Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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1 The human rights committee secretariat is staffed by parliamentary officers drawn from the Department of the Senate Legislative Scrutiny Unit (LSU), which usually includes two principal research officers with specialised expertise in international human rights law. LSU officers regularly work across multiple scrutiny committee secretariats.

Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee is required to examine bills, Acts and legislative instruments for compatibility with human rights, and report its findings 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 against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[2] **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, 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, in relation to most human rights, prescribed limitations on the enjoyment of a right may be justified under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationally connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A **statement of compatibility** for a measure limiting a right must provide a **detailed and evidence-based assessment** of the measure against the limitation criteria.

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or else draw the matter to the attention of the proponent on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in Guidance Note 1 (see **Appendix 4**).

2 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

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Chapter 1

New and continuing matters

1.1 This chapter provides assessments of the human rights compatibility of:

- bills introduced into the Parliament between 20 and 23 August 2018 (consideration of 1 bill from this period has been deferred);[1]
- legislative instruments registered on the Federal Register of Legislation between 21 June and 25 July 2018;[2] and
- bills and legislative instruments previously deferred.

Instruments not raising human rights concerns

1.2 The committee has examined the legislative instruments registered in the period identified above, as listed on the Federal Register of Legislation. Instruments raising human rights concerns are identified in this chapter.

1.3 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. See, https://www.legislation.gov.au/.

Response required

1.4 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

Court and Tribunal Legislation Amendment (Fees and Juror Remuneration) Regulations 2018 [F2018L00819]

Purpose	Increases certain court fees payable in the High Court of Australia, Federal Court of Australia and Federal Circuit Court of Australia; increases the frequency of fee indexation in the High Court of Australia, Federal Court of Australia, Federal Circuit Court of Australia, National Native Title Tribunal and Administrative Appeals Tribunal; and increases the indexation of juror remuneration in the Federal Court of Australia
Portfolio	Attorney-General
Authorising legislation	*Administrative Appeals Tribunal Act 1975*; *Family Law Act 1975*; *Federal Circuit Court of Australia Act 1999*; *Federal Court of Australia Act 1976*; *Judiciary Act 1903*; *Migration Act 1958; Native Title Act 1993*.
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 25 June 2018)
Rights	Fair hearing; effective remedy (see **Appendix 2**)
Status	Seeking additional information

Background

1.5 The committee has previously considered the human rights implications of increases to court fees on several occasions.[1]

Increase to High Court fees

1.6 The regulations increase the base court fees prescribed by the *High Court of Australia (Fees) Regulation 2012* (High Court Fees Regulation), payable in the High Court of Australia on or after 1 July 2018 by 17.5%.[2] The fees include:

- filing fees;

1 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-third report of the 44th Parliament* (2 February 2016), pp. 33-36; *Twenty-sixth teport of the 44th Parliament* (18 August 2015); *Twenty-fifth report of the 44th Parliament* (11 August 2015) pp. 65-67; *Report 1 of 2013* (6 February 2013) p. 107.

2 Fee and Juror Remuneration Regulations, schedule 1, items 89 to 103.

- hearing fees;
- fees for obtaining documents;
- annual subscription fees for copies of reasons for judgments; and
- any other fees under the regulations for services provided on or after 1 July 2018.[3]

1.7 The increase applies to all fee categories, including 'financial hardship fees'. Under section 12 of the High Court Fees Regulation, the Registrar may determine that a person may pay the 'financial hardship fee' instead of the usual fee that would otherwise be payable if, in the Registrar's opinion, at the time the usual fee is payable, the payment of the fee would cause financial hardship to the individual.[4] In making this decision, the Registrar must consider the 'individual's income, day-to-day living expenses, liabilities and assets'.[5]

Compatibility of the measure with the right to a fair hearing and right to an effective remedy

1.8 The right to a fair hearing in Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that all persons are equal before courts and tribunals and are entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.[6] The UN Human Rights Committee has considered that the imposition of fees on parties to proceedings that would de facto prevent their access to justice might give rise to issues under the right to a fair hearing.[7]

1.9 In addition, the right to an effective remedy in Article 2 of the ICCPR requires states to ensure access to an effective remedy for violations of human rights. States are required to establish appropriate judicial and administrative mechanisms for addressing claims.[8]

1.10 The statement of compatibility acknowledges that the increase to the base fees payable in the High Court and other courts 'may limit some persons' right of access to remedies which are enforceable by these courts'.[9] However, the statement

3 Fees and Juror Remuneration Regulations, schedule 1, item 88.

4 High Court Fees Regulation, section 12(1)(c).

5 High Court Fees Regulation, section 12(2).

6 International Covenant on Civil and Political Rights (ICCPR), Article 14(1).

7 See UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial* (2007), para. [11]. See also *Lindon v Australia*, Communication No. 646/1995 (25 November 1998), para. [6.4].

8 Parliamentary Joint Committee on Human Rights, *Short Guide to Human Rights*, pp. 13-14.

9 Fees and Juror Remuneration Regulations, statement of compatibility (SOC) pp. 18-19.

of compatibility only addresses the issue from the perspective of the right to an effective remedy and does not explicitly acknowledge that fair hearing rights may be engaged.

1.11 Limitations on fair hearing rights may be permissible where the measure pursues a legitimate objective, is rationally connected to the objective and is a proportionate means of achieving the objective. In relation to the right to an effective remedy, the UN Human Rights Committee has stated that while limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states parties must comply with the fundamental obligation to provide a remedy that is effective.[10]

1.12 The statement of compatibility explains that the increase to court fees are necessary to achieve a legitimate objective for the purpose of international human rights law, because:

> The additional revenue will be applied towards providing the High Court with additional ongoing funding for its security arrangements. The High Court is the apex court under Australia's constitutional arrangements. Ensuring the security of the Court, therefore contributes to the integrity of Australia's federal court system and the protection of human rights that this affords. Additionally, this funding will enhance the physical security of the Court's Justices, staff and visitors.[11]

1.13 Ensuring the security of the court, including the physical security of court staff and visitors, by upgrading security arrangements is likely to be a legitimate objective for the purpose of international human rights law. Raising revenue to fund security upgrades by increasing court fees may also be rationally connected to this objective.

1.14 The statement of compatibility explains that increases to the High Court fees are reasonable and proportionate because 'they reflect that the Court and its users are the key beneficiary of the additional revenue'.[12] It further notes that the regulations maintain exemptions and waivers from fees in the relevant courts for disadvantaged litigants. These include:

> recipients of legal aid, people receiving income support, people in detention and children (including those seeking to be protected or exercising their right to freedom from discrimination).[13]

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10 See UN Human Rights Committee, *General Comment No.29: States of Emergency (Article 4)* (2001) para. [14].

11 SOC, p. 19.

12 SOC, p. 19.

13 SOC, p. 19.

1.15 This is consistent with section 11(1) of the High Court Fees Regulations, which provides that certain persons are exempt from paying a filing fee or a hearing fee if one of the following circumstances apply:

- the person has been granted legal aid under a legal aid scheme or service;[14]
- the person holds a health care card, pensioner concession card, Commonwealth seniors health card, or any other card that certifies the holder's entitlement to Commonwealth health concessions;[15]
- the person is serving a sentence of imprisonment or is otherwise detained in a public institution;[16]
- the person is younger than 18;[17]
- the person is receiving youth allowance or Austudy payments or benefits under the ABSTUDY Scheme;[18] or
- the person has been granted assistance under certain provisions of the *Native Title Act 1993*.[19]

1.16 However, these fee waivers do not apply to document or service fees.

1.17 There are also other safeguards in the High Court Fees regulations in relation to the deferring of the payment of fees where the Registrar considers that the need to file the document or hear the proceeding is so urgent that it overrides the requirement to pay the fee immediately.[20]

1.18 The committee has previously considered that the availability of fee exemptions, waivers and deferrals are important safeguards of the right to a fair hearing in the context of increases in court fees.[21]

1.19 However, in order to be a proportionate limitation on human rights, limitations on human rights must be the least rights restrictive way of achieving a legitimate objective. In this respect, questions remain as to whether a 17.5 per cent increase to the fees is the least rights restrictive approach to achieving the legitimate

14 High Court Fees Regulation, section 11(1)(a).

15 High Court Fees Regulation, section 11(1)(b). Section 11(2) clarifies that the holder of a card does not include a dependent of the person who is issued the card.

16 High Court Fees Regulation, section 11(1)(c).

17 High Court Fees Regulation, section 11(1)(d).

18 High Court Fees Regulation, section 11(1)(e).

19 High Court Fees Regulation, section 11(1)(e).

20 High Court Fees Regulation, section 13.

21 See, for example, the committee's consideration of the Federal Courts Legislation Amendment (Fees) Regulation 2015 in the *33rd Report of the 44th Parliament* (2 February 2016), p. 36.

objective of ensuring the security of the court. This is particularly so in the case of the 'financial hardship' category of High Court fees, noting that this category of fees is specifically designed for people for whom the payment of the fee would cause financial hardship. This may include people who are not otherwise eligible for a fee waiver under section 11 of the High Court Fees Regulation. This raises concerns that an increase in the court fees, particularly for those suffering hardship, may preclude persons from being able to access the court and access justice. This in turn raises concerns as to whether the measure is a proportionate limitation on fair hearing rights and whether the measure may preclude persons from accessing an effective remedy.[22]

Committee comment

1.20 The preceding analysis raises questions as to whether the increase in the 'financial hardship' category of court fees in the High Court by 17.5 per cent is compatible with the rights to a fair hearing and effective remedy.

1.21 The committee therefore seeks the advice of the Attorney-General as to:

- **whether the limitation on the right to a fair hearing is proportionate to the stated objective of the measure, addressing, in particular, whether less rights-restrictive options are available (noting the impact the measure may have on those who would suffer financial hardship); and**
- **whether the increase in the 'financial hardship' category of court fees in the High Court by 17.5 per cent is compatible with the right to an effective remedy (including any safeguards in place to protect persons who may suffer hardship).**

22 See, in relation to increased court fees in employment tribunals and the Employment Appeal Tribunal in the United Kingdom, *R (Unison) v Lord Chancellor* [2017] UKSC 51.

Further response required

1.22 The committee seeks a further response from the relevant minister or legislation proponent with respect to the following bills and instruments.

National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 [F2018L00632]

Purpose	Provides oversight relating to behaviour support, monitoring the use of restrictive practices within the National Disability Insurance Scheme (NDIS)
Portfolio	Social Services
Authorising legislation	*National Disability Insurance Scheme Act 2013*
Last day to disallow	15 sitting days after tabling (tabled Senate 18 June 2018)
Rights	Torture, cruel, inhuman and degrading treatment or punishment; liberty; rights of persons with disabilities (see **Appendix 2**)
Previous report	7 of 2018
Status	Seeking further additional information

Background

1.23 The committee first reported on the rules in its *Report 7 of 2018*, and requested a response from the Minister for Social Services by 29 August 2018.[1]

1.24 The minister's response to the committee's inquiries was received on 28 August 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Conditions relating to the use of regulated restrictive practices by NDIS providers

1.25 The rules set out the conditions of registration that apply to all registered National Disability Insurance Scheme (NDIS) providers who use 'regulated restrictive practices' in the course of delivering NDIS support. A 'regulated restrictive practice' involves any of the following:

(a) seclusion, which is the sole confinement of a person with disability in a room or a physical space at any hour of the day or night where

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018* (14 August 2018) pp. 39-47.

voluntary exit is prevented, or not facilitated, or it is implied that voluntary exit is not permitted;

(b) chemical restraint, which is the use of medication or chemical substance for the primary purpose of influencing a person's behaviour. It does not include the use of medication prescribed by a medical practitioner for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition;

(c) mechanical restraint, which is the use of a device to prevent, restrict, or subdue a person's movement for the primary purpose of influencing a person's behaviour but does not include the use of devices for therapeutic or non-behavioural purposes;

(d) physical restraint, which is the use or action of physical force to prevent, restrict or subdue movement of a person's body, or part of their body, for the primary purpose of influencing their behaviour. Physical restraint does not include the use of a hands-on technique in a reflexive way to guide or redirect a person away from potential harm/injury, consistent with what could reasonably be considered the exercise of care towards a person.

(e) environmental restraint, which restricts a person's free access to all parts of their environment, including items or activities.[2]

1.26 The rules prescribe different conditions of registration of NDIS providers depending on the regulation of restrictive practices in a state or territory. Broadly, for those states and territories that prohibit the use of a restrictive practice, it is a condition of registration of the NDIS provider that the provider must not use the restrictive practice in relation to a person with a disability.[3] However, where the practice is not prohibited but rather is regulated by an authorisation process,[4] registration is conditional upon the use of the regulated restrictive practice being authorised (other than a 'single emergency use'[5]), and the provider must lodge with the NDIS Quality and Safeguards Commissioner (Commissioner) evidence of that

2 Section 6 of the National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 (rules).

3 Section 8 of the rules.

4 The rules note that an authorisation process may, for example, be a process under relevant State or Territory legislation or policy or involve obtaining informed consent from a person and/or their guardian, approval from a guardianship board or administrative tribunal or approval from an authorised state or territory officer.

5 'Single emergency use' is not defined in the instrument but is described in the explanatory statement (ES) as 'the use of a regulated restrictive practice in relation to a person with disability, in an emergency, where the use of a regulated restrictive practice has not previously been identified as being required in response to behaviour of that person with disability previously'. See, ES, p. 9.

authorisation as soon as reasonably practicable after the use of the regulated restrictive practice.[6]

1.27 The rules also prescribe the conditions of registration where a 'behaviour support plan' is used in relation to a regulated restrictive practice. Behaviour support plans may only be developed by a NDIS behaviour support practitioner[7] and are subject to certain conditions, including the requirement that all reasonable steps be taken to reduce and eliminate the need for the use of regulated restrictive practices.[8] In particular, section 21 of the rules sets out the minimum content of behaviour support plans containing regulated restrictive practices, and provides that the registration of specialist behaviour support providers[9] is subject to the condition a regulated restrictive practice must:

- be clearly identified in the behaviour support plan;
- if the state or territory in which the regulated restrictive practice is to be used has an authorisation process – be authorised in accordance with that process;
- be used only as a last resort in response to risk of harm to the person with disability or others, and after the provider has explored and applied evidence-based, person-centred and proactive strategies; and
- be the least restrictive response possible in the circumstances to ensure the safety of the person and others; and
- reduce the risk of harm to the person with disability or others; and
- be in proportion to the potential negative consequence or risk of harm; and
- be used for the shortest possible time to ensure the safety of the person with disability or others.[10]

1.28 Where an NDIS provider provides support or services in accordance with a behaviour support plan that includes the use of a restrictive practice, registration as

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6 Section 9 of the rules.

7 'Behaviour support practitioner' is defined in section 5 of the rules to mean a person the Commissioner considers is suitable to undertake behaviour support assessments (including functional behavioural assessments) and to develop behaviour support plans that may contain the use of restrictive practices.

8 See sections 18-20.

9 A specialist behaviour support provider is defined in section 5 of the rules to mean a registered NDIS provider whose registration incudes the provision of specialist behaviour support services.

10 Section 21(3) of the rules.

a provider is conditional on the regulated restrictive practice being used in accordance with the behaviour support plan.[11]

1.29 The rules also set out registration requirements where the use of a regulated restrictive practice may be unauthorised by state or territory law but be in accordance with a behaviour support plan, and vice versa. In particular:

- where the NDIS provider uses a regulated restrictive practice pursuant to an authorisation process but not in accordance with a behaviour support plan (described as the 'first use' in the rules), and the use of such practices will or is likely to continue, the NDIS provider must take all steps to develop an interim behaviour support plan within one month after the use of the regulated restrictive practice and a comprehensive behaviour support plan within six months;[12]
- where the NDIS provider uses a regulated restrictive practice that is not authorised pursuant to an authorisation *and* is not in accordance with a behaviour support plan, and the use of such practices will or is likely to continue, the NDIS provider must (relevantly) obtain authorisation for the ongoing use of the regulated restrictive practice and take all reasonable steps to develop an interim behaviour support plan within one month and a comprehensive behaviour support plan within six months;[13] and
- where the NDIS provider uses a regulated restrictive practice that is not in accordance with a behaviour support plan but authorisation is not required in the state or territory, and the use will or is likely to continue, the NDIS provider must take all reasonable steps to develop an interim behaviour support plan within one month and a comprehensive behaviour support plan within six months that covers the use of the regulated restrictive practice.[14]

Compatibility of the measure with the prohibition on torture, cruel, inhuman or degrading treatment or punishment

1.30 Australia has an obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.[15] The prohibition on torture, cruel, inhuman and degrading treatment or punishment is absolute and may never be subject to any limitations. The UN Committee on the Rights of Persons with

11 Section 10 of the rules.

12 Section 11 of the rules.

13 Section 12 of the rules.

14 Section 13 of the rules.

15 Article 7 of the International Covenant on Civil and Political Rights; article 15 of the Convention on the Rights of Persons with Disabilities; articles 3-5 Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment; article 37 of the Convention on the Rights of the Child.

Disabilities (UNCRPD) has stated that Australia's use of restrictive practices may raise concerns in relation to freedom from torture and cruel, inhuman or degrading treatment or punishment, and has recommended that Australia take immediate steps to end such practices.[16] The statement of compatibility acknowledges that the rules engage the prohibition on torture, cruel, inhuman or degrading treatment or punishment,[17] and also acknowledges the concerns raised by the UNCRPD about the unregulated use of restrictive practices.[18]

1.31 The statement of compatibility emphasises the minimum requirements in behaviour support plans that include the use of regulated restrictive practices (summarised above at [1.27]) and also emphasises that behaviour support plans 'must contain strategies that aim to reduce and eliminate the use of restrictive practices, both in the long-term and in the short-term'.[19] It also states that the oversight of behaviour support plans (including lodging the plans with the Commissioner and reviewing the plans every 12 months) and the obligations on behaviour support providers 'act as a safeguard against inhumane treatment'.[20] However, the initial human rights analysis noted that while the safeguards that ensure regulated restrictive practices are (for example) 'proportionate' or the 'least restrictive response' are important, they would not be of assistance where the practice amounted to torture, cruel, inhuman or degrading treatment or punishment. This is because, as noted earlier, Australia's obligations in relation to torture, cruel, inhuman or degrading treatment or punishment are absolute.

1.32 There were also particular questions in circumstances where the regulated restrictive practice may be used against a disabled person not in accordance with a behaviour support plan and/or without authorisation. The initial analysis stated that it is possible that a disabled person could be subject to a regulated restrictive practice without authorisation or a behaviour support plan (and the accompanying safeguards), and the NDIS provider could still obtain registration as a provider so long as the provider is subsequently authorised and develops a behaviour support plan.[21] There is limited information provided in the statement of compatibility that specifically addresses how the NDIS provider registration scheme will ensure that the regulated restrictive practices used without authorisation or a behaviour support plan do not amount to torture, cruel, inhuman or degrading treatment or

16 Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia, adopted by the committee at its tenth session,* CRPD/C/AUS/CO1(2013) [35]-[36].

17 Statement of compatibility (SOC) p. 29.

18 SOC, p. 28.

19 SOC, p. 30.

20 SOC, pp. 30-31.

21 See section 12 of the rules.

punishment. The initial analysis stated that further information as to the safeguards to prevent such practices in breach of Australia's obligations occurring in the first instance, rather than requirements imposed after the practice has occurred, would be of assistance in determining human rights compatibility.

1.33 The initial analysis also raised questions relating to circumstances where an NDIS provider engages in a 'single emergency use' of the regulated restrictive practice without authorisation.[22] 'Single emergency use' is not defined in the rules. The explanatory statement indicates that 'single emergency use' refers to a practice 'that has not previously been identified as being required in response to behaviour of that person with a disability previously'.[23] The explanatory statement provides the following example:

> For example, if a person suddenly presents with behaviour that poses a risk of harm to themselves and immediate steps have to be taken to protect them from that harm, the emergency use of a restrictive practice may be required. An example would be where a person receives unexpected news causing them distress and in their distress they are about to run out onto a busy highway and the disability worker has to stand in front of him and physically restrain him by grabbing his wrists to prevent him from running onto the road.[24]

1.34 While the explanatory statement appears to indicate that a 'single emergency use' is restricted to certain circumstances (such as where immediate steps need to be taken to protect a person from harm), those restrictions and safeguards do not appear in the rules. It was not clear from the information provided what safeguards there are in place to prevent the 'single emergency use' occurring in circumstances where that practice may amount to torture, cruel, inhuman or degrading treatment or punishment.

1.35 The committee therefore sought the advice of the minister as to the compatibility of the rules with this right, including:

- safeguards to prevent regulated restrictive practices (including 'first use' of a regulated restrictive practice and 'single emergency use' of a regulated restrictive practice) amounting to torture, cruel, inhuman or degrading treatment or punishment; and
- whether the rules could be amended to include safeguards to prevent regulated restrictive practices (in particular 'first use' regulated restrictive practices and 'single emergency use' regulated restrictive practices)

22 Section 9 of the rules.

23 ES, p. 9.

24 ES, p. 9.

amounting to torture, cruel, inhuman or degrading treatment or punishment.

Compatibility of the measure with multiple other rights relating to the protection of persons with disabilities

1.36 The statement of compatibility also acknowledges that the use of regulated restrictive practices engages the following rights in the Convention on the Rights of Persons with Disabilities:

- the right to equal recognition before the law and to exercise legal capacity;[25]
- the right of persons with disabilities to physical and mental integrity on an equal basis with others;[26]
- the right to liberty and security of the person;[27]
- the right to freedom from exploitation, violence and abuse;[28] and
- the right to freedom of expression and access to information.[29]

1.37 Each of these rights may be subject to permissible limitations provided the limitation addresses a legitimate objective, is effective to achieve (that is, rationally connected to) that objective and is a proportionate means to achieve that objective.

1.38 The objective of the rules is stated to be to oversee behaviour support and 'the reduction and elimination of restrictive practices in the NDIS'.[30] While this is capable of being a legitimate objective for the purposes of international human rights law, the statement of compatibility provides limited information as to the importance of these objectives in the context of the particular measure. This is particularly significant given that the rules regulate the use of restrictive practices, that is, are directed toward oversight of their use rather than explicitly eliminating their use.

1.39 As to proportionality, the statement of compatibility identifies several safeguards, including the minimum requirements for the use of regulated restrictive practices in behaviour support plans, and reporting and monitoring requirements. All of these safeguards are relevant in determining the proportionality of the measure. The requirement that the use of any regulated restrictive practice pursuant to a behaviour support plan be the 'least restrictive', as a matter of last resort and proportionate are particularly relevant. However, it was not clear from the

25 CRPD, Article 12.

26 CRPD, Article 17.

27 CRPD, article 14; ICCPR, article 9; CRC, article 37.

28 CRPD, article 16.

29 CRPD, article 21.

30 ES, p. 1; SOC, p. 32.

information provided who determines whether a measure is the 'least restrictive' and 'proportionate', the criteria that are relevant to making such a determination, and whether there is any oversight of such a determination.

1.40 There are also questions as to proportionality in circumstances where the use of the regulated restrictive practice occurs not in accordance with a behaviour support plan or without authorisation. In that circumstance, it was not clear what safeguards would be in place to ensure that use of the regulated restrictive practice occurs in a manner compatible with the human rights outlined above. This includes what safeguards would be in place to ensure that any use of the restrictive practice (including but not limited to the 'first use' and a 'single emergency use') occurs in the least rights restrictive manner possible. It would appear that there would be other, less rights restrictive, approaches which could be taken by the rules, such as requiring *all* use (including 'first use' and 'single emergency use' practices) to be the subject of authorisation and behaviour support plans.

1.41 The preceding analysis indicates that the use of regulated restrictive practices engages the right to equal recognition before the law and to exercise legal capacity, the right of persons with disabilities to physical and mental integrity on an equal basis with others, the right to liberty and security of the person, the right to freedom from exploitation, violence and abuse, and the right to freedom of expression and access to information.

1.42 The committee therefore sought the advice of the minister as to the compatibility of the use of regulated restricted practices with these rights, including:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective;
- information as to safeguards to ensure that the 'first use' of a regulated restrictive practice and any 'single emergency use' occurs in a manner that is compatible with human rights;
- whether the rules could be amended to include safeguards to ensure regulated restrictive practices (in particular 'first use' regulated restrictive practices and 'single emergency use' regulated restrictive practices) occur in a manner that is compatible with the human rights discussed in the preceding analysis.

