# Chapter 2

## Concluded matters

2.1 This chapter considers responses 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 available on the committee's website.[1]

## Bills

## Electoral Legislation Amendment (Voter Integrity) Bill 2021[2]

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| **Purpose** | This bill seeks to amend the *Commonwealth Electoral Act 1918* and *Referendum (Machinery Provisions) Act 1984* to require voters to present identification documentation or an attestation from another enrolled person in order to cast an ordinary vote during the pre-polling period and on polling day |
| **Portfolio** | Special Minister of State |
| **Introduced** | House of Representatives, 28 October 2021 |
| **Rights** | Right to take part in public affairs; equality and non-discrimination |

2.3 The committee requested a response from the minister in relation to the bill in *Report 13 of 2021*.[3]

### Requirement to provide proof of identity to cast ordinary vote

2.4 This bill seeks to amend the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* to introduce voter identification requirements for pre-poll and polling day ordinary votes. The bill provides that for each person seeking to cast a vote at an election, a voting officer must request that

1 See 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, Electoral Legislation Amendment (Voter Integrity) Bill 2021, *Report 14 of 2021*; [2021] AUPJCHR 140.

3 Parliamentary Joint Committee on Human Rights, *Report 13 of 2021* (10 November 2021), pp. 2-9.

the person produce a proof of identity document and ask whether they have voted before in the election.[4] The bill provides for a number of types of identification that can be shown in hard copy or electronic form, including government issued documents, documents from financial institutions and documents from Aboriginal and Torres Strait Islander land councils or bodies.[5] A voting officer must not make any copies or records of any identification shown.[6] After requesting proof of identity, a voting officer can ask questions of the voter to work out their full name or place of living, or both, and where not satisfied the voter is a particular person on the certified list of voters, the voting officer can ask additional questions about the matters on the certified list of voters to establish their identity,[7] for example their date of birth.[8]

2.5 If a person is unable to provide appropriate proof of identity, another enrolled voter would be able to attest to their identity.[9] The person attesting must provide their own appropriate proof of identity and complete an approved form which includes the attester's name, residential address, type of identification provided and name of the person they are attesting for.[10] This form can be completed with the assistance of the presiding officer or polling official, but the attester and voter must sign it.[11]

2.6 If a voter does not have the appropriate proof of identity and no one attests to their identity, a voting officer must inform them, during the pre-polling period, that they can cast a pre-poll declaration vote, or on polling day, that they can cast a

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4 Proposed section 200DI(1).

5 Proposed section 4AB provides that a 'proof of identity document' is any of: a current Australian driver's licence; a current Australian passport; a current Australian proof of age card; an Australian birth certificate; a notice evidencing a person's Australian citizenship; a current identification card issued by, or on behalf of, the Commonwealth or State or Territory or an authority of the Commonwealth, State or Territory (including a Medicare card, pension card or health care card); an account statement issued by a local government body, utility provider or carriage service in the last twelve months; a credit or debit card issued by an Australian financial institution, or an account statement issued by an Australian financial institution in the last twelve months; a notice of assessment in the last twelve months in respect of a year of income; a notice issued by the Electoral Commissioner notifying a person of their enrolment; a document that relates to the affairs of a particular person, that specifies the person's name and that is issued by an Aboriginal or Torres Strait Islander land council or land trust, or prescribed body corporate.

6 Proposed subsection 200DI(6).

7 Proposed subsections 200DI(2)-(3).

8 Explanatory memorandum, p. 4.

9 Proposed subsection 200DI(4).

10 Proposed paragraph 200DI(4)(b).

11 Proposed subsection 200DI(7) and proposed subparagraph 200DI(4)(b)(iii).

provisional vote.[12] A provisional vote is a kind of declaration vote. Declaration votes are currently used for voters whose name or address cannot be found on the certified list or who have already been marked off as having voted. To cast a declaration vote, a voter fills out a separate declaration envelope at the polling centre declaring their identity and entitlement to vote. Currently, it appears that the declaration envelope requests additional details such as the person's date of birth, current permanent address, a driver's licence or passport number or confirmation of the voter's identity by another enrolled person, and signature.[13] Votes are then placed in the sealed declaration envelope and are subject to additional checks to verify the identity of the person casting the vote before it is admitted to the count. The process does not require the person to provide any further identification after casting the declaration vote.[14] Once admitted to the count, a declaration vote counts the same as an ordinary vote.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights to take part in public affairs and equality and non-discrimination*

2.7 By providing for additional identification requirements for a person to cast an ordinary vote, the bill engages and may limit the right to take part in public affairs and the right to equality and non-discrimination.[15] The right to take part in public affairs includes guarantees of the right of citizens to vote in elections,[16] and is an essential part of democratic government that is accountable to the people. The United Nations (UN) Human Rights Committee has stated that the right to vote at elections and referendums must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. States must take effective measures to ensure that all persons entitled to vote are able to exercise that right.[17] In this case a limit on the right to participate in public affairs may arise if a person is unable to cast a vote because of an inability to show identification or cast a declaration vote – or potentially if there is a lower voter turnout because of a perception that identification is required to vote. The right to

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12 Proposed subsections 200DG(3) and 229(6).

13 Australian Electoral Commission, *Approved form for pre-poll and absent-provisional declaration voting* (2 February 2018) available at: https://www.aec.gov.au/about_aec/cea-notices/files/2018/pre-poll-absent-provisional-dec-vote.pdf.

14 Statement of compatibility, p. 5.

15 The bill also engages the right to privacy, however, it is noted that the statement of compatibility adequately explains how any limitation on this right is proportionate.

16 UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996).

17 UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) [10]–[11].

take part in public affairs may be permissibly limited where a measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is a proportionate means by which to achieve it.

2.8 Further, as requiring proof of identity may have a disproportionate impact on particular groups who may face issues accessing identification documentation or having such documentation on them while voting (such as those who are homeless or Aboriginal or Torres Strait Islander people in remote communities), the measure engages and may limit the right to equality and non-discrimination.[18] This right 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.[19] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[20] 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.[21] 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 objective and is a proportionate means of achieving that objective.[22]

2.9 Further information is required in order to assess the compatibility of this measure with the rights to take part in public affairs and equality and non-discrimination, and in particular:

(a) what evidence exists that demonstrates that protecting against voter fraud and ensuring public confidence in the federal electoral system is necessary and addresses an issue of public or social concern that is

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18 International Covenant on Civil and Political Rights, articles 2 and 26.

19 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

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

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

22 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].

pressing and substantial enough to warrant limiting the rights to participate in public affairs and equality and non-discrimination;

(b) how would voter identification requirements be effective to prevent people from voting multiple times at different locations;

(c) whether any modelling has been undertaken to assess whether this measure is likely to impact voter turnout;

(d) what information is required from voters casting a declaration vote and, where the voter does not provide all the requested information, how this will impact the counting of their vote;

(e) whether the measure is likely to have a disproportionate impact on particular groups, and if so, how such differential treatment is based on reasonable and objective criteria; and

(f) whether consideration has been given to alternative, less rights restrictive ways of achieving the stated objectives, such as greater training of polling officials to reduce inadvertent mistakes.

***Committee's initial view***

2.10 The committee noted that as a matter of law, no voter will be denied a vote for not having an appropriate form of identification or attestation, as they would be able to cast a declaration vote. However, these additional requirements imposed before a voter can cast their vote engages and may limit the right to take part in public affairs and the right to equality and non-discrimination. The committee noted it is unclear whether the measure addresses a pressing and substantial concern; whether the measure will effectively achieve its objectives; whether the measure will disproportionately impact particular groups; and whether alternative, less rights restrictive approaches have been considered, and sought the minister's advice as to the matters set out at paragraph [2.9].

2.11 The full initial analysis is set out in *Report 13 of 2021*.

## Minister's response[23]

2.12 The minister advised:

> The Government introduced the Bill in the House of Representatives on 28 October 2021, which requires voters to present acceptable identification documentation prior to receiving a ballot paper at polling places, pre-poll locations, and mobile polling locations, as recommended

[23] The minister's response to the committee's inquiries was received on 23 November 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

by the Joint Standing Committee on Electoral Matter's (JSCEM) reports into the conduct of the 2013, 2016 and 2019 elections.

The Bill aims to reduce the potential for voter fraud and impersonation, and safeguard public confidence in the outcome and integrity of federal elections and referendums, in line with the 'one vote, one value' principle. The Bill preserves the principles of compulsory voting in Australia, by ensuring no person will be turned away from a polling place due to being unable to present identification.

In deliberating on their recommendation in their report into the conduct of the 2019 election, the JSCEM stated that "multiple voting is frequently the subject of media commentary and social media speculation". This demonstrates a public concern relating to the importance of safeguarding public confidence in Australian electoral processes. The Bill aims to address this concern by implementing measures to ensure that voters are enfranchised to make their one vote count, and also deter voters who may intentionally try to vote more than once.

While some instances of suspected multiple voting are the result of administrative error, unfortunately many are not. After the 2019 federal election, 2,102 people received letters from the Australian Electoral Commission (AEC) asking them to explain why they appeared to have voted more than once, many of whom voted multiple times. The AEC successfully caught 311 multiple votes before they were counted. There were 743 confirmed instances of persons admitting to the AEC they had cast multiple votes at the election. At the 2016 federal election, there were a further 1954 instances of persons admitting to the AEC they had multiple voted.

Nonetheless, in responding to evidence of instances of multiple voting due to clerical errors and also voters who voted multiple times without adequate explanation, the JSCEM's report into the conduct of the 2013 election recommended the implementation of a voter identification requirement, noting that over 18,000 multiple mark-offs were identified. The Bill helps avoid errors relating to accidental mark-offs against the wrong person by using identity documents where they are presented, to find the name and residence of a voter on the Commonwealth Electoral Roll.

Critically, this Bill will also reduce the risk of electoral fraud in the form of voter impersonation. By requiring voters who do not have proof of identity at a polling place to vote via declaration vote, the Australian Electoral Commission can ensure that only the first vote received from such a voter is admitted to the scrutiny process. This is consistent with the 'one person, one vote' principle of democracy and supports sections 8 and 30 of the Australian Constitution, which provide that 'an elector shall only vote once' in each federal election.

The measures are designed to deter voters from intentionally voting more than once, and may also assist with the investigation of offences relating

to instances of multiple voting. Voter identification measures also complement reforms introduced in the *Electoral Legislation Amendment (Electoral Offences and Preventing Multiple Voting) Act 2021* by minimising unintentional multiple voting and clerical errors, and thereby assisting in correct identification of voters who intentionally vote multiple times.

There is no evidence that the voter identification reforms contained in the Bill would negatively impact voter turnout. As evidenced by the publications of the Electoral Commission of Queensland, of the three most recent Queensland state elections, the 2015 election was simultaneously the only one with voter identification laws in place, and the election with the highest voter turnout. Voter turnout has been lower, not higher in Queensland, since voter identification laws were repealed. At the 2015 election, less than one per cent of voters cast a declaration vote as a result of not presenting identification.

No amendments to the information required for a voter to cast a declaration vote have been made by the Bill. In casting a declaration vote, a voter would be asked to complete the elector details section on the declaration envelope, which requires a voter to provide their full name (and former name if relevant), date of birth, current address (and enrolled address if it is different to the current address) a contact number and the voter's signature. Any other evidence of identity requested by this form is wholly optional, and a ballot paper will still be issued if this additional information is not provided.

If a declaration vote does not meet the requirements under paragraph 6 in Schedule 3 of the *Commonwealth Electoral Act 1918* or paragraph 6 Schedule 4 of the *Referendum (Machinery Provisions) Act 1984,* the vote will be excluded from the count.

Importantly, no voter will be turned away from casting a vote and exercising their right to participate in public affairs due to not having an acceptable form of identification, and therefore implementation of voter identification requirements will not have a disproportionate impact on particular groups. Provisions have been made to ensure that no voter will be denied the opportunity to vote for lack of identity documentation, by ensuring that a voter who does not meet the identification requirements can have their identity attested to by another enrolled person who has proof of identity, or else will still be able to cast a pre-poll declaration vote (if during pre-polling) or a provisional vote (if on polling day). The Bill requires AEC officers to inform voters who do not have an acceptable form of identification of the ability to cast a declaration vote.

