



# Parliamentary Joint Committee on Human Rights

---

Human rights scrutiny report

Report 1 of 2022

9 February 2022

© Commonwealth of Australia 2022

ISSN 2204-6356 (Print)

ISSN 2204-6364 (Online)

PO Box 6100  
Parliament House  
Canberra ACT 2600

Phone: 02 6277 3823

Fax: 02 6277 5767

Email: [human.rights@aph.gov.au](mailto:human.rights@aph.gov.au)

Website: [http://www.aph.gov.au/joint\\_humanrights/](http://www.aph.gov.au/joint_humanrights/)

This report can be cited as: Parliamentary Joint Committee on Human Rights, *Report 1 of 2022*; [2022] AUPJCHR 2.

This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

# Membership of the committee

## Members

Dr Anne Webster MP, Chair	Mallee, Victoria, Nats
Mr Graham Perrett MP, Deputy Chair	Moreton, Queensland, ALP
Mr Josh Burns MP	Macnamara, Victoria, ALP
Mr Ian Goodenough MP	Moore, Western Australia, LP
Ms Celia Hammond MP	Curtin, Western Australia, LP
Senator Andrew McLachlan CSC	South Australia, LP
Senator Deborah O'Neill	New South Wales, ALP
Senator Louise Pratt	Western Australia, ALP
Senator Janet Rice	Victoria, AG
Senator Benjamin Small	Western Australia, LP

## Secretariat

Anita Coles, Committee Secretary  
Rebecca Preston, Principal Research Officer  
Stephanie Lum, Senior Research Officer  
Ingrid Zappe, Legislative Research Officer

## External legal adviser

Associate Professor Jacqueline Mowbray



# Table of contents

<b>Membership of the committee .....</b>	<b>iii</b>
<b>Committee information .....</b>	<b>vii</b>
<b>Chapter 1—New and continuing matters .....</b>	<b>1</b>
<b>Bills</b>	
National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021.....	2
<b>Chapter 2—Concluded matters .....</b>	<b>23</b>
<b>Bills</b>	
Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021.....	23



## Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee's functions are to examine bills, Acts and legislative instruments for compatibility with human rights, and report to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation for compatibility with the human rights set out in seven international treaties to which Australia is a party.<sup>1</sup> The committee's *Guide to Human Rights* provides a short and accessible overview of the key rights contained in these treaties which the committee commonly applies when assessing legislation.<sup>2</sup>

The establishment of the committee builds on Parliament's tradition of legislative scrutiny. The committee's scrutiny of legislation seeks to enhance understanding of, and respect for, human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, most rights may be limited as long as it meets certain standards. Accordingly, a focus of the committee's reports is to determine whether any limitation on rights is permissible. In general, any measure that limits a human right must comply with the following limitation criteria: be prescribed by law; be in pursuit of a legitimate objective; be rationally connected to (that is, effective to achieve) its stated objective; and be a proportionate way of achieving that objective.

Chapter 1 of the reports include new and continuing matters. Where the committee considers it requires further information to complete its human rights assessment it will seek a response from the relevant minister, or otherwise draw any human rights concerns to the attention of the relevant minister and the Parliament. Chapter 2 of the committee's reports examine responses received in relation to the committee's requests for information, on the basis of which the committee has concluded its examination of the legislation.

---

1 International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

2 See the committee's [Guide to Human Rights](#). See also the committee's guidance notes, in particular [Guidance Note 1 – Drafting Statements of Compatibility](#).





## Chapter 1<sup>1</sup>

### New and continuing matters

1.1 In this chapter the committee has examined the following bill and legislative instruments for compatibility with human rights:

- National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021, previously deferred in *Report 15 of 2021*; and
- legislative instruments registered on the Federal Register of Legislation between 14 November to 19 December 2021.<sup>2</sup>

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

1.3 The committee comments on the following bill seeking a response from the relevant minister.

---

1 This section can be cited as Parliamentary Joint Committee on Human Rights, *New and continuing matters, Report 1 of 2022*; [2022] AUPJCHR 2.

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

## Bills

### National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021<sup>1</sup>

<p><b>Purpose</b></p>	<p>This bill seeks to implement recommendations of the <i>Comprehensive Review of the Legal Framework of the National Intelligence Community</i> and other measures</p> <p>Schedule 1 would enable the Australian Intelligence Service (ASIS), the Australian Signals Directorate (ASD) and Australian Geospatial Intelligence Organisation (AGO) to immediately undertake activities to produce intelligence where there is, or is likely to be, an imminent risk to the safety of an Australian person</p> <p>Schedule 2 would enable ASIS, ASD and AGO to seek ministerial authorisations to produce intelligence on a class of Australian persons who are, or are likely to be, involved with a listed terrorist organisation</p> <p>Schedule 3 would enable ASD and AGO to seek ministerial authorisation to undertake activities to produce intelligence on an Australian person or a class of Australian persons where they are assisting the Australian Defence Force (ADF) in support of military operations</p> <p>Schedule 4 would insert new provisions to:</p> <ul style="list-style-type: none"> <li>- limit the requirement for ASIS, ASD and AGO to obtain ministerial authorisation to produce intelligence on an Australian person to circumstances where the agencies seek to use covert and intrusive methods, which include methods for which ASIO would require a warrant to conduct inside Australia; and</li> <li>- make explicit the long-standing requirement for ASIS, ASD and AGO to seek ministerial authorisation before requesting a foreign partner agency to produce intelligence on an Australian person</li> </ul> <p>Schedule 5 seeks to enhance the ability of ASIS to cooperate with ASIO in Australia when undertaking less intrusive activities to collect intelligence on Australian persons relevant to ASIO's</p>
-----------------------	--

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021, *Report 1 of 2022*; [2022] AUPJCHR 3.

<p><b>Portfolio</b></p> <p><b>Introduced</b></p>	<p>functions, without ministerial authorisation</p> <p>Schedule 6 would amend section 13 of the <i>Intelligence Services Act 2001</i> to provide that, for the purposes of carrying out its non-intelligence functions, AGO is not required to seek ministerial approval for cooperation with authorities of other countries</p> <p>Schedule 7 would require the Office of National Intelligence (ONI) to obtain Director-General approval when undertaking cooperation with public international organisations</p> <p>Schedule 8 would extend the period for passport and foreign travel document suspension or surrender from 14 to 28 days, to provide ASIO with more time to prepare a security assessment</p> <p>Schedule 9 would extend the immunity provisions provided to staff members and agents of ASIS and AGO for computer-related acts done outside Australia, in the proper performance of those agencies' functions, to acts which inadvertently affect a computer or device located inside Australia</p> <p>Schedule 10 would require the Defence Intelligence Organisation (DIO) to have legally binding privacy rules, require ASIS, ASD, AGO and DIO to make their privacy rules publicly available, and update ONI's privacy rules provisions so that they apply to intelligence about an Australian person under ONI's analytical functions</p> <p>Schedule 11 seeks to include ASD in the Assumed Identities scheme contained in the <i>Crimes Act 1914</i></p> <p>Schedule 12 seeks to clarify the meaning of an 'authority of another country' in the <i>Intelligence Services Act 2001</i></p> <p>Schedule 13 would permit the Director-General of Security to approve a class of persons to exercise the authority conferred by an ASIO warrant in the <i>Telecommunications (Interception and Access) Act 1979</i>; clarify the permissible scope of classes under section 12 of that Act and under section 24 of the <i>Australian Security Intelligence Organisation Act 1979</i>; and introduce additional record-keeping requirements regarding persons exercising the authority conferred by all relevant ASIO warrants and relevant device recovery provisions</p> <p>Schedule 14 seeks to make technical amendments related to the <i>Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Act 2018</i></p> <p>Home Affairs</p> <p>House of Representatives, 25 November 2021</p>
--	---

<b>Rights</b>	Privacy; equality and non-discrimination; right to life; freedom of movement; effective remedy
---------------	--

## Background

1.4 This bill seeks to implement recommendations of the 2020 Comprehensive Review of the Legal Framework of the National Intelligence Community (Comprehensive Review) led by Dennis Richardson AC, amendments recommended by the 2017 Independent Intelligence Review, and other measures to address issues facing the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS), the Australian Signals Directorate (ASD), the Australian Geospatial-Intelligence Organisation (AGO), the Defence Intelligence Organisation (DIO) and the Office of National Intelligence (ONI).

