36 In relation to the cashless welfare scheme as a whole, it has not been clearly demonstrated that the scheme constitutes a permissible limit on the rights to social security and privacy or, noting that the scheme has a disproportionate impact on Indigenous Australians, that it is a reasonable and proportionate measure and therefore not discriminatory.¹³ As such, extending the cashless welfare scheme by adding to the list of businesses where participants cannot use their restrictable welfare payments also appears to impermissibly limit the rights to social security, a private life and equality and non-discrimination.

Committee view

1.37 The committee notes this determination specifies an additional two business types in relation to which transactions involving money in a welfare restricted bank account may be declined by a financial institution. As such, welfare recipients subject to the cashless welfare scheme would not be able to purchase goods at such businesses using their cashless debit card.

1.38 This determination, by adding businesses where a cashless welfare scheme participant cannot spend the restricted portion of their welfare payments, engages the same rights as those engaged by the cashless welfare scheme as a whole. The committee considers that the cashless welfare scheme engages and, in some instances, may promote the right to an adequate standard of living and the rights of

13 See Parliamentary Joint Committee on Human Rights, *Report 1 of 2021* (3 February 2021) p. 83-102.

the child, to the extent that quarantining welfare means that the money can only be spent on essential goods such as groceries and housing. However, the committee also considers the cashless welfare scheme engages and limits other human rights, including the rights to privacy and social security, as it intrudes into the freedom and autonomy of individuals to make their own decisions about the way in which they use their social security payments. Further, noting that a significant proportion of participants in the cashless welfare scheme identify as being Indigenous, the scheme disproportionately impacts on Indigenous Australians and therefore limits the right to equality and non-discrimination.

1.39 As set out in previous assessments of the cashless welfare scheme,¹⁴ the committee considers it has not been clearly demonstrated that this scheme constitutes a permissible limit on the rights to social security and privacy or that it is a reasonable and proportionate measure and therefore not discriminatory. As such, in extending the cashless welfare scheme by adding to the list of businesses where participants cannot use their restrictable welfare payments, the committee considers this measure also appears to impermissibly limit the rights to social security, a private life and equality and non-discrimination.

1.40 The committee draws these human rights concerns to the attention of the minister and the Parliament.

14 See Parliamentary Joint Committee on Human Rights, *Report 1 of 2021* (3 February 2021) p. 83-102.