Minister's response

1.43 The minister's response firstly emphasises that the rules do not authorise a registered NDIS provider to use a restrictive practice, but rather the rules 'seek to achieve a reduction and elimination of restrictive practices in the NDIS by promoting

behaviour support strategies including positive behaviour support and imposing significant conditions around the use of restrictive practices'. The minister's response further reiterates the parts of the rules that set out the requirements for the regulation of restrictive practices through behaviour support plans in section 21 of the rules, including the requirement that restrictive practices must:

- be part of a behaviour support plan developed by a behaviour support practitioner;
- be the least restrictive response possible in the circumstances;
- reduce the risk of harm to the person or others;
- be used for the shortest possible time to ensure the safety of the person or others; and
- if the State or Territory requires authorisation for the use of that practice, such authorisation must be obtained.

1.44 The minister's response also emphasises the requirements not to use a restrictive practice where it has been prohibited in the state or territory (section 8) and the requirement that a restrictive practice be authorised in accordance with any relevant state or territory process in relation to the use of that practice (section 9). As noted in the initial analysis, these are important safeguards.

1.45 In relation to the regulation of a 'single emergency use' of a restricted practice, the minister's response provides the following information:

> In addition, a 'single emergency use' of a regulated restrictive practice that has not been authorised in accordance with a State or Territory process in relation to the use of that practice, constitutes a reportable incident for the purposes of the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018* (section 16). This reporting requirement ensures the NDIS Commission has visibility of the 'first use' and 'single emergency use' of a regulated restrictive practice. Such reports will be provided to the NDIS Quality and Safeguards Commission's behaviour support team for consideration and follow up as required.
>
> The Rules aim to achieve the reduction and elimination of restrictive practices in the NDIS, consistent with the Convention on the Rights of Persons with Disabilities (UNCRPD) and Australian Governments' commitments under the National Framework for the Reduction and Elimination of Restrictive Practices (2014).
>
> The Rules and related instruments seek to achieve this by imposing reasonable, necessary and proportionate conditions of registration on NDIS providers, including reporting requirements in relation to emergency use of restrictive practices, which will give the NDIS Commission visibility of progress made in relation to the reduction and elimination of restrictive practices in the NDIS.

1.46 The further information from the minister that a 'single emergency use' is a reportable incident within the meaning of the National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018 indicates that there are some safeguards in place to regulate and monitor single emergency use of restrictive practices.

1.47 The minister's response otherwise does not address the committee's inquiries in relation to the compatibility of the measure with Australia's obligation not to subject persons to torture, cruel, inhuman or degrading treatment or punishment. As noted above, this obligation can never be subject to limitations and requires appropriate safeguards to ensure that practices are compatible with this obligation. Further, the minister's response otherwise does not address the committee's inquiries in relation to the compatibility of the measure with the rights relating to the protection of persons with disabilities, namely the right to equal recognition before the law and to exercise legal capacity, the right of persons with disabilities to physical and mental integrity on an equal basis with others, the right to liberty and security of the person, the right to freedom from exploitation, violence and abuse, and the right to freedom of expression and access to information.

1.48 In particular, the minister's response does not provide information in relation to the safeguards in place to ensure that the 'single emergency use' referred to in section 9(2)(a) does not occur in circumstances where that use may amount to torture, cruel, inhuman or degrading treatment or punishment. While the minister's response refers to reporting requirements in relation to the 'single emergency use' after it occurs, there would seem to be other safeguards which could be put in place to protect the rights of persons with disabilities before the 'single emergency use' occurs. For example, there could be a requirement that any 'single emergency use' be subject to some of the same safeguards that are applicable to the use of restrictive practices in accordance with behaviour support plans (for example, that the single emergency use be the least restrictive response possible in the circumstances, reduce the risk of harm to the person or others, and be used for the shortest possible time to ensure the safety of the person or others).

1.49 The minister's response also does not address the concerns raised in the initial analysis in relation to the 'first use' of a restrictive practice. As noted in the initial analysis, section 11 of the rules provides that where a restrictive practice is used (the 'first use') in accordance with an authorisation process but not in accordance with a behaviour support plan, and the use of that practice is likely to continue, registration of the NDIS provider is subject to the condition that (relevantly) a behaviour support plan be developed.[31] While this would mean that ongoing use would be subject to the requirements contained in a behaviour support

31 See also section 12, which deals with circumstances where the 'first use' is not in accordance with a behaviour support plan or authorisation; or section 13 where the first use is not in accordance with a behaviour support plan but where authorisation is not required.

plan (for example, the requirement that the practice must be the least restrictive response possible in the circumstances), it remains unclear what restrictions are placed on, and what safeguards apply to, the 'first use'. This raises the same concerns discussed above in relation to 'single emergency use' as to compatibility with Australia's obligation not to subject persons to torture, cruel, inhuman or degrading treatment or punishment, and multiple rights relating to the protection of persons with disabilities. In the absence of further information it is difficult to complete the committee's analysis as to the human rights compatibility of the measures.

Committee response

1.50 The committee thanks the minister for his response.

1.51 The committee seeks the further advice of the minister in relation to the compatibility of the measures with Australia's obligation not to subject persons to torture, cruel, inhuman or degrading treatment or punishment. In particular, the committee seeks the advice of the minister as to the safeguards to prevent the 'first use' of a regulated restrictive practice in sections 11, 12 and 13 of the rules and the 'single emergency use' in section 9(2) of the rules amounting to torture, cruel, inhuman or degrading treatment or punishment.

1.52 The committee seeks the further advice of the minister as to the compatibility of the measures with the right to equal recognition before the law and to exercise legal capacity, the right of persons with disabilities to physical and mental integrity on an equal basis with others, the right to liberty and security of the person, the right to freedom from exploitation, violence and abuse, and the right to freedom of expression and access to information. In particular, the committee seeks the minister's further advice as to:

- **whether the measures are aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measures are effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation on human rights is a reasonable and proportionate measure to achieve the stated objective;**
- **information as to safeguards to ensure that the 'first use' of a regulated restrictive practice in sections 11, 12 and 13 of the rules and the 'single emergency use' in section 9(2) of the rules occurs in a manner that is compatible with human rights;**
- **whether the rules could be amended to include safeguards to ensure regulated restrictive practices (in particular 'first use' of a regulated restrictive practice in sections 11, 12 and 13 of the rules and the 'single emergency use' in section 9(2) of the rules) occur in a manner that is compatible with the human rights discussed in the preceding analysis.**

Record keeping requirements

1.53 The rules also prescribe record keeping requirements in relation to the use of regulated restrictive practices, including a requirement to record the details of the names and contact details of the persons involved in the use of the regulated restrictive practice and of any witnesses.

Compatibility of the measure with the right to privacy

1.54 Article 22 of the CRPD guarantees that no person with disabilities shall be subjected to arbitrary or unlawful interference with their privacy.[32] The right to privacy includes respect for private and confidential information, particularly the storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.

1.55 As the record keeping requirements relate to the storing and use of information (including personal information) the measures engage and limit the right to privacy. The right to privacy is not addressed in the statement of compatibility.

1.56 The statement of compatibility explains that the reporting and record keeping requirements 'allow appropriate action to be taken in response to any issues raised and to inform future policy development, education and guidance to providers, participants and their support networks'.[33] The record keeping requirements appear to be rationally connected to this objective.

1.57 As to proportionality, limitations on the right to privacy must be accompanied by adequate safeguards. There is limited information in the explanatory statement or statement of compatibility as to the safeguards that apply to the information stored pursuant to the record keeping requirements, such as requirements to keep records secure and confidential, or penalties for unauthorised disclosure. The initial analysis stated that further information as to these matters would assist in determining whether the limitation on the right to privacy is proportionate.

1.58 The committee therefore sought the advice of the minister as to the proportionality of the limitation on the right to privacy. In particular, the committee sought information as to the safeguards that would apply to protect the right to privacy.

Minister's response

1.59 In relation to the proportionality of the limitation on the right to privacy, the minister's response states:

32 See also article 17 of the International Covenant on Civil and Political Rights.

33 SOC, p. 28.

> An NDIS provider is obliged to adhere to privacy laws and other applicable laws which protect the privacy and confidentiality of information. In relation to additional safeguards, it is a requirement under paragraph 6(b) of the *National Disability Insurance Scheme (Code of Conduct) Rules 2018* that an NDIS provider respect […] the privacy of people with disability. A contravention of the NDIS Code of Conduct can attract a penalty of up to 250 penalty units. An NDIS provider is also obliged to adhere to privacy laws and other applicable laws which protect the privacy and confidentiality of information.
>
> Once the information is provided to the Commission, it becomes protected Commission information and is subject to the protections outlined in Division 2, Part 2, and Chapter 4 of the Act.

1.60 The information provided by the minister indicates that the limitations on the right to privacy that arise in relation to the record keeping requirements are likely to be compatible with the right to privacy.

Committee response

1.61 The committee thanks the minister for his response and has concluded its examination of this issue.

1.62 Based on the further information provided by the minister, the committee considers that the record keeping requirements are likely to be compatible with the right to privacy.

Advice only

1.63 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Plebiscite (Future Migration Level) Bill 2018

Purpose	Seeks to set up a framework for a compulsory national plebiscite on rates of immigration to Australia
Legislation proponent	Senator Hanson
Introduced	Senate, 15 August 2018
Rights	Freedom of expression; equality and non-discrimination (see **Appendix 2**)
Status	Advice only

Vote in relation to immigration levels and obligations on broadcasters

1.64 The bill would establish a compulsory, national plebiscite at the same time as the next election that would ask Australians, in view of the level of population increase from migration in the ten years to 2016: 'Do you think the current rate of immigration to Australia is too high?'[1]

1.65 During the election period, the bill would impose a requirement on broadcasters, who broadcast a 'plebiscite matter'[2] that is not in favour, or is in favour, of the plebiscite proposal, to give a reasonable opportunity to a representative of an organisation with the opposite views to broadcast 'plebiscite matter' during the election period.[3]

Compatibility of the measure with the right to freedom of expression and the right to equality and non-discrimination

1.66 The committee has previously reported on the human rights implications of national plebiscites and this current bill raises some similar issues.[4] The right to

1 See explanatory memorandum (EM) p. 2.

2 Proposed section 4 defines 'plebiscite matter' as: (a) matter commenting on the level of migration to Australia, the plebiscite or the plebiscite proposal; (b) matter stating or indicating the plebiscite proposal; (c) matter soliciting votes in favour or not in favour of the plebiscite proposal; (d) matter referring to a meeting held or to be held in connection with the level of migration to Australia, the plebiscite or the plebiscite proposal.

3 See proposed section 30.

4 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 25-29; *Report of 8 of 2016* (9 November 2016) pp. 66-71

freedom of expression requires Australia to ensure that broadcasting services operate in an independent manner and to guarantee their editorial freedom.[5] While enabling both sides of the debate relating to a national plebiscite to air their views may pursue the legitimate objective of promoting freedom of expression and the right to participate in public affairs, it is nonetheless a limitation on editorial freedom and must be proportionate to the legitimate aim sought to be achieved. Accordingly, the bill engages, and may limit, the right to freedom of expression.

1.67 Additionally, the bill may engage the right to equality and non-discrimination. This is because requiring broadcasters to give a reasonable opportunity to the representative of an organisation in favour of the plebiscite proposal to discuss the level of migration to Australia generally could lead to vilification of persons on the basis of their race or national or social origin.

1.68 The statement of compatibility does not acknowledge that any rights are engaged by the bill.[6]

Committee comment

1.69 The committee draws the human rights implications of the bill to the attention of the legislation proponent and the parliament. If the bill proceeds to further stages of debate, the committee may request information from the legislation proponent with respect to the compatibility of the bill with human rights.

5 See Human Rights Committee, *General Comment No. 34, Article 19: Freedom of opinion and expression*, [16].

6 EM, statement of compatibility, p. 31.

Bills not raising human rights concerns

1.70 Of the bills introduced into the Parliament between 20 and 23 August 2018, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Aged Care Amendment (Staffing Ratio Disclosure) Bill 2018;
- Australian Multicultural Bill 2018;
- Customs Amendment (Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation) Bill 2018;
- Customs Tariff Amendment (Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation) Bill 2018;
- Family Law Amendment (Review of Government Support for Single Parents) Bill 2018;
- Federal Circuit and Family Court of Australia Bill 2018;
- Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018;
- Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018;
- My Health Records Amendment (Strengthening Privacy) Bill 2018;
- Restoring Territory Rights Bill 2018;
- Social Security Commission Bill 2018;
- Treasury Laws Amendment (Improving the Energy Efficiency of Rental Properties) Bill 2018; and
- Veterans' Entitlements Amendment Bill 2018.

Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at **Appendix 3**.

National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018 [F2018L00633]

National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018 [F2018L00634]

Purpose	[F2018L00633]: prescribes the requirements for NDIS providers to implement and maintain incident management systems to record reportable incidents, and for inquiries by the NDIS Quality and Safeguards Commissioner in relation to reportable incidents. [F2018L00634]: prescribes the requirements for the resolution of complaints relating to NDIS providers, complaints to and inquiries by the NDIS Quality and Safeguards Commissioner
Portfolio	Social Services
Authorising legislation	*National Disability Insurance Scheme Act 2013*
Last day to disallow	15 sitting days after tabling (tabled Senate 18 June 2018)
Rights	Privacy; fair hearing; rights of persons with disabilities (see **Appendix 2**)
Previous report	7 of 2018
Status	Concluded examination

Background

2.3 The committee first reported on the rules in its *Report 7 of 2018*, and requested a response from the Minister for Social Services by 29 August 2018.[1]

2.4 The minister's response to the committee's inquiries was received on 28 August 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Disclosure of information relating to complaints

2.5 The National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018 (the Complaints Management Rules) set out the rules governing the resolution of complaints about NDIS providers that have been made to the Commissioner.

2.6 Section 25 of the Complaints Management Rules provides that the Commissioner may give information, including about any action taken in relation to an issue raised in a complaint, to any person or body that the Commissioner considers has a sufficient interest in the matter.

Compatibility of the measure with the right to privacy

2.7 Article 22 of the Convention on the Rights of Persons with Disabilities (CRPD) guarantees that no person with disabilities shall be subjected to arbitrary or unlawful interference with their privacy.[2] The right to privacy includes respect for private and confidential information, particularly the storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.

2.8 The statement of compatibility addresses the right to privacy in relation to a different aspect of the Complaints Management Rules,[3] but does not specifically address whether section 25 engages and limits the right to privacy. However, as stated in the initial human rights analysis, it would appear that the provision of 'information' could include personal information, including information about complainants or persons the subject of a complaint. If this is the case, then the provision would engage and limit the right to privacy.

2.9 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 and proportionate to achieving that objective.

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1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018* (14 August 2018) pp. 23-31.

2 See also Article 17 of the International Covenant on Civil and Political Rights.

3 See Statement of compatibility (SOC) to the Complaints Management Rules, pp. 33-34.

2.10 The statement of compatibility describes the overall objective of the Complaints Management Rules as being to 'ensure providers are responsive to the needs of people with disability and focussed on the timely resolution of issues and that, when things go wrong, something is done about it'.[4] While this is capable of being a legitimate objective for the purposes of international human rights law, no information is provided as to the importance of this objective in the context of the particular measure. The initial analysis stated that further information as to the purpose of the particular measure (that is, the purpose of allowing the Commissioner to give information to 'any person or body that the Commissioner considers has a sufficient interest in the matter') would assist in determining whether the measure pursues a legitimate objective.

2.11 As to proportionality, the statement of compatibility explains that any personal information collected by the Commissioner in the performance of their functions is 'protected Commission information' under the *National Disability Insurance Scheme Act 2013* (the NDIS Act). It states that therefore:

> [protected Commission information] will be handled in accordance with the limitations placed on the use and disclosure of protected Commission information under the Act, the *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018,* the *Privacy Act 1988,* and any other applicable Commonwealth, State or Territory legislation. Information will only be dealt with where reasonably necessary for the fulfilment of the Commissioner's lawful and legitimate functions.[5]

2.12 However, this general description of the safeguards does not assist in determining whether the measure is a proportionate limitation on the right to privacy. In order to be proportionate, limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure, and be accompanied by adequate safeguards to protect the right to privacy. Further information as to the specific safeguards in the NDIS Act, the National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018 and the *Privacy Act 1988* that would protect personal and confidential information which may disclosed pursuant to section 25 of the Complaints Management Rules would assist in determining whether the measure is proportionate.

2.13 It was also not clear from the information provided what is meant by a person having a 'sufficient interest' in the information. The explanatory statement states that a person may have 'sufficient interest' in the matter 'if the Commissioner is satisfied that, in relation to the purpose of disclosure, the proposed recipient has a

4 SOC, p. 32.

5 SOC, p. 34.

genuine and legitimate interest in the information'.[6] The explanatory statement further states:

> Other persons or bodies that may have a sufficient interest in the matter may include:
>
> - with the consent of the person with disability affected by an issue raised in a complaint, independent advocates or representatives;
> - with the consent of a person with disability affected by an issue raised in a complaint, their family members, carers or other significant people.
>
> In providing information, the Commissioner must comply with his or her obligations under the *Privacy Act 1988,* and should consider whether providing the information is appropriate or necessary for the proper handling of the complaint.[7]

2.14 However, beyond the reference to these safeguards in the explanatory statement, it was not clear from the information provided whether these safeguards and limitations on the meaning of 'sufficient interest' (such as the requirement to provide information with the consent of the person with disability, or the requirement that the Commissioner should consider whether providing information is appropriate or necessary for the proper handling of the complaint) are required as matters of law, or whether they are matters of discretion for the Commissioner.

2.15 The committee therefore sought the advice of the minister as to:

- whether the measure is aimed at pursuing a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including information as to the specific safeguards in the NDIS Act, the National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018 and the *Privacy Act 1988* that protect personal and confidential information when the Commissioner exercises their power under section 25 of the rules).

Minister's response

2.16 The minister's response states that the purpose of section 25 is, in effect, to facilitate the closure of a complaint. The response emphasises that section 25 is situated within the subdivision of the Complaints Management Rules that relate to the outcome of the resolution process. The response repeats the information

6 Explanatory Statement (ES) to the Complaints Management Rules, p. 25.

7 ES to the Complaints Management Rules, p. 25.

provided in the explanatory statement as to the requirement for the commissioner to comply with their obligations under the Privacy Act and also reiterates the information about examples of the types of persons who may have a sufficient interest in the matter, including:

- persons or bodies who have the consent of a person with disability affected by an issue raised in a complaint, independent advocates or representatives;
- persons or bodies who have the consent of a person with disability affected by an issue raised in a complaint, their family members, carers or other significant people.

2.17 While not identified in the minister's response, the requirement that the person's consent be sought before disclosing information to the persons identified in the minister's response is contained in section 67E(1)(b)(ii) of the NDIS Act, which allows the Commissioner to disclose information to a person who has the express or implied consent of the person to whom the information relates.

2.18 The minister's response does not respond to the committee's inquiries as to whether the measure pursues a legitimate objective or is rationally connected to the objective. Nevertheless, the context of the measure means that sharing information about complaints to those with a sufficient interest may be capable of pursuing a legitimate objective and be rationally connected to that objective. It would have been useful if this had been explicitly addressed by the minister.

2.19 As to proportionality, the minister explains that the commissioner is required under section 19 of the Complaints Rules to ensure that a request by a complainant for confidentiality is complied with unless the Commissioner considers that doing so will, or is likely to, place the safety, health or well-being of the complainant, a person with disability affected by an issue raised in a complaint or any other person. The response also explains that, pursuant to section 19 of the complaints rules, before deciding not to keep information confidential, the Commissioner must take all reasonable steps to notify the complainant. This indicates that, where a complainant requests confidentiality, that request must be respected subject to the exceptions identified in the rules.

2.20 However, the information provided by the minister does not address the committee's inquiries as to the specific safeguards in the NDIS Act and the National Disability Insurance Scheme (Protection and Disclosure of Information - Commissioner) Rules 2018 (Commissioner Protection and Disclosure Rules) that protect personal and confidential information which may be disclosed pursuant to section 25. Instead, the minister's response repeats the information in the explanatory statement that in general terms section 25 is subject to the protections in the NDIS Act and the Commissioner Protection and Disclosure Rules.

2.21 In the absence of specific guidance from the minister as to what safeguards are provided in the NDIS Act, it appears that the minister may be referring to section

67E(1)(b) of the NDIS Act. This section relevantly provides when the commissioner may disclose information:

> (i) to the Secretary of a Department of State of the Commonwealth, or to the head of an authority of the Commonwealth, for the purposes of that Department or authority; or
>
> (ii) to a person who has the express or implied consent of the person to whom the information relates to collect it; or
>
> (iii) to a Department of State of a State or Territory, or to an authority of a State or Territory, that has responsibility for matters relating to people with disability, including the provision of supports or services to people with disability; or
>
> (iv) to the chief executive (however described) of a Department of State of a State or Territory, or to the head of an authority of a State or Territory, for the purposes of that Department or authority.

2.22 The Commissioner Protection and Disclosure Rules outline further safeguards when disclosing information under section 67E(1)(b)(i), (iii) and (iv).[8] In broad terms, those rules require that the Commissioner, so far as reasonably practicable, de-identify any personal information,[9] consult with the affected individual,[10] notify the recipient that they are receiving NDIS information (including limitations on how they can use that information),[11] and maintain records of that disclosure. The NDIS Act also includes a number of offence provisions for unauthorised disclosure of protected commission information.[12]

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8 These safeguards do not apply where the person has given express or implied consent to the disclosure (that is, they do not apply to information disclosed pursuant to section 67E(1)(b)(ii): see section 10(1), 11(1), 12(1) and 13(1) of the Commissioner Protection and Disclosure Rules).

9 Section 10(1) of the Commissioner Protection and Disclosure Rules. This is subject to the exception that de-identification is not required if the Commissioner is satisfied that the disclosure is necessary to prevent or lessen a serious threat to an individual's life, health or safety; compliance would result in unreasonable delay or compliance would frustrate the purpose of disclosure: section 10(3). Personal information is also not required to be de-identified where the affected individual has consented to the proposed disclosure: section 10(2).

10 Section 11 of the Commissioner Protection and Disclosure Rules. 'Consultation' includes notifying any affected individual about disclosure, seeking the consent of the affected individual to the proposed disclosure and providing a reasonable opportunity for the affected individual to comment on the proposed disclosure: section 11(1). There are several exceptions to the consultation requirements, including those similar to the requirements in section 10(3). See section 11(5)-(7).

11 Section 12 of the Commissioner Protection and Disclosure Rules.

12 See sections 67B-67D of the NDIS Act.

2.23 To the extent that these safeguards in the NDIS Act and Commissioner Protection and Disclosure Rules apply, there would appear to be sufficient safeguards in place to ensure that the measure is compatible with the right to privacy. However, it would have been useful if more specific information had been provided in the statement of compatibility and the minister's response to assist the committee with its analysis.

Committee response

2.24 The committee thanks the minister for his response and has concluded its examination of the issue.

2.25 The preceding analysis indicates the measure may be compatible with the right to privacy.

2.26 The committee draws the minister's attention to its *Guidance Note 1* which sets out the committee's expectations in relation to drafting statements of compatibility.

Record keeping and incident and complaint management requirements

2.27 Section 10(2) of the Complaints Management Rules states that appropriate records of complaints received by the NDIS provider must be kept and include information about complaints, any action taken to resolve complaints, and the outcome of any action taken. Those records must be kept for 7 years from the day the record is made.[13] The complaints management system must also provide for the collection of statistical and other information relating to complaints made to the provider to review issues raised in complaints, identify and address systemic issues raised through the complaints management and resolution process, and report information relating to complaints to the Commissioner if requested to do so.[14]

2.28 Similarly, section 12 of the National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018 (Reportable Incidents Rules) sets out the documentation, record keeping and statistics requirements in relation to the incident management systems. An NDIS provider must provide specified information in the record of each incident that occurs, including a description of the incident, the names and contact details of the persons involved in the incident, the names and contact details of any witnesses to the incident, the name and contact details of the person making the record of the incident, and the details and outcomes of any investigations into the incident.[15] These records must also be kept for 7 years from

13 Section 10(3) of the Complaints Management Rules.

14 Section 10(4) of the Complaints Management Rules.

15 See section 12(2) and (3) of the Reportable Incidents Rules.

the day the record is made and the incident management system must also provide for the collection of statistical and other information relating to incidents.[16]

Compatibility of the measure with the right to privacy

2.29 As the provisions in the Complaints Management Rules and Reportable Incidents Rules relate to the storing, use and sharing of information (including personal information), the provisions engage and limit the right to privacy.