Additionally, the accepted forms of identification provided in the Bill are sufficiently expansive, including hardcopy and digital forms, so as to be widely accessible by voters. This includes prevalent forms of identity documents that are commonly carried by people in the normal course of their affairs, including driver's licences, credit cards and debit cards, Medicare cards, citizenship certificates, utility bills, or documents issued by

> Aboriginal and Torres Strait Islander land councils or native title bodies, to name a few.
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> As such, the Bill responds to concerns relating to electoral integrity and aims to ensure that each voter has the same opportunity to make their vote count in line with the 'one vote, one value' principle. To the extent that the Bill limits the rights of persons to participate in public affairs and equality and non-discrimination, those limitations are reasonable, necessary, and proportionate.
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> Finally it is important to note that requiring voter identification is not unique. This reform will align us with other democracies. All but 14 states in the USA have proactively addressed this challenge. Canada requires voter identification, as does Sweden, Belgium, France, and almost all other European nations. The United Kingdom introduced voter ID laws to parliament this year.

## Concluding comments

### *International human rights legal advice*

*Rights to take part in public affairs and equality and non-discrimination*

2.13 By providing for additional identification requirements for a person to cast an ordinary vote, the bill engages and may limit the right to take part in public affairs and the right to equality and non-discrimination (if the measure disproportionately impacts on certain groups). 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.

*Legitimate objective*

2.14 As set out in the initial analysis, a measure may be aimed at achieving a legitimate objective if it is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. In order to demonstrate that the measure in this bill pursues legitimate objectives for the purposes of international human rights law, the onus is on the State to provide a reasoned and evidence-based explanation of why the measure addresses an issue of public or social concern that is substantial and pressing enough to warrant limiting human rights.

2.15 In response to this, the minister advised that the bill aims to reduce the potential for voter fraud and impersonation, and safeguard public confidence in the electoral process. The minister's advice notes that there is public concern relating to the importance of safeguarding public confidence in the Australian electoral process. To support this the minister states that the Joint Standing Committee on Electoral Matters (JSCEM) stated in its report into the 2019 election that 'multiple voting is frequently the subject of media commentary and social media speculation'.

However, it is noted that this quote from the JSCEM's report was from the Australian Electoral Commission's submission to that inquiry.[24] In this submission the AEC also stated that 'multiple voting is a very small issue in the context of the actual number of multiple votes', but that 'the perception of multiple voting is an important issue with respect to the integrity of election results'.[25] No further information was provided by the minister, such as survey data, to demonstrate that there is currently a lack of public confidence in Australian electoral processes.

2.16 The minister also set out instances of multiple voting in previous elections, noting that there were 743 confirmed instances of persons admitting they had cast multiple votes at the 2019 election, and 1,954 during the 2016 election. The minister advised that the measures are designed to deter voters from intentionally voting more than once. However, the Australian Electoral Commission has noted that the majority of instances of multiple voting are unintentional. The Australian Electoral Commissioner has stated in relation to multiple votes, that the vast majority are cast by 'people over the age of 80 or people who have English as a second language issues or who are confused about the act of voting'.[26] As such, it is not clear that the measures would deter most instances of multiple voting.

2.17 The minister also advised that the bill would help to avoid errors relating to accidental mark-offs against the wrong person by using identity documents to find the person's name and residence. The minister advised that the JSCEM report into the 2013 election identified over 18,000 multiple mark-offs. It is noted that the JSCEM's report stated that 'a significant number of apparent roll mark-offs that would seem to indicate multiple voting incidents is attributable to official error (an issuing officer marking a certified list incorrectly)'. The JSCEM noted that the use of electronic certified lists 'would offer a significant reduction in the official error rate'.[27]

2.18 The minister also advised that, critically, the bill would reduce the risk of electoral fraud in the form of voter impersonation, as requiring voter identification will mean that for those without identification, who must vote via the declaration

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24 Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2019 election and matters related thereto* (December 2020) p. 142.

25 Australian Electoral Commission, *Supplementary Submission 120.7*, p.20, to the Joint Standing Committee on Electoral Matters, *Inquiry into and report on all aspects of the conduct of the 2019 Federal Election and matters related thereto*.

26 Mr Tom Rogers, Australian Electoral Commissioner, *Finance and Public Administration Legislation Committee Hansard*, 23 March 2021, p. 170 and Mr Tom Rogers, Australian Electoral Commissioner, *Finance and Public Administration Legislation Committee Hansard*, 26 October 2021, p. 109.

27 Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2013 federal election: An assessment of electronic voting options* (November 2014) p. 10.

process, only the first vote cast will be admitted to the scrutiny process. However, no evidence has been provided as to whether there have been cases of voter impersonation in previous elections. As such, it is not possible to conclude that this issue addresses a pressing or substantial public or social concern.

*Rational connection*

2.19 It must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective to achieve the objective being sought. In response to the question as to whether any modelling has been undertaken to assess whether this measure is likely to impact voter turnout, the minister advised that there is no evidence that the reforms would negatively impact voter turnout. In particular, the minister noted that when Queensland introduced a requirement similar to that proposed by this bill, of the three most recent Queensland elections, the 2015 election (which had voter identification laws in place), had higher voter turnout, and since voter identification laws were repealed, the voter turnout has been lower. The minister also advised that at the 2015 election less than one per cent of voters cast a declaration vote as a result of not presenting identification. This is a useful comparison that helps in assessing the likelihood of whether such laws may affect voter turnout. However, it is noted that the voter turnout in the Queensland election before voter identification laws were introduced was slightly higher than in 2015 (in the 2012 election turnout was 91 per cent compared to 89.9 per cent in 2015).[28] It is also noted that it is difficult to determine the specific causes for voter turnout, noting that this turns on various factors.

2.20 The minister's response did not address the question as to how voter identification requirements would be effective to prevent people from voting multiple times at different locations. The minister stated that the measures in the bill are designed to deter voters from intentionally voting more than once. Yet, as the Australian Electoral Commissioner has said, the vast majority of multiple votes are cast by the elderly, those with English as a second language or who are confused about the act of voting.[29] As such, it remains unclear how requiring such voters to show identification would prevent them from continuing to cast their vote multiple times (and showing their identification each time they do so). In relation to clerical error, it has also not been established how electoral officials would be less likely to make mistakes in marking voters off the roll if they see an identity document rather than by asking for the name of the elector.

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28 Electoral Commission Queensland, *2015 State General Election Evaluation Report and Statistical Return*, October 2015, p.60.

29 Mr Tom Rogers, Australian Electoral Commissioner, *Finance and Public Administration Legislation Committee Hansard*, 23 March 2021, p. 170 and Mr Tom Rogers, Australian Electoral Commissioner, *Finance and Public Administration Legislation Committee Hansard*, 26 October 2021, p. 109.

*Proportionality*

2.21 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether the measure is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective. In this respect, the bill introduces a number of safeguards that seek to ensure the ability of a person to vote. In particular, there are a number of different types of identification documents that can be produced that the majority of voters are likely to have access to. Importantly, no voter would be denied a vote for not having an acceptable form of identification. Rather, where a voter does not have acceptable identification, another enrolled voter can attest to their identity, or they can cast a declaration vote. These are important safeguards that assist with the proportionality of the measure.

2.22 Nevertheless, there is concern about how the measure will operate in practice in relation to certain vulnerable groups. As stated in the initial analysis, requiring proof of identity may have a disproportionate impact on particular groups who may face issues accessing identification documentation or having such documentation on them when voting. A 2014 research report prepared for the NSW Electoral Commission on multiple voting and voter identification identified numerous challenges that certain groups may face in providing documentation, including people with no fixed address, people with disability, people of low-socio economic status, people from non-English speaking backgrounds, Aboriginal and Torres Strait Islander peoples and women escaping domestic violence.[30]

2.23 For those who do not have identification when seeking to cast their vote and do not have another elector to attest to their identity, a declaration vote can be made. The minister has advised that in casting such a vote the elector would be asked to provide their full name (and former name if relevant), date of birth, current address (and enrolled address if different), a contact number and their signature. However, it remains unclear how a person can complete a declaration form if they have no current address (for example, if homeless or fleeing domestic violence). There are also other requirements on the declaration envelope to provide additional information, such as a driver's licence or passport number. However, the minister has advised that all other evidence of identity requested by the form is wholly optional. However, it is noted that the current declaration form does not indicate that the provision of such information is optional,[31] and as such it is not clear if electors would always understand the optional nature of this.

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30 Report prepared for the NSW Electoral Commission by Professor Rodney Smith, University of Sydney, *Multiple Voting and Voter Identification*, February 2014, pp. 20-21.

31 Australian Electoral Commission, *Approved form for pre-poll and absent-provisional declaration voting* (2 February 2018) available at: https://www.aec.gov.au/about_aec/cea-notices/files/2018/pre-poll-absent-provisional-dec-vote.pdf.

2.24 The minister's response also did not address the questions as to whether consideration has been given to alternative, less rights restrictive, ways of achieving the stated objectives. It is noted that the AEC has recommended that the issue of multiple voting could be addressed by creating a special category of electors, such that where a person had previously been identified as one who may have intentionally voted multiple times, they could be declared to be a multiple voter and would be provided with a declaration vote rather than an ordinary vote.[32] This recommendation has recently been adopted, with the *Electoral Legislation Amendment (Electoral Offences and Preventing Multiple Voting) Act 2021* commencing on 3 September 2021. The amendments made by this Act provide that the Electoral Commissioner may declare an elector to be a designated elector on the basis of a reasonable suspicion that the elector has voted more than once in an election. Once designated, such a person may only vote by declaration vote.[33] The explanatory memorandum to the bill that became this Act, stated:

> This provides the Electoral Commissioner with mechanism for electors who are reasonably suspected of having voted multiple times in the same election to safeguard against multiple voting in future elections… This approach aligns with other state jurisdictions that have taken steps to overcome instances of multiple voting, and enhance the integrity of the election, in line with the one-vote, one-value principle. For example New South Wales has a comparable method for designating certain persons as 'special voters', where multiple voting behaviour has been proven or is suspected on reasonable grounds.[34]

2.25 Noting the intention of this legislation, which commenced operation less than two months before the current bill was introduced, it is not clear why any concerns regarding multiple voting are not able to be addressed by this new legislation (noting there has been no election since that legislation commenced, and so therefore no opportunity to determine its effectiveness).

2.26 Further, it appears that many instances of markings of multiple voting are as a result of clerical error. In its report into the 2013 election the JSCEM noted the use of electronic certified lists would offer a significant reduction in the official error rate, and recommended that the AEC be resourced to deploy electronic certified lists.[35] It

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32 Australian Electoral Commission, *Supplementary Submission 120.7*, p.20, to the Joint Standing Committee on Electoral Matters, *Inquiry into and report on all aspects of the conduct of the 2019 Federal Election and matters related thereto*.

33 *Electoral Legislation Amendment (Electoral Offences and Preventing Multiple Voting) Act 2021*, Schedule 1.

34 Electoral Legislation Amendment (Electoral Offences and Preventing Multiple Voting) Bill 2021, Explanatory Memorandum, pp. 6-7.

35 Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2013 federal election: An assessment of electronic voting options* (November 2014) p. 10 and recommendations 1 and 2.

appears that the AEC is using such lists for all pre-poll votes and some voting centres on polling day, but not for the majority of voting centres.[36] It is not clear if consideration was given to increasing the use of these electronic certified lists before introducing this bill to address concerns regarding multiple votes and clerical errors.