### Ministerial authorisations by class (Schedules 2 and 3)

1.5 Schedule 2 of the bill seeks to amend the *Intelligence Services Act 2001* (Intelligence Services Act) to introduce a new counter-terrorism class ministerial authorisation. Currently, the Australian Intelligence Service (ASIS), the Australian Signals Directorate (ASD) and the Australian Geospatial Intelligence Organisation (AGO) (together, the Intelligence Services agencies) are required to get ministerial authorisation before producing intelligence on an Australian person in a foreign country.<sup>2</sup> Schedule 2 seeks to extend this to a 'class' of Australian persons, so that the Intelligence Services agencies could expeditiously produce intelligence on one or more members of a class of Australian persons who are, or are likely to be, involved with a listed terrorist organisation.<sup>3</sup>

1.6 The amendments provide for non-exhaustive circumstances in which a person is taken to be involved with a listed terrorist organisation.<sup>4</sup> This includes where a person directs, or participates in, the activities of the organisation; recruits a person to join, or participate in the activities of, the organisation; provides training to, receives training from, or participates in training with, the organisation; is a member of the organisation; provides financial or other support to the organisation; or advocates for, or on behalf of, the organisation.<sup>5</sup>

2 In addition to receiving agreement from the Attorney-General. If conducting activities onshore, a warrant is required.

3 Schedule 2, items 2 and 3.

4 'Listed terrorist organisation' has the same meaning as in subsection 100.1(1) of the Criminal Code, which means an organisation that is specified by the regulations for the purposes of paragraph (b) of the definition of 'terrorist organisation' in section 102.1 of the Criminal Code.

5 Schedule 2, item 2, proposed subsection 9(1AAB).

1.7 The amendments also provide for additional requirements for class authorisations, including requirements that a list is kept that identifies each Australian in relation to whom the agency intends to undertake activities under the authorisation, and requirements regarding oversight by the Inspector-General of Intelligence and Security (IGIS), and reporting of activities to the minister within three months of the authorisation.<sup>6</sup>

1.8 Schedule 3 also seeks to amend the Intelligence Services Act to provide that all Intelligence Services agencies can obtain an authorisation to produce intelligence on one or more members of a class of Australian persons when providing assistance to the Australian Defence Force in support of military operations.<sup>7</sup> Currently, only ASIS has this power.<sup>8</sup> These class ministerial authorisations are subject to the same additional requirements outlined at paragraph [1.7].

1.9 The committee has previously commented on class ministerial authorisations in relation to ASIS providing assistance to the Australian Defence Force (ADF) in the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.<sup>9</sup>

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

#### ***Rights to privacy and equality and non-discrimination***

1.10 Australia's obligations under the International Covenant on Civil and Political Rights apply in respect of its acts undertaken in the exercise of its jurisdiction to anyone within its power or effective control, even if the acts occur outside its own territory.<sup>10</sup> The ministerial authorisation scheme, in respect of Intelligence Services agencies, appears to apply primarily to Australians living offshore. However, the statement of compatibility states that the amendments may permit the production of intelligence on a person in Australia's territory or subject to Australia's effective control.<sup>11</sup> Therefore, to the extent that the class ministerial authorisations provided for in Schedules 2 and 3 apply to those under Australia's effective control, Australia's international human rights obligations would apply.

1.11 In that context, allowing the Intelligence Services agencies to produce intelligence on one or more members of a class of Australian persons engages and

---

6 Schedule 2, items 12 and 13.

7 Schedule 3, item 1.

8 *Intelligence Services Act 2001*, subparagraph 8(1)(a)(ia).

9 Parliamentary Joint Committee on Human Rights, *Twenty-second report of the 44<sup>th</sup> Parliament* (13 May 2015), pp. 137-162.

10 United Nations 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 (26 May 2004) [10]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136 [107]-[111].

11 Statement of compatibility, p. 16.

limits the right to privacy. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.<sup>12</sup> This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.<sup>13</sup> The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective. Further, to the extent that the class ministerial authorisations could discriminate against individuals based on their religion, race or ethnicity, the measure also engages and may limit the right to equality and non-discrimination.<sup>14</sup> 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.<sup>15</sup> 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).<sup>16</sup> 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.<sup>17</sup> 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.

1.12 In relation to whether the class authorisations relating to counter-terrorism pursue a legitimate objective, the statement of compatibility states that this

---

12 UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]-[4].

13 The UN Human Rights Committee further explains that this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. *General Comment No. 16: Article 17* (1988).

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

15 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.

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

17 *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'.

amendment 'pursues the legitimate objectives of protecting the lives and security of Australians, mitigating any imminent and significant risks to their safety, and addressing national security risks to Australia'.<sup>18</sup> In relation to the class authorisations for activities in support of the ADF, the statement of compatibility states that this amendment pursues 'the legitimate objective of protecting Australia's national security, the safety of Australians and the security of ADF personnel'. Protecting national security constitutes a legitimate objective for the purpose of international human rights law, and the measure may be rationally connected to (that is, effective to achieve) this objective.

1.13 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 a proposed limitation is sufficiently circumscribed and whether it is accompanied by sufficient safeguards. Another relevant factor in assessing whether a measure is proportionate is whether there is the possibility of oversight and the availability of review.

1.14 International human rights law jurisprudence states that laws conferring discretion or rule-making powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.<sup>19</sup> This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. Schedule 2 of the bill requires that the minister must be *satisfied* that the class of Australian persons is, or is likely to be, involved with a listed terrorist organisation before giving an authorisation. However, while the amendments set out some circumstances in which someone may be considered to be involved with a listed terrorist organisation, this is a non-exhaustive list. As such, the minister has a broad discretion to include anyone in a class where the minister is satisfied they are 'involved', or 'likely to be involved' with the organisation. It is not clear on what basis the minister would make such an assessment. For example, could all members of the family of a person who has advocated on behalf of a terrorist organisation be subject to a class authorisation on the basis that it is likely they too would be involved, because of their family connection. It is not clear why the circumstances set out in proposed subsection 9(1AAB) (see paragraph [1.6]) are non-exhaustive, noting that the range of listed circumstances would appear to capture any involvement in a listed terrorist organisation. The class ministerial authorisation power under Schedule 3 may similarly capture a broad range of individuals, noting such authorisations do not require actual knowledge that an individual is under suspicion; the individual need only be part of a particular class.

---

18 Statement of Compatibility, p. 16.

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

1.15 There is also a risk that, given an individual's religion, race or ethnicity, they may be more likely to be considered to be involved with a listed terrorist organisation and captured under a class authorisation. It is not clear why the circumstances of involvement in a listed terrorist organisation in Schedule 2 cannot be more narrowly defined. It is also not clear whether this measure may indirectly discriminate against individuals from particular religions, races or ethnicities, noting there is no need for evidence against an individual to be included in a class authorisation.

1.16 While the bill provides that the minister must also obtain the agreement of the Attorney-General before giving an authorisation,<sup>20</sup> the Comprehensive Review clarifies that this role is not an additional 'check and balance' but is designed to provide visibility of proposed operational activities that relate to a threat to security.<sup>21</sup> In practice therefore it appears that the agreement of the Attorney-General does not operate as a safeguard on the minister's power.

1.17 The bill includes some safeguards that go to the proportionality of the measure. The statement of compatibility clarifies that any 'intelligence information' collected under the class ministerial authorisation is subject to the agencies' privacy rules.<sup>22</sup> Further, as is currently the case with individual ministerial authorisations, a class ministerial authorisation must specify how long it is in effect and must not exceed six months.<sup>23</sup> In addition, any renewal of an authorisation must not exceed six months.<sup>24</sup>

1.18 Proposed section 10AA would also introduce several requirements in relation to all class ministerial authorisations.<sup>25</sup> Each agency head would be required to keep a list identifying each Australian in relation to whom the agency intends to undertake activities under the authorisation; explain why the agency believes the person is a member of the class; and include any other information that the agency head considers appropriate.<sup>26</sup> Where the Attorney-General's agreement was obtained, the agency head must provide a copy of the list and written notice to the Director-General of Security.<sup>27</sup> The agency head must also ensure the list is available for

---

20 Schedule 2, item 3, proposed paragraph 9(1AAA)(b).

21 Mr Dennis Richardson AC, *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community*, December 2020, volume 1, [8.105] and [8.106].

22 Statement of compatibility, p. 17.

23 *Intelligence Services Act 2001*, subsection 9(4).

24 *Intelligence Services Act 2001*, subsection 10(1A).