2.30 The statement of compatibility to the Complaints Management Rules discusses the right to privacy in general terms (discussed above), but does not specifically address the record keeping requirements in those rules. The statement of compatibility to the Reportable Incidents Rules does not acknowledge that the rules may engage and limit the right to privacy.

2.31 The explanatory statement to the Reportable Incidents Rules states that it is 'crucial that the incident management system is documented so that compliance with the system can be monitored and enforced, including by quality auditors and the Commissioner'.[17] Similarly, the explanatory statement to the Complaints Management Rules states that the documentation and record keeping requirement 'is fundamental to the proper functioning of a complaints management and resolution system as it ensures that persons with disability and their families and carers are aware of their rights and can advocate for their needs and safety where appropriate'.[18] The explanatory statement to each of the instruments explains that the collection of statistics and other information is for the purpose of identifying any systemic issues that may exist.[19] The initial analysis stated that each of these objectives appear to be legitimate objectives for the purposes of international human rights law, and the measures appear to be rationally connected to this objective.

2.32 As to proportionality, as noted above, limitations on the right to privacy must be accompanied by adequate safeguards. There is limited information in the explanatory statement or statement of compatibility as to the safeguards that apply to the information stored pursuant to the record keeping requirements, such as requirements for keeping records secure and confidential, or penalties for unauthorised disclosure.

2.33 Further, in relation to the collection of statistical and 'other information', the initial analysis noted that this appears to be very broad and, according to the explanatory statement to the Reportable Incidents Rules, would allow disclosure of

16 Section 12(4) and (5) of the Reportable Incidents Rules.

17 SOC to the Reportable Incident Rules, p. 10.

18 SOC to the Complaints Management Rules, p. 10.

19 SOC to the Complaints Management Rules, p. 11; SOC to the Reportable Incidents Rules, p. 12.

'who is involved in incidents (for example, whether particular workers and/or people with disability are involved in multiple incidents)'.[20] No information is provided in the explanatory statements or statements of compatibility as to the safeguards that would apply to protect the right to privacy of those persons whose information is disclosed pursuant to the statistical collection requirements.

2.34 The committee therefore sought the advice of the minister as to the proportionality of the limitation on the right to privacy. In particular, the committee sought information as to the safeguards that would apply to protect the right to privacy.

Minister's response

2.35 In response to the committee's inquiries, the minister's response reiterates the objectives of the record keeping requirements and explains that section 10(2) of the Complaints Management Rules and section 12 of the Reportable Incidents Rules are also designed to ensure that a registered NDIS provider complies with its obligation in relation to complaints and incident management and is accountable to people with disability in working to improve the quality and safety of services as a result of complaints and incidents. As noted in the initial analysis, these are likely to be legitimate objectives for the purposes of international human rights law.

2.36 In relation to safeguards, the minister's response provides the following information:

> In relation to safeguards, it is a requirement under paragraph 6(b) of the *National Disability Insurance Scheme (Code of Conduct) Rules 2018* that an NDIS provider respect of the privacy of people with disability. A contravention of the NDIS Code of Conduct can attract a penalty of up to 250 penalty units. An NDIS provider is also obliged to adhere to privacy laws and other applicable laws which protect the privacy and confidentiality of information.
>
> Any personal information which the Commissioner collects as part of the performance of his or her functions is 'protected Commission information' under the Act. As such, it will be handled in accordance with the limitations placed on the use and disclosure of protected Commission information under the Act, the *National Disability Insurance Scheme (Protection and Disclosure of Information - Commissioner) Rules 2018*, the *Privacy Act 1988*, and any other applicable Commonwealth, State or Territory legislation. Information will only be dealt with where reasonably necessary for the fulfilment of the Commissioner's lawful and legitimate functions.

2.37 This information, and in particular the information as to the penalties for disclosure in breach of the NDIS Code of Conduct, assists in determining the

20 ES to the Reportable Incidents Rules, p. 12.

proportionality of the measure. Having regard to the safeguards in the NDIS Act and the Commissioner Protection and Disclosure Rules discussed above as to the use and disclosure of protected commission information, on balance the measure is likely to be compatible with the right to privacy.

Committee response

2.38 The committee thanks the minister for his response and has concluded its examination of this issue.

2.39 The preceding analysis indicates the measure is likely to be compatible with the right to privacy.

Inquiry powers and procedural fairness requirements relating to complaints and incident management

2.40 Section 9 of the Complaints Management Rules provides that the complaints management and resolution system of a registered NDIS provider must ensure that people are afforded procedural fairness when a complaint is dealt with by a provider. Similarly, section 11 of the Reportable Incidents Rules provides that incident management systems of registered NDIS providers must require that people are afforded procedural fairness when an incident is dealt with by a provider. The Commissioner must have due regard to the rules of procedural fairness when taking action in relation to a reportable incident,[21] and must give due regard to procedural fairness when considering any complaints.[22] For each of these provisions, the Commissioner may make guidelines relating to procedural fairness.[23]

2.41 The Complaints Management Rules also give the Commissioner powers to authorise inquiries in relation to issues connected with complaints, a series of complaints or about support or services provided by NDIS providers.[24] The Reportable Incidents Rules allow for the Commissioner to authorise inquiries in relation to reportable incidents.[25]

Compatibility of the measure with the right to a fair hearing

2.42 Article 14(1) of the ICCPR requires that in the determination of a person's rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

21 Section 28 of the Reportable Incident Rules.

22 Section 30 of the Complaints Management Rules.

23 Section 9(2) of the Complaints Management Rules; Section 11(2) of the Reportable Incidents Rules; see also the note to section 28 of the Reportable Incidents Rules and section 30 of the Complaints Management Rules.

24 Section 29 of the Complaints Management Rules.

25 Section 27 of the Reportable Incidents Rules; pursuant to section 73Z of the NDIS Act.

Australia also has obligations to ensure effective access to justice for persons with disabilities on an equal basis with others.[26]

2.43 The concept of 'suit at law' encompasses judicial procedures aimed at determining rights and obligations, equivalent notions in the area of administrative law and also extends to other procedures assessed on a case-by-case basis in light of the nature of the right in question.[27]

2.44 It was not clear from the information provided the extent to which the processes in relation to incident and complaints management by NDIS providers and the Commissioner would involve the determination of rights and obligations of persons subject to the complaints (such as persons employed or engaged by NDIS providers) such as to constitute a 'suit at law'. However, it was noted that some of the outcomes of resolving incidents by NDIS providers appear to include corrective action,[28] the Commissioner may refer incidents to authorities with responsibility in relation to incidents (such as child protection authorities),[29] or 'take any other action that the Commissioner considers reasonable in the circumstances'.[30] In relation to complaints management, the Commissioner must undertake a resolution process in relation to complaints which appears to include the ability to make adverse findings against persons employed or engaged by NDIS providers.[31] Similarly in relation to inquiries the Commissioner may 'prepare and publish a report setting out his or her findings in relation to the inquiry'.[32]

2.45 To the extent that these processes may involve the determination of rights and obligations, fair hearing rights may apply. This matter was not addressed in the statement of compatibility. The instruments and the explanatory statement refer to the development of the National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018. A copy of these guidelines would assist in determining whether the procedural fairness requirements afforded are consistent with fair hearing rights.

2.46 Another relevant factor in determining compatibility with fair hearing rights is the availability of independent review of decisions. The explanatory statement states that decisions of the Commissioner may be the subject of complaint to the

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26 Article 13 of the CRPD.

27 See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [16].

28 Section 10(1)(g) of the Reportable Incidents Rules.

29 Section 26(1)(a) of the Reportable Incidents Rules.

30 Section 26(1)(f) of the Reportable Incidents Rules.

31 Section 16(3) and (5) of the Complaints Management Rules.

32 Section 24(6) of the Reportable Incidents Rules; section 29 of the Complaints Management Rules.

Commonwealth Ombudsman.[33] This would be a relevant safeguard. However, further information, including information as to any external review of decisions of the Commissioner (such as merits review), would assist in determining whether these review options are sufficient for the purposes of the right to a fair hearing.

2.47 The committee therefore sought the advice of the minister as to the compatibility of the measures with this right, including:

- a copy of the National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018 (or if a copy is not available, a detailed overview of the guidelines having regard to the matters discussed above including any relevant safeguards); and
- safeguards to protect fair hearing rights (including information as to any external review of decisions).

Compatibility of the measure with the right to privacy

2.48 The ability of the Commissioner to prepare and publish reports setting out their findings in relation to an inquiry may also engage and limit the right to privacy, insofar as those reports may contain personal and confidential information. The privacy implications of the inquiry process were not specifically addressed in the statements of compatibility to either the Reportable Incidents Rules or the Complaints Management Rules.

2.49 The explanatory statements to the Reportable Incidents Rules and the Complaints Management Rules explain that the inquiry function is 'intended to determine or define potential matters including any systemic issues which may be connected with support services provided under the NDIS'. This is likely to be a legitimate objective for the purposes of international human rights law, and the ability to publish reports on such matters appears to be rationally connected to this objective.

2.50 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to privacy and, in particular, information as to the safeguards in place to protect personal and confidential information.

Minister's response

2.51 The minister's response attaches a final consultation draft of the *National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018.* These guidelines outline detailed procedural fairness requirements that apply, and assist in determining the proportionality of the limitation on human rights. The response explains that:

> These Guidelines have been developed in close consultation with stakeholders including representatives of workers. Following feedback

33 SOC to the Complaints Management Rules, p. 27.

> from stakeholders, they have been drafted to apply principally to the management of complaints by NDIS providers and the Commission. In the context of responding to incidents, feedback indicated that it was not appropriate or necessary to apply specific guidelines outside of the existing common law requirements for procedural fairness. Further guidance will be developed to support the implementation of the Guidelines which will be subject to regular review.

2.52 As to the compatibility of the measure with fair hearing rights, the minister's response provides a detailed explanation of the extent to which the provisions of the Complaints Management Rules and Incident Management Rules may involve the determination of rights and obligations such as to constitute a 'suit at law' within the meaning of Article 14 of the ICCPR, by reference to the provisions discussed in the committee's analysis above at [2.31]:

> a) paragraph 10(1)(g) of the Incident Management Rules — this is part of the incident management system to be established by a registered NDIS provider and the example provided in the Explanatory Statement is: if system failure or worker actions contributed to an incident, the incident management system should set out a process for addressing those issues. In this context general employment law and associated review rights as well as ordinary principles of procedural fairness would apply to any action taken by a provider in respect of conduct by a worker which was found to have contributed to an incident.
>
> b) paragraph 26(1)(a) of the Incident Management Rules - the referral of matters to other regulatory bodies including the police or child protection authorities would not involve a determination of rights and would be subject to the protections afforded to personal information under the Act and the *National Disability Insurance Scheme (Protection and Disclosure of Information - Commissioner) Rules 2018*.
>
> c) paragraph 26(1)(f) of the Incident Management Rules - this may include a decision to refer the matter to an authorised officer for the purposes of determining whether to conduct an investigation under the Act or to take other compliance or enforcement action under the Act in respect of which rights of review are available (Part 6 of the [NDIS] Act).
>
> d) subsections 16(3) and (5) of the Complaints Management Rules - in the event that the resolution of a complaint included making adverse findings against a person, the process would be subject to that outlined in the attached Procedural Fairness Guidelines. Any compliance or enforcement action taken by the Commission would be subject to the review rights outlined in Part 6 of the [NDIS] Act.
>
> e) in respect of any inquiries conducted by the Commissioner under the Complaints or Incident rules, the Commissioner must comply with procedural fairness and the protections and limitations on the use of personal information outlined in the Act and the *National Disability Insurance Scheme (Protection and Disclosure of Information -*

> *Commissioner) Rules 2018*. The Commissioner's inquiry power is not intended to determine the rights or interests of parties to a complaint or incident. The Commissioner has other investigation powers under the Act that could be used for that purpose.
>
> As stated above, the Commissioner's inquiry power is not intended to determine the rights or interests of parties to a complaint or incident. The Commissioner has other investigation powers under the Act that could be used for that purpose.

2.53 Based on this information, to the extent that some of the provisions may involve the determination of rights and obligations, the measures are likely to be compatible with fair hearing rights.

2.54 In addition to the information discussed above, the minister's response also provides the following information in relation to the compatibility of the measure with the right to privacy.

> In the course of conducting enquiries, the protections and limitations on the use of personal information are outlined in the Act and the *National Disability Insurance Scheme (Protection and Disclosure of Information - Commissioner) Rules 2018*.

2.55 The provisions referred to in the minister's response appear to be a reference to the provisions of the NDIS Act and the Commissioner Protection and Disclosure rules discussed above in relation to the commissioner's disclosure power. On balance and in light of this information the measures also appear to be compatible with the right to privacy.

Committee response

2.56 The committee thanks the minister for his response and has concluded its examination of this issue.

2.57 Based on the information provided, the measures are likely to be compatible with the right to a fair hearing and the right to privacy.

National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018 [F2018L00635]

Purpose	Provides for the disclosure of information in certain circumstances by the NDIS Quality and Safeguards Commissioner
Portfolio	Social Services
Authorising legislation	*National Disability Insurance Scheme Act 2013*
Last day to disallow	15 sitting days after tabling (tabled Senate 18 June 2018)
Right	Privacy (see **Appendix 2**)
Previous report	7 of 2018
Status	Concluded examination

Background

2.58 The committee first reported on the National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018 (Disclosure Rules) in its *Report 7 of 2018*, and requested a response from the Minister for Social Services by 29 August 2018.[1]

2.59 The minister's response to the committee's inquiries was received on 28 August 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

2.60 The National Disability Insurance Scheme (NDIS) Quality and Safeguards Commission and Commissioner (commissioner) were established by the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (the NDIS Amendment Act). The committee considered the human rights compatibility of the NDIS Amendment Act in *Report 7 of 2017.*[2] In that report, the committee noted that there were questions as to the compatibility of that Act with the right to privacy in light of the broad disclosure power of the commissioner in section 67E(1) of the *National Disability Insurance Scheme Act 2013* (NDIS Act).

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018* (14 August 2018) pp. 32-38.

2 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) pp. 27-30.

2.61 The statement of compatibility for the NDIS Amendment Act explained that the proposed information gathering and disclosure powers were proportionate to achieving a legitimate objective because, amongst other factors, the commissioner would first need to satisfy the relevant NDIS rules,[3] which would 'enumerate specific bodies and purposes' for which the commissioner could disclose information in the public interest and 'include limitations on the further use and disclosure of such information'.[4] The committee noted that without a copy of these rules it was unclear whether the rules would sufficiently constrain the exercise of the commissioner's disclosure powers, such that the disclosure powers would constitute a permissible limitation on the right to privacy. Consequently, the committee advised that it would revisit the matters raised in its assessment when reviewing the rules once they were made.[5]

Information sharing – disclosure powers

2.62 Part 3 of the Disclosure Rules prescribe the rules and guidance regarding the commissioner's disclosure powers in section 67E(1) of the NDIS Act.

2.63 Division 1 sets out the rules which the commissioner must follow in disclosing any 'NDIS information',[6] where:

- the commissioner is satisfied on reasonable grounds that it is in the public interest to do so;[7] or
- the NDIS information is being disclosed to:
  - the head of a Commonwealth, state or territory department or authority for the purposes of that department or authority;[8] or
  - a state or territory department or authority with responsibility for matters relating to people with disabilities.[9]

2.64 Subject to a number of exceptions,[10] in these circumstances the commissioner must:

3 NDIS Amendment Bill, addendum to the explanatory memorandum, p. 2.

4 NDIS Amendment Bill, statement of compatibility (SOC), p. 13.

5 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) p. 30.

6 Section 8 of the Disclosure Rules defines 'NDIS information' as information acquired by a person in the performance of a person's functions or duties or in the exercise of the person's powers under the NDIS Act.

7 NDIS Act, section 67E(1)(a).

8 NDIS Act, section 67E(1)(b)(i), (iv).

9 NDIS Act, section 67E(1)(b)(iii).

10 See discussion at [1.21].

- de-identify personal information included in NDIS information, where doing so would not adversely affect the purpose for which the information is disclosed;[11]
- notify and seek the consent of the affected individual about the proposed disclosure prior to disclosure, and provide them with a reasonable opportunity to comment;[12]
- notify the recipient of the NDIS information about the purpose of and limitations on the disclosure, and state that the information may only be used in accordance with the purpose of the disclosure;[13] and
- ensure a record of the disclosure is made, containing prescribed information.[14]

2.65 Division 2 of part 3 of the Disclosure Rules outlines matters to which the commissioner must have regard in determining whether there are reasonable grounds on which to disclose NDIS information in the public interest under section 67E(1) of the NDIS Act. Section 14 of the Disclosure Rules requires the commissioner to have regard to:

- whether the affected individual would be likely to be in a position to seek assistance themselves or notify the proposed recipient of the information of their circumstances;
- the purpose for which the information was collected, including any information provided to the affected individual at that time about how the information would or would not be used or disclosed;
- whether the affected individual would reasonably expect the commissioner to disclose the information for the proposed purpose and to the proposed recipient;
- whether the disclosure would be contrary to a request by a complainant under section 15(3) of the National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018;
- whether the proposed recipient has 'sufficient interest' in the information;[15]

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11 Disclosure Rules, section 10.

12 Disclosure Rules, section 11.

13 Disclosure Rules, section 12.

14 Disclosure Rules, section 13.

15 Under section 14(2) of the Disclosure Rules, a person will have a 'sufficient interest' in the information if the Commissioner is satisfied that they have a 'genuine and legitimate interest' in the information or if they are a Commonwealth, State or Territory Minister.

- whether the proposed recipient could reasonably obtain the information from a source other than the commissioner; and
- whether sections 15 to 19 of the Disclosure Rules apply.

2.66 Sections 15 to 19 set out additional matters about which the commissioner must be satisfied if the proposed disclosure is for one of the following purposes:

- enforcement of laws and related circumstances;[16]
- briefing the minister;[17]
- missing or deceased persons;[18]
- assisting child welfare agencies;[19] and
- assisting professional bodies;[20]

2.67 For example, where the proposed disclosure is to assist a 'professional body',[21] the commissioner must be satisfied that:

- the commissioner holds information about a person employed or otherwise engaged by an NDIS provider; and
- the disclosure is necessary to assist a professional body to consider whether the person's conduct meets the standards required to attain or maintain membership of the professional body.[22]

Compatibility of the measure with the right to privacy

2.68 The right to privacy includes respect for private and confidential information, particularly the storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.[23]

2.69 Allowing for the disclosure of NDIS information (including personal information) under section 67E of the NDIS Act engages and limits the right to privacy. By setting out the factors that the commissioner must consider in

16 Disclosure Rules, section 15.

17 Disclosure Rules, section 16.

18 Disclosure Rules, section 17.

19 Disclosure Rules, section 18.

20 Disclosure Rules, section 19.

21 Section 19(2) of the Disclosure Rules defines 'professional body' as 'an organisation that is responsible, nationally or in one or more States or Territories, for registering members of a particular profession and monitoring their compliance with specified standards of behaviour'.

22 Disclosure Rules, section 19.

23 Article 17 of the International Covenant on Civil and Political Rights; Article 22 of the Convention on the Rights of Persons with Disabilities; article 16 of the Convention on the Rights of the Child (CRC)

determining whether to disclose NDIS information, the statement of compatibility acknowledges that the Disclosure Rules engage this right.[24]

2.70 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, they must seek to achieve a legitimate objective and be rationally connected (that is, effective to achieve) and proportionate to that objective.

2.71 In relation to whether the measure pursues a legitimate objective, the statement of compatibility explains that the objective of permitting the commissioner to disclose NDIS information is to enhance system-level oversight of serious incidents involving the abuse, neglect or exploitation of people with disabilities, by facilitating coordination with the family or carers of people with disabilities and relevant professional bodies and government departments and agencies.[25] Regarding the importance of this objective, the statement cites three inquiries in 2014-2015 into abuse in the disability sector, which emphasised the need for system-level oversight to adequately identify and address systemic issues in the sector.[26]

2.72 As acknowledged in the committee's assessment of the primary legislation, this is likely to constitute a legitimate objective for the purposes of international human rights law.[27]

2.73 The statement of compatibility provides further information about the individual measures in division 2 of part 3 (summarised at [2.65] above), which assists in determining how each disclosure power is effective to achieve (that is, rationally connected to) the stated objective. For example, the statement of compatibility notes that section 16, which permits disclosures to brief the minister, is designed 'to enable matters to be escalated and managed appropriately' by the relevant minister.[28] The initial human rights analysis noted that, in light of the minister's oversight role, the escalation and management of issues by the minister is likely to be rationally connected to the legitimate objective of promoting effective system-level oversight of, and response to, the abuse of people with disabilities. For this reason, and having regard to the committee's previous conclusions in relation to the primary legislation, the measures appear to be rationally connected to this objective.

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24 Statement of compatibility (SOC), p. 13.

25 SOC, p. 15.

26 SOC, p. 15.

27 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) p. 28.

28 SOC, p. 16.

2.74 As noted by the committee in its analysis of the NDIS Amendment Act,[29] the extent to which the Disclosure Rules constrain the commissioner's exercise of the disclosure powers in section 67E(1) of the NDIS Act is key to determining whether the disclosure powers are a proportionate limitation on the right to privacy.

2.75 The statement of compatibility highlights a number of provisions in division 2 of the Disclosure Rules which are intended to 'limit the scope of the exercise of the [commissioner's] decision making power'.[30] For example, amongst other factors, the statement of compatibility notes that the commissioner must consider whether the proposed recipient of the information could reasonably obtain the information from another source,[31] and whether the person requesting the information has 'sufficient interest' in the information.[32] Section 14(2) of the Disclosure Rules imposes an additional limitation on this threshold by prescribing that a person has a 'sufficient interest' if they have a 'genuine and legitimate interest in the information', or are a Commonwealth, state or territory minister. Section 14 also requires the commissioner to consider whether a person about whom information would be disclosed is likely to be in a position to seek assistance themselves or give notice to the proposed recipient of the information, where the information concerns their life, health or safety.[33] The statement of compatibility explains that this provision is:

> …intended to insure that, as far as possible, the Commissioner takes into account the interests of the person concerned and…is a further protection against arbitrary interference with the privacy of a person…[34]

2.76 The statement of compatibility also identifies some specific further restrictions on the disclosure of information for the purposes defined in sections 15 to 19 of the Disclosure Rules, summarised above at [2.66]. For example, disclosure of information to brief the minister is limited to the prescribed purposes of enabling the minister to consider complaints, incidents or issues, and if necessary respond to the affected person; informing the minister about an error or delay on the part of the Commission; or alerting the minister to an anomalous or unusual operation of the Act, regulations or rules.[35] Such restrictions are relevant to the proportionality of the measure and assist to ensure that disclosure is sufficiently circumscribed.

2.77 However, sections 15, 17, 18 and 19 of the Disclosure Rules may permit the disclosure of personal information to bodies that are not constrained by the *Privacy*

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29 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017), p. 29.

30 Disclosure Rules, SOC, p. 15.

31 Disclosure Rules, section 14(1)(f).

32 Disclosure Rules, section 14(1)(e).

33 Disclosure Rules, section 14(1)(a).

34 Disclosure Rules, SOC, p. 16.

35 Disclosure Rules, section 16.

Act 1988 (Privacy Act). The initial analysis stated that, while compliance with the Privacy Act is not a complete answer to concerns about the right to privacy, it may provide relevant safeguards that assist in determining whether a limitation on the right to privacy is proportionate. Noting this potential gap in coverage, the relevant sections do not require the commissioner to be satisfied of how bodies that are not subject to the Privacy Act will collect, store and disclose personal information that is disclosed to them. The statement of compatibility does not provide any additional information about this issue. The potential for information to be disclosed to bodies that are not constrained by the Privacy Act raises a question as to whether there are other, relevant safeguards in place to protect the right to privacy.

2.78 The initial analysis noted that there are also a number of exceptions to the safeguards in division 1, which may restrict the effectiveness of the safeguards. For example, under section 10(3)(b), the commissioner is not required to de-identify personal information if they are satisfied that to do so would result in an unreasonable delay. A similar exception applies to the consent and consultation requirements in section 11.[36] Neither the Disclosure Rules nor the statement of compatibility explain what constitutes an 'unreasonable delay' or how this is determined. Further information as to how this threshold is determined would assist the committee to assess whether the limitation on the right to privacy is proportionate to the legitimate objective sought.

2.79 Finally, the Disclosure Rules do not appear to make decisions made by the commissioner under part 3 of the rules reviewable, nor does the NDIS Act make decisions under section 67E reviewable. This raised concerns about the sufficiency of the safeguards in place to protect the right to privacy. These matters were not fully addressed in the statement of compatibility for the Disclosure Rules.