*Conclusion*

2.27 From the minister's response it appears that the objectives of the bill are threefold: to reduce voter fraud, which appears to be focused on instances of multiple voting and voter impersonation; to avoid clerical errors; and overall to improve public confidence in the electoral process. As noted above, a measure may be aimed at achieving a legitimate objective if it is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. In relation to voter fraud, the minister's response states that the bill will reduce the risk of fraud in the form of voter impersonation. However, no evidence has been provided as to whether voter impersonation has been a problem during previous elections. In relation to multiple voting, the minister has stated that there were 311 admitted multiple votes in the 2019 election and 1,954 in the 2016 election. Noting that over 15 million votes were cast during the 2019 election,[37] the level of intentional multiple voting appears to be extremely small.[38] As such, it does not appear to have been demonstrated that seeking to address concerns regarding multiple voting addresses an issue that is pressing and substantial enough to warrant limiting human rights. In relation to the desire to reduce clerical errors, it is not sufficient that a measure simply seeks an outcome regarded as desirable or convenient. Administrative convenience, in and of itself, is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights law. Finally, while public confidence in the electoral system is an important objective in a democracy, the minister has not provided any evidence that demonstrates a lack of public confidence, other than referring to 'media commentary and social media speculation' regarding multiple voting.

2.28 With regard to the question as to whether the measure is likely to be effective to achieve the stated objectives, evidence as to the impact of such laws in Queensland when similar laws were introduced may be a useful comparison in

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36 Australian Electoral Commission, *Supplementary submission 120.7*, p.26–27 to the Joint Standing Committee on Electoral Matters, *Inquiry into and report on all aspects of the conduct of the 2019 Federal Election and matters related thereto*.

37 Australian Electoral Commission, *Tally room 2019 Federal Election – First preferences by party*, July 2019.

38 The Australian Electoral Commissioner has said that this issue is 'vanishingly small': see Mr Tom Rogers, Australian Electoral Commissioner, *Finance and Public Administration Legislation Committee Hansard*, 23 March 2021, p. 170 and Mr Tom Rogers, Australian Electoral Commissioner, *Finance and Public Administration Legislation Committee Hansard*, 26 October 2021, p. 109.

assessing the likelihood of whether such laws may affect voter turnout, while noting that it is difficult to determine the specific causes for overall voter turnout. Questions remain as to how requiring electors to show identification would prevent electors from continuing to cast their vote multiple times, and why this would reduce clerical error.

2.29 In relation to proportionality, the bill importantly introduces a number of safeguards that seek to protect the ability of a person to vote, including allowing for numerous types of identification documents to be used, and providing that no voter would be denied a vote for not having an acceptable form of identification. It appears likely that the vast majority of voters would be able to meet these requirements when casting their vote. However, there are concerns that certain vulnerable groups may be disproportionately impacted by this measure, particularly Indigenous persons in remote communities, people experiencing homelessness and those fleeing domestic violence. In this regard, it is noted that the alternative to producing identification still requires a person to state their current address, which may be particularly difficult for those experiencing homelessness. It is also not clear that consideration has been given to any less rights restrictive alternatives that may be able to achieve the stated objectives. In particular, it is noted that less than two months before this bill was introduced, legislation commenced that is designed to address concerns regarding multiple voting, one of the main objectives of this bill. It is not clear why these changes have not first been tested to determine if these might address some of the concerns said to be addressed by this bill. On this basis, the measure does not appear to be the least rights restrictive way to achieve the stated objectives.

2.30 Under international human rights law the onus is on the State to demonstrate that any limit on the right to participate in public affairs and the right to equality and non-discrimination is necessary, reasonable and proportionate. Despite the many safeguards in the bill designed to ensure people may continue to cast their vote, the minister's response has not established: that the measure seeks to achieve an objective that addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting these rights; that the measure is rationally connected to those objectives; or that it is proportionate. As such, there is a risk that this measure would impermissibly limit the right to participate in public affairs and the right to equality and non-discrimination.

## Committee view

**2.31 The committee thanks the minister for this response. The committee notes that this bill seeks to introduce identification requirements for voters to cast pre-poll and polling day ordinary votes. Voters would be required to show an appropriate proof of identity document, have another enrolled voter attest to their identity, or cast a declaration vote in place of an ordinary vote.**

**2.32 The committee notes that as a matter of law, no voter will be denied a vote for not having an appropriate form of identification or attestation, as they would**

**be able to cast a declaration vote. However, these additional requirements imposed before a voter can cast their vote engage and limit the right to take part in public affairs and the right to equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.**

**2.33 The committee considers that in general terms the objectives of electoral integrity and ensuring public confidence in the electoral process, are legitimate and important objectives. However, the committee notes that under international human rights law the onus is on the State to demonstrate that any measures which limit rights are necessary and seek to address an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. As set out above, it appears that the evidence provided does not fully establish that these measures seek to address such concerns. The committee notes there are significant safeguards in the bill that seek to protect the ability of a person to cast their vote, and the committee considers that the vast majority of voters would be able to provide the requisite identification, or be able to cast a declaration vote. However, noting the potential for the bill to disproportionately impact on certain groups (such as Indigenous persons in remote communities, people experiencing homelessness and those fleeing domestic violence), and that it has not been established that there are no less rights restrictive ways to achieve the stated objectives, the committee considers the measure has not been demonstrated to be proportionate to the stated objectives. As such, there is a risk that this measure would impermissibly limit the right to participate in public affairs and the right to equality and non-discrimination.**

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

# National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021[1]

| | |
|---|---|
| **Purpose** | This bill seeks to amend the *National Disability Insurance Scheme Act 2013* to:<br>• provide for the Participant Service Guarantee that will legislate timeframes and engagement principles for how the National Disability Insurance Agency (NDIA) undertakes key administrative processes;<br>• provide administrative amendments in relation to changing participant plans;<br>• clarify eligibility for psychosocial disability;<br>• allow the NDIA to make direct payments on behalf of participants; and<br>• remove redundant references and rule-making powers used during the NDIS transition phase |
| **Portfolio** | National Disability Insurance Scheme |
| **Introduced** | House of Representatives, 28 October 2021 |
| **Rights** | Rights of persons with disability |

2.35 The committee requested a response from the minister in relation to the bill in *Report 13 of 2021*.[2]

## Variation or reassessment of a participant's plan

2.36 This bill seeks to amend the *National Disability Insurance Scheme Act 2013* (the Act) to allow the plan of a participant in the National Disability Insurance Scheme (NDIS) to be varied or reassessed. This could occur on the Chief Executive Officer's (CEO) own initiative or on request of the participant.[3]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021, *Report 14 of 2021*; [2021] AUPJCHR 141.

2 Parliamentary Joint Committee on Human Rights, *Report 13 of 2021* (10 November 2021), pp. 10-21.

3 Schedule 1, item 23, proposed section 47A and item 24, proposed sections 48 and 49.

2.37 Specifically, the bill would allow the CEO to vary a participant's plan (except the participant's statement of goals and aspirations) if the variation is: a change to the statement of participant supports in the circumstances prescribed by the NDIS rules; a correction of a minor or technical error; or of a kind prescribed by the NDIS rules.[4] Each variation must be prepared with the participant.[5] In varying participant supports, the CEO would be required to have regard to a number of factors, including the participant's statement of goals and aspirations; any relevant assessments; and the principle that a participant should manage their plan to the extent that they wish to do so.[6] The CEO must also be satisfied of the criteria relating to reasonable and necessary supports under section 34 of the Act. The bill would allow the CEO to make a variation to a participant's plan that is different from the variation requested by the participant.[7]

2.38 Regarding reassessment of a participant's plan, the bill would allow the CEO to conduct a reassessment of a plan at any time.[8] The outcome of a reassessment would either be a complete reassessment; a variation of the plan; or the preparation of a new plan.[9] The CEO would also be required to reassess the participant's plan before the reassessment date and in any circumstances specified in the plan.[10]

2.39 The bill further provides that the NDIS rules may set out matters to which the CEO must have regard in deciding whether to vary or reassess a participant's plan on their own initiative or in making a decision about variation or reassessment of a plan on request of the participant.[11] In addition, where the participant requests a variation or reassessment, the bill sets out the timeframes in which the CEO must make a decision and the notice requirements in relation to that decision.[12]

4 Schedule 1, item 23, proposed subsection 47A(1).

5 Schedule 1, item 23, proposed subsection 47A(1).

6 Schedule 1, item 23, proposed subsection 47A(3).

7 Schedule 1, item 23, proposed subsection 47A(9).

8 Schedule 1, item 24, proposed subsection 48(1).

9 Schedule 1, item 24, proposed subsection 48(7).

10 Schedule 1, item 24, proposed sections 49 and 49A.

11 Schedule 1, item 23, proposed subsection 47A(6); item 24, proposed subsection 48(5).

12 Schedule 1, item 23, proposed subsection 47A(4) and (8); item 24, proposed subsections 48(3), (4), (6) and (8).

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights of persons with disability*

2.40 There are various measures in this bill that would promote or facilitate the realisation of some of Australia's obligations under the Convention on the Rights of Persons with Disabilities.[13] However, by allowing the CEO to vary or reassess a participant's plan on the CEO's own initiative and without the participant's consent, this measure engages and may limit the rights of persons with disability. In particular, where a participant's supports are reduced or adversely changed as a result of the CEO varying or reassessing the participant's plan, the measure engages and may limit the rights to health and an adequate standard of living, as well as the rights of persons with disability (as outlined below in paragraph [2.41]). The right to health is the right to enjoy the highest attainable standard of physical and mental health.[14] It is a right to have access to adequate health care as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food, and a healthy environment).[15] The right to an adequate standard of living requires that States parties take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in their jurisdiction.[16]

13 For example, Schedule 1, items 11 and 12 would extend the minimum time, from 28 to 90 days, for prospective participants to provide information requested by the National Disability Insurance Agency to support an access decision before the access request is deemed to be withdrawn. This is a positive measure that would provide people with disability more time to obtain the relevant information necessary to support their application to access the NDIS. See also schedule 2, items 2 and 3, which would remove qualifying language from the Act and insert a new guiding principle that states '[p]eople with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity'. These amendments would bring the general principles under the Act into closer alignment with the Convention on the Rights of Persons with Disability. Schedule 2, items 18–20, would also clarify that for the purposes of subsection 24(1) of the Act (which sets out the disability criteria for access to the NDIS), impairments to which a psychosocial disability is attributable, and that are episodic or fluctuating, may be taken to be permanent. This appears to be a positive measure insofar as it may provide greater access to the NDIS for people with psychosocial disability.

14 International Covenant on Economic, Social and Cultural Rights, article 12(1).

15 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [4]. See also, *General Comment No. 12: the right to food (article 11)* (1999); *General Comment No. 15: the right to water (articles 11 and 12)* (2002); and *General Comment No. 22: the right to sexual and reproductive health* (2016).

16 International Covenant on Economic, Social and Cultural Rights, article 11. See also, UN Human Rights Committee, *General Comment No. 3: Article 2 (Implementation at a national level)*.