25 Schedule 2, item 12, proposed section 10AA.

26 Schedule 2, item 12, proposed subsection 10AA(2).

27 Schedule 2, item 12, proposed subsection 10AA(3).



inspection on request by the Inspector-General of Intelligence and Security (IGIS).<sup>28</sup> Additionally, a report in respect of the activity would be required to be given to the minister no later than three months following the authorisation ceasing to have effect or being renewed, and the report must be accompanied with a statement identifying every Australian person who was included on the list during the period the authorisation was in effect.<sup>29</sup> The statement of compatibility further explains that an Australian person who may wish to object or make a complaint relating to the production of intelligence on them may refer the matter to IGIS, and IGIS may choose to conduct an inquiry into the actions of an intelligence agency and could recommend to the responsible minister that the person receive compensation.<sup>30</sup> The oversight functions of IGIS may serve as a useful safeguard to help ensure future compliance with the legislation, however, given that the production of intelligence is designed to be sought covertly, it is unclear how an applicant could practically seek review of a decision of which they are unaware.<sup>31</sup> Further, the requirements in proposed section 10AA relate to requirements after the authorisation has been given and do not provide any safeguards relating to the granting of the authorisation or its exercise, and therefore appear to provide more of a record-keeping and oversight function. Thus, while there are some oversight and review mechanisms, it is not clear if these are sufficient to protect the right to privacy and equality and non-discrimination of those who could be captured under a broad definition of 'involvement with a terrorist organisation'.

### **Right to life**

1.19 The statement of compatibility states that the right to life is engaged by the amendments in Schedule 3 as they will apply to ASD and AGO's activities for the purposes of assisting the Australian Defence Force in support of military operations. It states '[i]ntelligence activities by those agencies may contribute to ADF action that results in loss of life'.<sup>32</sup> The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;

---

28 Schedule 2, item 12, proposed subsection 10AA(4).

29 Schedule 2, item 13, proposed subsection 10A(3).

30 Statement of compatibility, pp. 17-18.

31 In this way, the right to an effective remedy would also appear to be engaged. See International Covenant on Civil and Political Rights, article 2(3).

32 Statement of compatibility, p. 19. For the right to life see International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1.

- it imposes an obligation on the state to protect people from being killed by others or identified risks,<sup>33</sup> and
- it requires the state to undertake an effective and proper investigation into all deaths where the state is involved.

1.20 International human rights law requires that force be used as a matter of last resort and the use of deadly force can be lawful only if it is strictly necessary and proportionate, aimed at preventing an immediate threat to life and there is no other means of preventing the threat from materialising.

1.21 The statement of compatibility explains that the objective of the measure is to protect 'Australia's national security, the safety of Australians and the security of ADF personnel'.<sup>34</sup> While national security is a legitimate objective for the purposes of international human rights law, it is unclear whether the measure is a proportionate limit on the right to life.

1.22 The bill provides that ASD and AGO are able to obtain a class authorisation to produce intelligence on one or more members of a class of Australian persons when providing assistance to the ADF in support of military operations. 'Military operations' are not defined in the Intelligence Services Act and could therefore include a wide range of operations. It would appear that the ADF may engage in a range of activities that may lead to the loss of life as a result of intelligence provided by ASD and AGO, and which may also include militarily targeting Australians and other persons overseas. This is also acknowledged in the statement of compatibility where it states that 'intelligence activities by those agencies may contribute to ADF action that results in loss of life'<sup>35</sup> and additionally, the Comprehensive Review states that 'in most circumstances the Government is able to authorise the same intelligence activities offshore against Australians that those agencies undertake against non-Australians—including, in very rare circumstances, the production of intelligence that would enable targeting for lethal action in accordance with the laws of armed conflict'.<sup>36</sup>

1.23 The statement of compatibility states that the amendments may result in the ADF receiving additional, more detailed and timelier intelligence relating to military operations, and to this extent 'may promote the right to life as they are likely to enhance the ability of the ADF to make fully-informed decisions about the necessity

---

33 International Covenant on Civil and Political Rights, article 6. The right should not be understood in a restrictive manner: UN Human Rights Committee, *General Comment No. 6: article 6 (right to life)* (1982) [5].

34 Statement of compatibility, p. 21.

35 Statement of compatibility, p. 19.

36 Mr Dennis Richardson AC, *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community*, December 2020, volume 1, [10.3].

and proportionality of its activities'.<sup>37</sup> It also states it may promote the right to life by enhancing the ability to identify threats to ADF personnel and others 'enabling the ADF to pursue opportunities to lessen that threat'.<sup>38</sup> The statement of compatibility lists what it states are the safeguards that apply to this measure:

- the intelligence agencies must not do anything that is not necessary for the proper performance of their functions;
- the IGIS has the power to examine the legality and propriety of action taken by intelligence agencies in support of the ADF, and should it choose to conduct an inquiry it has strong coercive powers;
- in defining a class of persons, the responsible minister must be satisfied that the intelligence produced on that class would be relevant to the conduct of the particular military operation; and
- the requirements in proposed section 10AA would apply, relating to keeping lists on the class of persons subject to the authorisation (see above at paragraph [1.18]).

1.24 However, while these measures may offer some oversight, it is not clear that this would be sufficient to ensure the measure is proportionate. It would appear that as long as the minister considers the collection of intelligence on a class of persons would be relevant to the conduct of a specific military operation, and this related to the proper performance of the ASD and AGO's functions, intelligence on Australians could be shared with the ADF, even in circumstances where this could lead to a loss of life. While it may be that such intelligence sharing may promote the right to life by ensuring more targeted operations, it would also appear likely it could be used to limit the right to life. As noted above, the requirements in proposed section 10AA apply after the authorisation has been given and does not provide any safeguards relating to the granting of the authorisation or its exercise. Similarly, IGIS acts after the authorisation is made and the intelligence shared. Further, 'military operations' is not defined in the Intelligence Services Act and as class authorisations may capture a broad group of individuals, it is not clear what class of persons would be defined to support such an operation and why the legislation is not more specific about who could be included in the class.

1.25 In order to assess the compatibility of the measure with the rights to privacy, equality and non-discrimination and life, further information is required as to:

- (a) in what circumstances would a class authorisation apply to those within Australia or subject to Australia's effective control;

---

37 Statement of compatibility, p. 19.

38 Statement of compatibility, p. 19.

- (b) the basis on which the minister would be able to be satisfied that a class of Australian persons are 'involved', or 'likely to be involved' with a listed terrorist organisation (other than the non-exhaustive circumstances set out in proposed subclause 9(1AAB)). For example, could all Australian members of the family of a person who has advocated on behalf of a terrorist organisation be subject to a class authorisation on the basis that it is likely that they too would be involved, because of their family connection;
- (c) noting that proposed subsection 9(1AAB) sets out a range of circumstances in which a person is taken to be involved in a listed terrorist organisation, why is it necessary that this be a non-exhaustive list;
- (d) whether the measures may disproportionately affect people who adhere to a particular religion, or from particular racial or ethnic backgrounds, and if so, whether this differential treatment is based on reasonable and objective criteria;
- (e) what safeguards are in place to ensure individuals who do not have any actual involvement in a terrorist organisation or in activities relevant to military operations are not part of a class authorisation;
- (f) how can an individual seek a remedy for any unlawful interference with their privacy if they are part of a class authorisation; and
- (g) what class of persons would be defined to support a military operation and why the legislation is not more specific about who could be included in such a class.

### **Committee view**

**1.26** The committee notes that Schedule 2 of the bill seeks to enable the Australian Intelligence Service (ASIS), the Australian Signals Directorate (ASD) and the Australian Geospatial Intelligence Organisation (AGO) to seek ministerial authorisation to produce intelligence on a class of Australian persons who are, or are likely to be, involved with a listed terrorist organisation. The committee notes that Schedule 3 seeks to enable ASD and AGO to seek ministerial authorisation to undertake activities to produce intelligence on an Australian person or a class of Australian persons where they are assisting the Australian Defence Force (ADF) in support of military operations.

**1.27** The committee notes that these measures may engage and limit the rights to privacy, equality and non-discrimination and life. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

**1.28** The committee considers that the measures seek to achieve the legitimate objective of protecting national security and notes that they implement

recommendations made by the *Comprehensive Review of the Legal Framework of the National Intelligence Community*. However, the broad scope of class ministerial authorisations raises questions as to the proportionality of these measures.

**1.29** The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of Schedules 2 and 3, and as such seeks the minister's advice as to the matters set out at paragraph [1.25].

---

### **ASIS cooperating with ASIO within Australia (Schedule 5)**

1.30 Currently, section 13B of the Intelligence Services Act provides that if ASIO has notified ASIS that it requires the production of intelligence on Australians, ASIS may support ASIO in the performance of its functions by carrying out an activity to produce such intelligence, but only if the activity will be undertaken outside Australia.<sup>39</sup> Section 13D also provides that if ASIO could not undertake the activity in at least one state or territory without it being authorised by warrant, this division does not allow ASIS to undertake the activity.<sup>40</sup> Schedule 5 seeks to amend section 13B to remove the requirement that ASIS undertake the activity outside Australia.<sup>41</sup> The effect of this would be that ASIS could help ASIO, if requested, to produce intelligence on Australians inside Australia.