2.80 Accordingly, while part 3 of the Disclosure Rules significantly constrains the commissioner's disclosure powers under section 67E(1) of the NDIS Act, some questions remained as to the proportionality of the measures, such as whether the exceptions to the safeguards in division 1 are the least rights restrictive approach to achieving the legitimate objective and whether the safeguards in division 2 for public interest disclosures are sufficient to constitute a proportionate limitation on the right to privacy.

2.81 The committee therefore sought the advice of the minister as to whether the Disclosure Rules ensure that the limitation on the right to privacy in section 67E(1) of the NDIS Act is proportionate to achieve the relevant objective, in particular:

- whether information may be disclosed to organisations that are not covered by the Privacy Act and, if so, the sufficiency of other relevant safeguards to protect the right to privacy;

36 Disclosure Rules, section 11(7)(b).

- whether the exceptions to the safeguards on the commissioner's disclosure powers in division 1 are the least rights restrictive approach to pursue the legitimate objective; and
- whether decisions made by the commissioner in part 3 of the Disclosure Rules are reviewable.

Minister's response

2.82 The minister's response contains the following information about the sufficiency of safeguards to protect the right to privacy in circumstances in which sections 15, 17, 18 and 19 permit the disclosure of personal information to organisations that are not covered by the Privacy Act:

> In the event that sections 15, 17, 18 and 19 of the Information Rules do enable disclosure to organisations that are not covered by the Privacy Act or other applicable laws protecting the privacy and confidentiality of information, they remain subject to the protections and offences outlined in Part 2 of Chapter 4 of the Act in respect [to] the use of protected or personal information. In addition, the disclosure notice that must be completed by the Commissioner pursuant to section 12 of the Information Rules can stipulate limitations on how the organisation can use, record or disclose information.

2.83 This is a relevant safeguard and assists with determining the proportionality of the limitation on the right to privacy.

2.84 The minister's response also refers to additional safeguards in Division 2 of part 2 of chapter 4 of the NDIS Act. These provisions contain the following offences regarding protected information held by the commission:

- unauthorised use or disclosure of protected commission information;[37]
- soliciting disclosure of protected commission information;[38] and
- offering to supply protected commission information.[39]

2.85 The offences apply to any person, and the penalty for each offence is imprisonment for 2 years or 120 penalty units, or both.[40] These offences constitute significant safeguards to protect against unauthorised disclosure of personal information.

37 NDIS Act, section 67B.

38 NDIS Act, section 67C.

39 NDIS Act, section 67D.

40 NDIS Act, sections 67B, 67C and 67D. Under section 4AA of the *Crimes Act 1914*, the current amount of a penalty unit is $210.

2.86 The minister's response also provides further information about how the threshold of 'unreasonable delay' will be determined in the exceptions to the safeguards on the disclosure of protected information in sections 10 and 11 of the NDIS rules:

> The assessment and determination of whether adhering to the de-identification or consultation requirements in Division 1 of the Information Rules would result in an unreasonable delay would need to be determined on a case by case basis. Generally speaking, it is unlikely that the de-identification of information would result in an unreasonable delay. In relation to the consultation requirements, an unreasonable delay will generally be determined in circumstances where an affected person has been given a reasonable opportunity to comment on a proposed disclosure and has not responded.

2.87 The advice that de-identification is unlikely to result in unreasonable delay under section 10(3)(b) of the NDIS Rules, combined with the clarification that the exception in section 11(7)(b) will generally only apply in situations in which 'an affected person has been given a reasonable opportunity to comment on a proposed disclosure and has not responded', further indicates that the limitation on the right to privacy imposed by the exceptions to the safeguards on the commissioner's disclosure powers is likely to be proportionate.

2.88 Finally, in response to the committee's inquiries about the availability of review, the minister's response explains that decisions made under Part 3 of the Rules will not be reviewable, because:

> The rules attempt to strike a balance between, on the one hand, protecting the privacy of individuals and, on the other hand, enabling the Commission to be a responsive regulator and work effectively with other bodies to prevent harm to people with disability arising from unsafe or poor quality NDIS supports or services.

2.89 In light of the further information contained in the minister's response, despite the absence of merits review, there would appear to be sufficient safeguards in place to ensure that the rules and guidance in the NDIS rules regarding the commissioner's disclosure powers in section 67E(1) of the NDIS Act are compatible with the right to privacy.

Committee response

2.90 The committee thanks the minister for his response and has concluded its examination of this issue.

2.91 Based on the information provided, the measure is likely to be compatible with the right to privacy.

National Redress Scheme for Institutional Child Sexual Abuse Bill 2018

National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018

National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 [F2018L00975]

National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 [F2018L00969]

National Redress Scheme for Institutional Child Sexual Abuse Direct Personal Response Framework 2018 [F2018L00970]

Purpose	Seeks to establish a national redress scheme for survivors of institutional child sexual abuse
Portfolio	Social Services
Bills introduced	House of Representatives, 10 May 2018
Instruments made under legislation	Last day to disallow for F2018L00975: 15 sitting days after tabling (tabled Senate 13 August 2018) F2018L00970, F2018L00969: non-disallowable
Rights	Equality and non-discrimination; privacy; effective remedy; fair hearing (see **Appendix 2**)
Previous report	5 of 2018
Status	Concluded examination

Background

2.92 The committee first reported on the bills in its *Report 5 of 2018*, and requested a response from the Minister for Social Services by 4 July 2018.[1] The minister's response to the committee's inquiries was received on 9 July 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

1 Parliamentary Joint Committee on Human Rights, *Report 5 of 2018* (19 June 2018) pp. 16-40.

2.93 The National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 (the 2018 Bill) and the National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018 (the 2018 Consequential Amendments Bill) passed both Houses of Parliament on 19 June 2018 and received Royal Assent and became Acts on 21 June 2018 (2018 Act and the 2018 Consequential Amendment Act).

2.94 The committee has previously considered the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (the 2017 Bill) and the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 (the 2017 Consequential Amendments Bill) in its *Report 13 of 2017* and *Report 2 of 2018.*[2] Those bills sought to establish a Commonwealth redress scheme for survivors of institutional child sexual abuse absent a referral power from states to establish a national redress scheme.

2.95 Following referral of powers by states,[3] the 2018 Acts establish a national redress scheme (the scheme) for survivors of institutional child sexual abuse.

2.96 Following the committee's initial analysis, the National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 (redress scheme rules), the National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 and the National Redress Scheme for Institutional Child Sexual Abuse Direct Personal Response Framework 2018 were tabled in the House of Representatives and the Senate on 13 August 2018. The redress scheme rules, which were foreshadowed in the previous analysis, are relevant to the human rights compatibility of the 2018 Acts and are addressed in this analysis where relevant.[4]

Previous analysis of the proposed Commonwealth Redress Scheme

2.97 In *Report 2 of 2018,* the committee noted that the minister had foreshadowed the introduction of the 2018 Bill, and that the minister had also

2 See, Parliamentary Joint Committee on Human Rights, *Report 13 of 2017* (5 December 2017) pp. 2-16; Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 73-96.

3 The statement of compatibility refers to the assistance of New South Wales, Victoria and the Australian Capital Territory: see Statement of compatibility (SOC) p. 113. See the National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 (NSW) which passed both houses in New South Wales on 16 May 2018, and the National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 (Victoria) which passed both houses in Victoria on 7 June 2018.

4 The committee has assessed the National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 and the National Redress Scheme for Institutional Child Sexual Abuse Direct Personal Response Framework 2018 and considers that the compatibility of these instruments with the right to an effective remedy will depend on how the instruments operate in practice on a case by case basis.

indicated that a number of the human rights issues raised by the committee in relation to the 2017 Bill would be considered when developing the 2018 Bill.[5]

2.98 A number of aspects of the 2017 Bill are replicated in the 2018 Bill. As such, in *Report 5 of 2018*, the human rights analysis noted that where there is overlap and no substantive change to the provision, the committee's previous human rights analysis of the measures in the 2017 Bill applies equally to the 2018 Bill (now 2018 Act). In particular:

- *Eligibility to receive redress under the scheme for non-citizens and non-permanent residents*: The human rights analysis of the 2017 Bill noted that the restriction on non-citizens' and non-permanent residents' eligibility for redress engaged and limited the right to equality and non-discrimination on the basis of nationality or national origin.[6] Following correspondence from the minister, the committee concluded that while the measure pursues a legitimate objective, there were concerns that the breadth of the restriction on the eligibility of all non-citizens and non-permanent residents may not be proportionate.[7] However, the committee further stated that allowing for rules to prescribe further classes of persons who may be eligible, including those who would otherwise be excluded due to not being citizens or permanent residents, may be capable of addressing these concerns.[8] This same eligibility criterion is also present in the 2018 Bill (now 2018 Act).[9]
- *Power to determine entitlement, eligibility and ineligibility by rules:* The previous human rights analysis stated that the proposed power in the 2017 Bill to prescribe eligibility and ineligibility by way of rules raised concerns as to compatibility with the right to an effective remedy.[10] This was because, in the absence of sufficient safeguards, the broad scope of the power to determine eligibility or ineligibility could be exercised in such a way as to be

5 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 73, 79, 83, 93.

6 See Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 74.

7 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 78.

8 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 78; see section 13(2) and (3) of the 2018 Bill.

9 See section 13(1)(e) of the 2018 Bill; see statement of compatibility (SOC) 117-118. While the redress scheme rules do not prescribe any further classes of persons who would be eligible pursuant to section 13(2) of the bill, the redress scheme rules do provide that certain institutions are equally responsible for the abuse of certain child migrants from the United Kingdom and Malta: see section 10 of the redress scheme rules.

10 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 79-83.

incompatible with this right.[11] The committee noted, however, that the proposed discretion of the scheme operator to determine eligibility of survivors if they are otherwise ineligible may be capable of addressing some of these concerns.[12] The power to determine eligibility and ineligibility by way of rules is also present in the 2018 Bill (now 2018 Act), as well as a broad power to determine entitlement to redress by way of rules.[13] To that extent the concerns expressed in the previous human rights analysis apply equally here. However, there are also additional issues relating to entitlement, eligibility and ineligibility under the scheme that are discussed in further detail below.

- *Power to determine by rules whether an institution is responsible for abuse:* The 2017 Bill contained a provision that allowed for rules to be made prescribing circumstances in which a participating institution is not responsible for sexual or non-sexual abuse.[14] The committee noted the broad scope of this power may give rise to human rights concerns as to its operation. This was because its scope was such that it could be used in ways that may risk being incompatible with the right to an effective remedy.[15] The 2018 Bill (now 2018 Act) also includes a provision that allows for rules to be made to prescribe whether an institution is responsible, primarily responsible or equally responsible for abuse.[16] The concern as to the potential operation of this rule-making power in a manner incompatible with the right to an effective remedy also applies to the 2018 Bill (now 2018 Act).[17]
- *Bar on future civil liability of participating institutions and associates:* The 2017 Bill provided that where an eligible person receives an offer of redress and chooses to accept the offer, the person releases and forever discharges all institutions participating in the scheme from civil liability for abuse, and

11 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 80.

12 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 83.

13 Section 12(3) and (4) of the 2018 Bill, section 13(2) and (3) of the 2018 Bill.

14 See section 21(7) of the 2017 Bill.

15 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 83-85.

16 Section 15(4)(f),(5) and (6) of the 2018 Bill.

17 The redress scheme rules contain provisions relating to circumstances in which institutions (section 11) and government authorities (section 12) will not be held responsible for abuse, including where an institution has already been ordered by a court to pay damages or compensation. While these sections of rules do not raise specific human rights concerns, the broad power in the 2018 Bill to enact rules to prescribe when institutions are or are not responsible for abuse remains a concern for the reasons discussed above.

the eligible person cannot bring or continue any claim against those institutions in relation to that abuse.[18] The committee considered that this bar on future civil liability of participating institutions may engage and limit the right to an effective remedy.[19] However, the committee noted that the proposed rules governing the provision of legal services under the redress scheme may operate as a sufficient safeguard so as to support the human rights compatibility of the measure.[20] The 2018 Bill (now 2018 Act) also requires survivors who accept redress to forever release from civil liability all institutions providing them with redress, and additionally extends this release to 'officials of those responsible institutions and associates (other than an official who is an abuser of the person)'.[21] The 2018 Bill (now 2018 Act) also provides further detail as to the effect of accepting the release on civil liability.[22] The concern as to compatibility of the bar on future civil liability with the right to an effective remedy also applies to the 2018 Bill (now 2018 Act).[23]

- *Absence of external merits review and removal of judicial review:* The 2017 Bill provided for a system of internal review of determinations made under the scheme.[24] The 2017 Consequential Amendments Bill also exempted decisions made under the scheme from judicial review under the

18 Sections 39 and 40 of the 2017 Bill.

19 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 85-88.

20 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 88.

21 Section 42(2)(c) of the 2018 Bill; see also sections 39, 42 and 43 of the 2018 Bill; see also SOC 122-123. The SOC explains (at 123) the rationale for expanding the release to 'associates' as follows: ' organisations comprising multiple institutions are likely to opt-in to the Scheme as one, forming a 'participating group' (institutions are then known as 'associates' of one another). In order to form a participating group, institutions must be sufficiently connected and appoint a representative for the group. That representative will then be jointly and severally liable with each associate for funding contributions. Attaching the release to all associates of responsible participating institution(s) for sexual abuse and related non-sexual abuse within the scope of the Scheme is therefore reflective of their joint financial liability, and is a necessary component of ensuring that institutions will opt-in to the Scheme together, therefore ensuring maximum coverage for survivors'.

22 Section 43 of the 2018 Bill.

23 The redress scheme rules do not address the provision of legal services. The committee will therefore consider the compatibility of the proposed rules governing the provision of legal services, and whether they offer adequate safeguards, when they are received. The committee also notes that it is preferable for details of proposed rules to be available for consideration in conjunction with the related bill prior to its passage.

24 Part 4-3 of the 2017 Bill.

Administrative Decisions (Judicial Review) Act 1977 (ADJR Act).[25] The committee considered that these measures raised concerns as to compatibility of the review scheme with the right to a fair hearing.[26] However, having regard to the information provided by the minister and the particular context in which the review scheme operated, the committee considered that the internal review mechanism may be capable of ensuring that survivors have adequate opportunities to have their rights and obligations determined in a manner compatible with the right to a fair hearing. The committee recommended that the operation of the internal review mechanism be monitored to ensure that survivors have sufficient opportunities to have their rights and obligations determined by an independent and impartial tribunal.[27] The 2018 Bill (now 2018 Act) also establishes an internal review mechanism,[28] and the 2018 Consequential Amendments Bill (now Act) excludes the scheme from judicial review under the ADJR Act.[29] Therefore, the conclusions relating to the right to a fair hearing in the 2017 Bill apply equally to the 2018 Bill. As to review of the internal review mechanism, it is noted that the statement of compatibility to the 2018 Bill further advises that:

> The Government intends to monitor the Scheme's internal review mechanism, including through broader reviews of the Scheme's implementation. General information relevant to internal review may also be detailed in the Scheme's annual report to the Minister (for presentation to the Parliament) and also has the capacity to be scrutinised through the Scheme's governance arrangements.[30]

2.99 The matters discussed in the remainder of this human rights analysis relate to matters in the 2018 Bill (now 2018 Act) and National Redress Consequential Amendments Bill (now 2018 Consequential Amendments Act) that raise additional or new issues to the 2017 Bill that required further advice from the minister.

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25 Schedule 3 of the 2017 Consequential Amendments Bill.

26 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 93-96.

27 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 96.

28 Part 4-1 of the 2018 Bill.

29 Schedule 3 to the National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018.

30 SOC, p. 127.

Information sharing provisions

Compatibility of the measures with the right to privacy

Public interest disclosure power of the scheme operator

2.100 The 2017 Bill set out the circumstances in which the scheme operator may disclose protected information in the public interest.[31] Following the further information provided by the minister, the committee considered that disclosure in such circumstances may be sufficiently circumscribed such that the measure would be a proportionate limitation on the right to privacy.

2.101 The 2018 Bill (now 2018 Act) also provides under section 95 that the National Redress Scheme Operator (operator)[32] may disclose protected information[33] in the public interest if certain circumstances are satisfied, including where the operator certifies that disclosure is necessary in the public interest.[34] As with the 2017 Bill, this measure engages and limits the right to privacy.[35] The provision in the 2018 Bill (now 2018 Act) is substantively identical to the provision in the 2017 Bill, and to that extent the committee's comments on the 2017 Bill apply equally.

2.102 However, it was noted that the statement of compatibility for the 2018 Bill provided the following information:

> The Committee also noted that the (former) Minister has indicated he will consider including a positive requirement that the Operator must have regard to the impact the disclosure may have on a person to whom the information relates in any future legislation developed for a National Redress Scheme. This has now been reflected in the Bill.[36]

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31 See section 77 of the 2017 Bill.

32 National Redress Scheme Operator is defined in section 6 to mean the person who is the Secretary of the Department in the person's capacity as operator of the scheme. 'Department' is not defined in the bill and pursuant to section 19A of the *Acts Interpretation Act 1901* means the department that is administered by the minister or ministers administering that provision in relation to the relevant matter, and that deals with that matter.

33 'Protected Information' is defined in section 92(2) of the 2018 Bill as '(a) information about a person or an institution that: (i) was provided to, or obtained by, an officer of the scheme for the purposes of the scheme; and (ii) is or was held in the records of the Department or the Human Services Department; or (b) information to the effect that there is no information about a person or an institution held in the records of a Department referred to in subparagraph (a)(ii)'.

34 Section 95 of the 2018 Bill.

35 For the relevant principles relating to the right to privacy, see Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 89.

36 SOC, p. 125.

2.103 Yet, there is no requirement in section 95 of the 2018 Bill (which relates to public interest disclosure) that requires the operator to have regard to the impact the disclosure may have on a person to whom the information relates.

2.104 The committee therefore sought clarification from the minister, having regard to the statement on page 125 of the statement of compatibility, as to whether the public interest disclosure power in section 95 of the 2018 Bill could be amended so as to include a positive requirement that the scheme operator must have regard to the impact the disclosure may have on a person to whom the information relates.

Disclosure by employees and officials of government institutions

2.105 Section 97 provides an additional authorisation for employees or officers of government institutions to whom protected information is disclosed to obtain, record, disclose or use the information for certain permitted purposes including the enforcement of criminal law; the safety or wellbeing of children; investigatory, disciplinary or employment processes related to the safety or wellbeing of children; or for a purpose prescribed by the rules. As this provision involves the disclosure of protected information (including personal information), this provision also engages and limits the right to privacy.

2.106 The previous human rights analysis of the 2018 Bill noted that, like the scheme operator's public interest disclosure power, this provision does not require the employee or officer of the institution to consider the impact the disclosure may have on the person to whom the information relates. This raised concerns as to whether, with respect to the proportionality of the measure, the measure is the least rights restrictive approach. The statement of compatibility does not address this specific new provision and its compatibility with the right to privacy.

2.107 It was also noted that the provision allows for rules to introduce new purposes for which employees or officers of government institutions may disclose information. This also raised concerns as to proportionality. This is because 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.[37] Without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. Further information from the minister would therefore assist in determining whether this additional disclosure power is a proportionate limitation on the right to privacy.

37 See the discussion of the human rights implications of expressing legal discretion of the executive in overly broad terms in *Hasan and Chaush v Bulgaria,* European Court of Human Rights application no 30985/96 (26 October 2000) [84].

2.108 The committee therefore sought the advice of the minister as to the compatibility of additional disclosure authorisations for employees or officers of government institutions in section 97 with the right to privacy.

Minister's response

Public interest disclosure power of the scheme operator

2.109 In relation to the public interest disclosure power in section 95 of the bill, the minister states:

> Section 95 of the National Act provides that the Scheme Operator may disclose protected information if the Scheme Operator certifies that the disclosure is necessary in the public interest. In certifying the disclosure in the public interest, the Scheme Operator must also act in accordance with the Rules, which set out detailed requirements for this certification. In particular, rule 42 expressly requires the Scheme Operator to have regard to the impact that the disclosure might have on the person to whom the information relates.

2.110 The further information provided by the minister - that the redress scheme rules contain an explicit requirement in section 42 that the operator must have regard to the impact disclosure might have on the person to whom the information relates - assists in determining the proportionality with the right to privacy.

2.111 The redress scheme rules also set out the various circumstances in which a public interest certificate may be given by the operator for the purposes of disclosure under section 95 of the 2018 Act. Purposes for which a public interest disclosure certificate can be given include disclosure necessary for: protecting public revenue;[38] protecting the Commonwealth, States and Territories;[39] proceeds of crime orders;[40] extradition;[41] international assistance in criminal matters;[42] correcting a mistake of fact;[43] ministerial briefings;[44] locating missing persons;[45] locating a relative or beneficiary of deceased persons;[46] research, statistical analysis and policy development;[47] and contacting persons about possible entitlement to

38 Redress scheme rules, section 44.

39 Redress scheme rules, section 45.

40 Redress scheme rules, section 46.

41 Redress scheme rules, section 47.

42 Redress scheme rules, section 48.

43 Redress scheme rules, section 49.

44 Redress scheme rules, section 50.

45 Redress scheme rules, section 51.

46 Redress scheme rules, section 52.

47 Redress scheme rules, section 53.

compensation.[48] Noting the offence provisions for unauthorised disclosure under the 2018 Bill,[49] and the requirement discussed above that the scheme operator must have regard to the impact of disclosure on the person to whom the information relates, on balance and in the context of this particular measure, the measure may be a proportionate limitation on the right to privacy. However, given the broad scope of some of the purposes for which a public interest disclosure certificate can be given, much may depend on how the rules are applied in practice, and in particular how the potential impact of disclosure on the person is assessed and applied (for example, whether consideration of the impact of the disclosure on the person means that personal information is redacted in appropriate cases).

Disclosure by employees and officials of government institutions

2.112 In relation to the additional disclosure authorisations for employees or officers of government institutions in section 97 of the bill, the minister states:

> These disclosure arrangements were included after significant consultation with the states and territories and key non-government institutions, who strongly advocated that such disclosure provisions were essential to enable them to comply with existing state or territory mandatory reporting laws or reportable conduct scheme requirements, and necessary to support states to opt in to the Scheme.
>
> Using the Rules to prescribe other permitted purposes rather than incorporating all elements of the Scheme in the National Act provides appropriate flexibility and enables the Scheme to respond to matters as they arise in a timely manner through adapting and modifying the Rules. The Rules do not currently prescribe any additional permitted purposes and any adaptations or modifications to the Rules will be agreed by participating states and territories.

2.113 The minister's response suggests that the purpose of section 97 is to ensure compliance with existing state or territory mandatory reporting laws. In the context of this particular measure, and in light of the broader purposes of disclosure identified in section 97 (enforcement of criminal law and safety and well-being of children), the measure is likely to pursue a legitimate objective for the purposes of international human rights law. Enabling disclosure by employees of the applicable institution also appears to be rationally connected to these objectives.

2.114 As to proportionality, the minister's response explains that the broad rule-making power is necessary so as to be able to respond to matters as they arise and clarifies that any new rules would be required to be agreed by participating states and territories. These matters suggest that the power to introduce further purposes of disclosure by way of rules may be capable of operating in a manner which is

48 Redress scheme rules, section 54.

49 See sections 99-101 of the 2018 Bill.

necessary and proportionate in this particular case. However, it is recommended that the disclosure power be monitored to ensure that any limitation on the right to privacy be no more extensive than what is strictly necessary.

2.115 Further, the minister's response does not specifically address the committee's inquiry as to whether section 97 could be amended to include a positive requirement that the operator must have regard to the impact the disclosure may have on a person to whom the information relates. However, having regard to the stated purposes for which disclosure may be permitted and the accompanying offence provisions for unauthorised disclosure,[50] on balance and in the context of this particular measure the limitation on the right to privacy appears to be sufficiently circumscribed.

Committee response

2.116 The committee thanks the minister for his response and has concluded its examination of this issue.

2.117 The committee notes the further information from the minister that rule 42 of the National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 requires the scheme operator to have regard to the impact disclosure might have on the person to whom the information relates when determining whether disclosure is necessary in the public interest.

2.118 In light of the further information from the minister and having regard to the committee's conclusion at [2.174] of *Report 2 of 2018* and the redress scheme rules, the committee considers that, on balance, the public interest disclosure power in section 95 of the 2018 Bill may be a proportionate limitation on the right to privacy.

