Ministerial responses — Report 14 of 2021[1]

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THE HON BEN MORTON MP
MINISTER ASSISTING THE PRIME MINISTER AND CABINET
MINISTER FOR THE PUBLIC SERVICE
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Reference: MC21-003893

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

By email: human.rights@aph.gov.au

Dear Dr Webster MP

Thank you for your correspondence dated 10 November 2021 requesting further information regarding human rights issues in relation to the *Electoral Legislation Amendment (Voter Integrity) Bill 2021* (the Bill).

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 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.

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.

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.

Thank you again for writing. I trust that this information will assist you in finalising your consideration of the Bill.

Yours sincerely

BEN MORTON

23/11/2021

SENATOR THE HON LINDA REYNOLDS CSC
MINISTER FOR THE NATIONAL DISABILITY INSURANCE SCHEME
MINISTER FOR GOVERNMENT SERVICES
SENATOR FOR WESTERN AUSTRALIA

MC21-009350

Dr Anne Webster MP
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Dear Dr Anne Webster

Thank you for your email of 10 November 2021 seeking further information regarding the National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021 (the Bill).

To support the Committee's consideration of the human rights implications of the Bill, responses to each of the Committee's questions are enclosed at **Attachment A**.

I trust this information will assist the Joint Committee in understanding the intent and operation of these provisions and that you will appreciate the intention to adhere to human rights while improving the National Disability Insurance Scheme.

Recognising the Committee's concerns, I would welcome suggestions for where the explanatory memorandum could be amended to ensure the meaning of the provisions and their relationships to human rights are appropriately explained.

Yours sincerely

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Encl.

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Australian Government Response to the Parliamentary Joint Committee on Human Rights

National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021

The specific questions raised by the Committee are addressed below. In relation to the general issues raised by the Committee, the following information may assist the Committee.

As the explanatory memorandum stated, this Bill will implement significant improvements for participants, their families and carers by increasing flexibility and clarifying timeframes for decision-making by providing for the Participant Service Guarantee. The Bill is focused on improving the experience and outcomes of people with disability engaging with the National Disability Insurance Scheme (NDIS) and is consistent with Articles 7, 12, 16, 19, 29 and 31 of the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD).

The Committee is concerned that:

> *'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'*

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 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.

f) 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.

Senator the Hon Anne Ruston

Minister for Families and Social Services
Minister for Women's Safety
Senator for South Australia
Manager of Government Business in the Senate

Ref: MS21-000630

Dr Anne Webster
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Dear ~~Dr Webster~~ Anne

Thank you for your email of 26 August 2021 regarding the Parliamentary Joint Committee on Human Rights' consideration of the *National Redress Scheme for Institutional Child Sexual Abuse Amendment (2021 Measures No. 1) Rules 2021.*

My response in relation to the human rights compatibility of the legislation is enclosed.

Yours sincerely

Anne Ruston

11 / 11 / 2021

Enc.

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

This responds to the Parliamentary Joint Committee on Human Rights' (the Committee) human rights analysis of the *National Redress Scheme for Institutional Child Sexual Abuse Amendment (2021 Measures No. 1) Rules 2021* (the Amending Rules) in its Report 10 of 2021.

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.

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.

THE HON SUSSAN LEY MP
MINISTER FOR THE ENVIRONMENT
MEMBER FOR FARRER

MC21-092507

10 NOV 2021

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Dear ~~Chair~~ Anne

I write in response to the observations of the Parliamentary Joint Committee on Human Rights (the Committee) on the *Sydney Harbour Federation Trust Regulations 2021* (the Regulations) in *Human rights scrutiny report – Report 12 of 2021* (the Report).

To support the Committee's consideration of the human rights implications of the Regulations, I provide the following advice on matters requested by the Committee at paragraph 1.15 of the Report.

Response to the Committee's request

(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 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 65B 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.

Yours sincerely

SUSSAN LEY