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

#### ***Right to privacy***

1.31 Amending the basis on which ASIS can produce intelligence on Australians to include those within Australia engages and limits the right to privacy. The activities that ASIS could do in support of ASIO are likely to relate to less intrusive activities than those which would require a warrant: noting that section 13D provides that ASIS cannot undertake such acts in circumstances where ASIO would need to obtain a warrant (such as the use of tracking devices, listening devices and the interception of telecommunications). However, this power would still enable the collection of personal information, albeit obtained through less intrusive means, which limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly

---

39 *Intelligence Services Act 2001*, section 13B.

40 *Intelligence Services Act 2001*, section 13D.

41 See item 1 of Schedule 5. It is also noted that if the proposed amendment in item 2 of Schedule 5 was to be made there would also appear to be a need to make a consequential amendment to section 13B(7) of the *Intelligence Services Act 2001*, to change the reference from 'paragraph (3)(a)' to paragraph (3)(b)'.

the storing, use and sharing of such information.<sup>42</sup> It also includes the right to control the dissemination of information about one's private life.

1.32 The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.33 In relation to the objective of the measure, the statement of compatibility states that it is 'necessary to enhance cooperation and integration between agencies' and the current geographic limit 'restricts cooperation that is essential to maximising the likelihood of Australia's success in thwarting attacks and defeating other threats to security'.<sup>43</sup> It also goes on to say that the government considers there is an increasing operational need to improve cooperation between agencies as Australia's security environment becomes more complex, and as domestic and foreign sources of security threats have become less mutually exclusive.<sup>44</sup> Improving cooperation and integration between national security agencies in order to protect the security of Australia is, in general, likely to be a legitimate objective. However, in order to demonstrate that the measure pursues a legitimate objective for the purposes of international human rights law, it is necessary to provide a reasoned and evidence-based explanation of why the measure addresses a substantial and pressing concern. In this respect, it is noted that the Comprehensive Review recommended that section 13B should not be extended to apply to ASIS's onshore activities.<sup>45</sup> This was on the following basis:

Section 13B exists to enable ASIS to support ASIO in the performance of ASIO's functions. There is insufficient evidence before the Review to demonstrate the operational need for such a supporting role onshore in the same way as it is needed offshore. The Review considers that any issues with the 13B regime can be mitigated by focusing on collaboration, understanding and working relationships between ASIO and ASIS staff, at all levels.<sup>46</sup>

1.34 Noting that the Comprehensive Review considered that it was not necessary for ASIS to be empowered to provide assistance in producing intelligence on Australians in Australia, further information is required to demonstrate that this measure is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right to privacy.

---

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

43 Statement of compatibility, p. 25.

44 Statement of compatibility, p. 26.

45 Mr Dennis Richardson AC, *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community*, December 2020, volume 2, recommendation 57.

46 Mr Dennis Richardson AC, *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community*, December 2020, volume 2, [22.65].

1.35 In relation to whether the measure is proportionate to the objective sought to be achieved, the statement of compatibility sets out the following safeguards:<sup>47</sup>

- the Director-General of ASIS must be satisfied that there are satisfactory arrangements in place to ensure that the activities are only to be performed by ASIS in support of ASIO's functions;<sup>48</sup>
- ASIO must issue ASIS with a written notice stating that it requires the production of intelligence on the Australian person, or class of Australian persons before relying on this framework. In giving such a notice, ASIO must comply with certain requirements, including that: the obtaining of intelligence must be relevant to 'security'; the exercise of the right to lawful advocacy, protest or dissent shall not, by itself, be regarded as prejudicial to security; and the Director-General of Security continues to have special responsibility to take all reasonable steps to ensure that the work of ASIO is limited to what is necessary for the purpose of the discharge of its functions and is kept free from any influences or considerations not relevant to its functions;<sup>49</sup>
- if ASIO could not undertake a particular act in at least one state or territory without it being authorised by a special powers warrant or telecommunication interception warrant, then ASIS may not undertake that act without ministerial authorisation;<sup>50</sup> and
- all notices provided to ASIS must be kept by ASIS and made available for inspection on request by the Inspector-General of Intelligence and Security, and a written report must be given to ASIS' responsible Minister in respect of the relevant activities.<sup>51</sup>

1.36 These are important safeguards and likely assist with the proportionality of the measure. Nevertheless, while the measure will allow ASIS to support ASIO in its functions, it is not clear what specifically this measure will authorise ASIS to be able to do and how intrusive this may be to an individual's privacy.

1.37 In order to assess the compatibility of the measure with the right to privacy, further information is required as to:

- (a) what is the pressing and substantial public or social concern that the measure is seeking to address (noting the Comprehensive Review recommended against introducing this measure); and

---

47 Statement of compatibility, pp. 26-27.

48 *Intelligence Services Act 2001*, section 13E.

49 *Australian Security Intelligence Organisation Act 1979*, section 20.

50 *Intelligence Services Act 2001*, section 13D and statement of compatibility, p. 27.

51 *Intelligence Services Act 2001*, subsections 13F(3) and (4).

- (b) what specifically would this measure authorise ASIS to do (including examples as to the type of information that may be gathered).

### Committee view

**1.38** The committee notes that Schedule 5 seeks to amend section 13B of the Intelligence Services Act to remove the requirement that ASIS may produce intelligence on an Australian person or a class of Australian persons to support ASIO in the performance of its functions only for activities undertaken outside Australia. The effect of this would be that ASIS could help ASIO, if requested, to produce intelligence on those inside Australia.

**1.39** The committee notes the measure may engage and limit the right to privacy. The committee notes that the right to privacy may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

**1.40** The committee considers that while the objective of improving cooperation and integration between national security agencies in order to protect the security of Australia may constitute a legitimate objective for the purposes of international human rights law, questions remain as to whether there exists a pressing and substantial concern to be addressed, noting that the *Comprehensive Review of the Legal Framework of the National Intelligence Community* recommended not implementing this measure. Questions also remain as to whether the measure is a proportionate limitation on the right to privacy.

**1.41** The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of Schedule 5, and as such seeks the minister's advice as to the matters set out at paragraph [1.37].

---

### Extension of period for suspension of travel documents (Schedule 8)

**1.42** Schedule 8 of the bill seeks to amend the *Australian Passports Act 2005* and the *Foreign Passports (Law Enforcement and Security) Act 2005* to extend the period of time for which an Australian or foreign travel document may be suspended from 14 days to 28 days. The Director-General of Security can request the minister to make an order to suspend a person's travel documents if the Director-General suspects, on reasonable grounds, that the person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country.<sup>52</sup> The effect of this is to prevent a person from travelling while a security assessment considering cancellation or long-term surrender of their travel documents can be

---

52 *Australian Passports Act 2005*, section 22A; *Foreign Passports (Law Enforcement and Security) Act 2005*, section 15A.



undertaken. As is currently the case, a suspension cannot be extended, and any further request to suspend a person's travel documents must be based on new information.<sup>53</sup>

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

### ***Rights to freedom of movement, privacy and effective remedy***

1.43 The suspension of a person's travel documents, such that they cannot travel overseas, engages and limits the right to freedom of movement and right to privacy. The right to freedom of movement includes the right to leave any country and the right to enter one's own country.<sup>54</sup> This encompasses both the legal right and practical ability to leave a country, and therefore it applies not just to departure for permanent emigration but also for the purpose of travelling abroad. As international travel requires the use of passports, the right to freedom of movement encompasses the right to obtain necessary travel documents, such as a passport.<sup>55</sup> The right to leave a country may only be restricted in particular circumstances, including where it is necessary to achieve the objectives of protecting the rights and freedoms of others, national security, public health or morals, and public order.<sup>56</sup> Measures that limit the right to leave a country must also be rationally connected and proportionate to these legitimate objectives.

1.44 The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.<sup>57</sup> This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.<sup>58</sup> A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The rights to freedom of movement and privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

---

53 *Australian Passports Act 2005*, subsection 22A(3); *Foreign Passports (Law Enforcement and Security) Act 2005*, subsection 15A(2).

54 International Covenant on Civil and Political Rights, article 12.

55 See UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999) [8]-[10].

56 International Covenant on Civil and Political Rights, article 12(3).

57 UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]-[4].

58 The UN Human Rights Committee further explains that this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. *General Comment No. 16: Article 17* (1988).