2.119 In light of the further information from the minister, the committee considers section 97 of the 2018 Bill may be a proportionate limitation on the right to privacy.

2.120 The committee recommends that the operator's disclosure powers be monitored by government to ensure that any limitation on the right to privacy is no more extensive than what is strictly necessary.

Entitlement to receive redress under the national redress scheme: special rules for persons with serious criminal convictions

2.121 Section 63 of the 2018 Bill introduces a special assessment procedure for persons with 'serious criminal convictions', which applies when a person has been sentenced to imprisonment for five years or longer for an offence against a law of

50 See sections 99-101 of the 2018 Bill.

the Commonwealth, a State, a Territory or a foreign country.[51] Section 63(2) provides that a person is not entitled to redress under the scheme unless there is a determination by the scheme operator that the person is not prevented from being entitled to redress. Section 63(5) provides:

> (5) The Operator may determine that the person is not prevented from being entitled to redress under the scheme if the Operator is satisfied that providing redress to the person under the scheme would not:
>
> (a) bring the scheme into disrepute; or
>
> (b) adversely affect public confidence in, or support for, the scheme.

2.122 As soon as practicable after becoming aware of the person's sentence, the scheme operator is required to consider whether to make a determination and give a written notice to the relevant 'specified advisor'[52] from the Commonwealth or participating State or Territory, requesting that the specified advisor provide advice about whether a determination should be made and setting a timeframe within which to provide that advice.[53]

2.123 Section 63(6) additionally provides that, when making a determination, the Operator must take into account:

> (a) any advice given by a specified advisor in the period referred to in the notice; and
>
> (b) the nature of the offence; and
>
> (c) the length of the sentence of imprisonment; and
>
> (d) the length of time since the person committed the offence; and

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51 The minister foreshadowed in his response to the 2017 Bill that the 2018 Bill would limit the eligibility of persons with certain criminal convictions to obtain redress: see Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 80-83. The committee noted that there are human rights concerns in relation to the proposed exclusion of persons with certain criminal convictions from being eligible for the scheme: 83.

52 'Specified advisor' is defined in section 64(3)(b) as the following: (i) if the abuse of the persons occurred inside a participating state or a participating territory – the Attorney-General of the state or territory, or another person nominated by that Attorney-General in writing; (ii) if the abuse of the person occurred outside a participating state or participating territory – the Commonwealth Attorney-General; (iii) if the offence was against a law of a participating state or participating territory – the Attorney-General of the state or territory, or another person nominated by that Attorney-General in writing; (iv) if the offence was against a law covered by subparagraph (iii) – the Commonwealth Attorney-General.

53 The written notice must also include sufficient information to enable the specified advisor to provide that advice. The period in which the specified advisor may provide the advice must be at least 28 days starting on the date of the notice: see section 63(4) of the 2018 Bill.

(e) any rehabilitation of the person; and

(f) any other matter that the Operator considers is relevant.

2.124 Section 63(7) provides that, when taking into account the matters referred to above, the operator must give greater weight to any advice that is given by a specified advisor from the jurisdiction in which the abuse occurred, in the period referred to in the notice, than to any other matter.

Compatibility of the measure with the right to equality and non-discrimination

2.125 The right to equality and non-discrimination in the International Covenant on Civil and Political Rights (ICCPR) 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 the equal and non-discriminatory protection of the law.[54] Articles 1, 2, 4 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) further describe the content of this right and the specific elements that state parties are required to take into account to ensure the elimination of discrimination on the basis of race, colour, descent, or national or ethnic origin.

Racial discrimination

2.126 'Racial discrimination' is defined in article 1(1) of ICERD to mean:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2.127 Thus, racial discrimination can be direct (that is, have a discriminatory purpose) or indirect (that is, have a discriminatory effect on the enjoyment of rights).[55] Accordingly, treatment which disproportionately affects members of a particular racial group will amount to differential treatment based on race for the purpose of international human rights law.

2.128 As acknowledged in the statement of compatibility, Aboriginal and Torres Strait Islander peoples are over-represented in the criminal justice system and are sentenced to custody at a higher rate than non-Indigenous defendants.[56]

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54 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'.

55 Committee on the Elimination of Racial Discrimination, *General Recommendation 14* (1993); see also *Althammer v Austria*, HRC 998/01 (2003) para 10.2.

56 SOC, p. 118.

The measure may therefore indirectly discriminate on the basis of race due to the disproportionate negative impact of the measure on Aboriginal and Torres Strait Islander peoples.[57]

Criminal record

2.129 The United Nations Human Rights Committee has not considered whether having a criminal record is a relevant personal attribute for the purposes of the prohibition on discrimination in Article 26 of the ICCPR. However, relevantly, the European Court of Human Rights has interpreted the prohibition on discrimination on the grounds of 'other status' to include an obligation not to discriminate on the basis of a criminal record.[58] While this jurisprudence is not binding on Australia, the case law from the Court is useful in considering Australia's obligations under similar provisions in the ICCPR.[59] Limiting the entitlement to redress for persons with a criminal record accordingly may also engage and limit the right to equality and non-discrimination on this basis.

Limitations on the right to equality and non-discrimination

2.130 Differential treatment will not constitute discrimination if it can be shown to be justifiable, that is, if it can be shown to be based on objective and reasonable grounds such that it is rationally connected to, and proportionate in pursuit of, a legitimate objective. The statement of compatibility states that the restriction on eligibility of persons with serious criminal convictions is permissible on the following basis:

> restricting eligibility on the basis of criminal history is necessary to achieve the legitimate aim of the Scheme aligning with community expectations around who should receive redress payments from Government, with flexibility to make relevant persons entitled to redress on a case-by-case basis, where appropriate to do so. There is a risk the public would not support a Scheme that paid redress to perpetrators of serious crimes. In particular, victims of those crimes may strongly object to redress payments being made to people who have committed crimes against them.
>
> Furthermore, the restriction on survivors with serious criminal convictions was developed in consultation with State and Territory Attorneys-General,

57 SOC, p. 118.

58 See *Thlimmenos v Greece*, European Court of Human Rights Application No. 34369/97 (6 April 2000).

59 See also the *Australian Human Rights Commission Act 1986* (Cth) which considers preventing discrimination in employment on the basis of a criminal record as part of Australia's obligations under International Labour Organisation Convention 111, the Discrimination (Employment and Occupation) Convention 1958*,* which prohibits discrimination in employment. See Australian Human Rights Commission*, 'On the Record: Discrimination in Employment on the basis of Criminal Record under the AHRC Act'* (2012).

> who were almost unanimous that reasonable limitations on applications is necessary to uphold public faith and confidence in the Scheme, and a necessary part of the framework for states to opt-in to the Scheme (ensuring nationwide access to redress).[60]

2.131 The overall objectives of the redress scheme are to 'recognise and alleviate the impact of past institutional child sexual abuse and related abuse' and 'to provide justice for survivors of that abuse'.[61] The previous analysis stated that these are undoubtedly legitimate objectives for the purposes of international human rights law. However, the objective of limiting entitlements to persons with serious criminal convictions is narrower and is stated to be to align this scheme with 'community expectations'. To be a legitimate objective, the objective must be one that is pressing and substantial and not one that simply seeks an outcome that is desirable or convenient. On this basis, the previous analysis raised questions as to whether 'aligning the scheme with community expectations' would be a legitimate objective for the purposes of international human rights law.

2.132 Further, noting the overall purpose of the scheme to 'recognise and alleviate the impact of past institutional child sexual abuse' and provide justice for survivors, the previous analysis also raised questions as to whether limiting the entitlement of certain persons based on their subsequent conduct was rationally connected to this objective. It was noted that the *Final Report* of the Royal Commission stated the impact of child sexual abuse on a survivor may manifest itself in 'interconnected and complex ways', including the development of 'addictions after using alcohol or other drugs to manage the psychological trauma of abuse, which in turn affected their physical and mental health, sometimes leading to criminal behaviour and relationship difficulties'.[62]

2.133 There were also concerns as to whether the measure is proportionate. Important factors in determining whether a measure is proportionate include whether there is sufficient flexibility to treat individual cases differently and whether there are less rights restrictive approaches reasonably available. Section 63 contains a number of provisions that allow a person's individual circumstances to be taken into account and to provide persons who may have a serious criminal conviction to be entitled to redress where the operator so determines. This is an important safeguard and allows for matters such as a person's rehabilitation to be taken into account.

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60 SOC, pp. 118-119.

61 Section 3 of the 2018 Bill.

62 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Impacts,* Volume 3 (2017) 11. See also, James RP Ogloff, Margaret C Cutajar, Emily Mann and Paul Mullen, 'Child sexual abuse and subsequent offending and victimisation: A 45 year follow-up study' (2012) *Trends & Issues in Crime and Criminal Justice No.440*.

2.134 However, the starting point for persons who have serious criminal convictions is that they are *not* entitled to redress *unless* a determination is made by the scheme operator.[63] Even where a scheme operator is satisfied that providing redress to the person would not bring the scheme into disrepute or adversely affect public confidence in or support for the scheme, the 2018 Bill (now 2018 Act) provides only that the operator *may* determine the person is not prevented from being entitled.[64] Further, a person's individual circumstances (namely, the nature of the offence, the length of the sentence of imprisonment, the length of time since the commission of the offence, and any rehabilitation) are given lesser weight than advice of the specified advisor.[65] The previous analysis noted that there would appear to be other, less rights restrictive, measures available.

2.135 Another relevant factor in determining whether safeguards are sufficient includes whether there is a possibility of monitoring and access to review.[66] It was not clear from the information provided whether determinations by the scheme operator under section 63(5) are capable of being reviewed either internally or externally.[67]

2.136 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to equality and non-discrimination, in particular:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available, and whether determinations by the scheme operator under section 63 are able to be reviewed).

Minister's response

2.137 The minister's response provides the following information in this regard:

> The limitations on applications from people who have committed serious offences have been included in the National Act [2018 Act] to ensure integrity of and public confidence in the Scheme, and to prevent further

63 Sections 63(2) and 63(5) of the 2018 Bill.

64 Section 63(5) of the 2018 Bill.

65 Section 63(6) and 63(7) of the 2018 Bill.

66 See Parliamentary Joint Committee on Human Rights, *Guidance Note 1* (2014) 2.

67 The review provisions of the 2018 Bill appear to apply to determinations made under section 29: see section 73.

> traumatising victims or survivors of serious or harmful crimes. These arrangements were developed in consultation with state and territory Redress Ministers, who agreed that reasonable limitations on such applications are necessary to have public confidence in the Scheme, and a necessary part of the framework for the states and territories to opt in to the Scheme. The participation of the states, territories and non-government institutions is integral to ensuring nationally consistent and equal access to effective remedy for those who have experienced institutional child sexual abuse.
>
> Before being entitled to redress, those with serious criminal convictions will go through a special, case-by-case assessment under section 63 of the National Act. Determining eligibility by way of special assessment (including consideration of the nature of the crime committed, the duration of the sentence, rehabilitation outcomes of the person and broader public interest issue factors), provides assurance that only those who have committed very serious, heinous crimes will be prevented from being entitled to redress.

2.138 As noted in the previous analysis, 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 legitimate objective and is a proportionate means of achieving that objective.

2.139 Ensuring that persons who have experienced institutional child sexual abuse have access to an effective remedy is a legitimate objective for the purposes of international human rights law. However, there remains a concern insofar as the limitation on the right to equality and non-discrimination is stated to be for the purpose of ensuring 'public confidence' in the scheme. As noted in the previous analysis, international human rights jurisprudence has held that tolerance and broadmindedness are the hallmarks of a democratic society, and so restrictions on rights of persons purely based on what might offend public opinion is not generally considered a legitimate objective.[68] Insofar as the minister indicates that an additional objective of the measure is to 'prevent further traumatising victims or survivors of serious or harmful crimes', this could be capable of constituting a legitimate objective. However, it would have been useful if the minister's response had provided specific evidence as to the extent to which this is a pressing and substantial concern in the context of the specific measure.

2.140 As to proportionality, the minister's response does not address the committee's specific inquiries as to the availability of review of determinations of the minister made under section 63(5), and by what mechanism.

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68 See *Hirst v the United Kingdom (No. 2)*, European Court of Human Rights App No. 74025/01, (Grand Chamber, 6 October 2005) [69]-[71]; *Dickson v United Kingdom,* European Court of Human Rights App No. 44362/04 (Grand Chamber, 4 December 2007) [68] and [72].

2.141 Further, while the minister's response states that 'only those who have committed very serious, heinous crimes will be prevented from being entitled to redress', the language of the 2018 Bill (now 2018 Act) is broader. 'Serious criminal conviction' is broadly defined to mean a sentence of five years or longer. As noted in the previous analysis, the starting point for persons who have serious criminal convictions is that they are *not* entitled to redress *unless* a determination is made by the scheme operator. The operator's decision to determine that the applicant is not prevented from being entitled to redress is discretionary, and the applicant's circumstances are given lesser weight than advice of the specified advisor.[69] Noting the potential disproportionate negative impact that the measure may have on Aboriginal and Torres Strait Islander people (discussed above at [2.128]), there remain concerns that the measure may be insufficiently circumscribed.

2.142 Further, in order to be proportionate, the measure must be the least rights restrictive way of achieving a legitimate objective. There would appear to be other, less rights restrictive measures available in relation to the measure. This includes: making it a requirement that a person with a serious criminal conviction *is* entitled to redress *unless* a determination is made that the person receiving redress would bring the scheme into disrepute, or providing that the operator *must* determine a person with a serious criminal conviction is entitled to redress if satisfied that providing redress under the scheme would not bring the scheme into disrepute, or providing that an individual's personal circumstances be given equal weight to the submissions of the specified advisors. Therefore, while in practice the provision for the scheme operator to determine a person with a serious criminal conviction is nevertheless entitled to redress may address this concern for some individuals, there remain concerns as to the proportionality of the measure as it is drafted.

Committee response

2.143 The committee thanks the minister for his response and has concluded its examination of this issue.

2.144 The preceding analysis indicates that the measure may be incompatible with the right to equality and non-discrimination. However, it is noted that the provision for the scheme operator to determine that a person with a serious criminal conviction is nevertheless entitled to redress may, in practice, address this concern for a number of individuals.

2.145 Noting the potential disproportionate negative impact that the measure may have on particular groups, the committee recommends the special assessment process for persons with serious criminal convictions be monitored by government to ensure that it operates in a manner compatible with the right to equality and non-discrimination.

69 Section 63(5) of the 2018 Bill; Section 63(6) and 63(7) of the 2018 Bill.

Compatibility of the measure with the right to an effective remedy

2.146 Article 2(3) of the ICCPR requires states parties to ensure that persons whose human rights under the ICCPR have been violated have access to an effective remedy. States parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law, and to make reparation to individuals whose rights have been violated. Effective remedies can involve restitution, rehabilitation and measures of satisfaction – such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices – as well as bringing to justice the perpetrators of human rights violations. Such remedies should be appropriately adapted to take account of the special vulnerabilities of certain categories of persons, including, and particularly, children.

2.147 The redress scheme seeks to provide remedies in response to historical failures of the Commonwealth and other government and non-government organisations to uphold human rights obligations, including the right of every child to protection by society and the state,[70] and the right of every child to protection from all forms of physical and mental violence, injury or abuse (including sexual exploitation and abuse).[71] Insofar as persons with serious criminal convictions may be precluded from accessing redress, restrictions on the entitlement of survivors with serious criminal convictions engages the right to an effective remedy.

2.148 The statement of compatibility does not specifically address the entitlement of survivors with serious criminal convictions from the perspective of the right to an effective remedy. For the same reasons as those discussed above in relation to the right to equality and non-discrimination, the previous analysis raised questions as to whether restricting the entitlement to redress of survivors with serious criminal convictions is compatible with the right to an effective remedy.

2.149 The committee therefore sought the advice of the minister as to the compatibility of the special assessment process for persons with serious criminal convictions with the right to an effective remedy.

Minister's response

2.150 In response, the minister states:

> These arrangements do not contravene the right to effective remedy, as people with serious criminal convictions will still have the opportunity to apply for redress under the Scheme. The Scheme Operator will determine the person's application on a case-by-case basis and only prevent entitlement to redress where the person would bring disrepute to the Scheme or affect the public's confidence in the Scheme. This balances the

70 Article 24 of the International Covenant on Civil and Political Rights: see SOC, p. 122.

71 Articles 19 and 34 of the Convention on the Rights of the Child: see SOC, p. 117.

need to allow everyone to apply to the Scheme, with the need to give integrity and public confidence to the Scheme by placing some limitations on applications from people who themselves have committed serious and harmful offences.

2.151 While it is acknowledged that persons who are survivors of institutional child sexual abuse will still be able to apply for redress, as noted earlier concerns remain insofar as the default position under the bill is that such persons will not be entitled to redress unless the operator exercises their discretion in accordance with section 63. A person's entitlement to redress being a matter of discretion of the operator raises concerns as to compatibility with the right to an effective remedy. This is particularly so as the UN Human Rights Committee has stated that while limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states parties must comply with the fundamental obligation to provide a remedy that is effective.[72] However, it is acknowledged that the provision for the scheme operator to determine a person with a serious criminal conviction is nevertheless entitled to redress may, in practice, address this concern for a number of individuals.

Committee response

2.152 The committee thanks the minister for his response and has concluded its examination of this issue.

2.153 In light of the preceding analysis and noting that survivors of institutional child sexual abuse with serious criminal convictions will not be entitled to redress unless the operator makes a determination, there is a risk that the measure may operate in a manner that may be incompatible with the right to an effective remedy. However, it is acknowledged that the provision for the scheme operator to determine that a person with a serious criminal conviction is nevertheless entitled to redress may, in practice, address this concern for a number of individuals.

Access to redress under the national redress scheme for persons in gaol

2.154 Section 20(1)(d) of the 2018 Bill (now 2018 Act) provides a person cannot make an application for redress under the scheme if the person is in gaol.[73] Sections 20(2) and (3) provide that the restriction on applying for persons in gaol does not apply if the operator determines in accordance with requirements prescribed by the

72 See UN Human Rights Committee, *General Comment No.29: States of Emergency (Article 4)* (2001) [14].

73 'In gaol' in the 2018 Bill is defined by reference to section 23(5) of the *Social Security Act 1991* which provides that a person is in gaol if (a) the person is being lawfully detained (in prison or elsewhere) while under sentence for conviction of an offence and not on release on parole or licence; or (b) the person is undergoing a period of custody pending trial or sentencing for an offence.

rules that there are 'exceptional circumstances justifying the application being made'.

2.155 Section 14 of the redress scheme rules sets out the requirements for determining exceptional circumstances justifying an application when a person is in gaol. The rules provide that, before making a determination that there are exceptional circumstances justifying the making of an application, the operator must give a notice to the relevant state or territory Attorney-General[74] requesting advice and information about whether the operator should make a determination. The operator is required to consider any advice from the relevant Attorneys-General and 'any other matter that the Operator considers is relevant to the question of whether the determination should be made'.[75] The operator must give greater weight to advice of the Attorney-General of the state or territory in which the abuse occurred than any other matter.[76] Section 14(2) of the rules provides that the requirements do not apply if the person is so ill that it is reasonable to expect the person will not be able to apply for redress after ceasing to be in gaol or is expected to remain in gaol after the scheme sunset day.[77]

Compatibility of the measure with the right to equality and non-discrimination and the right to an effective remedy

2.156 Persons who are in prison continue to enjoy all of the rights and freedoms guaranteed under international human rights law except for those that are demonstrably necessitated by the fact of incarceration (such as the right to liberty).[78] The matters discussed above in relation to the limitation on persons with serious criminal convictions applying for redress apply equally to persons who are incarcerated. That is, the overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system means that precluding persons who are incarcerated from making an application is likely to disproportionately negatively affect Aboriginal and Torres Strait Islander survivors of sexual abuse, raising concerns as to the compatibility of the measure with the right to equality and non-discrimination. By precluding persons who are incarcerated from applying for redress, the measure may also discriminate on the basis of criminal record. The UN Committee on Economic, Social and Cultural Rights has specifically noted that the

74 This includes the Attorney-General of the state or territory in which the person is in gaol, and if the person claims to have suffered abuse in another state or territory, the Attorney-General of that state or territory: see section 14(3) of the redress scheme rules.

75 Section 14(5) of the redress scheme rules.

76 Section 14(6) of the redress scheme rules.

77 Section 14(2) of the redress scheme rules.

78 *Hirst v the United Kingdom (No. 2)*, European Court of Human Rights App No. 74025/01, (Grand Chamber, 6 October 2005); *Basic Principles for the Treatment of Prisoners,* General Assembly Resolution 45/111 (14 December 1990) Principle 5.

denial of a person's legal capacity because she or he is in prison may constitute discrimination on the basis of 'other status'.[79] The measure also engages the right to an effective remedy by limiting the ability of persons who are incarcerated to access redress under the scheme.

2.157 The statement of compatibility emphasises that persons will be able to make an application for redress if they are not in gaol at some point during the 10 years of the redress scheme.[80] Section 20 therefore does not remove a person's entitlement or eligibility for redress but rather precludes that person from making an application during their period of incarceration, and to this extent for most incarcerated survivors otherwise entitled and eligible for redress the measure would be a practical limitation on the right to equality and non-discrimination and the right to an effective remedy during their period of incarceration.

2.158 The statement of compatibility does not specifically address this aspect of the 2018 Bill in light of the right to equality and non-discrimination and the right to an effective remedy. However, the statement of compatibility does provide some information as to why the restriction is necessary and permissible:

> This restriction is necessary as the Scheme will be unable to deliver appropriate Redress Support Services to incarcerated survivors, which may make it more difficult for those survivors to write an application, or for those survivors to understand the implications of releasing responsible participating institutions from liability for sexual abuse and related non-sexual abuse within the scope of the Scheme. Additionally, institutions may not be able to deliver an appropriate direct personal response to a survivor if that survivor is incarcerated. As the Scheme will run for 10 years, survivors who are incarcerated for a short period of time will be able to apply when they are no longer incarcerated. In a closed institutional setting there will also be greater difficulty maintaining survivor privacy and confidentiality.
>
> Additionally, survivors who are incarcerated for longer periods of time (i.e. five or more years) may not be entitled to redress as a result of their custodial sentence (detailed above) in the first instance.[81]

2.159 The initial analysis acknowledged that there may be practical issues associated with delivering appropriate support services to incarcerated survivors. However, while the statement of compatibility identifies some of the challenges associated with providing redress to incarcerated survivors, the statement of

79 UN Committee on Economic, Social and Cultural Rights, *General Comment No.20: Non-discrimination in economic, social and cultural rights* (2009) [27].

80 SOC, p. 119.

81 SOC, pp. 119-120.

compatibility does not otherwise identify how the restriction pursues a legitimate objective for the purposes of international human rights law.

2.160 There may also be concerns as to proportionality. In particular, while section 20 allows the operator to override the restriction on incarcerated persons applying, this may only occur in 'exceptional circumstances'. The statement of compatibility provides examples of what constitutes an exceptional circumstance for overriding this provision, including 'because they will be in gaol during the last two years of the Scheme, or they are terminally ill'.[82] However, this was not apparent from the bill itself which refers only to requirements prescribed by the rules.[83] The content of the rules, described above, was not available at the time of the committee's initial consideration.

2.161 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to equality and non-discrimination, in particular:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available, and whether determinations by the scheme operator under section 20 are able to be reviewed).

2.162 The committee also sought the advice of the minister as to the compatibility of the measure with the right to an effective remedy.

Minister's response

2.163 In relation to the compatibility of the measure with the right to equality and non-discrimination, the minister states:

> The restriction on applications from people in gaol has been included in the National Act as the ability to deliver appropriate Redress Support Services to incarcerated survivors is limited. Limited access to support services may make it more difficult for those survivors to write an application, or for those survivors to understand the implications of releasing responsible participating institutions from liability for sexual abuse and related non-sexual abuse within the scope of the Scheme. Additionally, institutions may not be able to deliver an appropriate direct personal response to a survivor if that survivor is incarcerated. In a closed

82 SOC, p. 119.

83 Section 20(2) and (3) of the 2018 Bill. At the time of the initial analysis, the redress scheme rules were not yet available.

> institutional setting there will also be greater difficulty maintaining survivor privacy and confidentiality, particularly considering the Scheme's content matter.
>
> The Scheme includes important safeguards not to discriminate against those in gaol. People who cannot make an application because they are in gaol will be able to apply once they are released. As the Scheme will run for 10 years, many people will be able to apply once they are released, with the full support of the Redress Support Services. The Scheme Operator can also determine that there are exceptional circumstances that justify an application being made from a person in gaol. These exceptional circumstances may include where a person will be in gaol beyond the Scheme sunset day, or if the person is so ill or frail that they would not be able to make an application when they are released.