2.41 Under the Convention on the Rights of Persons with Disabilities, Australia also has a number of specific obligations that may be engaged and limited by this measure, including to:

- provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons;[17]
- take appropriate steps to safeguard and promote the realisation of the right to an adequate standard of living and social protection without discrimination on the basis of disability;[18]
- take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of the right to live and participate in the community, including by ensuring that persons with disabilities have the opportunity to choose their place of residence; have access to a range of in-home, residential and other community support services; and that general community services and facilities are available on an equal basis and responsive to the needs of persons with disabilities;[19]
- take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;[20] and
- refrain from engaging in any act or practice that is inconsistent with the Convention and to ensure that public authorities and institutions act in conformity with the Convention, which includes respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons with disability.[21]

2.42 Further, to the extent that this measure is applied to children with disability, it would also engage and may limit the rights of the child. Children have special rights under international human rights law taking into account their particular vulnerabilities.[22] Children's rights are protected under a number of treaties, including

17 Convention on the Rights of Persons with Disabilities, article 25.

18 Convention on the Rights of Persons with Disabilities, article 28.

19 Convention on the Rights of Persons with Disabilities, article 19.

20 Convention on the Rights of Persons with Disabilities, article 20.

21 Convention on the Rights of Persons with Disabilities, articles 3 and 4.

22 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds.[23]

2.43 Australia has obligations to progressively realise the above social and economic rights, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. To the extent that this measure results in a participant's supports being reduced and, as a consequence, may deprive a participant of the full enjoyment of the above rights, this measure may be considered retrogressive. Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective. In this context, the United Nations (UN) Committee on Economic, Social and Cultural Rights has stated that '[t]here is a strong presumption of impermissibility of any retrogressive measures taken in relation to the [Covenant rights]' and where retrogressive measures are deliberately taken, states have 'the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the [Covenant] rights' and in the context of the full use of the maximum available resources.[24] Similarly, the Committee on the Rights of Persons with Disabilities has stated that the duty of progressive realisation entails a presumption against retrogressive measures and states are 'obliged to demonstrate that such measures are temporary, necessary and non-discriminatory'.[25] It further observed that 'States parties are prohibited from taking retrogressive measures with respect to the minimum core obligations of the right to live independently within the community'.[26]

2.44 Noting that the statement of compatibility did not address the extent to which this measure may engage and limit a number of human rights, further information is required to assess the human rights compatibility of this measure, in particular:

23 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also Convention on the Rights of Persons with Disabilities, article 7; International Covenant on Civil and Political Rights, articles 2 and 26.

24 UN Committee on Economic, Social and Cultural Rights, *General Comment 13: The right to education* (1999) [45].

25 UN Committee on the Rights of Persons with Disabilities, *General Comment on article 19: Living independently and being included in the community* (2017) [43]–[44].

26 UN Committee on the Rights of Persons with Disabilities, *General Comment on article 19: Living independently and being included in the community* (2017) [45].

(a) what is the specific objective being pursued by enabling the CEO to vary or reassess a participant's NDIS plan on their own initiative, and how does this promote general welfare;

(b) why is the CEO's power to vary a participant's plan not limited to changes that would benefit the participant;

(c) why is the participant's consent not required for a plan variation or reassessment;

(d) in relation to the requirement to involve the participant in a plan variation:

(i) will the participant be notified of the CEO's intention to initiate a plan variation prior to the CEO initiating the variation process;

(ii) will the participant genuinely be able to influence the outcome of the CEO's decision to vary a plan;

(iii) to what extent is the participant's consent an objective of the consultation process, and what weight will be given to the participant's will and preferences;

(iv) will there be guidance to assist the CEO in effectively involving the participant in any decisions and processes that affect them; and

(v) will the participant be able to access support, if desired, to effectively participate in the consultation process.

(e) what other safeguards, if any, accompany the measure to ensure that any limitation on rights is proportionate; and

(f) has consideration been given to alternative, less rights restrictive measures.

***Committee's initial view***

2.45 The committee noted that a number of the measures in the bill would promote or facilitate the realisation of some of Australia's obligations under the Convention on the Rights of Persons with Disabilities. However, the committee noted that allowing the CEO, on their own initiative and without the participant's consent, to vary or reassess a participant's plan, engages and may limit a number of rights, including the rights to health and an adequate standard of living, as well as the rights of persons with disability

2.46 The committee considered there were questions as to the objective being pursued by this measure and whether it was a proportionate means of achieving this objective, particularly as much of the detail is to be included in the as yet unmade NDIS rules, and sought the minister's advice as to the matters set out at paragraph [2.44].

2.47 The full initial analysis is set out in *Report 13 of 2021*.

## Minister's response[27]

2.48 The minister advised:

> The variation process proposed in this Bill follows the same construction as the existing review process in the NDIS Act established in 2013, agreed with bipartisan support, with state and territory governments and with the support of the disability sector. The *National Disability Insurance Scheme Act 2013* (NDIS Act) enshrines principles the National Disability Insurance Agency (NDIA) CEO (the CEO) must take into account when exercising his or her functions, including when varying a plan. These include, amongst others, that people with disability exercise choice and control about matters that affect them (see subsection 4(8) and paragraphs 17A(3)(a) and 31(i)) and that people with disability are enabled to make decisions that affect their lives (see subsection 4(8) paragraph 17A(3)(b) and 31(b)). While the NDIS rules detailing the operation of the new variation provision are yet to be finalised, these overarching principles in the NDIS Act cannot be overridden by a rule and protect the interest and welfare of people with disability. This is in line with the object in paragraph 3(1)(e) of the Act to enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports.
>
> Final rules governing operation of the new variation provision are being developed. Consistent with recommendation 21 of the 2019 Review of the NDIS Act conducted by David Tune AO PSM (the Tune Review) these will be 'Category D' NDIS rules requiring consultation with states and territories.
>
> **Specific questions raised by the Committee**
>
> ***(a) What is the specific objective being pursued by enabling the CEO to vary or reassess a participant's NDIS plan on their own initiative, and how does this promote general welfare?***
>
> - Enabling the CEO to vary or reassess a participant's plan on the CEO's own initiative promotes general welfare by enabling a quicker, less disruptive approach to revising an element of a plan.
>
> The Tune Review identified that the inability to amend a plan without creating a new plan or requiring a plan reassessment was a key frustration for participants. Subsection 48(4) of the NDIS Act currently allows the CEO, on their own initiative, to conduct a plan review (to be termed a reassessment) at any time. This allows the CEO to respond to changes in a

27 The minister's response to the committee's inquiries was received on 23 November 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

participant's circumstances. The CEO must be satisfied funded supports are reasonable and necessary in accordance with each of the requirements of paragraphs 34(1)(a) to (f) together with other obligations under the NDIS Act and NDIS Rules ensuring the needs of people with disability are being appropriately met promotes their general welfare. This same approach is replicated in the proposed subsection 48(2).

Similarly, the ability to vary a participant's plan on the CEO's initiative is consistent with the CEO's existing powers to reassess all of a participant's plan on the CEO's own initiative under the NDIS Act. In any of these circumstances in which a plan can be reassessed or varied, the CEO is required to be satisfied that funded supports are reasonable and necessary, as set out in other provisions of the NDIS Act and NDIS Rules, which apply equally to reassessment of all of a plan and, as proposed, to a variation of part of a plan.

The circumstances in which a plan can be varied will be limited to the circumstances prescribed in NDIS rules and minor and technical changes. The NDIS Rules are intended to limit the circumstances in which variations can be used, consistent with the Tune Review. As stated in the explanatory memorandum, these could include:

- emergencies including urgent equipment repair;
- to ensure safety in an accommodation crisis or family and domestic violence situation;
- to support a discharge out of hospital where an unplanned transition is experienced.

***(b) Why is the CEO's power to vary a participant's plan not limited to changes that would benefit the participant?***

As outlined above, NDIS Rules will outline the circumstances in which a plan variation may be made, consistent with the recommendations of the Tune Review. Specifically, the Tune Review recommended that the relevant circumstances are:

- if a participant changes their statement of goals and aspirations;
- if a participant requires crisis/emergency funding as a result of a significant change to their support needs and the CEO is satisfied that the support is reasonable and necessary;
- if a participant has obtained information, such as assessments and quotes, requested by the NDIA to make a decision on a particular support, and upon receipt of the information the NDIA is satisfied that the funding of the support is reasonable and necessary (for example, for assistive technology and home modifications);
- if the plan contains a drafting error (e.g. a typographical error);

- if, after the completion of appropriate risk assessments, plan management type is changed;
- for the purposes of applying or adjusting a compensation reduction amount;
- to add reasonable and necessary supports if the relevant statement of participant supports is under review by the AAT;
- upon reconciliation of an appeal made to the AAT;
- to implement an AAT decision that was not appealed by the parties.

***(c) Why is the participant's consent not required for a plan variation or reassessment?***

Consistent with the existing requirements for plan reviews, proposed section 47A will specify that each variation is to be prepared with the participant. Any new plan developed as a result of a reassessment must also be prepared with the participant. In addition, amended section 31 of the NDIS Act will require any variation or reassessment to be directed by the participant so far as reasonably practicable. The goal will always to be to work collaboratively with the participant to meet their reasonable and necessary support needs.

Any variation to a participant's plan must be consistent with other provisions in the Act, including whether a funded support is reasonable and necessary in accordance with section 34 of the Act.

There may be occasions where a final funding decision or change is made where the participant does not agree. In such situations, the participant can be assisted with reasons for the decision and also has rights of internal and external merits review. This is also consistent with the sound administration of Government social services programs and schemes, and is consistent with fair administrative decision-making practice.

In addition, the new services standards that form part of the Participant Service Guarantee require the NDIA to keep participants and prospective participants informed about the progress of decision-making processes under the NDIS Act that may affect them. This includes all variations and reassessments.

***(d) In relation to the requirement to involve the participant in a plan variation:***

***i. will the participant be notified of the CEO's intention to initiate a plan variation prior to the CEO initiating the variation process;***

Yes, a participant will be informed when a variation process is initiated other than at their request.

***ii. will the participant genuinely be able to influence the outcome of the CEO's decision to vary a plan;***

A participant will be able to provide evidence to the CEO as part of being involved in the variation process.

***iii. to what extent is the participant's consent an objective of the consultation process, and what weight will be given to the participant's will and preferences;***

The role of the participant and their views are central to the process of determining their supports and services under the NDIS Act. As stated above, the objects and principles underpinning the NDIS Act emphasise the participant's right to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports (see for example, section 3(1)(e) of the NDIS Act). This process explicitly enables the participant to express their will and preferences. The CEO must give appropriate weight to a participant's will and preferences as part of the process prescribed for determining the plan (see for example, section 31(i)) as part of the overall process under Division 2, Part 2, Chapter 3 of the NDIS Act. The concept of direct consent of a participant to all contents of a plan does not exist within plan decision-making under the Act and there is no intention to include such a provision in the Act.

***iv. will there be guidance to assist the CEO in effectively involving the participant in any decisions and processes that affect them; and***

Yes. Guidance will be provided to assist the CEO and delegates in the exercise of their powers. The NDIA will, in accordance with the NDIS Act, respond to the individual needs and circumstances of the participant when considering a variation or plan reassessment.

***v. will the participant be able to access support, if desired, to effectively participate in the consultation process.***

As with all planning processes, participants have access to a range of advocacy and support services that help people with a disability navigate the NDIS. Local Area Coordinators are available to assist participants understand and access the scheme, and these services will extend to both participant and CEO initiated variations.

***(e) What other safeguards, if any, accompany the measure to ensure that any limitation on rights is proportionate?***

In addition to the safeguards contained in the objects and principles of the NDIS Act, people with disability must be supported in their dealings and communications with the NDIA, the NDIS must respect people with a disability in exercising choice and control about matters that affect them, and enable them to make decisions that will affect their lives.

Further, the proposed engagement principles of the Participant Service Guarantee provide guidance for how the NDIA must keep participants at the centre of any decision making in the NDIS. Notably, it will ensure participants are informed about the progress of decision-making processes

under the Act that affect them. Standards are also proposed under the engagement principle of *transparency* that the scheme must provide clear, consistent, accurate and accessible guidance on the evidence required to enable the CEO to make a decisions relating to varying or reassessing participant plans. In this way, the Participant Service Guarantee will ensure decision-making involves participants and is communicated to them.

Finally, the NDIS rules setting out the circumstances in which the CEO may vary a plan will be subject to consultation with states and territories, and will be subject to parliamentary scrutiny and potentially disallowance.

***(j) Has consideration been given to alternative, less rights restrictive measures?***

The Government does not consider the proposed plan variation power to be a rights restrictive measure. The critical issues are the way a review (reassessment) or variation is undertaken and the outcome of any review of a participant's plan. This is governed by other provisions within the Act, and in particular the provisions that relate to funded supports being reasonable and necessary, the requirement to undertake planning with a participant and the requirement for the Agency to ensure that the decisions and preferences of participants are respected and given appropriate priority. Whichever approach is taken (reassessment or variation), the result is a plan that has been prepared with the participant and includes what is reasonable and necessary.