1.45 Where an individual's travel documents are suspended in a manner that unlawfully limits the right to freedom of movement and privacy, and where a person has suffered loss in relation to this, the measure may also engage the right to an effective remedy, as it is not clear that a person can seek compensation for any loss suffered by not being able to travel during this period. The right to an effective remedy requires access to an effective remedy for violations of human rights.<sup>59</sup> This may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse. 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.<sup>60</sup>

1.46 In relation to whether the measure pursues a legitimate objective, the statement of compatibility states that the extension of the time period is to 'to achieve the national security objective of taking proactive, swift and proportionate action to mitigate security risks relating to Australians travelling overseas who may be planning to engage in activities of security concern'.<sup>61</sup> As to why it is necessary to increase the time period of the suspension from 14 to 28 days, the statement of compatibility states that 'operational experience' has demonstrated that 14 days can be insufficient time to resolve all investigative activities and prepare a security assessment in order to consider whether permanent action is appropriate. It states that on a number of occasions the first time a person has come to ASIO's attention has been as they are preparing to travel to an overseas conflict zone, meaning it is necessary to take action in a very short timeframe.<sup>62</sup> Protecting Australia's national security is a legitimate objective for the purposes of international human rights law. Temporarily suspending the travel documents of individuals who may leave Australia to engage in conduct that might prejudice Australia's security appears to be rationally connected to that objective.

1.47 In order to be a permissible limitation on the rights to freedom of movement and privacy, the measure must also be proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed, whether it is accompanied by sufficient safeguards, and whether any less rights restrictive alternatives could achieve the same stated objective. Another relevant factor in assessing whether a measure is proportionate is whether there is the possibility of oversight and the availability of review.

---

59 International Covenant on Civil and Political Rights, article 2(3).

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

61 Statement of compatibility, p. 31.

62 Statement of compatibility, p. 31.

1.48 The extension of time from 14 days to 28 days is justified in the statement of compatibility on the grounds that 'operational experience has demonstrated that 14 days can be insufficient time to resolve all appropriate investigative activities and prepare a subsequent security assessment'.<sup>63</sup> Given the significant limitation the measure poses on the right to freedom of movement and privacy however, it is not clear why such a substantial time extension is warranted in order to address this issue and whether this is the least rights restrictive approach. As noted in the statement of compatibility, in 2014 the Independent National Security Legislation Monitor proposed a 7-day timeframe,<sup>64</sup> and the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*, which introduced the power to suspend travel documents, introduced a 14-day suspension.<sup>65</sup> It is noted that the Comprehensive Review did not consider this issue. It is not clear why 28 days is considered an appropriate period of time or whether other less rights-restrictive approaches have been considered. In particular, if operational experience has demonstrated that 14 days 'can be insufficient' it is not clear why it is necessary to double it to 28 days in all instances. No information has been provided as to why the period could not remain at 14 days with the possibility of one further extension should it prove necessary in the specific individual circumstances.

1.49 Further, in doubling the time by which travel documents can be suspended, it is also necessary to consider if the existing regime allowing for such a suspension is proportionate. In relation to whether the measure is sufficiently circumscribed and only as extensive as strictly necessary, the Director-General of Security can make a request to the minister for the suspension where they suspect, on reasonable grounds, that a person *may* leave Australia to engage in conduct that *might* prejudice the security of Australia or a foreign country. On receiving such a request, the minister has the discretion to suspend the person's travel documents. This is in contrast to the higher threshold for a request to cancel or long-term surrender a person's travel documents, where the Director-General of Security must first suspect that a person *would* be likely to engage in conduct that might prejudice the security of Australia or a foreign country.<sup>66</sup> The statement of compatibility notes that the 'temporary nature of the passport suspension is commensurate with the lower threshold for the making of a request for suspension or temporary surrender'.<sup>67</sup> However, it is not clear that the temporary nature of a suspension warrants a lower

---

63 Statement of compatibility, p. 31.

64 Statement of compatibility, p. 32.

65 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014) p. 140.

66 *Australian Passports Act 2005*, section 14; *Foreign Passports (Law Enforcement and Security) Act 2005*, paragraph 15(1)(a).

67 Statement of compatibility, p. 30.

threshold, particularly noting that a period of 28 days is a substantial period of time in which to suspend a person's travel documents.

1.50 In relation to whether the measure is accompanied by sufficient safeguards, the statement of compatibility notes that the request must come from the Director-General of Security, the minister has discretion as to whether to order suspension or surrender, and the prohibition on 'rolling' or consecutive orders remains.<sup>68</sup> These are important safeguards and likely assist with the proportionality of the measure.

1.51 However, whereas cancellation or long-term surrender of travel documents is subject to merits review through the Administrative Appeals Tribunal,<sup>69</sup> there is no provision for review for a decision to suspend travel documents. The statement of compatibility does not explain why merits review is not available for a decision to suspend travel documents. Given the proposed longer period of time in which travel documents can be suspended, it is not clear why it is not considered necessary for merits review to be available in relation to such a decision.

1.52 Further, the statement of compatibility does not give any indication of whether there is any remedy available for individuals who have had their travel documents suspended and where it is found that there is no need to cancel or long-term surrender their documents. This violation of the individual's right to freedom of movement and right to privacy could feasibly result in financial loss for the individual. It is not clear whether there is any form of compensation or remedy available if these rights were unlawfully limited.

1.53 In order to assess the compatibility of the measure with the rights to freedom of movement, privacy and effective remedy further information is required as to:

- (a) why 28 days is considered an appropriate period of time and whether other less rights-restrictive approaches have been considered, for example retaining 14 days but with the possibility of one extension where it is demonstrated it is necessary to have further time;
- (b) why it is considered necessary for the Director-General of Security to be able to make a request to the minister where they suspect, on reasonable grounds, that a person *may* leave Australia to engage in particular conduct rather than *would* be likely to engage in particular conduct, given the substantial travel document suspension period of 28 days;
- (c) why merits review of a decision to suspend travel documents is not available; and

---

68 Statement of compatibility, p. 32.

69 *Australian Passports Act 2005*, sections 48 and 50; *Foreign Passports (Law Enforcement and Security) Act 2005*, section 23.

- (d) whether any effective remedy (such as compensation) is available for individuals who have had their travel documents suspended for 28 days where it is assessed that their travel documents should not have been suspended.

### **Committee view**

**1.54** The committee notes that Schedule 8 of the bill seeks to amend the *Australian Passports Act 2005* and the *Foreign Passports (Law Enforcement and Security) Act 2005* to extend the period of time for which an Australian or foreign travel document may be suspended from 14 days to 28 days.

**1.55** The committee notes that the measure engages and limits the right to freedom of movement and the right to privacy. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The measure may engage the right to an effective remedy.

**1.56** The committee considers that the measure seeks to achieve the legitimate objective of protecting national security and is rationally connected to that objective. However, the committee considers that it is not clear whether the measure is a proportionate limitation on the rights to freedom of movement and privacy.

**1.57** The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of Schedule 8, and as such seeks the minister's advice as to the matters set out at paragraph [1.53].



## 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.<sup>1</sup>

### Bills

#### **Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021<sup>2</sup>**

<p><b>Purpose</b></p>	<p>This bill seeks to amend various Acts relating to aged care, health and aged care pricing, and information sharing in relation to veterans and military rehabilitation and compensation</p> <p>Schedule 1 would enable the introduction of the Australian National Aged Care Classification, to replace the Aged Care Funding Instrument as the residential aged care subsidy calculation model from 1 October 2022</p> <p>Schedule 2 would establish nationally consistent pre-employment screening for aged care workers of approved providers to replace existing police checking obligations</p> <p>Schedule 3 would allow the Aged Care Quality and Safety Commissioner (Commissioner) to make and enforce a Code of Conduct that applies to approved providers and their workers, including governing persons</p> <p>Schedule 4 would extend the Serious Incident Response Scheme from residential care to home care and flexible care delivered in a home or community setting from 1 July 2022</p> <p>Schedule 5 would introduce new governance and reporting</p>
-----------------------	--

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

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021, *Report 1 of 2022*; [2022] AUPJCHR 4.