2.164 In relation to the compatibility of the measure with the right to an effective remedy, the minister states:

> This measure does not contravene the right to effective remedy, as people will be able to apply for redress once they are released from gaol. For those who will not have the opportunity to apply when they are released, either because they are so ill that they may not be able to make an application when they are released, or if they are expected to remain in gaol after the Scheme sunset day, the Scheme Operator can determine that exceptional circumstances apply that justify the application from gaol being made.

2.165 The minister's response provides further information as to the purpose of limiting a person's ability to apply for redress while in gaol, and on balance the purpose of ensuring that survivors receive appropriate support services during the application process is likely to be a legitimate objective for the purposes of international human rights law. Precluding a person from applying during their period of incarceration (but otherwise not precluding their entitlement or eligibility to redress) also appears to be rationally connected to this objective.

2.166 As to proportionality, the effect of section 20 is not to remove a person's entitlement or eligibility for redress but rather to preclude that person from making an application during their period of incarceration. As a result, for most individuals the measure will be only a practical limitation on the right to equality and non-discrimination and effective remedy during their period of incarceration.

2.167 For persons who have 'exceptional circumstances', the minister's response indicates that such persons will be able to apply for redress if the operator makes a determination to that effect. In particular, the explanatory statement to the redress scheme rules explains that it is the policy intent of the rules that where one of the circumstances of subsection 14(2) of the redress scheme rules is satisfied (that is, where the person will be too ill to apply for redress upon release from gaol or will remain in gaol until after the scheme sunset day), the operator will determine that exceptional circumstances exist which would allow the person to make an

application for redress. On balance, the information provided by the minister and in the explanatory materials indicates that the measure may be compatible with the right to equality and non-discrimination and the right to an effective remedy. However, noting that the operator is not *required* to determine that exceptional circumstances exist where a person is too ill to apply upon release from gaol or will remain in gaol after the scheme sunset day, the practical operation of the measures should be monitored so as to ensure the measure is compatible with human rights in its implementation.

Committee response

2.168 The committee thanks the minister for his response and has concluded its examination of this issue.

2.169 The information provided from the minister and in the explanatory materials indicates that the measure may be compatible with the right to equality and non-discrimination and the right to an effective remedy. However, the practical operation of the measures should be monitored so as to ensure the measure is compatible with human rights in its implementation.

Entitlement to receive redress under the national redress scheme: persons subject to a security notice

2.170 The 2018 Bill also introduces special rules excluding entitlement to redress for persons subject to security notices from the Minister for Home Affairs. Section 64 provides that a person is not entitled to redress under the scheme while a security notice is in force in relation to the person. Section 65(1) provides that the Home Affairs Minister may give the minister a written notice (a security notice) if:

> (a) the Foreign Affairs Minister gives the Home Affairs Minister a notice under subsection 66(1) in relation to the person;[84] or
>
> (b) the person's visa is cancelled under section 116 or 128 of the *Migration Act 1958* because of an assessment by the Australian Security Intelligence Organisation that the person is directly or indirectly a risk to security

84 Section 66 allows the foreign minister to give the home affairs minister a written notice if the foreign minister has refused to issue a travel document or cancelled a travel document of a person following a request from a competent authority on the basis the competent authority suspects on reasonable grounds that if an Australian travel document were issued to a person, the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country: see also sections 14(1)(a)(i), 14(2) and 22 of the *Australian Passports Act 2005*.

(within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*);[85] or

(c) the person's visa is cancelled under section 134B of the *Migration Act 1958* (emergency cancellation on security grounds) and the cancellation has not been revoked because of subsection 134C(3) of that Act; or

d) the person's visa is cancelled under section 501 of the *Migration Act 1958* and there is an assessment by the Australian Security Intelligence Organisation that the person is directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*).

2.171 Before giving a security notice, the Minister for Home Affairs must have regard to the extent (if any) that payments to the person under the scheme have been or may be used for a purpose that might prejudice the security of Australia or a foreign country, if the Minister for Home Affairs is aware of that extent.[86] Security notices must be reviewed annually,[87] and the home affairs minister may revoke a security notice.[88]

2.172 Section 20(b) of the 2018 Bill additionally provides that a person cannot make an application for redress under the scheme if a security notice is in force against the person.

Compatibility of the measure with the right to an effective remedy

2.173 Restrictions on the entitlement of survivors who are subject to a security notice engage the right to an effective remedy as such persons may be precluded from obtaining redress.

2.174 The statement of compatibility does not address whether this measure is compatible with the right to an effective remedy. However, it provides the following information about why precluding persons subject to security notices is necessary:

85 'Security' is defined in section 4 of the *Australian Security Intelligence Organisation Act 1979* to mean: (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from: (i) espionage; (ii) sabotage; (iii) politically motivated violence; (iv) promotion of communal violence; (v) attacks on Australia's defence system; or (vi) acts of foreign interference; whether directed from, or committed within, Australia or not; and (aa) the protection of Australia's territorial and border integrity from serious threats; and (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

86 Section 65(2) of the 2018 Bill.

87 Section 69 of the 2018 Bill.

88 Section 70 of the 2018 Bill.

> This limitation is necessary to ensure that redress funds are not given to persons who may prejudice Australia's national security interests, or may use funds for purposes against Australia's security interests.[89]

2.175 The explanatory memorandum further explains that:

> These provisions ensure that those individuals assessed to be engaged in politically motivated violence overseas, fighting or actively supporting extremist groups, or that the individual would be likely to engage in conduct that might prejudice the security of Australia or a foreign country, would not be entitled to redress under the scheme.[90]

2.176 However, while national security may generally constitute a legitimate objective to limit human rights, Australia is still obliged to provide an effective remedy for breaches of the ICCPR. The committee therefore sought the advice of the minister as to the compatibility of the restriction with the right to an effective remedy.

Compatibility of the measure with the right to a fair trial and fair hearing

2.177 Article 14(1) of the ICCPR requires that in the determination of a person's rights and obligations in a 'suit at law', everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

2.178 The concept of 'suit at law' encompasses judicial procedures aimed at determining rights and obligations, equivalent notions in the area of administrative law and also extends to other procedures assessed on a case-by-case basis in light of the nature of the right in question.[91]

2.179 As acknowledged in the statement of compatibility to the 2018 Bill, a determination of a person's entitlement to redress as a result of sexual abuse, and a finding of responsibility on the part of institutions for such abuse, involves the determination of rights and obligations and is likely to constitute a 'suit at law'.[92] In relation to a security notice, removing a person's entitlement to redress while a security notice is in force in relation to the person[93] may similarly engage fair trial and fair hearing rights. For example, it is possible that a security notice may be in force in relation to a person for the entire duration of the scheme, removing an otherwise entitled person's entitlement to redress entirely. The application or

89 SOC, pp. 121-122.

90 Explanatory memorandum, p. 55.

91 See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [16].

92 SOC p. 126; See Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) [2.179]-[2.189].

93 Section 64 of the 2018 Bill.

continuance of a security notice may therefore similarly involve a determination of the person's rights and obligations.

2.180 If the security notice process were to constitute a 'suit at law', there may be fair trial and fair hearing concerns, as it is unclear whether persons subject to the notice have the benefit of any hearing where, for example, they may be able to make representations to the Minister for Home Affairs or the Minister for Foreign Affairs as to whether a security notice should be given, or as part of the annual review process, or in determining whether a security notice should be revoked.

2.181 The committee therefore sought the advice of the minister as to the compatibility of the security notice procedures with fair trial and fair hearing rights under Article 14 of the ICCPR.

Minister's response

2.182 In relation to the compatibility of the restrictions on the entitlement of survivors who are subject to a security notice with the right to an effective remedy, the minister states:

> The National Act [2018 Act] includes provisions that restrict a person's access to redress where it may prejudice the security of Australia or a foreign country. A person's access to redress will only be impacted in circumstances where the receipt of redress is relevant to the assessed security risk posed by the individual and the receipt of redress would adversely impact the requirements of security. It is not intended that every person whose passport or visa has been refused or cancelled would not be entitled to access redress, rather only in cases where it is appropriate or justified on security grounds.
>
> These provisions provide consistent powers for the Australian Government to deal with the threat of terrorism within Australia and that posed by Australians who participate in terrorist activities overseas. These are also standard arrangements that align with Australia's existing counter-terrorism legislative framework by mirroring provisions contained in the *Paid Parental Leave Act 2010* (sections 278A to 278L), *Social Security Act 1991* (sections 38L to 38W) and *A New Tax System (Family Assistance) Act 1999* (sections 57GH to 57GS).
>
> While not entitled to apply for redress, a person subject to a security notice who has suffered sexual abuse may still be able to pursue a civil claim to seek remedy for the abuse suffered. Should that person no longer be subject to a security notice, that person will then be entitled to apply for redress under the Scheme, should they satisfy other entitlement requirements.

2.183 The minister's response identifies that only a narrow category of persons whose passport or visa has been refused or cancelled would fall within the scope of

the security notice provisions (see also [2.170] and [2.171] above).[94] As noted in the initial analysis, while limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), state parties must provide a remedy that is effective where there has been a violation of human rights under the ICCPR. In this case, precluding a person's entitlement to redress where they are subject to a security notice applies to all elements of the redress scheme (the monetary payment, access to counselling and psychological services, and a direct personal response), not merely (for example) removing a person's entitlement to monetary payments. Therefore, while the scope of persons who may be subject to the security notice is very narrow, there remains a small risk that a survivor of institutional child sexual abuse who is subject to a security notice may not receive an effective remedy. However, as noted in the minister's response, such persons may still be able to pursue a civil claim to seek a remedy providing that the claim is not outside the statute of limitations in the relevant jurisdiction.[95]

2.184 As to the compatibility of the security notice procedures with fair trial and fair hearing rights, the minister provides the following information:

> A person subject to a security notice seeking to apply for redress will not be able to seek internal review of their entitlement for redress, as they are not entitled by way of a security notice as determined and decided by the Minister for Home Affairs. However, as section 69 of the National Act [2018 Act] outlines, the Minister for Home Affairs is required to review the application of a security notice every 12 months, and as outlined in section 70 of the National Act, may revoke a security notice.
>
> The right to judicial review of the determination of a security notice is maintained, and is not limited by the National Act. Judicial review under section 75(v) of the Constitution is maintained and where such a suit is initiated, a person will be entitled to a fair and public hearing by an independent and impartial tribunal. A person subject to a security notice will also maintain existing judicial review rights in the Administrative Appeals Tribunal in relation to the issuing of an adverse security assessment or the decision to cancel a passport.

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94 In relation to the minister's reference to consistency between the redress scheme and existing arrangements under social security laws, the committee has previously raised questions as to the compatibility of measures which cancel social security payments of persons as part of the counter-terrorism legislative framework with multiple human rights: See, relevantly, the committee's analysis of the Counter-Terrorism Legislation (Foreign Fighters) Bill 2014 in Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) 56-62; *Thirtieth Report of the 44th Parliament* (10 November 2015) pp. 98-101.

95 While this may be a safeguard in some circumstances, it is noted that a person may be unable to pursue a civil claim due to, for example, statute of limitation periods expiring. Therefore, whether this is a sufficient safeguard will depend on how the measure operates in practice.

2.185 To the extent fair trial and fair hearing rights may be limited by the bill, it appears that any such limitation is pursued on the basis of protecting Australia's national security interests. This would be a legitimate objective for the purposes of international human rights law. In relation to proportionality, noting the requirement to review the security notice every 12 months, the minister's ability to revoke the notice, and the continued availability of judicial review for the determination and for the underlying security notice, on balance and in the context of the particular scheme, the measure appears to be compatible with fair trial and fair hearing rights.

Committee response

2.186 The committee thanks the minister for his response and has concluded its examination of this issue.

2.187 In relation to the right to an effective remedy, there remains a small risk that a survivor of institutional child sexual abuse who is subject to a security notice may not receive an effective remedy.

2.188 Based on the further information provided by the minister, the measure appears likely to be compatible with fair trial and fair hearing rights.

Entitlement to receive redress under the national redress scheme: child applicants

2.189 For children who will turn 18 years before the scheme sunset day, who make an application for redress, there is a special process for such applicants to be prescribed by the redress scheme rules.[96] As a result of these provisions, the 2018

96 Section 21 of the 2018 Bill. Section 20(1)(c) provides that a person who is a child who will not turn 18 before the scheme sunset day cannot make an application for redress. The effect of this is that children under eight when the scheme commences will not be able to receive redress under the scheme. Section 20(1)(c) engages the right to equality and non-discrimination and the right to an effective remedy. However, the SOC explains at 120-121 that only around 50 of more than 8,000 survivors that attended private sessions were under the age of 8 years. The SOC explains that, as found by the Royal Commission, while it was possible that some individuals would wish to seek redress while they are still a minor, it is not expected that many minors will apply as it would almost always be within the time limitations to commence proceedings through civil litigation, and an individual would be more than likely to receive larger payment either through settlement or civil litigation than they might during the scheme. The SOC also explains alternative avenues that were considered, such as requiring minors to have a nominee arrangement or paying amounts into a trust account, and explains why this approach was not considered to be appropriate. Based on the information provided (particularly the availability of civil litigation for survivors under the age of 8 and the explanation of less rights restrictive approaches that were considered), this aspect of the measure appears to be compatible with the right to an effective remedy and appears to constitute a permissible limitation on the right to equality and non-discrimination.

Consequential Amendments Bill (now 2018 Consequential Amendments Act) exempts the 2018 Bill (now 2018 Act) from the *Age Discrimination Act 2004*.[97]

Compatibility of the measure with the right to equality and non-discrimination and the right to an effective remedy

2.190 The relevant principles relating to the right to equality and non-discrimination are set out at [2.125] above. While 'age' is not listed as a prohibited ground of discrimination in Article 26 of the ICCPR, the UN Human Rights Committee has stated that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination based on the ground of 'other status'.[98] Additionally, the Convention on the Rights of the Child (CRC) requires states parties to respect and ensure rights under the CRC to each child without discrimination.[99] This includes an obligation to ensure that children are protected against all forms of violence and all forms of sexual abuse without discrimination.[100] The relevant principles relating to the right to an effective remedy are set out above.

2.191 While the statement of compatibility states that the CRC 'does not explicitly exclude different processes based on age',[101] the different application process for child applicants directly engages the right to equality and non-discrimination. By providing for a special application process for children who will turn 18 before the scheme sunset day, the measure also engages the right to an effective remedy.

2.192 The statement of compatibility provides information as to why the different application process is necessary and permissible:

> The restriction on some children applying for redress, and the special process for how children's applications are treated, is necessary to protect those children's interests. As a requirement of the Scheme is to release responsible participating institutions from any liability for sexual abuse and related non-sexual abuse within the scope of the Scheme (restricting their right to later pursue civil litigation), it is necessary to ensure that the effect of the release is fully understood. Survivors who are children are unlikely to be able to fully comprehend the implications of such a decision, especially when the impact of their abuse may not have been fully realised yet.

97 Schedule 5 to the 2018 Consequential Amendments Bill.

98 *Love v Australia* (983/01), UN Human Rights Committee (2003) [8.2].

99 Article 2(1), CRC.

100 Articles 19 and 34 read with Article 2(1) of the CRC. See Committee on the Rights of the Child, *General Comment No.13: The right of the child to freedom from all forms of violence* (2011) [60].

101 SOC, p. 120.

> Furthermore, a component of the application process is for survivors to articulate the impact that the relevant abuse has had on them. As the impact of child abuse in a person's early years may not be realised until later in the person's life, an application submitted as a child may not contain the relevant detail. Similarly, a child survivor's ability to articulate their experience would likely increase with age. While children who will turn 18 years of age before the Scheme sunset day are able to make an application for redress as a child, it is important that they are able to provide the Operator with updated information once they are an adult, which the special process will allow.
>
> Whilst other avenues to include children, such as requiring them to have a nominee arrangement were considered, numerous stakeholders raised concerns about nominees not making decisions in the best interests of the survivor, or not using redress payments for the benefit of the survivor. Additionally, even if the Scheme were to require that payments go into a trust account, the necessary interaction with the minor's parent or guardian would present complexities. Some minors who have been sexually abused in an institutional setting may have fractured relationships with their parents or guardians, and may remain in out of home care. Due to these relationships, the minor may not trust that their parent or guardian will make choices in their best interest.
>
> The special process described strikes the right balance between safeguarding the interests of children whilst allowing them to have some indication of their likely redress entitlement. This will allow these children to pursue a range of different options. Some survivors may wait until they turn 18 in order to access redress, whilst others (supported by their parent/ or guardian/s) may choose to pursue civil litigation.
>
> …
>
> Child survivors and their families, including both those who are unable to access redress under the Scheme and those who have to wait until they are 18 to receive a redress determination, will be able to access the Scheme's community support services, as well as legal support services to receive advice about available options outside of the Scheme.[102]

2.193 The information provided by the minister indicates that the measure has been introduced so as to protect the best interests of the child and has been considered appropriate in light of other, less rights restrictive, options. This is relevant to the compatibility of the measure with the right to equality and the right to an effective remedy.

2.194 However, there were concerns as to whether the broad power to determine the special process for child applicants by way of rules is compatible with these rights. This is because, as discussed earlier, in the absence of sufficient safeguards,

102 SOC, pp. 120-121.

the broad scope of the power to determine a person's entitlement to eligibility or ineligibility could be exercised in such a way as to be incompatible with human rights. Further information was required as to the proposed content of the redress scheme rules as it relates to the special process for child applicants so as to determine whether the application process as it applies to children is compatible with the right to an effective remedy and the right to equality and non-discrimination.[103]

2.195 The committee sought further information as to the proposed process for child applicants, including:

- a copy of the proposed rules prescribing the process for child applicants (or, if no copy was available, a detailed outline of the proposed rules); and
- information as to safeguards in the proposed rules to protect the right to an effective remedy and the right to equality and non-discrimination (including whether the rules will be subject to disallowance or other parliamentary oversight, and whether decisions by the operator pursuant to the rules will be capable of being reviewed).

Minister's response

2.196 In response, the minister provides the following information about the redress scheme rules made under the 2018 Act:

> Section 15 of the Rules deals with applications by a child. The process contained in this section is consistent with the right to an effective remedy and the right to equality and non-discrimination. The intention of this process is to allow the child, in the months prior to turning 18, to provide further detail about the abuse related to their application and the impact of the abuse, which may not have been realised at the time they submitted their application due to their young age. This process also allows the Scheme Operator to make a more fully informed determination regarding the child's eligibility for redress as soon as practicable after they turn 18.
>
> As stated in the human rights statement of compatibility accompanying the National Act [2018 Act], prior to turning 18 child applicants will be given an indication of their likely redress entitlement. The purpose of this is to provide information to the child to pursue a range of different options, if they so choose. Some may wait until they turn 18 in order to access redress, whilst others (supported by their parent/s or guardian/s) may choose to pursue civil litigation. Once a determination to approve, or not approve, the application has been made, child applicants will be able to seek a review of the determination, consistent with all other determinations, as outlined in Chapter 4, Part 4-1 of the National Act.

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103 This includes information as to the extent to which the rules will be subject to parliamentary oversight, noting section 44(1)(a) of the *Legislation Act 2003*.

2.197 The minister's response usefully outlines the rules in place for child applicants and clarifies that such rules do not preclude entitlement or eligibility for redress. Based on the information provided and in light of the content of the redress scheme rules as they relate to applications by children, the measure is likely to be compatible with the right to an effective remedy and the right to equality and non-discrimination.

Committee response

2.198 The committee thanks the minister for his response and has concluded its examination of this issue.

2.199 Based on the information provided, the special application process for child applicants is likely to be compatible with the right to an effective remedy and the right to equality and non-discrimination.

Mr Ian Goodenough MP

Chair

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Social Security Legislation Amendment (Community Development Program) Bill 2018.

Appendix 2

Short guide to human rights

4.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.[1]

4.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).[2]

Right to life

*Article 6 of the International Covenant on Civil and Political Rights (**ICCPR**); and article 1 of the Second Optional Protocol to the ICCPR*

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [4.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, Guide to Human Rights (June 2015).

2 Parliamentary Joint Committee on Human Rights, Guidance Note 1 (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

*Article 7 of the ICCPR; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)*

4.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [4.9] to [4.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [4.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

4.9 Non-refoulement obligations are absolute and may not be subject to any limitations.

4.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

4.11 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Prohibition against slavery and forced labour

Article 8 of the ICCPR

4.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

4.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

4.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

4.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

4.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

4.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [4.6] to [4.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

4.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

4.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

4.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note* 2 provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

4.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [4.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [4.6] to [4.8]);
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

4.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

4.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

4.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);

- respect for family life (prohibiting interference with personal family relationships);
- respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
- the right to reputation.

Right to protection of the family

*Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)*

4.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

4.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

4.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

4.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

4.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

*Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (**CRPD**)*

4.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

4.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

4.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

4.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

4.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

4.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

4.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

4.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

*Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**); CRPD; and article 2 of the Convention on the Rights of the Child (**CRC**)*

4.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

4.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).[3] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[4]

4.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

4.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

4.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

3 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'.

4 Althammer v Austria HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [4.29]).

Right of the child to be heard in judicial and administrative proceedings

Article 12 of the CRC

4.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

4.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

4.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

4.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

4.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

4.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

4.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

4.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

4.56 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.

4.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

- accessible (providing universal coverage without discrimination; and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

Right to an adequate standard of living

Article 11 of the ICESCR

4.58 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.

Right to health

Article 12 of the ICESCR

4.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

4.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

4.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

4.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

4.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

4.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

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Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough Ian,

Thank you for your letter of 15 August 2018 regarding the assessment by the Parliamentary Joint Committee on Human Rights (the committee) on the following legislation:

- *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018* [F2018L00633]
- *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018* [F2018L00634]

I appreciate the time you have taken to bring this matter to my attention. The committee has requested further information around the human rights compatibility of these 2018 Rules as assessed in the committee's Report 6 of 2018.

The context for section 25 of the *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018* (Complaints Rules) is ending a complaint under subdivision C – notices relating to outcome of resolution process. In particular, a notice to take no further action on the basis that section 17 applies or the decision to end a resolution process under section 22.

The purpose of the section 25 is, in effect, to facilitate the closure of a complaint. The Explanatory Statement notes that other persons or bodies who may have a sufficient interest in the outcome of a matter may include:

- persons or bodies who have the consent of a person with disability affected by an issue raised in a complaint, independent advocates or representatives;
- persons or bodies who have the consent of a person with disability affected by an issue raised in a complaint, their family members, carers or other significant people.

The Explanatory Statement also notes that in providing information, the Commissioner must comply with his or her obligations under the *Privacy Act 1988*, and should consider whether providing the information is appropriate or necessary in the context of the proper handling of the complaint.

The Commissioner is also required under section 19 of the Complaints Rules to ensure that a request by a complainant for confidentiality is complied with unless the Commissioner considers that doing so will, or is likely to, place the safety, health or well-being of the complainant, a person with disability affected by an issue raised in a complaint or any other person. Before deciding not to keep information confidential, the Commissioner must take all reasonable steps to notify the complainant.

Section 25 of the Complaints Rules is also subject to the protections and limitations placed on the use and disclosure of protected or personal Commission information under the *National Disability Insurance Scheme Act 2013* (the Act) and the *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018*.

The outcome of a complaint may reveal more systemic issues about the provision of supports or services that require consultation with other regulatory bodies, for example relating to possible manufacturing defects associated with products regulated by the Therapeutic Goods Administration. If that is the case, it may be appropriate to disclose the substance of the complaint without revealing the identity of the complainant unless they consent as required under the Privacy Act or other applicable information laws.

The Committee notes the legitimate objectives of the record management obligations of registered NDIS providers in relation to incidents and complaints, including the following:

- the documentation of an incident management system so that compliance with the system can be monitored and enforced, including by quality auditors and the Commissioner;
- documentation of the complaints management system is fundamental to the proper functioning of a complaints management and resolution system as it ensures that persons with disability and their families and carers are aware of their rights and can advocate for their needs and safety where appropriate;
- documentation of complaints and incidents through appropriate document management systems may enable the identification of systemic issues which should lead to service improvements either at the individual or provider level.

The record keeping requirements in section 10(2) of the Complaints Rules and section 12 of the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018* (Incidents Rules) are also designed to ensure that a registered NDIS provider complies with its obligation in relation to complaints and incident management and is accountable to people with disability in working to improve the quality and safety of services as a result of complaints and incidents.