These measures were recommended as part of the Tune Review, following significant community and sector consultation. The legislative measures have been developed having regard to significant consultation activities with people with disability, their carers and families.

Most recently, an exposure draft of the Bill and the proposed NDIS Rules regarding variations, contained in the proposed National Disability Insurance Rules (Plan Administration) Rules 2021 (the Plan Administration Rules) was released. Extensive feedback was received and the Bill has been amended as a result of that feedback. The Plan Administration Rules will also be amended to take into account feedback.

Through both consultation and rigorous policy and legislative development, the Government has determined the current formulation of the variation and reassessment powers to be appropriate. These models have been developed as the best means of delivering on the requests on the NDIS to improve the system of plan review, allowing flexibility for variations to plans to be made in appropriate, prescribed circumstances.

## Concluding comments

### *International human rights legal advice*

*Legitimate objective and rational connection*

2.49 As noted in the initial analysis, any limitation on the above rights must pursue a legitimate objective, namely, one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. Additionally, in the context of economic, social and cultural rights, any limitation must be 'compatible with the nature' of those rights, and 'solely for the purpose of promoting the general welfare in a democratic society'.[28] As to the objective being pursued by the measure, the minister advised that enabling the CEO to vary or reassess a participant's plan on the CEO's own initiative promotes general welfare by enabling a quicker, less disruptive approach to revising an element of an NDIS participant's plan. The minister stated that the measure would allow the CEO to respond to changes in a participant's circumstances, noting that ensuring that the needs of people with disability are being appropriately met would promote their general welfare. More generally, the minister advised that the bill seeks to increase flexibility and clarify timeframes for decision-making by providing for the Participant Service Guarantee to improve the experience and outcomes of people with disability.

2.50 The objectives of improving the CEO's ability to respond to changes in the circumstances of NDIS participants and ensuring that plans appropriately meet the needs of people with disability may be capable of constituting legitimate objectives for the purposes of international human rights law. Noting that the inability to amend a plan without creating a new plan or requiring a plan reassessment was a key frustration for participants, seeking to improve the plan variation process appears to be an objective directed at addressing a pressing or substantial issue of public or social concern. Insofar as the measure seeks to improve the social and economic wellbeing of people with disability by better responding to the needs and

28 See International Covenant on Economic, Social and Cultural Rights, article 4. It is noted that while the Convention on the Rights of Persons with Disabilities contains no general limitation provision, the general limitation test under international human rights law is applicable, noting that many rights in the Convention on the Rights of Persons with Disabilities are drawn from the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights.

circumstances of participants, the measure may also be considered to promote 'general welfare'.[29]

2.51 Further, allowing a participant's plan to be varied or reassessed on the CEO's own initiative may be rationally connected to the objective of increasing the CEO's flexibility to respond to changes in a participant's circumstances and revise a participant's plan more efficiently. However, in circumstances where a participant's supports are reduced or adversely changed as a result of the CEO varying or reassessing the participant's plan, it is not clear that the measure would necessarily be effective to achieve the broader objective of ensuring the needs of people with disability are appropriately met and their general welfare promoted.

*Proportionality*

2.52 In assessing proportionality, it is necessary to consider a number of factors, including whether the proposed measure is sufficiently circumscribed and accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and whether there is the possibility of oversight and the availability of review.

2.53 As currently drafted, the measure confers a broad discretionary power on the CEO to initiate a variation or reassessment of a participant's plan. The scope of this power is therefore relevant in assessing whether the measure is sufficiently circumscribed. In relation to the variation of a plan, the minister advised that the circumstances in which a plan can be varied will be limited to the circumstances prescribed in the NDIS rules and to minor and technical changes. The minister stated that the NDIS rules are yet to be finalised but are intended to limit the circumstances in which variations can be used, consistent with the Tune Review.[30] The minister

29 The term 'general welfare' is to be interpreted restrictively and refers primarily to the economic and social well-being of the people and the community as a whole, meaning that a limitation on a right which disproportionately impacts a vulnerable group may not meet the definition of promoting 'general welfare'. See Limburg Principles on the Implementation of the ICESCR, June 1986 [52]. See also, Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review* vol. 9, no. 4, 2009, p. 573; Erica-Irene A Daes, The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, *Study of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, E/CN.4/Sub.2/432/Rev.2 (1983), pp. 123–4.

30 See David Tune, *Review of the National Disability Insurance Scheme Act 2013: Removing Red Tape and Implementing the NDIS Participant Service Guarantee*, December 2019, pp. 135 and 140. Recommendation 20 stated: 'The NDIS Act is amended to introduce a new Category D rule making power that sets out the matters the NDIA must consider when deciding whether to undertake an unscheduled plan review'. Recommendation 21 stated: 'The NDIS Act is amended to introduce a new Category D rule making power giving the NDIA the ability to amend a plan in appropriate circumstances'.

noted that the circumstances in which it may be appropriate for a variation to be initiated by the CEO include those set out in the Tune Review, such as if a participant changes their statement of goals and aspirations, or requires crisis or emergency funding as a result of a significant change to their supports.[31] Further, the explanatory memorandum notes that it is 'intended' that any variation would benefit the participant and would typically occur where the variation does not require a reduction or significant increase to the level of NDIS funding.[32]

2.54 In relation to a reassessment of a participant's plan, the bill provides that the CEO may conduct a reassessment on their own initiative at any time and the matters to which the CEO must have regard in deciding whether to conduct a reassessment of a plan on their own initiative are to be set out in the NDIS rules. The minister's response does not provide any further information as to what matters are to be set out in the NDIS rules in relation to a plan reassessment. The explanatory memorandum states that it is intended that a reassessment would occur where a participant has undergone a significant change in circumstances requiring a change in the level of support they need, or a participant otherwise requires significant additional funding to a range of existing supports.[33]

2.55 The minister's response suggests that the circumstances that are to be specified in the NDIS rules will be consistent with the recommendations of the Tune Review. If the NDIS rules clearly set out the circumstances in which the CEO may initiate a plan variation or reassessment, consistent with the Tune Review recommendation, this may assist with the proportionality of the measure. However, it remains unclear whether the NDIS rules will also specify the circumstances in which the CEO must *not* initiate a plan variation on their own initiative, for example, where it would result in the reduction of supports or would otherwise be detrimental to the participant. As noted in the initial analysis, while the explanatory memorandum states that 'it is intended' that the CEO would exercise their power to vary a participant's plan in a manner that benefits the participant and typically, this would not involve a reduction in NDIS funding or the participant's supports, this intention is not reflected in the text of the bill itself.[34] As a matter of legislative interpretation, as currently provided in the bill it appears that the CEO may initiate a plan variation that may result in a reduction in a participant's supports. It is noted that the minister did not provide any information as to why the CEO's power to vary a participant's plan is not limited to changes that would benefit the participant.

31 See also explanatory memorandum, p. 20.

32 Explanatory memorandum, p. 20.

33 Explanatory memorandum, p. 21.

34 Explanatory memorandum, p. 20.

2.56 It is noted that international human rights law jurisprudence states that laws conferring discretionary 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.[35] This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. Noting that the NDIS rules are yet to be finalised and without knowing the detail to be contained in the NDIS rules, it is not possible to conclude that the measure, as currently drafted, is sufficiently circumscribed.

2.57 As to safeguards, the measure requires that a plan variation be prepared with the participant, even where the variation is initiated by the CEO or where the variation is different from the one requested by the participant.[36] The minister stated that each variation is to be prepared with the participant and any new plan developed as a result of a reassessment must also be prepared with the participant. Additionally, the minister noted that a plan variation or reassessment must be consistent with other provisions in the NDIS Act. For example, provisions that require the preparation, review and replacement of a participant's plan, and the management of the funding for supports under a participant's plan, should, so far as is reasonably practicable, be underpinned by the right of the participant to exercise control over his or her own life; and maximise the choice and independence of the participant.[37] The minister stated that the goal is to work collaboratively with the participant to meet their reasonable and necessary support needs. Where a participant does not agree with the CEO's decision to vary or reassess their plan, they will be provided with reasons for the decision and have access to internal and external merits review.

2.58 As noted in the initial analysis, involving participants in plan variation or reassessment decisions assists with the proportionality of the measure to the extent that it would ensure that participants are consulted on decisions that affect them. However, the strength of this safeguard is dependent on how the consultation process operates in practice. In this regard, the minister advised that a participant will be informed when a variation process is initiated and will be able to provide evidence to the CEO as part of being involved in the variation process. Participants will have access to a range of advocacy and support services to help them navigate the plan variation or reassessment process. The minister stated that the variation process will enable the participant to express their will and preferences, and the CEO must give appropriate weight to this, as required under the NDIS Act.[38] The minister

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

36 Explanatory memorandum, pp. 20–21.

37 *National Disability Insurance Scheme Act 2013*, section 31.

38 See *National Disability Insurance Scheme Act 2013*, subsection 31(i).

further stated that guidance will be provided to the CEO and delegates to assist in the exercise of their powers in relation to plan variation or reassessment. However, the minister also noted that obtaining a participant's consent in relation to decisions about their plan is not required under the NDIS Act and there is no intention to include such provision in the Act.

2.59 The provision of guidance to assist the CEO in effectively involving the participant in any decisions and processes that affect them may assist with the proportionality of this measure. In addition, enabling participants to provide evidence to the CEO, express their will and preferences, and be informed of the decision-making process, as well as providing participants with access to advocacy and support services, may help to ensure that participants are actively involved in the plan variation or reassessment decision-making process. However, it remains unclear whether participants will genuinely be able to influence the outcome of the CEO's decision to vary a plan, noting that the participant's consent is not required to vary their plan and is not an objective sought to be obtained as part of the consultation process. Meaningful participation is particularly important given Australia's general obligation under the Convention on the Rights of Persons with Disabilities to closely consult with and actively involve persons with disabilities, including children with disabilities, regarding decisions that concern them;[39] and the general principle of respect for inherent dignity, individual autonomy (including the freedom to make one's own choices), and independence of persons with disability.[40] In this context, the UN Committee on the Rights of Persons with Disabilities has emphasised that participation must be meaningful, with due weight given to the views of persons with disabilities so that such views and the results of consultations

39 Convention on the Rights of Persons with Disabilities, article 4(3). See also UN Committee on the Rights of Persons with Disabilities, *General Comment no. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention* (2018). At [21], the Committee stated that to '"closely consult with and actively involve" persons with disabilities through their representative organizations is an obligation under international human rights law that requires the recognition of every person's legal capacity to take part in decision-making processes based on their personal autonomy and self-determination'.

40 Convention on the Rights of Persons with Disabilities, articles 3 and 4(3). It is noted that the general obligation under article 4(3) is critical for the implementation of other rights under the Convention, including the right to live independently and be included in the community (article 19) and the right to an adequate standard of living (article 28). See UN Committee on the Rights of Persons with Disabilities, *General Comment no. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention* (2018) [67]–[93].

are reflected in the decisions adopted.[41] It further noted that 'States parties have an obligation to ensure the transparency of consultation processes, the provision of appropriate and accessible information and early and continuous involvement'.[42]

2.60 As to the existence of other safeguards, the minister stated that the proposed engagement principles of the Participant Service Guarantee provide guidance for how the NDIA must keep participants at the centre of any decision-making in the NDIS. The minister noted that the principles will ensure participants are informed about the progress of decision-making processes that affect them. The minister also noted that the NDIS rules, which are to contain the operational detail of this measure, will be subject to the overarching principles in the NDIS Act that protect the interest and welfare of people with disability. These include that people with disability exercise choice and control about matters that affect them and that people with disability are enabled to make decisions that affect their lives.[43] Further, as noted in the initial analysis, participants will have access to internal and external review of the CEO's decision in relation to plan variation or reassessment and the provision of reasons for such a decision.[44] These additional safeguards would assist with the proportionality of this measure.