	<p>responsibilities for approved providers</p> <p>Schedule 6 would increase information sharing between Commonwealth bodies across the aged care, disability and veterans' affairs sectors in relation to non-compliance of providers and their workers</p> <p>Schedule 7 would enable the Secretary or Commissioner to request information or documents from a provider or borrower of a loan made using a refundable accommodation deposit or bond</p> <p>Schedule 8 would expand the functions of the Independent Health and Aged Care Pricing Authority to include the provision of advice on health and aged care pricing and costing matters, and the performance of certain functions</p>
<b>Portfolio</b>	Health
<b>Introduced</b>	House of Representatives, 1 September 2021
<b>Rights</b>	Rights of persons with disabilities

2.3 The committee requested a response from the minister in relation to the bill in [Report 14 of 2021](#).<sup>3</sup>

### Background

2.4 This bill seeks to make numerous amendments to implement eight measures in response to recommendations of the Royal Commission into Aged Care Quality and Safety. The committee previously commented on the provisions in the bill which sought to require the Aged Care Quality and Safety Commissioner to establish and maintain a register of all individuals against whom a banning order has been made at any time.<sup>4</sup> On 25 October 2021 the government introduced amendments to the bill (which were agreed to in the House of Representatives). These included amendments in relation to the use of restrictive practices.<sup>5</sup> The committee has previously inquired into, and commented on, the regulation of the use of restrictive practices in aged care.<sup>6</sup>

3 Parliamentary Joint Committee on Human Rights, *Report 14 of 2021* (24 November 2021), pp. 2-8.

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

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

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



## Consent to restrictive practices and immunity from liability

2.5 The amendments seek to allow the Quality of Care Principles to make provision for persons or bodies who may give informed consent to the use of a restrictive practice on a person in aged care, if the care recipient lacks capacity to give consent. The amendments also provide that if such consent was given and the restrictive practice was used in approved circumstances, the aged care provider and staff member who used the restrictive practice are immune from any civil or criminal liability in relation to the use of the restrictive practice.<sup>7</sup>

## Summary of initial assessment

### *International human rights legal advice*

#### *Rights of persons with disabilities*

2.6 Setting out requirements relating to when restrictive practices can be used by aged care providers engages and may promote and limit a number of human rights, as set out by the committee in previous report entries.<sup>8</sup> Enabling consent to be given on behalf of a person who lacks capacity to give consent engages and limits the rights of persons with disabilities, including the right of persons with disabilities to consent to medical treatment. Article 12 of the Convention on the Rights of Persons with Disabilities provides that in all measures that relate to the exercise of legal capacity, there should be appropriate and effective safeguards to prevent abuse. Such safeguards must ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by an independent and impartial body.<sup>9</sup> The United Nations (UN) Committee on the Rights of Persons with Disabilities has confirmed that there can be no derogation from article 12, which describes the content of the general right to equality before the law under the International Covenant on Civil and Political Rights.<sup>10</sup> In other words, 'there are no permissible circumstances under international human rights law in which this right may be limited'.<sup>11</sup> The denial of legal capacity to care recipients by

---

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

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

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

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

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

enabling a substitute decision-maker to consent to the use of a restrictive practice would therefore engage this right.<sup>12</sup>

2.7 The UN Committee on the Rights of Persons with Disabilities has stated that substitute decision-making should be replaced by supported decision-making.<sup>13</sup> Supports may include peer support, advocacy, assistance with communication or advance planning, whereby a person can state their will and preferences in advance should they be unable to do so at a later point in time. The Committee on the Rights of Persons with Disabilities has noted that 'where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations'.<sup>14</sup> States are also required to create appropriate and effective safeguards for the exercise of legal capacity to protect persons with disabilities from abuse.<sup>15</sup>

2.8 In addition, the Convention on the Rights of Persons with Disabilities requires health professionals to provide care of the same quality to persons with disabilities as to others including on the basis of free and informed consent.<sup>16</sup> It also provides persons with disabilities must be protected from all forms of exploitation, violence and abuse.<sup>17</sup>

2.9 Further, granting immunity from liability to aged care providers and their staff for the use of restrictive practices on those who lack the capacity to give consent, where consent is provided by a substitute decision-maker, engages and may

---

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

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

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

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

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

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

limit the rights of persons with disabilities to equal recognition before the law and access to justice. The right to equal recognition before the law includes the right to enjoy legal capacity on an equal basis with others in all aspects of life, and the right to equal and effective legal protection against discrimination on all grounds.<sup>18</sup> The Convention on the Rights of Persons with Disabilities also provides that there should be effective access to justice for persons with disabilities on an equal basis with others.<sup>19</sup>

2.10 Further information was sought to assess the compatibility of this measure with the rights of persons with disabilities, including:

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

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

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

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

---

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

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

the committee sought the minister's advice as to the matters set out at paragraph [2.10].

2.13 The full initial analysis is set out in [Report 14 of 2021](#).

### **Minister's response**<sup>20</sup>

2.14 The minister advised:

It is important to highlight that these amendments follow the significant legislative reform which introduced strengthened legislation on the use of restrictive practices from 1 July 2021. These amendments are a part of the continued commitment from the Commonwealth to lead work on this matter and follow subsequent identification of gaps in state and territory legislation. These amendments are only to provide an interim solution to allow time for states and territories to amend their legislation and address any gaps that exist.

#### ***Compatibility with the right of persons with disabilities to enjoy legal capacity***

As confirmed by the United Nations Committee on the Rights of Persons with Disabilities there can be no derogation from article 12. The amendments to Schedule 9 do not limit the right of persons with a disability to equal recognition before the law.

It is important to note that ageing is not a disability and not every care recipient in residential aged care has a disability. As such the protections offered through the legislation are afforded to care recipient's regardless of the presence of a disability.

There are significant safeguards in place in the proposed legislation, the provisions in the *Aged Care Act 1997* (Act) will be supported by amendments to the Quality of Care Principles which will stipulate that a restrictive practice may only be used in accordance with the terms of the consent that has been provided. To further protect the care recipient, a restrictive practices substitute decision-maker is only deemed necessary when the care recipient is unable to consent themselves.

The person who is given the power to consent on behalf of the care recipient as the restrictive practices substitute decision-maker, will include individuals nominated by the care recipient (when they had capacity) or otherwise must have a personal interest in the health and wellbeing of the care recipient and therefore would have an understanding of the care recipient's preference. They are also able to decline the request to be the restrictive practices substitute decision-maker if they wish.

---

20 The minister's response to the committee's inquiries was received on 13 January 2022. 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](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports).

While consent is one requirement of the use of restrictive practices, there are several additional criteria, as outlined in the Quality of Care Principles, that must be adhered to. These include:

- that the restrictive practice is only used as a last resort to prevent harm to the care recipient or others, and after consideration of the likely impact of the use of the restrictive practice on the care recipient;
- to the extent possible, best practice alternative strategies have been used before the restrictive practice on the care recipient;
- the alternative strategies have been documented in the behaviour support plan;
- it is only used to the extent necessary and in proportion to the risk of harm to the care recipient or others;
- the use of the restrictive practice complies with any provisions outlined in the care recipient's behaviour support plan;
- the use of the restrictive practice complies with the Aged Care Quality Standards;
- the use of the restrictive practice is not inconsistent with the Charter of Aged Care rights set out in the User Rights Principles 2014; and
- that the use of the restrictive practices meets requirements (if any) of the law of the state or territory the restrictive practice is used.

#### ***Necessity and appropriateness of providing immunity***

The immunity provision (proposed new section 54-11 of the Act) which provides immunity from civil or criminal liability only applies where consent was given to the use by a person authorised to provide consent under the Commonwealth laws, and the use was in alignment with all other requirements under the Quality of Care Principles.

To ensure the immunity applies appropriately, these provisions will be supported by amendments to the Quality of Care Principles, stipulating that a restrictive practice may only be used in accordance with the terms of the consent that has been provided (such as the particular type of restrictive practice, for the time specified). This will mean that if, for example, consent is given to the use of a nominated restrictive practice for a particular period of time and it is used for longer than that specified period, it will not have been used in the circumstances set out in the Quality of Care Principles, and therefore those involved will not be able to rely on the immunity in this provision.

#### ***Appropriateness of immunity for the use of restrictive practices on persons without capacity***

If a jurisdiction's laws provide authority for a person or body to consent to the use of restrictive practices, this immunity does not apply. The immunity will only apply in circumstances where the Commonwealth law

authorises a person or body to consent to the use of restrictive practices, because the state and territory arrangements do not otherwise provide for this consent to be given.

As the proposed consent arrangements will result in an approved provider relying on consent by a person or body authorised to give that consent under the Commonwealth's aged care laws, rather than under the laws of the relevant state or territory, this will ensure that approved providers and relevant individuals working with them (such as staff members, volunteers and medical practitioners) are not open to any civil or criminal liability when restrictive practices are used. A condition of the immunity is that the use must also be used in compliance with all the additional criteria introduced through the strengthened requirements on the use of restrictive practices (listed on previous page).