In relation to safeguards, it is a requirement under paragraph 6(b) of the *National Disability Insurance Scheme (Code of Conduct) Rules 2018* that an NDIS provider respect of the privacy of people with disability. A contravention of the NDIS Code of Conduct can attract a penalty of up to 250 penalty units. An NDIS provider is also obliged to adhere to privacy laws and other applicable laws which protect the privacy and confidentiality of information.

Any personal information which the Commissioner collects as part of the performance of his or her functions is 'protected Commission information' under the Act. As such, it will be handled in accordance with the limitations placed on the use and disclosure of protected Commission information under the Act, the *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018*, the *Privacy Act 1988*, and any other applicable Commonwealth, State or Territory legislation. Information will only be dealt with where reasonably necessary for the fulfilment of the Commissioner's lawful and legitimate functions.

A copy of the final consultation draft of the *National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018* is at **Attachment A**. These Guidelines have been developed in close consultation with stakeholders including representatives of workers. Following feedback from stakeholders, they have been drafted to apply principally to the management of complaints by NDIS providers and the Commission. In the context of responding to incidents, feedback indicated that it was not appropriate or necessary to apply specific guidelines outside of the existing common law requirements for procedural fairness. Further guidance will be developed to support the implementation of the Guidelines which will be subject to regular review.

The Committee notes at paragraph 1.97, the following possible outcomes of incident or complaint resolution by a registered NDIS provider or the Commission:

a) paragraph 10(1)(g) of the Incident Management Rules – the incident management system of a registered NDIS provider must establish procedures to identify when the provider must take 'corrective action' as a result of an incident;
b) paragraph 26(1)(a) of the Incident Management Rules - the Commissioner may refer incidents to authorities with responsibility in relation to incidents (such as child protection authorities);
c) paragraph 26(1)(f) of the Incident Management Rules – the Commissioner may take any other action that the Commissioner considers reasonable in the circumstances';
d) subsections 16(3) and (5) of the Complaints Management Rules - the Commissioner must undertake a resolution process in relation to complaints which appears to include the ability to make adverse findings against persons employed or engaged by NDIS providers;
e) in relation to both complaints and incidents, the Commissioner may 'prepare and publish a report setting out his or her findings in relation to the inquiry' (subsection 24(6) of the Incident Rules and section 29 of the Complaints Rules.

The Committee notes that to the extent that these processes may involve the determination of rights and obligations, fair hearing rights may apply. Each of the above mentioned outcomes is discussed below in the context of whether they could in fact involve the determination of rights and interests:

a) paragraph 10(1)(g) of the Incident Management Rules – this is part of the incident management system to be established by a registered NDIS provider and the example provided in the Explanatory Statement is: if system failure or worker actions contributed to an incident, the incident management system should set out a process for addressing those issues. In this context general employment law and associated review rights as well as ordinary principles of procedural fairness would

apply to any action taken by a provider in respect of conduct by a worker which was found to have contributed to an incident.

b) paragraph 26(1)(a) of the Incident Management Rules – the referral of matters to other regulatory bodies including the police or child protection authorities would not involve a determination of rights and would be subject to the protections afforded to personal information under the Act and the *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018*.

c) paragraph 26(1)(f) of the Incident Management Rules – this may include a decision to refer the matter to an authorised officer for the purposes of determining whether to conduct an investigation under the Act or to take other compliance or enforcement action under the Act in respect of which rights of review are available (Part 6 of the Act).

d) subsections 16(3) and (5) of the Complaints Management Rules – in the event that the resolution of a complaint included making adverse findings against a person, the process would be subject to that outlined in the attached Procedural Fairness Guidelines. Any compliance or enforcement action taken by the Commission would be subject to the review rights outlined in Part 6 of the Act.

e) in respect of any inquiries conducted by the Commissioner under the Complaints or Incident rules, the Commissioner must comply with procedural fairness and the protections and limitations on the use of personal information outlined in the Act and the *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018*. The Commissioner's inquiry power is not intended to determine the rights or interests of parties to a complaint or incident. The Commissioner has other investigation powers under the Act that could be used for that purpose.

As stated above, the Commissioner's inquiry power is not intended to determine the rights or interests of parties to a complaint or incident. The Commissioner has other investigation powers under the Act that could be used for that purpose.

In the course of conducting enquiries, the protections and limitations on the use of personal information are outlined in the Act and the *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018*.

Thank you again for bringing your concerns to my attention.

Yours sincerely,

DAN TEHAN

Encl.

National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018

I, Graeme Head, Commissioner of the NDIS Quality and Safeguards Commission, make the following Guidelines.

Dated

Graeme Head **CONSULTATION DRAFT ONLY—NOT FOR SIGNATURE**
Commissioner of the NDIS Quality and Safeguards Commission

Contents

Introduction

The *National Disability Insurance Scheme Act 2013* provides that the National Disability Insurance Scheme (NDIS) Quality and Safeguards Commission has complaints functions which are described in section 181 of the Act.

The *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018* set out the complaint handing obligations of registered NDIS providers and the Commission. The Complaint Rules require registered NDIS providers to have complaints management arrangements in place and to support people with disability to understand how to make a complaint to the provider and the Commission.

The Commission is responsible for supporting the resolution of complaints about the provision of supports and services by all NDIS providers (not just those that are registered). All NDIS providers and their workers are obliged to comply with the NDIS Code of Conduct: https://www.ndiscommission.gov.au/providers/ndis-code-conduct

Complaints can play an important role in strengthening the NDIS and driving improvements in the quality of NDIS supports and services. Complaints can highlight weaknesses in service provision, unmet expectations and misunderstandings. A person's right to complain is also important to ensure that possible problems in NDIS service provision are identified and addressed at the earliest opportunity.

These broader benefits of complaints management can only be met if people have confidence that complaints will be handled and resolved fairly, impartially and efficiently. The Complaint Rules require the Commission and NDIS providers to have proper regard to procedural fairness requirements in managing complaints (ss 9, 30). These guidelines support that requirement.

Part 1 – Preliminary

1 Name

This instrument is the *National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018*.

2 Commencement

This instrument commences on the day after it is registered.

3 Authority

This instrument is made under subsection 181D(2) of the *National Disability Insurance Scheme Act 2013* and section 9 of the *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018*.

Note 1: Section 181D sets out the functions of the Commission, and relevantly provides that the Commissioner must have due regard to procedural fairness in performing his or her functions (subsection 181D(3B)).

Note 2: Section 9 of the *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018* provides that the Commission may, by notifiable instrument, make guidelines relating to procedural fairness for the purpose of complaints management and resolution system requirements for registered NDIS providers.

4 Definitions

Note: A number of expressions used in this instrument are defined in section 9 of the Act, including the following:

(a) Commissioner;
(b) National Disability Insurance Scheme rules;
(c) Commission;
(d) NDIS provider;
(e) nominee;
(f) participant;
(g) registered NDIS provider;
(h) restrictive practice.

In this instrument:

Act means the *National Disability Insurance Scheme Act 2013*.

complainant means a person who has made a complaint under the Complaint Rules to a registered NDIS provider or the Commission.

Complaint Rules means the *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018*.

Investigation in the context of the Commission's complaints functions means an investigation conducted under Part 3 of the *Regulatory Powers (Standard Provisions) Act 2011* (see section 73ZF of the Act).

worker means a person employed or otherwise engaged by a registered NDIS provider.

5 Interpretation

A reference in this instrument to a provider includes a reference to a person who is applying to become a registered NDIS provider under section 73C of the Act.

Part 2 – Procedural fairness and NDIS complaint handling

6 Application of this instrument

(1) This instrument applies to the Commission's complaints functions under section 181G of the Act in determining whether an NDIS provider or worker has contravened the Act or National Disability Insurance Scheme rules.

(2) This instrument also applies to complaint handling by a registered NDIS provider under the Complaint Rules. Registered NDIS providers are required to have a complaints management and resolution system that both:
   (a) supports people with disability to understand how to make a complaint to the provider and to the Commission; and
   (b) requires that people are afforded procedural fairness when a complaint is dealt with by the provider.

(3) Effective complaint management and resolution by registered NDIS providers and the Commission is important to a range of people and organisations, including complainants and NDIS providers and workers against whom complaints are made. They all have a direct interest in the complaint process being conducted properly and fairly.

(4) Procedural fairness compliance by the Commission and NDIS providers is integral to building confidence in NDIS complaint processes.

7 An outline of procedural fairness

(1) As part of the handling of a complaint under the Complaint Rules, procedural fairness must be afforded to a person if their rights or interests may be adversely or detrimentally affected in a direct and specific way. In those circumstances -

   (a) the person must be given notice of each prejudicial matter that may be considered against them;
   (b) the person must be given a reasonable opportunity to be heard on those matters before adverse action is taken, and to put forward information and submissions in support of an outcome that is favourable to their interests;
   (c) the decision to take adverse action should be soundly based on the facts and issues that were raised during that process, and this should be apparent in the record of the decision, and
   (d) the decision maker should be unbiased and maintain an unbiased appearance.

(2) The precise requirements of procedural fairness can vary from one situation to another. The required steps can vary according to:

   (a) the nature of the matter being dealt with;

(b) the options for resolving it;
(c) the time-frame for resolution;
(d) whether facts in issue are in dispute;
(e) the gravity of possible findings that may be reached; and
(f) the sanctions that could be imposed based on those findings.

(3) Sometimes a quick, informal and consultative procedure will be sufficient – but on other occasions procedural fairness may require a more formal, structured or arms-length procedure. A more formal procedure may be required if a complaint involves direct criticism of or an allegation against a worker, or consideration is being given to imposing a harsh sanction on an NDIS provider or worker. Even in those situations, procedural fairness does not preclude the adoption initially of an informal and consultative process that can become more formal at the request of a party or if circumstances require. A transparent procedure should be adopted that ensures a person whose interests may be directly and adversely affected by a complaint process is given the opportunity to have their views heard and considered in a fair and impartial manner.

(4) The obligation to provide procedural fairness must be balanced against the need to ensure that neither a complainant (including a person with disability) nor a person with disability affected by an issue raised in a complaint is disadvantaged as a result of the complaint being made and resolved. The steps adopted to ensure procedural fairness in any situation must be tailored to ensure that disadvantage is not suffered by the complainant or person with disability.

(5) Procedures developed by a registered NDIS provider as part of its complaints management and resolutions system must take into account the elements of, and approach to, procedural fairness described in this instrument.

Note: A complaints management and resolution system must be appropriate for the registered NDIS provider's size and the classes of supports or services provided – see Part 2, Complaint Rules.

8 Procedural fairness and other legal requirements

(1) The NDIS Act and the Complaint Rules outline procedural steps that must be followed by registered NDIS providers and the Commission in complaint handling. The central purpose of those requirements is to ensure fairness for all involved parties. Compliance with those steps will go a long way towards meeting procedural fairness legal requirements.

(2) It is important that the specific requirements of the Act and the National Disability Insurance Scheme rules are followed, in addition to procedural fairness requirements.

(3) Other laws such as the *Fair Work Act 2009* (Cth) contain protections for workers in relation to adverse employment action. Consideration may need to be given to the requirements of other laws in addition to procedural fairness requirements.

9 NDIS principles and objectives

(1) The Act outlines the principles and objectives that guide the NDIS scheme generally, and complaint handling in particular. Those principles and objectives are relevant in

deciding how procedural fairness requirements apply in particular circumstances, as the following examples illustrate:

(a) The objects of the Act include that people with disability have the same rights as other members of Australian society to pursue grievances and to be involved in decision making that affects them. To meet that objective when dealing with a complaint made on behalf of a person with disability, a registered NDIS provider or the Commission should, if necessary, consider taking separate procedural fairness steps in relation to both the person making the complaint and the person with disability.

(b) The Complaint Rules require the Commission to seek to resolve complaints as quickly and with as little formality as a proper consideration of the complaint allows (paragraph 16(5)(c)).

(c) The Complaint Rules allow that complaints to registered NDIS providers and the Commission may be made anonymously and that a complainant may request that information be kept confidential (subsections 8(1) and 15(3)). This is relevant in deciding the nature of the information to be disclosed to a provider or worker for the purposes of a procedural fairness hearing. The Complaint Rules equally acknowledge that it may not always be possible to fully honour a request for confidentiality if a complaint is to be properly investigated.

(d) The NDIS Code of Conduct requires providers (whether registered or not) and workers to act with respect for individuals and to respond to allegations of abuse. It may accordingly be necessary in resolving a complaint to reach a finding that is adverse to an individual worker or that results in a sanction being imposed. A fair process should be followed in reaching that adverse outcome, but procedural fairness does not preclude it.

10 How procedural fairness applies to NDIS complaint handling

(1) This section contains brief examples and discussion of where the obligation to observe procedural fairness in NDIS complaint handling is likely to arise.

(2) ***A complaint to a registered NDIS provider about the supports or services being provided to a person with disability***: A registered NDIS provider must afford procedural fairness to a person making a complaint, as that person has an interest (and possibly an expectation) in how the complaint is managed and the outcome.

(3) Procedural fairness requires only that the complainant has a reasonable opportunity to present their complaint, that the substance of their complaint is understood and their complaint is not dismissed on a view of the facts that was not raised with or apparent to them. If the complaint is made by a representative on behalf of a person with disability, consideration should be given to separately providing procedural fairness to the person with disability.

(4) ***A complaint to a registered NDIS provider that alleges inappropriate behaviour by a person who is identified***: Procedural fairness must be provided to any worker who is the specific subject of a complaint.

(5) Not every complaint to a registered NDIS provider will make adverse allegations, directly or implicitly, against an identifiable individual. Many complaints may instead be about the quality or level of supports or services provided by the provider or available to the person with disability. In those circumstances there is no obligation to afford procedural fairness to individual workers, unless a possible outcome of the investigation is that a worker will be identified as being at fault.

(6) A registered NDIS provider should ensure that its complaints management and resolution system distinguishes between complaints that are specifically about the conduct of identifiable workers and complaints about the provision of supports and services that incidentally identify workers.

(7) ***A complaint to the Commission about an NDIS provider***: The Complaint Rules provide that a person may complain to the Commission about the provision of supports or services by an NDIS provider (whether or not the provider is registered) (section 15). The Commission is required to take action on each issue raised in a complaint. The actions that can be taken are set out in the Complaint Rules, and include the following options: taking no action on a complaint issue (for example, if it has already been dealt with); deferring action on a complaint issue (for example, where another inquiry process is underway); noting the withdrawal of the complaint; requiring the provider to attempt to resolve the complaint issue; requesting the parties to participate in a resolution process; requiring the provider to take remedial action; and recording an adverse finding against the provider on the complaint.

(8) The Complaint Rules specify processes that the Commission may follow in deciding what action to take – for example, consulting with the NDIS provider and the complainant, reviewing documents and visiting the location at which supports or services are provided. In most instances those processes will adequately satisfy procedural fairness requirements.

(9) In some instances the Commission may need to take additional procedural fairness steps, particularly if its complaint handling process could result in adverse employment action being recorded or taken against the provider. An example of an additional step is the disclosure of specific information to the provider as part of a formal invitation to make a submission. The core issue is whether there is a matter on which the provider can reasonably expect to be heard before action is taken by the Commission that could be regarded as adverse to the provider.

(10) ***A complaint to the Commission that could result in an adverse finding against a worker***: The Commission is not generally required to undertake a separate procedural fairness process in relation to workers of an NDIS provider in handling complaints about the provider's supports or services. Even if workers are incidentally identified in the complaint to the Commission, the provider can decide which workers to consult after being notified of the complaint by the Commission.

(11) The Commission will need to consider undertaking a separate procedural fairness process in relation to a worker against whom an adverse finding may be made by the Commission. This is recognised in paragraph 16(5)(b) of the Complaint Rules which provide that in dealing with a complaint the Commission must consider whether procedural fairness requires 'allowing a worker reasonable opportunity to comment on any proposed adverse finding in relation to the person'. The procedural fairness

process can be confined to the possible adverse finding and need not canvass other issues.

(12) The NDIS provider would ordinarily be informed that a separate procedural fairness process was being undertaken with a worker, but not told of any provisional adverse finding. This allows the worker to make an effective submission that the provisional adverse finding should not be adopted. The final report by the Commission to the provider may nevertheless discuss the issue or allegation in another way in order to explain how the complaint was resolved.

(13) ***A decision by the Commission to initiate an inquiry***: The Commission may initiate an inquiry either independently of any complaint or in relation to issues that arise from complaints against a provider or complaints against more than one provider (section 29 of the Complaint Rules). A Commission decision to conduct an own motion inquiry potentially exposes a provider to reputational disadvantage if the fact of the inquiry becomes publicly known. Accordingly, it is generally prudent to provide advance notice of an inquiry to a provider that may be individually targeted or affected by the inquiry.

(14) The Commission decides the terms of reference for an inquiry. Procedural fairness does not require that a provider is given a reasonable opportunity to comment on the draft terms of reference – but it can be prudent administrative practice to do so in order to focus the inquiry on relevant and specific matters. This step may be less appropriate if a large number of providers fall within the scope of the inquiry and each is no more specifically affected than other providers.

(15) During the conduct of the inquiry there will be a need to take procedural fairness steps in relation to any provisional adverse finding against an individual provider, worker or other person. This is particularly important if the Commission may publish a report that sets out the adverse finding (subsection 29(6) of the Complaint Rules).

(16) ***A referral by the Commission of an issue raised in a complaint to the Minister, the Agency or another person or body***: A Commission decision to refer a complaint issue to another organisation under section 31 of the Complaint Rules may expose a provider to disadvantage – for example, if the matter referred involves an allegation against the provider, or the referral may lead to a separate inquiry by that other organisation into the actions of the provider.

(17) It is generally prudent to advise a provider in advance that a referral is being made, to alert it to any possible disadvantage. It is not usually necessary to invite the provider to make a submission before the referral occurs, as the obligation to afford procedural fairness will apply to the other entity if it decides to take action on the referral.

Part 3 – Key elements of procedural fairness

11 Procedural fairness steps – an illustrative summary

(1) Registered NDIS providers and the Commission must have regard to procedural fairness obligations in a range of different circumstances that are noted above. The nature of the procedural fairness obligation can vary in each situation.

(2) The following summary illustrates the procedural fairness steps that may need to be taken in one typical situation - when a registered NDIS provider has received a complaint that alleges inappropriate behaviour by a worker.

12 Procedural fairness steps in dealing with a complaint that alleges inappropriate conduct by a worker

(1) A registered NDIS provider that is intending to investigate or act upon a complaint it has received that expressly or implicitly alleges inappropriate conduct by a worker should have regard to the following procedural fairness steps:

(a) Identify whether any information that may be taken into account in resolving the complaint was provided on a confidential basis or may be confidential in nature, and if so –

i. consider how confidentiality can be maintained consistently with affording procedural fairness to the worker, and

ii. if it may be difficult practically to maintain confidentiality in resolving the complaint, consult with the person who provided the information to inform them of this difficulty and ascertain if they wish the complaint to proceed.

(b) Identify if the allegation relates to the behaviour of more than worker, and whether the same (or different) procedural fairness steps should apply to each worker.

(c) Consider who is an appropriate person within the registered NDIS provider's organisation to manage the complaint, and whether more than one person should discharge the role of examining the complaint, consulting with interested parties, ensuring that procedural fairness is provided to the worker, and making a decision on the complaint. More than one person may manage the complaint for organisational reasons or to avoid conflicts of interest or the appearance of bias.

(d) Identify the training, policies, procedures and any other relevant systems of work provided to the worker in the context of the supports or services in which the allegation arose.

(e) Determine an appropriate process for managing the complaint, having regard to the matters considered in paragraphs (a), (b) and (c), and aspects of this instrument.

(f) Inform the worker of the issue to be investigated, and the allegation(s) made against the worker. There is no formal requirement as to how the notice is to be given or the issues are to be framed – though the prudent course is to give notice in writing if the matters or potential sanctions under consideration are serious in nature.

(g) Inform the worker how the matter will be investigated, including who is conducting the investigation, how long it is expected to take, and how the investigation will be reported.

(h) Adequate details of any allegation should be given to enable the worker to respond in a constructive manner – for example, tell the worker what they are alleged to have done or omitted to do, when the incident occurred, and of any evidence that tends to confirm the allegation. Draw the worker's attention to any issue that may be critical to the outcome but which may not be apparent to them.

It is not generally necessary to identify who made the allegation, though this may be unavoidable in providing other details.

(i) It is not generally necessary to give the worker access to records relating to the complaint – providing them with a summary of the information that may be relied on in reaching a decision is usually sufficient. Depending on the nature of an allegation it may be necessary to allow a person to inspect a document or to listen to or view an audio-visual recording that may be taken into account.

(j) The decision maker or person conducting the inquiry or investigation is not required to notify their provisional views or tentative findings. However, it can enhance the fairness of a process to alert a person to a perceived deficiency or inconsistency in their submission.

(2) Inform the worker of any potential sanction that may be imposed.

(a) A sanction may be formal in nature (such as dismissal or an investigation into an alleged contravention of the Code of Conduct) or be an adverse consequence of a different kind (for example, work restrictions, or publication of an investigation report that reflects adversely on the worker's performance).

(b) The notice to the worker should identify considerations that may be relevant to deciding on a sanction to be imposed. This is particularly important if a harsh sanction such as dismissal or reduction in salary is a possibility.

(c) It may be desirable to conduct a separate hearing or procedure to decide on a sanction, to ensure fairness to the worker and to remove any appearance of bias.

(3) Give the worker a reasonable opportunity to respond to the issue to be investigated, the allegation(s) against the worker and possible sanctions.

(a) What will be a 'reasonable opportunity' will depend on the circumstances. Many issues can be dealt with quickly – by discussion or allowing the worker a few days to prepare a response. Other issues may require a longer period for the worker to consult others, obtain information or prepare a more extended response. The central requirement is that the worker should have a reasonable opportunity to comment upon or rebut adverse or prejudicial material and to put forward information and submissions in support of a favourable outcome.

(b) It is good practice to allow the worker to choose how they will respond – for example, a face-to-face interview or meeting to discuss the issue, a written submission, or a meeting at which the worker is accompanied by a support person that could be a colleague, a family member, or a representative (see paragraph (c) below).

(c) A worker may choose to consult a lawyer or union official in preparing a statement, and obtain advice about what they intend to say in making a verbal submission. The person may have the union official or lawyer attend a meeting as their support person or representative respectively.

(d) It may be necessary to allow a person to make more than one statement or submission before a final decision is made. For example, it may transpire at a meeting that some disputed matters cannot fairly be resolved without a further statement or evidence. Equally, if a harsh sanction is to be imposed it may be desirable to split the hearing into two stages – an initial finding on the complaint allegation, followed by a decision on the sanction to be imposed.

(e) Special measures may be required to ensure that a person has a reasonable opportunity to respond – such as use of an interpreter, conducting an

interview/hearing at a separate location, or agreeing to a worker's request (supported by reasons) for an extension of time or adjournment.

(4) Inform the worker in writing of the decision that has been made following the investigation.

(a) A written record of the decision is important to ensure clarity and certainty, and to enable the worker to decide whether to follow up.
(b) The written form can vary according to the circumstances. For example, a formal letter of advice should be used to notify an adverse decision that could be distressing to a worker or impair their career. In other circumstances – including if a decision is favourable to a worker – it may be sufficient to notify the decision by email, or to invite the worker to sign/initial a written record of the decision.
(c) If a sanction is imposed on a worker (including an adverse finding recorded on their personnel record) the nature of the sanction should be clearly stated. If the worker has a right to challenge or review the sanction, the procedure for doing so should be outlined.

(5) Ensure that the investigation of the complaint or allegation is conducted in a fair and unbiased manner.

(a) A transparent process should be followed that gives a worker a reasonable opportunity to present their views on all relevant issues.
(b) The person conducting the investigation should do so with an open mind and avoid forming a view on whether to sustain a complaint allegation against a worker before the investigation is complete.
(c) Consider whether any decision to impose a sanction should be made separately by someone other than the person who conducted the investigation, to avoid any appearance of prejudice or prejudgement at this stage.

13 Procedural fairness – practical considerations

(1) ***Fair process***: Procedural fairness requirements aim to ensure that a fair process is followed in decision making that could adversely or detrimentally affect the rights or interests of a person. The underlying assumption is that a fair process will lead to better decision-making – and, in this context, better and fairer complaint handling. However, procedural fairness requirements stop short of assessing whether a particular decision or outcome is fair: they address the process to be followed in reaching a decision, but not the substantive merits of that decision.