2.61 A further consideration is whether there are alternative less rights restrictive measures that may achieve the same objective.[45] Noting the intention that the CEO would only initiate a plan variation where it involves minor changes that would benefit a participant, the initial analysis stated that it is not clear why the bill does not specifically circumscribe the CEO's powers in this way and why the participant's

41 UN Committee on the Rights of Persons with Disabilities, *General Comment no. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention* (2018) [3], [4], [15] and [48]. The Committee further noted that 'States parties should guarantee that [the views of persons with disabilities] are not only heard as a mere formality or as a tokenistic approach to consultation'.

42 UN Committee on the Rights of Persons with Disabilities, *General Comment no. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention* (2018) [43].

43 *National Disability Insurance Scheme Act 2013*, subsection 4(8), subparagraph 17A(3)(a) and section 31.

44 Schedule 1, items 39 and 40; explanatory memorandum, pp. 16 and 25.

45 See *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [17.1], [23(c)]. The UN Committee on Economic, Social and Cultural Rights indicated that relevant in assessing the reasonableness and proportionality of the proposed limitation is whether the limitation is the only way to achieve the stated purpose and whether there are alternative measures that do not seriously limit rights.

consent is not required for a plan variation, particularly where the variation would change their supports. As to whether consideration has been given to alternative, less rights restrictive measures, the minister advised that the government does not consider the proposed plan variation power to be a rights restrictive measure. While the minister indicated that there is no intention to amend the NDIS Act to require a participant's consent to be obtained in relation to plan variation or reassessment decisions, the minister's response did not address why a plan variation cannot be limited to changes that benefit a participant. It appears that a less rights restrictive way of achieving the stated objective is available, namely, to require the consent of the participant to vary their plan and limiting the CEO's power to vary a participant's plan on their own initiative to variations that would benefit the participant (noting that the CEO would have the power to initiate a reassessment where more significant changes are required).

2.62 In conclusion, while the measure may pursue a legitimate objective, noting that there may be a less rights restrictive approach to achieving the stated objectives, it is not clear that, as currently drafted, the measure would constitute a proportionate limit on the rights to health and an adequate standard of living, as well as the rights of persons with disability, including the right to live independently and be included in the community.

## Committee view

**2.63 The committee thanks the minister for this response. The committee notes that this bill would allow an NDIS participant's plan to either be varied or reassessed on the CEO's own initiative or on request of the participant. The matters to which the CEO must have regard in deciding whether to vary or reassess a participant's plan on their own initiative are to be set out in the NDIS rules.**

**2.64 While a number of the measures in the bill would promote or facilitate the realisation of some of Australia's obligations under the Convention on the Rights of Persons with Disabilities, the committee notes that allowing the CEO, on their own initiative and without the participant's consent, to vary or reassess a participant's plan, engages and may limit a number of rights. In particular, where a participant's supports are reduced or adversely changed as a result of the CEO varying or reassessing the participant's plan, the measure would engage and may limit the rights to health and an adequate standard of living, as well as the rights of persons with disability, including the right to live independently and be included in the community. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.**

**2.65 The committee notes the minister's advice that enabling the CEO to vary or reassess a participant's plan on the CEO's own initiative promotes general welfare by enabling a quicker, less disruptive approach to revising an element of an NDIS participant's plan. The committee considers that the objectives of improving the CEO's ability to respond to changes in the circumstances of NDIS participants and**

**ensuring that plans appropriately meet the needs of people with disability may be capable of constituting legitimate objectives for the purposes of international human rights law. However, the committee notes that some questions remain as to whether the measure is a proportionate means of achieving these objectives, particularly as much of the detail is to be included in the as yet unmade NDIS rules.**

**2.66 The committee notes if the NDIS rules clearly set out the circumstances in which the CEO may initiate a plan variation or reassessment, consistent with the Tune Review recommendation, this may assist with the proportionality of the measure. However, without knowing the detail to be contained in the NDIS rules, including whether the circumstances in which the CEO must *not* initiate a plan variation will be specified (such as where it results in a reduction of supports or other adverse change), the committee considers it is not possible to conclude that the measure, as currently drafted, would be sufficiently circumscribed. The committee notes that the measure is accompanied by some important safeguards, such as access to internal and external merits review, and requiring the participant to participate in any plan variation initiated by the CEO. Regarding the latter, while the committee thanks the minister for providing useful information as to how the participant will likely be involved in plan variation or reassessment decision-making processes, the committee considers that it would be of assistance if this operational detail were to be set out in legislation.**

**2.67 Further, it is not clear that the measure represents the least rights restrictive approach to achieving the stated objective. The committee notes that a less rights restrictive way of achieving the stated objective may be to require the consent of the participant to vary their plan and limiting the CEO's power to vary a participant's plan on their own initiative to variations that would benefit the participant (noting that the CEO would have the power to initiate a reassessment where more significant changes are required).**

### Suggested action

**2.68 The committee considers that the proportionality of the measure may be assisted were the bill amended to provide that:**

- **(a) so far as is reasonably practicable, the CEO should obtain the participant's consent to vary their plan; and**
- **(b) the CEO's power to vary a participant's plan on their own initiative be limited to variations that would benefit the participant (noting that the CEO would have the power to initiate a full reassessment where more significant changes are required or where the participant does not consent to the variation).**

**The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.**

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

# Legislative instruments

## National Redress Scheme for Institutional Child Sexual Abuse Amendment (2021 Measures No. 1) Rules 2021 [F2021L00990][1]

| | |
|---|---|
| **Purpose** | This legislative instrument:<br>• sets out that a redress payment can be made to a person who has been appointed by a court, tribunal or board, or under a Commonwealth, state or territory law, to manage the financial affairs of a person entitled to redress;<br>• specifies the protected symbols used in connection with the scheme;<br>• allows certain universities to be declared as not state or territory institutions for the purpose of the scheme; and<br>• classifies the Police Citizens Youth Club Limited NSW as a state institution, allowing this institution to participate in the scheme as a participating state institution |
| **Portfolio** | Social Services |
| **Authorising legislation** | *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* |
| **Last day to disallow** | 15 sitting days after tabling (tabled in the Senate and the House of Representatives on 3 August 2021). |
| **Rights** | Effective remedy; rights of the child |

2.70 The committee commented on this legislative instrument in *Report 10 of 2021*.

### Participation in the National Redress Scheme for Institutional Child Sexual Abuse

2.71 The National Redress Scheme for Institutional Child Sexual Abuse (the scheme) seeks to provide remedies in response to historical failures of the Commonwealth and other government and non-government organisations to uphold

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Redress Scheme for Institutional Child Sexual Abuse Amendment (2021 Measures No. 1) Rules 2021 [F2021L00990], *Report 14 of 2021*; [2021] AUPJCHR 142.

human rights, including the right of every child to protection by society and the state,[2] from physical and mental violence, injury or abuse (including sexual exploitation and abuse).[3]

2.72 Subsection 111(1) of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Redress Act) provides that an institution is a 'state institution' if it is, or was, part of the state, or is, or was, a body established for public purposes by or under a law of a state. Subsection 111(2) of the Redress Act states that an institution is not a state institution if the rules prescribe this.

2.73 This legislative instrument excludes 37 universities from the definition of state and territory institutions for the purposes of the scheme. This has the effect that those institutions may only participate in the scheme if they choose to participate as non-government institutions.[4]

## Summary of initial assessment

### *International human rights legal advice*

*Rights of the child and right to an effective remedy*

2.74 For an individual to be eligible for redress pursuant to this scheme, the relevant institution against which a claim is being made must be participating in the scheme.[5] The prescription of universities as not being state or territory institutions for the purposes of the Redress Act means that they will not become participating institutions unless the minister is satisfied that the institutions themselves agree to participate in the scheme. Consequently, as this instrument ensures 37 universities are no longer automatically part of the redress scheme, this measure engages and may limit the rights of the child, and the right to an effective remedy.

2.75 Under international human rights law, the state is obliged to take all appropriate measures to protect children from all forms of violence or abuse, including sexual abuse.[6] The prescription of these institutions, and the potential for delay in securing redress for individuals making a claim in relation to them, therefore engages and may limit the right to an effective remedy, as this right exists in relation to the rights of children. International law requires that effective remedies must be available to redress violations, noting that children have a special and dependent

2 International Covenant on Civil and Political Rights, article 24.

3 The statement of compatibility to the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017, p. 70.

4 Explanatory statement, p. 1.

5 Redress Act, section 107.

6 Convention on the Rights of the Child, article 19.

status.[7] The right to an effective remedy may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse,[8] and 'remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children'.[9] While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), state parties must comply with the fundamental obligation to provide a remedy that is effective.[10] In addition, international human rights law may require an effective remedy to be available against the state, regardless of the availability of civil remedies against other individuals and non-state actors.[11]

2.76 It is questionable whether the fact that the 37 universities prescribed under these rules operate independently of government control[12] is a sufficient basis under international human rights law to potentially exclude victims of abuse from access to the redress scheme. Unless the institutions independently (re)join the scheme, the state may be responsible for providing redress to survivors of child sexual abuse at these educational institutions. Further, while a person may engage in civil litigation

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7 See, United Nations Committee on the Rights of the Child, *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, [24]. This right to an effective remedy also exists in relation to individuals who are now adults, but regarding conduct which took place when they were children. Article 5(1) of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP3 CRC) provides that a communication can be submitted by any *individual.*

8 UN Human Rights Committee, *General comment No. 31*: *The nature of the general legal obligation imposed on states parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13 (2004) [16]

9 UN Human Rights Committee, *General comment No. 31: The nature of the general legal obligation imposed on states parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13 (2004) [15].

10 See UN Human Rights Committee, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, CCPR/C/21/Rev.1/Add.11 (2001) [14]. See also UN Committee on the Rights of the Child, *General comment No. 16 on State obligations regarding the impact of business on children's rights*, CRC/C/GC/16 (2013) [30].The UN Committee on the Convention on the Rights of the Child has stressed that in cases of violence, '[e]ffective remedies should be available, including compensation to victims and *access to redress mechanisms* and appeal or independent complaint mechanisms'. See, UN Committee on the Rights of the Child, *General comment No. 13*: *The right of the child to freedom from all forms of violence*, CRC/C/GC/13 (2011) [56] (emphasis added).

11 In *Case of O'Keeffe v Ireland,* the European Court of Human Rights has held that the state itself has a positive duty to take steps to protect children from abuse and to provide an effective remedy. In this case, a victim of sexual abuse by her primary school principal took a case against the State, and the court held that 'a State cannot absolve itself from its obligations to minors in primary schools by delegating those duties to private bodies or individuals'. *Case of O'Keeffe v Ireland*, European Court of Human Rights, Application No. 35810/09 (2014) [150].

12 Explanatory statement, p. 1.

against the relevant institutions, the scheme offers a lower evidentiary burden and a high level of discretion, and therefore potentially affords a more effective remedy, particularly in historical abuse cases which may be harder to prove over time, noting also that civil litigation does not address systemic issues of redress and may not be available in all cases.[13]

2.77 As such there is some risk that exempting these 37 universities from the operation of the redress scheme, and relying on those universities voluntarily joining the scheme, may result in a victim of sexual abuse, whose rights under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child have been violated, not having access to an effective remedy.[14] In assessing the extent of such a risk it would generally be useful to know: how many people would be likely to be affected (including whether any intention to claim against the relevant institutions has been indicated); whether the institutions have indicated an intention to join the scheme voluntarily; and what time limits (if any) may apply to a decision to join.

***Committee's initial view***

2.78 The committee considered that this measure engages and may limit the right to an effective remedy, and the rights of the child, including the right to state-supported recovery for neglect, exploitation and abuse. In this regard the committee noted that the state bears the responsibility for providing an effective remedy with respect to violations of the rights of the child. The committee considered there is some risk that exempting these 37 universities from the operation of the redress scheme, and relying on the universities voluntarily joining the scheme, may result in a victim of sexual abuse not having access to an effective remedy.