As noted in the Bill's revised explanatory memorandum, it is also proposed that as part of the planned amendments to the Quality of Care Principles, clarifications will also be made to ensure that a restrictive practice may only be used in accordance with the consent that has been provided (such as the particular type of restrictive practice and for the time specified). This will mean that if, for example, the restrictive practices substitute decision-maker has consented to the use of bed rails between 10:00pm and 7:00am on weekdays, and the approved provider uses the bedrails outside the specified period, the restrictive practices will not have been used in accordance with the consent, and therefore in compliance with the requirements under the Quality of Care Principles, meaning those involved will not be able to rely on the immunity in this provision.

In the situation where a care recipient is unable to consent to the use of restrictive practices themselves and the provider is relying on the consent from a restrictive practices substitute decision-maker as set out by Commonwealth law, it is important that they are protected from liability should the decision be taken to court. Providing that the aged care provider and or staff meet all the requirements as set out in the Quality of Care Principles they should be able to rely on the consent of the substitute decision maker without fear of persecution. If an individual can consent themselves there is no requirement of immunity for the provider or staff as they will be relying on the direct consent from the individual and should not be exempt from criminal and civil liability should they use a restrictive practice inconsistently with the consent and the requirements as set out in the Quality of Care Principles.

### ***Substitute or supported decision maker***

It is acknowledged that supported decision-making is a best practice approach and would provide greater protections for consumers. However, the Australian Government is implementing this interim solution as quickly as possible, in acknowledgment of the time it may take state and territory governments to be able to address limitations in their laws.

As such, the Government acknowledges that the interim solution is the most practical approach and will continue to encourage state and territory governments to ensure there are rigorous protections at the jurisdictional level across the nation.

The interim solution will only apply in circumstances where a consumer does not have capacity to be able to provide consent. In these circumstances a supported decision-making model would not be appropriate. When a care recipient has capacity, they will be able to provide consent to the use of restrictive practices.

It is also proposed that the interim solution will involve arrangements where, while a consumer has capacity to do so, they would be able to nominate a person or body in writing who would be able to provide consent to restrictive practices on their behalf, if they later did not have capacity.

## Concluding comments

### *International human rights legal advice*

#### *Right of persons with disabilities to equal recognition before the law*

2.15 As noted in the initial assessment, enabling consent to be given in relation to the use of a restrictive practice on behalf of a person who is deemed to lack capacity to give consent engages and limits the rights of persons with disabilities, including the right to equal recognition before the law and the right to consent to medical treatment. It is noted that while not all aged care recipients are people with disability, those who are deemed to lack capacity are invariably those with cognitive impairment and thus in effect, the measure exclusively applies to people with disability.<sup>21</sup> The right to equal recognition before the law includes the right to enjoy legal capacity on an equal basis with others in all aspects of life and in all measures that relate to the exercise of legal capacity, there should be appropriate and effective safeguards to prevent abuse.<sup>22</sup> As acknowledged by the minister, there can be no derogation from article 12, which describes the content of the general right to equality before the law under the International Covenant on Civil and Political

---

21 The Committee on the Rights of Persons with Disabilities has stated that 'persons with cognitive or psychosocial disabilities have been, and still are, disproportionately affected by substitute decision-making regimes and denial of legal capacity. The Committee reaffirms that a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12. All practices that in purpose or effect violate article 12 must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others': *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [5].

22 Convention on the Rights of Persons with Disabilities, article 12.

Rights.<sup>23</sup> This means 'there are no permissible circumstances under international human rights law in which this right may be limited'.<sup>24</sup>

2.16 The denial of legal capacity to care recipients who are deemed to lack capacity by enabling a substitute decision-maker to consent to the use of a restrictive practice would therefore engage this right. By denying legal capacity in these circumstances, care recipients are also deprived of their right to give consent to medical treatment and healthcare, noting that restrictive practices may include chemical and physical restraints.<sup>25</sup> While the minister has stated that this right is not limited, the UN Committee on the Rights of Persons with Disabilities has made clear that practices that deny the right of people with disabilities to legal capacity in a discriminatory manner, such as substitute decision-making regimes, are contrary to article 12 and must be 'abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others'.<sup>26</sup>

2.17 Additionally, States parties are required to take appropriate measures to provide access to support for persons with disabilities in exercising their legal capacity. Support in this context may include peer support, advocacy, assistance with communication or advance planning, whereby a person can state their will and

---

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

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

25 With respect to persons with disability, the UN Committee on the Rights of Persons with Disabilities has held that 'forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law an infringement of the rights to personal integrity (art. 17); freedom from torture (art. 15); and freedom from violence, exploitation and abuse (art. 16). This practice denies the legal capacity of a person to choose medical treatment and is therefore a violation of article 12 of the Convention': *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [42]. More generally under international human rights law, the use of physical and chemical restraints against a person without their consent may engage and limit the right to privacy, which includes the right to personal autonomy and physical and psychological integrity, and protects against compulsory procedures: see, *MG v Germany*, UN Human Rights Committee Communication No. 1428/06 (2008) [10.1]. Note also that article 7 of the International Covenant on Civil and Political Rights expressly prohibits medical or scientific experimentation without the free consent of the person concerned. Article 7 may not be engaged, however, in relation to non-experimental medical treatment, even when given without consent, unless it reaches a certain level of severity: see *Brough v Australia*, UN Human Rights Committee Communication No. 1184/03 (2006) [9.5].

26 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [7]. For a discussion of the academic debate regarding the interpretation and application of article 12, particularly in relation to substitute decision-making, see, eg, Bernadette McSherry and Lisa Waddington, 'Treat with care: the right to informed consent for medical treatment of persons with mental impairments in Australia', *Australian Journal of Human Rights*, vol. 23, issue no. 1, pp. 109–129.



preferences in advance should they be unable to do so at a later point in time. The UN Committee on the Rights of Persons with Disabilities has stated that substitute decision-making should be replaced by supported decision-making and noted that '[s]upport in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making'.<sup>27</sup> It noted that 'where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations'.<sup>28</sup> The minister acknowledged that supported decision-making is best practice and would provide greater protections for care recipients. However, the minister stated that substitute decision-making is an 'interim solution' that is the 'most practical approach', noting that it will only apply in circumstances where the person does not have capacity to consent to a restrictive practice themselves. The minister noted that supported decision-making is not appropriate in these circumstances.

2.18 Under the Convention on the Rights of Persons with Disabilities, a person's impairment (including cognitive or sensory) must never be grounds for denying legal capacity.<sup>29</sup> Yet, the minister's response did not make clear how it is determined that a person lacks capacity to consent to a restrictive practice, and when a substitute decision-maker would be provided. Further, there is no legislative requirement that the care recipient be supported or assisted to make their own decisions. This substitute decision-making model, even if an interim solution, appears contrary to

---

27 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15]–[17], [21]. The features of a supported decision-making regime are detailed in paragraph [29].

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

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

the requirements in article 12 of the Convention on the Rights of Persons with Disabilities as set out above.<sup>30</sup>

*Rights of persons with disabilities to equality and non-discrimination and access to justice*

2.19 As noted in the initial assessment, granting immunity from liability to aged care providers and their staff for the use of restrictive practices on those who are deemed to lack the capacity to give consent, where consent is provided by a substitute decision-maker, engages and may limit the rights of persons with disabilities to equal recognition before the law (as discussed above), equality and non-discrimination, and access to justice.<sup>31</sup> The measure differentially treats care recipients on the basis of disability by only granting immunity from liability for the use of a restrictive practice on a person who is deemed to lack capacity to consent, whereas those care recipients who are deemed to have capacity to consent are afforded greater protection under the law. In this way, the measure limits the right to both equality *before* the law and equality *under* the law.<sup>32</sup> As noted in the initial assessment, this differential treatment limits the rights of persons with disabilities to be treated equally and the right to effective access to justice for persons with disabilities on an equal basis with others.

---

30 It is noted that Australia has made an interpretive declaration in relation to article 12, which most relevantly states, 'Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards'. The Australian Government has stated that it does not propose to withdraw this declaration and it does not purport to exclude or modify the legal effects of the Convention, but clarify Australia's understanding: see Committee on the Rights of Persons with Disabilities, *Combined second and third periodic reports submitted by Australia under article 35 of the Convention, due in 2018*, CRPD/C/AUS/2-3 (2019) [15]. The Committee on the Rights of Persons with Disabilities has recommended that Australia urgently withdraw this declaration: see Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, CRPD/C/AUS/CO/2-3 (2019) [5], [6], [63].

31 International Covenant on Civil and Political Rights, articles 2 and 26; Convention on the Rights of Persons with Disabilities, articles 5, 12 and 13.