2.79 The full initial analysis is set out in *Report 10 of 2021*.

13 See, for example the national legal service Knowmore's submission to the issues paper on civil litigation systems by the Royal Commission into Institutional Child Sexual Abuse: Knowmore, Submission in Response to Issues Paper 5: Civil Litigation, 17 March 2000, pp. 3-4, https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Issues%20Paper%205%20-%20Submission%20-%2017%20Knowmore.pdf, which lists the procedural and evidentiary hurdles that may restrict the chances of a successful civil claim.

14 See also, previous advice provided with respect to the prescription of 11 private schools. Parliamentary Joint Committee on Human Rights, National Redress Scheme for Institutional Child Sexual Abuse Amendment (2019 Measures No. 1) Rules 2019 [F2019L01491] and National Redress Scheme for Institutional Child Sexual Abuse Amendment (2020 Measures No. 1) Rules 2020 [F2020L00096], *Report 4 of 2020* (9 April 2020), pp. 122-130.

## Minister's response[15]

2.80 The minister advised:

**Context**

On 16 July 2021, the *National Redress Scheme for Institutional Child Sexual Abuse Rules 2018* (the Rules) were amended to prescribe that certain universities in each jurisdiction are not State or Territory institutions for the purposes of the National Redress Scheme for Institutional Child Sexual Abuse (the Scheme). These institutions operate independently from their state/territory governments and as such it would not be appropriate (nor would state/territory governments agree) for them to be participating in the Scheme as State or Territory institutions.

The amendment was required because, in some cases, these universities were arguably captured by the definitions of State or Territory institutions in subsections 111(2) and 113(2) of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act), and so could not join in their own right as non-government institutions.

**The amending Rules**

The Amending Rules prescribe that specific institutions are not State or Territory institutions for the purposes of subsections 111(2) and 113(2) of Act.

For a survivor to access redress under the Scheme, an institution responsible for the abuse must be participating in the Scheme. Under the Act, participation is voluntary and there is no mechanism to compel state/territory or non-government institutions to join.

Under section 115 of the Act, the Minister for Families and Social Services may only declare a State or Territory institution to be participating in the Scheme with the agreement of that state/territory. The relevant state and territory governments have not agreed for the universities in question to participate as State or Territory institutions as they operate independently of government.

The power to prescribe that an institution is not a State or Territory institution allows the Scheme to deal with instances where it is more appropriate for an institution to pay redress for a person, rather than the state/territory. This is especially critical where a state/territory has not agreed to the institution participating in the Scheme under its participating structure, as required by section 115 of the Act.

15 The minister's response to the committee's inquiries was received on 15 November 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

**Outcome**

The amendments enable the universities to join the Scheme as non-government institutions. This would provide opportunities for people who have experienced institutional child sexual abuse in these institutions to seek an effective remedy through the Scheme.

Prior to the amendments, persons seeking redress for abuse at those institutions would not be eligible to receive redress under the Scheme. It is the Government's view that therefore the amendments do not limit the rights of the child and the right to an effective remedy. Rather, the amendments provide clarity that the universities are not covered by state or territory participation in the Scheme, and provides the ability for the universities to join the Scheme and provide access to redress.

The Department of Social Services is actively engaging with institutions named in applications to encourage them to join the Scheme.

**Conclusion**

The Amending Rules are considered compatible with human rights, as they promote access to an effective remedy for people who have experienced institutional child sexual abuse.

The Amending Rules clarify that the relevant institutions can participate in the Scheme in their own right, therefore the Amending Rules facilitate access to redress.

The Government will continue to monitor and review the operation of the Scheme to ensure that the Scheme remains compatible with human rights.

## Concluding comments

### *International human rights legal advice*

*Rights of the child and right to an effective remedy*

2.81 This instrument excluded 37 universities from the definition of state and territory institutions for the purposes of the redress scheme, meaning they may only participate in the scheme if they choose to participate as non-government institutions. The minister has advised that while universities were arguably captured by the definitions of state or territory institutions, such institutions can only be declared to be participating in the redress scheme with the agreement of that state or territory. In the case of universities, the relevant state and territory governments have not agreed for the universities in question to participate as state or territory institutions as they operate independently of government. As such, prior to this instrument, persons seeking redress for abuse at those universities were not eligible to receive redress under the scheme (as the state or territory governments had not agreed to them participating).

2.82 The minister has advised that these amendments therefore enable the universities to join the scheme as non-government institutions, providing

opportunities for people who have experienced institutional child sexual abuse in these institutions to seek an effective remedy through the scheme. On the basis of this advice, in enabling universities to join the redress scheme, the instrument likely promotes the rights of the child and the right to an effective remedy.

## Committee view

**2.83 The committee thanks the minister for this advice. The committee notes that this legislative instrument prescribes 37 universities as not being state or territory institutions for the purposes of the National Redress Scheme for Institutional Child Sexual Abuse. The committee notes that this enables the universities to join the scheme as non-government institutions.**

**2.84 On the basis of the minister's advice that the state and territories had not accepted that universities could be considered a state or territory institution, the committee considers that this instrument, rather than excluding universities from the operation of the scheme, would enable universities to voluntarily participate in the scheme. As such, the committee considers the instrument likely promotes the rights of the child and the right to an effective remedy.**

### Suggested action

**2.85 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.**

# Sydney Harbour Federation Trust Regulations 2021 [F2021L01255][1]

| | |
|---|---|
| **Purpose** | These regulations empower the Sydney Harbour Federation Trust to grant licences or permits to authorise activities on Trust land; provide for the use and parking of vehicles on Trust land; set out the appointment, and functions and powers, of rangers; and deal with miscellaneous matters, such as the charging of fees by the Harbour Trust, and delegation of powers by the Harbour Trust |
| **Portfolio** | Agriculture, Water and the Environment |
| **Authorising legislation** | *Sydney Harbour Federation Trust Act 2001* |
| **Last day to disallow** | 15 sitting days after tabling (tabled in the Senate and the House of Representatives on 18 October 2021). Notice of motion to disallow must be given by 2 December 2021 in the House of Representatives and 4th sitting day of 2022 in the Senate[2] |
| **Rights** | Freedom of assembly; freedom of expression |

2.86 The committee requested a response from the minister in relation to the regulations in *Report 12 of 2021*.[3]

## Prohibition of public assembly

2.87 These regulations remake the Sydney Harbour Federation Trust Regulations 2001 (the 2001 regulations) which sunsetted on 1 October 2021. The regulations apply to the management of 'Trust land' under the *Sydney Harbour Federation Trust Act 2001* (the Act),[4] and set out what activities are permitted on Trust land.

2.88 Section 19 of the regulations provides that a person must notify the Sydney Harbour Federation Trust (the Trust) if the person intends to hold a public assembly

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Sydney Harbour Federation Trust Regulations [F2021L01255], *Report 12 of 2021*; [2021] AUPJCHR 143.

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 Parliamentary Joint Committee on Human Rights, *Report 12 of 2021* (20 October 2021), pp. 2-8.

4 'Trust land' is defined in section 3 and listed in Schedules 1 and 2 of the *Sydney Harbour Federation Trust Act 2001*. It includes a number of Lots in Middle Head, Georges Heights, Woolwich, and Cockatoo Island.

on Trust land. A 'public assembly' is defined in subsection 19(5) as an organised assembly of persons for the purpose of holding a meeting, demonstration, procession or performance. Under subsection 19(2), the Trust may prohibit the assembly if: it is a commercial activity; it raises public safety concerns considering the number of participants and the size or area of Trust land; or if the assembly is likely to result in violence, endanger the safety or security of individuals, severely damage Trust land or property, or interfere with the rights of other persons to enjoy Trust land.

2.89 The Act provides that the Trust may order any person, by written direction, to cease promoting, conducting or carrying out an activity on Trust land where the Trust reasonably believes that the activity contravenes the regulations, and a failure to comply with a written direction is an offence punishable by up to 10 penalty units ($2,220).[5]

2.90 The committee previously considered the Legislation (Deferral of Sunsetting—Sydney Harbour Federation Trust Regulations) Certificate 2019, which deferred the sunsetting of the 2001 regulations for two years.[6] Section 11 of the 2001 regulations provided that it was an offence for a person to 'organise or participate in a public assembly on Trust land'. At that time, the Attorney-General advised that the regulations were being considered as part of a broader independent review of the work of the Trust, and that consideration of whether the approach taken under section 11 with respect to public assemblies remained appropriate would be undertaken during that review.[7]

2.91 The committee again considered the issue in relation to the Sydney Harbour Federation Trust Amendment Bill 2021.[8] The bill sought to establish the Trust as an ongoing entity and empower it to enforce compliance with a range of matters related to Trust lands, including matters provided for under the regulations. The minister advised that the regulations would be redrafted to ensure they are consistent with Australia's international human rights obligations, and in particular, are more explicitly compatible with the right of peaceful assembly.[9]

5 *Sydney Harbour Federation Trust Act 2001*, section 65B to 65D.

6 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 35-38.

7 Parliamentary Joint Committee on Human Rights, *Report 4 of 2020* (9 April 2020), p. 101.

8 Parliamentary Joint Committee on Human Rights, *Report 4 of 2021* (31 March 2021), pp. 2-5.

9 Parliamentary Joint Committee on Human Rights, *Report 5 of 2021* (29 April 2021), p. 87.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights to freedom of assembly and expression*

2.92 The current regulations seek to address the human rights concerns previously raised by the committee. The 2001 regulations made it an offence to assemble unless organisers of a public assembly received a permit from the Trust. The current regulations remove the permit system and provide that a public assembly is lawful without the need for Trust approval, and instead introduce a requirement where organisers must notify the Trust of their intention to assemble. Removing the offence provision for persons seeking to assemble on Trust land, and the requirement to seek a permit, removes a significant limitation on the rights to freedom of assembly and expression. The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.[10] The right to freedom of expression extends to the communication of information or ideas through any medium, including public protest.[11]

*Notification process*

2.93 The statement of compatibility notes that public assemblies on Trust land are now lawful without the need for the Trust to approve them, albeit there is a requirement to notify the Trust.[12] It further explains that there is no fee attached to notification, and that failure to notify the Trust does not create an offence. This process appears to be in line with comments made by the United Nations (UN) Human Rights Committee in relation to the right to freedom of assembly, which has noted that 'a failure to notify the authorities of an upcoming assembly, where required, does not render the act of participation in the assembly unlawful'.[13] The UN Human Rights Committee notes that a failure to notify must not be used to justify 'imposing undue sanctions, such as charging the participants or organizers with criminal offences. Where administrative sanctions are imposed…this must be justified by the authorities.'[14] While the process set out in the regulations appears to be in line with these comments, it is not clear how this process operates when read in conjunction with the Act.

10 International Covenant on Civil and Political Rights, article 21.

11 International Covenant on Civil and Political Rights, article 19.

12 Statement of compatibility, p. 36.

13 UN Human Rights Committee, *General Comment No.37 (2020) on the right of peaceful assembly (article 21)* (2020) [71].

14 UN Human Rights Committee, *General Comment No.37 (2020) on the right of peaceful assembly (article 21)* (2020) [71].

*Prohibition of assembly*

2.94 By providing for the Trust to be able to prohibit the organisation of or participation in organised assemblies in certain circumstances, the regulations engage and appear to limit the rights to freedom of expression and assembly. Of particular concern is the power for the Trust to prohibit a public assembly if the assembly is likely to 'interfere with the rights of other persons to enjoy Trust land'.[15] The rights to freedom of assembly and expression may be permissibly limited where a measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is a proportionate means by which to achieve it. In order for a measure to be directed towards a legitimate objective for the purposes of these two rights, a limitation must be demonstrated to be necessary to protect: the rights or reputations of others; national security; public order; or public health or morals.[16] Further, in determining whether limitations on the right to freedom of expression are proportionate, the UN Human Rights Committee has noted that restrictions must not be overly broad.[17] On the right to peaceful assembly, the UN Human Rights Committee has noted that the prohibition of a specific assembly should be considered only as a measure of last resort.[18]

2.95 Further information is required in order to assess the compatibility of this measure with the rights to freedom of assembly and expression, and in particular:

(a) whether a public assembly can be held if the Trust has not been notified, including what the consequences are for failure to notify of a public assembly;

(b) in what circumstances would the Trust consider that assemblies would interfere with the rights of other persons to enjoy Trust land, and on what criteria would this be based;

(c) why it is necessary to empower the Trust to ban assemblies that might interfere with the enjoyment of Trust land by others, noting the other powers to ban assemblies that may cause public safety concerns, or which may result in violence, endanger safety or security of others, or lead to property destruction; and

15 Subparagraph 19(2)(c)(iv).

16 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36].