32 Convention on the Rights of Persons with Disabilities, article 5(1). See Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination* (2018) at [14] where the Committee explained: "Equality under the law" is unique to the Convention. It refers to the possibility to engage in legal relationships. While equality before the law refers to the right to be protected by the law, equality under the law refers to the right to use the law for personal benefit. Persons with disabilities have the right to be effectively protected and to positively engage... Thus, the recognition that all persons with disabilities are equal under the law means that there should be no laws that allow for specific denial, restriction or limitation of the rights of persons with disabilities, and that disability should be mainstreamed in all legislation and policies'.

2.20 While article 12 is absolute, the rights to equality and non-discrimination and access to justice may be subject to permissible limitations. Under international human rights law, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if it 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.<sup>33</sup> However, as the right to legal capacity and equal recognition before the law is a 'threshold right', were the measure to violate article 12, it is likely that it will impermissibly limit associated rights. In this regard, the UN Committee on the Rights of Persons with Disabilities has stated:

The right to legal capacity is a threshold right, that is, it is required for the enjoyment of almost all other rights in the Convention, including the right to equality and non-discrimination. Articles 5 and 12 are fundamentally connected, because equality before the law must include the enjoyment of legal capacity by all persons with disabilities on an equal basis with others. Discrimination through denial of legal capacity may be present in different ways, including status-based, functional and outcome-based systems. Denial of decision-making on the basis of disability through any of these systems is discriminatory.<sup>34</sup>

2.21 As noted in the initial assessment, the stated aim of these amendments is to address 'unexpected outcomes in relation to the interaction with State and Territory guardianship and consent laws'.<sup>35</sup> The minister further stated that the amendments are intended to provide an interim solution to allow time for states and territories to amend their legislation and address any gaps. The minister noted that the immunity applies in circumstances where the Commonwealth law authorises a person or body to consent to the use of restrictive practices (as a substitute decision-maker), because the state and territory arrangements do not otherwise provide for this consent to be given. The supplementary explanatory memorandum states that without clear consent arrangements in place across all jurisdictions, restrictive practices cannot be used in certain circumstances where it might otherwise be appropriate, which could result in harm to care recipients and others.<sup>36</sup> The purpose

---

33 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]. 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.

34 Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination* (2018) [47].

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

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

of the immunity is to ensure that approved providers and individuals who rely on the consent of a substitute decision-maker to use a restrictive practice are not open to any civil or criminal liability. The minister stated that it is important that those using the restrictive practice are protected from liability so that they can rely on the consent of the substitute decision-maker without fear of prosecution. Whereas the minister stated that those using a restrictive practice on the basis of direct consent from the care recipient should not be exempt from liability should they use the restrictive practice inconsistently with that consent or the requirements set out in the Quality of Care Principles.

2.22 Any limitation on a right must be shown to be aimed at achieving a legitimate objective. A legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the rights in question. While addressing gaps in legislation and ensuring consistency in consent arrangements would appear to be an important aim, it is not clear that the measure addresses a pressing and substantial concern as required to constitute a legitimate objective for the purposes of international human rights law. It is not clear why providing a blanket immunity is necessary, noting that seeking an outcome regarded as desirable or convenient, such as alleviating fears of prosecution, is, in and of itself, unlikely to be sufficient to constitute a legitimate objective.

2.23 As to proportionality, the minister stated that there are safeguards contained in the proposed legislation, notably that a restrictive practice may only be used in accordance with the terms of the consent that has been provided. For example, the minister stated that if consent is given to the use of a nominated restrictive practice for a particular period of time and it is used for longer than that specified period, it will not have been used in the circumstances set out in the Quality of Care Principles, and therefore those involved will not be able to rely on the immunity in this provision. However, this does not appear to be an adequate safeguard as the consent is that of a substitute decision-maker, not that of the individual whose rights may be affected. If the terms of consent were broad and contrary to the will and preferences of the care recipient, then it may have limited safeguard value in practice.

2.24 Additionally, the minister noted that the use of a restrictive practice must comply with criteria set out in the Quality of Care Principles, including that the restrictive practice be used as a last resort to prevent harm and only used to the extent necessary and in proportion to the risk of harm to the care recipient. The committee has previously considered these criteria, noting that while these safeguards are important, their strength will depend on how they are applied in practice.<sup>37</sup> In particular, there are concerns regarding the use of restraints in an

---

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

emergency, noting that certain criteria in the Quality of Care Principles do not apply to such use.

2.25 The minister also identified as a safeguard the fact that a restrictive practices substitute decision-maker will only be used where a person is unable to consent to the restrictive practice themselves. The minister stated that the substitute decision-maker will include individuals nominated by the care recipient or those who have a personal interest in the health and wellbeing of the care recipient. While in some circumstances the substitute decision-maker will act in accordance with the best interpretation of the care recipient's will and preferences, it is not clear that this requirement would operate as an effective safeguard in all instances. Further, as noted above, it is not clear in what circumstances a person would be considered to be unable to provide consent, and the denial of legal capacity and provision of a substitute decision-maker would, in itself, be contrary to article 12 and would likely limit other human rights.

#### *Right to an effective remedy*

2.26 Furthermore, by depriving care recipients who are deemed to lack capacity the ability to pursue a remedy for any violation of their human rights arising from the use of restrictive practices, the measure has implications on the right to an effective remedy. As noted in the initial assessment, it appears that if a restrictive practice was used in accordance with the Quality of Care Principles and after consent had been provided by the substitute decision-maker, but due to negligence the care recipient was injured, it would appear that a care recipient who lacked capacity to consent would not be able to bring an action for negligence, whereas a care recipient with capacity may be able to. It would also appear that even if a care recipient could successfully challenge the lawfulness of the consent provided on their behalf, no action could be brought against the provider or their staff if they used the restrictive practice after gaining informed consent by one of the listed substitute decision-makers.

2.27 The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of recognised rights and freedoms.<sup>38</sup> It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. This may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse.

---

38 International Covenant on Civil and Political Rights (ICCPR), article 2(3). See, *Kazantzis v Cyprus*, UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia*, UN Human Rights Committee Communication No. 1036/01 (2005), State parties must not only provide remedies for violations of the ICCPR, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia* UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect.

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.<sup>39</sup> This right must also be provided in a non-discriminatory way.<sup>40</sup> By granting immunity from *any* civil and criminal liability, care recipients who are denied legal capacity do not appear to have access to an effective remedy for any violation of their rights arising from the use of a restrictive practice against them.

2.28 In conclusion, the measure denies legal capacity to certain care recipients by enabling a substitute decision-maker to consent on their behalf to the use of a restrictive practice against them. The denial of legal capacity and the provision of a restrictive practices substitute decision-maker does not appear to be compatible with the right to equal recognition before the law and has the effect of limiting other human rights, including the right to consent to medical treatment, the right to equality and non-discrimination and the right to access to justice. It has not been established that these other human rights would be permissibly limited in practice. Further, by granting blanket immunity from liability, the measure has implications on the right to an effective remedy. As such, these amendments do not appear to be compatible with a number of human rights, particularly the rights of persons with disabilities.

### Committee view

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

**2.30 The committee notes that by enabling consent to be given in relation to the use of a restrictive practice on behalf of a person who is deemed to lack capacity, the measure engages and limits the rights of persons with disabilities, including the**

---

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

40 For commentary on this right see, International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide*, revised edition (2018). At pp. 53 and 58, the Guide stated: 'States have an obligation to make available effective remedies to people whose rights are violated. Universal and regional standards guarantee the right to an effective remedy to all persons who allege that their human rights have been violated...By requiring that human rights be enjoyed by all without discrimination, human rights law thereby obliges States to ensure that access to, and the provision of, effective remedies and reparation be without distinction of any kind'.

right to equal recognition before the law and the right to consent to medical treatment. The committee notes that the right to equal recognition before the law is absolute and may not be subject to permissible limitations. The committee notes the minister's advice that while supported decision-making is best practice, it is not appropriate in these circumstances as this measure is an interim solution to allow time for states and territories to amend their legislation regarding substitute decision-making, and that is the most practical approach. While the committee appreciates that this is a temporary measure and notes the minister's advice that the government will continue to encourage rigorous protections at state and territory levels, the committee considers that until such time there is a significant risk that the amendments are incompatible with the right to equal recognition before the law.

2.31 The committee also notes that granting immunity from liability to aged care providers and their staff for the use of restrictive practices on those who are deemed to lack the capacity to give consent, engages and may limit the rights of care recipients to equality and non-discrimination and access to justice. It is not clear that these rights would be permissibly limited in practice, noting that it has not been established that the measure pursues a legitimate objective or is proportionate in all circumstances. It also is not clear that this immunity would ensure an affected person would have access to an effective remedy. As such, the committee considers that the proposed amendments are unlikely to be compatible with a number of human rights, particularly the rights of persons with disability.

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

**Dr Anne Webster MP**

**Chair**