17 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34]-[35].

18 UN Human Rights Committee, *General Comment No.37 (2020) on the right of peaceful assembly (article 21)* (2020) [37].

(d) how is it proposed that the prohibition of public assemblies will be enforced, and how does the Trust's power in sections 65B to 65D of the Act interact with these provisions.

***Committee's initial view***

2.96 The committee welcomed the minister's stated commitment to comply with the rights to freedom of assembly and expression, in response to the committee's previous comments. The committee considered removing the offence provision removes a significant limitation on the rights to freedom of assembly and expression.

2.97 However, the committee noted that the Trust's power to prohibit public assemblies on Trust land also engages and appears to limit the rights to freedom of expression and assembly. The committee noted that the measure is designed to protect public order and the rights of others to enjoy Trust land, but questions remain as to how this will operate in practice and whether it is a proportionate limitation, and as such sought the minister's advice as to the matters set out at paragraph [2.95].

2.98 The full initial analysis is set out in *Report 12 of 2021*.

## Minister's response[19]

2.99 The minister advised:

> **(a) whether a public assembly can be held if the Trust has not been notified, including what the consequences are for failure to notify of a public assembly**
>
> Under subsection 19(1) of the Regulations there is a requirement for a person who intends to hold a public assembly to notify the Sydney Harbour Federation Trust (the Trust). While there is no offence attached to this requirement, the compliance powers of sections 65B to 65D can potentially be used in relation to a failure to comply.
>
> **(b) in what circumstances would the Trust consider that assemblies would interfere with the rights of other persons to enjoy Trust land, and on what criteria would this be based**
>
> Trust sites are active community spaces, with sporting events, community gatherings, ANZAC day celebrations, markets, concerts, art exhibitions, First Nations activities and weddings, among many other uses facilitated by permits and licences.
>
> It is important to the Trust that it has the power to prohibit a public assembly if it is the type of assembly that is likely to interfere with the

19 The minister's response to the committee's inquiries was received on 11 November 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

rights of other persons to enjoy Trust land. Assessment of this balance, to recognise the freedom of expression and assembly, while not interfering with the rights of others, will be on a case-by-case basis.

Some scenarios where it would be reasonable to consider whether a public assembly might interfere with other persons' enjoyment of Trust land could include an assembly:

- on a sports oval during a booked sports activity or
- in the midst of a licensed event (which could range from a private wedding, through to a commercial music concert).

Whilst the Trust does not have fixed criteria as to when public assemblies may need to be prohibited, in assessing scenarios such as those noted above, the Trust would explore the least disruptive approach to resolution, to ensure minimum interference to the rights of enjoyment of all parties concerned.

**(c) why it is necessary to empower the Trust to ban assemblies that might interfere with the enjoyment of Trust land by others, noting the other powers to ban assemblies that may cause public safety concerns, or which may result in violence, endanger safety or security of others, or lead to property destruction**

Under subsection 19(2) of the Regulations, the Trust has a limited power to prohibit a public assembly when notified of it. This power is in line with the restrictions recognised by Article 21 of the International Covenant on Civil and Political Rights (ICCPR), with a prohibition being allowed only to address public safety concerns, if the assembly is likely to result in violence, endanger the safety or security of individuals, severely damage Trust land or property, or interfere with the rights of other persons. These limitations on the right to assembly are in line with the permissible limits provided by Article 21 of the ICCPR, as noted at paragraph 2.85 in the Committee's Report 5 of 2021 when assessing section 11 of the now repealed Sydney Harbour Federation Trust Regulations 2001.

The Committee has noted, at paragraphs 1.11-1.12 of the Report, that disruptions that occur as a result of peaceful public assemblies must be accommodated, unless they impose a disproportionate burden. The Trust's ability to prohibit a public assembly that may interfere with the rights of other persons to enjoy Trust land is not a disproportionate burden, and the Trust has not used its powers to prohibit public assemblies in the past.

A Trust decision to prohibit a public assembly must be accompanied by a written notice, with reasons for a decision. Application for review of a decision to prohibit a public assembly may be made to the Administrative Appeals Tribunal.

**(d) how is it proposed that the prohibition of public assemblies will be enforced, and how does the Trust's power in sections 65B to 65D of the Act interact with these provisions**

> While there are no offences attached to the requirements of section 19 of the Regulations, the compliance powers of sections 658 to 65D can potentially be used in relation to a failure to comply with those requirements.
>
> The Harbour Trust is developing its approach to the exercise of these new compliance powers, in the context of the full suite of recent changes to the regulations and Act.
>
> The Trust is committed to considering the rights of all persons to enjoy Trust land and preserving Trust sites as active community spaces that are enjoyed by many members of the community, while respecting the freedom of expression and assembly.

## Concluding comments

### *International human rights legal advice*

*Rights to freedom of assembly and expression*

2.100 In relation to whether a failure to notify the Trust of a public assembly could constitute an offence, the minister has advised that the compliance powers in sections 65B to 65D of the Act 'can potentially be used in relation to a failure to comply'. This appears to mean that participants in a public assembly can be ordered to cease the activity because of a failure to notify the Trust of the assembly, with failure to comply amounting to an offence punishable by up to 10 penalty units ($2,220).[20] However, as stated in the initial analysis, the United Nations (UN) Human Rights Committee has commented that, in relation to the right to freedom of assembly, 'a failure to notify the authorities of an upcoming assembly, where required, does not render the act of participation in the assembly unlawful'.[21] The UN Human Rights Committee further notes that a failure to notify must not be used to justify 'imposing undue sanctions, such as charging the participants or organizers with criminal offences. Where administrative sanctions are imposed…this must be justified by the authorities.'[22] As such, noting the minister's advice that failure to notify of an assembly could result in a compliance action, including a criminal offence (which is contrary to the statement of compatibility's advice that failure to notify the Trust does not create an offence),[23] it would appear that this aspect of the regulations, when read in conjunction with the Act, is not compatible with the rights to freedom of assembly or expression.

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20 *Sydney Harbour Federation Trust Act 2001*, section 65B to 65D.

21 UN Human Rights Committee, *General Comment No.37 (2020) on the right of peaceful assembly (article 21)* (2020) [71].

22 UN Human Rights Committee, *General Comment No.37 (2020) on the right of peaceful assembly (article 21)* (2020) [71].

23 Statement of compatibility, p. 37.

2.101 In relation to the power to prohibit assemblies where they interfere with the rights of others to enjoy Trust land, the minister stated that the power is in line with the permissible limits in article 21 of the International Covenant on Civil and Political Rights (ICCPR), which includes limits to protect the rights of other persons.[24] However, as stated in the initial analysis, restrictions imposed for the protection of 'the rights and freedoms of others' must be to protect the *human rights* of people not participating in the assembly, not just any rights under the general law. In this regard, it is not clear what specific human rights are being protected by the regulations in enabling assemblies to be prohibited if they are likely to interfere with the rights of other persons 'to enjoy Trust land'. The minister has provided some scenarios where a public assembly may be considered to interfere with other people's use of Trust land, for example an assembly on a sports oval during a booked sports activity, or during a licensed event like a music concert or wedding. However, it is not clear what human rights are affected if these activities cannot proceed due to a public assembly. Further, the UN Human Rights Committee has stated that assemblies are a legitimate use of public and other spaces and by their very nature entail a certain level of disruption to ordinary life.[25] It has also stated that peaceful assemblies 'can in some cases be inherently or deliberately disruptive and require a significant degree of toleration'.[26] As the minister has advised that there are no fixed criteria in determining which assemblies may be prohibited, the regulations appear to give the Trust a broad power to prohibit peaceful assemblies where it considers there may be any level of disruption or inconvenience to other people's use of Trust land. It therefore remains unclear why it is necessary to retain this broad power, given section 19 of the regulations also allows the Trust to prohibit assemblies where the proposed number of participants in the assembly may result in public safety concerns, or where the assembly is likely to result in violence, endanger the safety or security of individuals, or severely damage Trust land or property.[27]

2.102 In relation to the enforcement of the prohibition on public assemblies, the minister has stated that the compliance powers of sections 65B to 65D of the Act can potentially be used, but also noted that '[t]he Harbour Trust is developing its approach to the exercise of these new compliance powers, in the context of the full

24 International Covenant on Civil and Political Rights, article 21: 'The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.'

25 UN Human Rights Committee, *General Comment No.37 (2020) on the right of peaceful assembly (article 21)* (2020) [47].

26 UN Human Rights Committee, *General Comment No.37 (2020) on the right of peaceful assembly (article 21)* (2020) [44].

27 Paragraph 19(2)(b) and subparagraphs (c)(i)–(iii).

suite of recent changes to the regulations and Act'. Noting that these powers are now in force[28] it is not clear why the full operation of these provisions is yet to be determined. It is noted that the minister has advised that the Trust has not used its powers to prohibit public assemblies in the past. However, as a matter of law, given the broad power the Trust has to prohibit peaceful public assemblies, the Trust would be empowered to ban such assemblies on a broad basis that does not appear to be compatible with the rights to freedom of expression and assembly.

## Committee view

**2.103 The committee thanks the minister for this response. The committee notes these regulations apply to the management of 'Trust land' under the *Sydney Harbour Federation Trust Act 2001*. The committee notes the regulations set out what activities are permitted on Trust land, provide for a system of notification for public assemblies and empower the Trust to prohibit public assemblies, including where the public assembly is likely to interfere with the rights of other persons to enjoy Trust land.**

**2.104 The committee considers that the power to order that a public assembly could cease for failure to notify the Trust of the assembly in advance, and the power to prohibit public assemblies that interfere with the rights of other persons to enjoy Trust land, engage and limit the right to freedom of assembly and expression. The committee notes that these rights may be permissibly limited where a limitation is reasonable, necessary and proportionate.**

**2.105 The committee notes that under international human rights law a failure to notify authorities of an assembly does not render the act of participation in the assembly unlawful, and criminal offences should not be imposed for any such failure. As such, noting the minister's advice that failure to notify of an assembly could result in compliance action, including a criminal offence, the committee considers that this aspect of the regulations, when read in conjunction with the Act, is not compatible with the rights to freedom of assembly or expression. Further, the committee considers that, noting the other powers to prohibit assemblies where they could result in public safety concerns, it has not been established that it is necessary or proportionate to enable assemblies to be banned only if the assembly may interfere with the rights of other persons to enjoy Trust land.**

**2.106 The committee also notes with some concern the lack of clarity on how the regulations and the Act will operate together in practice in relation to the enforcement of the prohibition on public assemblies.**

28 The regulations commenced on 14 September 2021, see section 2 of the regulations.

### Suggested action

**2.107 The committee considers that the human rights compatibility of the measure may be assisted were the regulations and/or the Act amended to:**

**(a) provide the failure to notify a public assembly on Trust land does not result in an order to cease the activity, and does not constitute an offence; and**

**(b) remove the power for the Trust to prohibit an assembly only on the basis that it may interfere with the rights of other persons to enjoy Trust land, or, at a minimum, ensure that guidelines are developed setting out the criteria to be considered in determining whether to prohibit an assembly, which states that assemblies will not be prohibited simply for inconveniencing or disrupting other persons' use of Trust land.**

**2.108 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister (noting that some of this advice appears to contradict the information currently in the statement of compatibility).**

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

**Dr Anne Webster MP**

**Chair**