(2) ***Fair process overall***: The obligation to afford procedural fairness applies to the overall process of making a decision or resolving a complaint, and not separately to each stage in that process. A person should be given a reasonable and informed opportunity to comment on any adverse finding or sanction before it is finally determined. The precise point in the process at which that opportunity is given can be of secondary importance.

(3) An illustration of that principle is that there is generally no procedural fairness obligation to notify a person of an adverse allegation or potential finding when a complaint is first recorded or referred to another body. A reasonable opportunity to comment on the allegation or potential finding can be given at a later stage. This enables appropriate analysis of a complaint to determine if it should be managed as a

complaint about the level or quality of services or supports that a person with disability is receiving, rather than an allegation of inappropriate conduct by a worker.

(4) A person who is facing a potential adverse finding or sanction should be reassured as necessary that the overall process will be fair. Equally, a deficiency at an early stage of the process can be corrected at a later stage, provided this is done by a good faith process in which the decision maker approaches the issue with an open mind and gives genuine consideration to any submission made by the person to whom procedural fairness is owed.

(5) ***The dual purpose of procedural fairness***: Procedural fairness is a legal obligation that applies to decisions made under statute that adversely affect the interests of others in a direct and specific manner. A failure to comply with this legal obligation may lead to an adverse decision being set aside by a court or questioned by a review tribunal or body.

(6) As importantly, procedural fairness aims to strengthen the fairness and integrity of administrative processes, regardless of whether legal proceedings for a breach are a possibility. Decision-makers should, accordingly, ensure procedural fairness in the pursuit of good administration as an overriding objective.

14 Dealing with confidential information

(1) Information to be considered in a complaint management and resolution process may have been received on a confidential basis. For example, a complainant, informant, witness or whistleblower may request that their identity remain confidential, or private personal information about a third party may be revealed during an investigation.

(2) The Complaint Rules (paragraph 8(5)(b)) require that a registered NDIS provider's complaints management and resolution system ensures that information provided in a complaint is kept confidential, and only disclosed if the disclosure is:

(a) required by law; or
(b) is otherwise appropriate in the circumstances.

(3) Procedural fairness principles recognise that protection of identity and confidentiality can be important elements of effective complaint handling and dispute resolution. This must nevertheless be balanced against the obligation to provide procedural fairness to a person whose interests may be adversely affected by an administrative action, particularly if a sanction may be imposed on a person as part of the resolution of a complaint or allegation.

(4) This means that the obligation to provide procedural fairness may override – in whole or in part - the obligation to maintain confidentiality, depending on the circumstances.

(5) Confidentiality can more easily be safeguarded if a complaint is classified as one about the quality or level of supports provided to a person with disability, rather than a complaint that alleges inappropriate conduct by a worker. Accordingly, a registered NDIS provider should consider at the outset whether any worker who is identified in a complaint is identified only in a manner incidental to describing a complaint issue about the quality or level of supports.

(6) Where a complaint involves allegations about the conduct of a worker, it may be practicable to provide the worker with the allegation and the details given in support of it, without disclosing the identity of the source of any prejudicial information. This may not be possible if, for example,.the identity of the source of information will be readily apparent from the nature of the allegation. Sometimes, too, fairness may require that a source of information is revealed, so that the worker can better understand how to comment upon or rebut that information. Generally, disclosure is required to a level necessary to avoid any practical injustice to a person to whom procedural fairness is owed.

(7) The decision maker or person conducting the inquiry or investigation should look for ways of balancing fairness and confidentiality and effectively safeguarding the interests of all parties. It may be desirable to conduct a separate preliminary discussion with each of the interested parties, so they may offer suggestions or make undertakings that ensure an appropriate balance can be struck.

15 Maintaining an impartial and unbiased appearance

(1) A decision maker should be impartial and free of actual or apprehended bias. The test for apprehended bias is whether a fair-minded observer might reasonably suspect that the decision maker is not impartial.

(2) Apprehended bias can be inferred from a person's conduct, comments, associations or other relevant circumstances. Examples of apprehended bias can include situations in which a decision maker (or person conducting an inquiry) -

(a) has a conflict of interest or personal stake in the matter to be resolved, or a relationship with one of the parties that casts doubt on the appearance of fairness

(b) displayed hostility or favouritism to one of the parties involved in a matter

(c) made comments that suggest the decision maker has prejudged a disputed issue and will not approach the evidence with an open mind

(d) was involved at an earlier stage of the process, for example, in making the allegation to be investigated or providing a statement in support of one of the parties.

(3) Actual or apprehended bias of a decision maker can undermine both the integrity and legal validity of the decision making process and outcome. The responsibility rests on the decision maker to ensure there is no actual or apprehended bias, and if necessary to withdraw from the process and assign the decision making responsibility to another person. If that is not practical (for example, it is a small organisation) another option is to outsource the inquiry/assessment role to an external professional to prepare a report for the decision maker. A registered NDIS provider has flexibility in deciding how to deal with bias and conflict of interest concerns.

(4) It is good practice to clarify bias and conflict of interest concerns before the process commences. It is open to the parties, once informed of a potential issue, to waive any objection and to allow the decision maker to continue. On the other hand, a decision maker should not withdraw merely because one of the parties raises a bias objection: the test of the 'fair-minded observer' should be followed. It is common that decision

makers will know or work with one or other of the parties, have some familiarity with the issues to be decided, or have expressed a preliminary view on or more of those issues.

(5) If a bias issue arises during the course of an inquiry after evidence and submissions have already been collected, these can generally be made available to the new inquirer/decision maker, subject to ensuring procedural fairness. It is good practice to consult the parties about this option before doing so.

The Hon Dan Tehan MP
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MC18-006138

28 AUG 2018

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough Ian

Thank you for your letter of 15 August 2018 regarding the assessment by the Parliamentary Joint Committee on Human Rights (the committee) on the following legislation:

- *National Disability Insurance Scheme (Protection and Disclosure of Information - Commissioner) Rules 2018* [F2018L00635]

I appreciate the time you have taken to bring this matter to my attention. The committee has requested further information around the human rights compatibility of these 2018 Rules as assessed in the committee's Report 6 of 2018.

The Committee notes at paragraph 1.125 that sections 15, 17, 18 and 19 of the *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018* (Information Rules) may permit the disclosure of personal information to bodies that are not constrained by the *Privacy Act 1988* (Privacy Act). While compliance with the Privacy Act is not a complete answer to concerns about the right to privacy, it may provide relevant safeguards that assist in determining whether a limitation on the right to privacy is proportionate. Noting this potential gap in coverage, the relevant sections do not require the Commissioner to be satisfied of how bodies that are not subject to the Privacy Act will collect, store and disclose personal information that is disclosed to them. The potential for information to be disclosed to bodies that are not constrained by the Privacy Act raises a question as to whether there are other, relevant safeguards in place to protect the right to privacy.

In the event that sections 15, 17, 18 and 19 of the Information Rules do enable disclosure to organisations that are not covered by the Privacy Act or other applicable laws protecting the privacy and confidentiality of information, they remain subject to the protections and offences outlined in Part 2 of Chapter 4 of the Act in respect the use of protected or personal information. In addition, the disclosure notice that must be completed by the Commissioner pursuant to section 12 of the Information Rules can stipulate limitations on how the organisation can use, record or disclose information.

The Committee notes at paragraph 1.126 that there are a number of exceptions to the safeguards in Division 1, which may restrict the effectiveness of the safeguards. For example, under paragraph 10(3)(b), the Commissioner is not required to de-identify personal information if they are satisfied that to do so would result in an unreasonable delay. A similar exception applies to the consent and consultation requirements in section 11. Neither the Information Rules nor the statement of compatibility explain what constitutes an 'unreasonable delay' or how this is determined. Further information as to how this threshold is determined is provided below to assist the committee to assess whether the limitation on the right to privacy is proportionate to the legitimate objective sought.

The assessment and determination of whether adhering to the de-identification or consultation requirements in Division 1 of the Information Rules would result in an unreasonable delay would need to be determined on a case by case basis. Generally speaking, it is unlikely that the de-identification of information would result in an unreasonable delay. In relation to the consultation requirements, an unreasonable delay will generally be determined in circumstances where an affected person has been given a reasonable opportunity to comment on a proposed disclosure and has not responded.

Finally, the Committee notes in relation to the Information Rules at paragraph 1.27 that the rules do not appear to make decisions made by the Commissioner under Part 3 [The Commissioner's information disclosure powers] reviewable, nor does the Act make decisions under section 67E reviewable. This raises concerns about the sufficiency of the safeguards in place to protect the right to privacy.

Decisions made under Part 3 of the Rules are not reviewable. The rules attempt to strike a balance between, on the one hand, protecting the privacy of individuals and, on the other hand, enabling the Commission to be a responsive regulator and work effectively with other bodies to prevent harm to people with disability arising from unsafe or poor quality NDIS supports or services.

Thank you again for bringing your concerns to my attention.

Yours sincerely

DAN TEHAN

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MC18-006139

28 AUG 2018

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
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Dear Mr Goodenough Ian,

Thank you for your letter of 15 August 2018 regarding the assessment by the Parliamentary Joint Committee on Human Rights (the committee) on the following legislation:

- *National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 [F2018L00632]*

I appreciate the time you have taken to bring this matter to my attention. The committee has requested further information around the human rights compatibility of these 2018 Rules as assessed in the committee's Report 6 of 2018.

The *National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018* (the Rules) do not authorise a registered NDIS provider to use a restrictive practice. The Rules seek to achieve a reduction and elimination of restrictive practices in the NDIS by promoting behaviour support strategies including positive behaviour support and imposing significant conditions around the use of restrictive practices. For example, a restrictive practice can only be used as a last resort in response to risk of harm to the person with disability or others, and after the provider has explored and applied evidence-based, person-centred and proactive strategies and be used for the shortest possible time to ensure the safety of the person with disability or others (section 21). The Rules state that an NDIS provider must not use a restrictive practice that has been prohibited by a State or Territory (section 8). In addition, the Rules require that a restrictive practice be authorised in accordance with any relevant State or Territory process in relation to the use of that practice (section 9).

The Rules, together with the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018* and *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*, engage a variety of regulatory mechanisms to develop a holistic system for the safeguarding of the human rights of people with disability.

The Rules create certain conditions on the registration of providers using regulated restrictive practices and impose a number of limitations when a restrictive practice is being used. For example, when a restrictive practice is being used it must:

- be part of a behaviour support plan developed by a behaviour support practitioner;
- be the least restrictive response possible in the circumstances;
- reduce the risk of harm to the person or others;
- be used for the shortest possible time to ensure the safety of the person or others; and
- if the State or Territory requires authorisation for the use of that practice, such authorisation must be obtained.

In addition, a 'single emergency use' of a regulated restrictive practice that has not been authorised in accordance with a State or Territory process in relation to the use of that practice, constitutes a reportable incident for the purposes of the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018* (section 16). This reporting requirement ensures the NDIS Commission has visibility of the 'first use' and 'single emergency use' of a regulated restrictive practice. Such reports will be provided to the NDIS Quality and Safeguards Commission's behaviour support team for consideration and follow up as required.

The Rules require that a person with disability, and their family, carers, guardian or other relevant person, be consulted when a behaviour support plan is being developed. Details of any regulated restrictive practice to be included in a behaviour support plan must also be provided in an appropriately accessible format (section 20). As noted above, the Rules create certain conditions on the registration of providers using regulated restrictive practices and impose a number of limitations on the use of regulated restrictive practices with a view to reducing and eliminating restrictive practices in the NDIS.

The Rules aim to achieve the reduction and elimination of restrictive practices in the NDIS, consistent with the Convention on the Rights of Persons with Disabilities (UNCRPD) and Australian Governments' commitments under the National Framework for the Reduction and Elimination of Restrictive Practices (2014).

The Rules and related instruments seek to achieve this by imposing reasonable, necessary and proportionate conditions of registration on NDIS providers, including reporting requirements in relation to emergency use of restrictive practices, which will give the NDIS Commission visibility of progress made in relation to the reduction and elimination of restrictive practices in the NDIS.

An NDIS provider is obliged to adhere to privacy laws and other applicable laws which protect the privacy and confidentiality of information. In relation to additional safeguards, it is a requirement under paragraph 6(b) of the *National Disability Insurance Scheme (Code of Conduct) Rules 2018* that an NDIS provider respect of the privacy of people with disability. A contravention of the NDIS Code of Conduct can attract a penalty of up to 250 penalty units. An NDIS provider is also obliged to adhere to privacy laws and other applicable laws which protect the privacy and confidentiality of information.

Once the information is provided to the Commission, it becomes protected Commission information and is subject to the protections outlined in Division 2, Part 2, and Chapter 4 of the Act.

Thank you again for bringing your concerns to my attention.

Yours sincerely

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MC18-004624

09 JUL 2018

Mr Ian Goodenough MP
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Dear Mr Goodenough Ian,

Thank you for your email of 20 June 2018 regarding your Committee's consideration of the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 (now Act) (the National Act) and National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018 (now Act). I appreciate the time you have taken to bring this matter to my attention. My response in relation to the human rights compatibility of the legislation is outlined below.

As you may be aware, the National Redress Scheme for people who have experienced institutional child sexual abuse (the Scheme) commenced operation on 1 July 2018. The National Act that established the Scheme passed the Australian Parliament and received Royal Assent on 21 June 2018. The passage of this legislation is significant as it enables jurisdictions and non-government institutions to opt into the Scheme, ensuring those who were sexually abused as children in institutions can apply for redress.

As acknowledged by the Committee, the statement of compatibility to the National Act and the Consequential Amendments Act draws extensively upon the Committee's earlier human rights analysis of the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017, and I thank the Committee for this analysis.

The Australian Government maintains the view that the National Act has the appropriate safeguards in place to be compatible with human rights while achieving the objective of establishing a best practice, supportive redress scheme for those who have experienced institutional child sexual abuse. Throughout its operation, the Scheme will continue to be monitored and reviewed to ensure these safeguards remain appropriate and compatible with human rights.

National Redress Scheme Rules

1.59 The committee requests the minister provide the committee with a copy of the proposed redress scheme rules. Alternatively, the committee requests a detailed overview of the proposed rules, having regard to the matters discussed above.

The National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 (the Rules) are now available on the Federal Register of Legislation.

Information sharing

1.69 The committee seeks clarification from the minister, having regard to the statement on page 125 of the statement of compatibility, as to whether the public interest disclosure power in section 95 of the 2018 Bill could be amended so as to include a positive requirement that the scheme operator must have regard to the impact the disclosure may have on a person to whom the information relates.

1.70 In relation to the additional disclosure authorisations for employees or officers of government institutions in section 97, the committee seeks the advice of the minister as to the compatibility of this provision with the right to privacy, in particular:

- **whether the measure pursues a legitimate objective;**
- **whether the measure is rationally connected to that objective;**
- **whether the measure is proportionate to the legitimate objective (including whether the provision is the least rights restrictive approach, and clarification as to the scope of the power to declare new permitted purposes by the rules); and**
- **whether section 97 could be amended to include a positive requirement that the operator must have regard to the impact the disclosure may have on a person to whom the information relates.**

Section 95 of the National Act provides that the Scheme Operator may disclose protected information if the Scheme Operator certifies that the disclosure is necessary in the public interest. In certifying the disclosure in the public interest, the Scheme Operator must also act in accordance with the Rules, which set out detailed requirements for this certification. In particular, rule 42 expressly requires the Scheme Operator to have regard to the impact that the disclosure might have on the person to whom the information relates.

Section 97 of the National Act provides limitations on when a person may disclose protected information to a government institution, and when employees or officers of a government institution may disclose protected information. That provision provides that protected information may be disclosed if that disclosure is reasonably necessary for a permitted purpose. The National Act limits disclosure for the permitted purposes of the enforcement of a criminal law, for the safety or wellbeing of children, for investigatory, disciplinary or employment processes related to the safety or wellbeing of children, or for a purpose prescribed in the Rules.

These disclosure arrangements were included after significant consultation with the states and territories and key non-government institutions, who strongly advocated that such disclosure provisions were essential to enable them to comply with existing state or territory mandatory reporting laws or reportable conduct scheme requirements, and necessary to support states to opt in to the Scheme.

Using the Rules to prescribe other permitted purposes rather than incorporating all elements of the Scheme in the National Act provides appropriate flexibility and enables the Scheme to respond to matters as they arise in a timely manner through adapting and modifying the Rules. The Rules do not currently prescribe any additional permitted purposes and any adaptations or modifications to the Rules will be agreed by participating states and territories.

Entitlement to receive redress under the National Redress Scheme: special rules for persons with serious criminal convictions

1.85 The preceding analysis indicates that the special assessment procedure for applicants with serious criminal convictions raises concerns as to the compatibility of the measure with the right to equality and non-discrimination. This is because the measure may disproportionately negatively affect Aboriginal and Torres Strait Islander peoples and so may constitute indirect discrimination on the basis of race. It may also constitute discrimination on the basis of a person's criminal record.

1.86 The committee seeks the advice of the minister as to the compatibility of the measure with the right to equality and non-discrimination, in particular:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available, and whether determinations by the scheme operator under proposed section 63 are able to be reviewed).**

1.90 The preceding analysis indicates that restrictions on the entitlement to redress for survivors with serious criminal convictions engage the right to an effective remedy. The statement of compatibility does not address the compatibility of the measure with this right.

1.91 The committee seeks the advice of the minister as to the compatibility of the special assessment process for persons with serious criminal convictions with the right to an effective remedy.

The limitations on applications from people who have committed serious offences have been included in the National Act to ensure integrity of and public confidence in the Scheme, and to prevent further traumatising victims or survivors of serious or harmful crimes. These arrangements were developed in consultation with state and territory Redress Ministers, who agreed that reasonable limitations on such applications are necessary to have public confidence in the Scheme, and a necessary part of the framework for the states and territories to opt in to the Scheme. The participation of the states, territories and non-government institutions is integral to ensuring nationally consistent and equal access to effective remedy for those who have experienced institutional child sexual abuse.

Before being entitled to redress, those with serious criminal convictions will go through a special, case-by-case assessment under section 63 of the National Act. Determining eligibility by way of special assessment (including consideration of the nature of the crime committed, the duration of the sentence, rehabilitation outcomes of the person and broader public interest issue factors), provides assurance that only those who have committed very serious, heinous crimes will be prevented from being entitled to redress.

These arrangements do not contravene the right to effective remedy, as people with serious criminal convictions will still have the opportunity to apply for redress under the Scheme. The Scheme Operator will determine the person's application on a case-by-case basis and only prevent entitlement to redress where the person would bring disrepute to the Scheme or affect the public's confidence in the Scheme. This balances the need to allow everyone to apply to the Scheme, with the need to give integrity and public confidence to the Scheme by placing some limitations on applications from people who themselves have committed serious and harmful offences.

Access to redress under the National Redress Scheme for persons in gaol

1.98 The preceding analysis indicates that precluding incarcerated persons from applying for redress may engage the right to equality and non-discrimination. This is because the measure may disproportionately negatively affect Aboriginal and Torres Strait Islander peoples and so may constitute indirect discrimination on the basis of race. It may also constitute discrimination on the basis of a person's criminal record.

1.99 The committee seeks the advice of the minister as to the compatibility of the measure with the right to equality and non-discrimination, in particular:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available, and whether determinations by the scheme operator under proposed section 20 are able to be reviewed).**

1.100 The preceding analysis also raises questions as to the compatibility of the measure with the right to an effective remedy. The committee therefore seeks the advice of the minister as to the compatibility of the measure with the right to an effective remedy.

The restriction on applications from people in gaol has been included in the National Act as the ability to deliver appropriate Redress Support Services to incarcerated survivors is limited. Limited access to support services may make it more difficult for those survivors to write an application, or for those survivors to understand the implications of releasing responsible participating institutions from liability for sexual abuse and related non-sexual abuse within the scope of the Scheme. Additionally, institutions may not be able to deliver an appropriate direct personal response to a survivor if that survivor is incarcerated. In a closed institutional setting there will also be greater difficulty maintaining survivor privacy and confidentiality, particularly considering the Scheme's content matter.

The Scheme includes important safeguards not to discriminate against those in gaol. People who cannot make an application because they are in gaol will be able to apply once they are released. As the Scheme will run for 10 years, many people will be able to apply once they are released, with the full support of the Redress Support Services. The Scheme Operator can also determine that there are exceptional circumstances that justify an application being made from a person in gaol. These exceptional circumstances may include where a person will be in gaol beyond the Scheme sunset day, or if the person is so ill or frail that they would not be able to make an application when they are released.

This measure does not contravene the right to effective remedy, as people will be able to apply for redress once they are released from gaol. For those who will not have the opportunity to apply when they are released, either because they are so ill that they may not be able to make an application when they are released, or if they are expected to remain in gaol after the Scheme sunset day, the Scheme Operator can determine that exceptional circumstances apply that justify the application from gaol being made.

Entitlement to receive redress under the National Redress Scheme: persons subject to a security notice

1.108 The preceding analysis indicates that the restrictions on entitlement to persons subject to security notices engage the right to an effective remedy.

1.109 The committee therefore seeks the advice of the minister as to the compatibility of the restriction with this right.

1.114 The preceding analysis raises questions as to whether removing a person's entitlement under the scheme while a security notice is in force engages and limits fair trial and fair hearing rights under Article 14 of the ICCPR.

1.115 The committee seeks the advice of the minister as to the compatibility of the security notice procedures with fair trial and fair hearing rights under Article 14 of the ICCPR.

The National Act includes provisions that restrict a person's access to redress where it may prejudice the security of Australia or a foreign country. A person's access to redress will only be impacted in circumstances where the receipt of redress is relevant to the assessed security risk posed by the individual and the receipt of redress would adversely impact the requirements of security. It is not intended that every person whose passport or visa has been refused or cancelled would not be entitled to access redress, rather only in cases where it is appropriate or justified on security grounds.

These provisions provide consistent powers for the Australian Government to deal with the threat of terrorism within Australia and that posed by Australians who participate in terrorist activities overseas. These are also standard arrangements that align with Australia's existing counter-terrorism legislative framework by mirroring provisions contained in the *Paid Parental Leave Act 2010* (sections 278A to 278L), *Social Security Act 1991* (sections 38L to 38W) and *A New Tax System (Family Assistance) Act 1999* (sections 57GH to 57GS).

While not entitled to apply for redress, a person subject to a security notice who has suffered sexual abuse may still be able to pursue a civil claim to seek remedy for the abuse suffered. Should that person no longer be subject to a security notice, that person will then be entitled to apply for redress under the Scheme, should they satisfy other entitlement requirements.

A person subject to a security notice seeking to apply for redress will not be able to seek internal review of their entitlement for redress, as they are not entitled by way of a security notice as determined and decided by the Minister for Home Affairs. However, as section 69 of the National Act outlines, the Minister for Home Affairs is required to review the application of a security notice every 12 months, and as outlined in section 70 of the National Act, may revoke a security notice.

The right to judicial review of the determination of a security notice is maintained, and is not limited by the National Act. Judicial review under section 75(v) of the Constitution is maintained and where such a suit is initiated, a person will be entitled to a fair and public hearing by an independent and impartial tribunal. A person subject to a security notice will also maintain existing judicial review rights in the Administrative Appeals Tribunal in relation to the issuing of an adverse security assessment or the decision to cancel a passport.

Entitlement to receive redress under the National Redress Scheme: child applicants

1.122 The preceding analysis indicates that the special process for child applicants, to be prescribed in the rules, raises concerns as to compatibility with the right to an effective remedy and the right to equality and non-discrimination.

1.123 The committee seeks further information as to the proposed process for child applicants, including:

- **A copy of the proposed rules prescribing the process for child applicants (or, if no copy is available, a detailed outline of the proposed rules); and**
- **Information as to safeguards in the proposed rules to protect the right to an effective remedy and the right to equality and non-discrimination (including whether the rules will be subject to disallowance or other parliamentary oversight, and whether decisions by the operator pursuant to the rules will be capable of being reviewed).**

Section 15 of the Rules deals with applications by a child. The process contained in this section is consistent with the right to an effective remedy and the right to equality and non-discrimination. The intention of this process is to allow the child, in the months prior to turning 18, to provide further detail about the abuse related to their application and the impact of the abuse, which may not have been realised at the time they submitted their application due to their young age. This process also allows the Scheme Operator to make a more fully informed determination regarding the child's eligibility for redress as soon as practicable after they turn 18.

As stated in the human rights statement of compatibility accompanying the National Act, prior to turning 18 child applicants will be given an indication of their likely redress entitlement. The purpose of this is to provide information to the child to pursue a range of different options, if they so choose. Some may wait until they turn 18 in order to access redress, whilst others (supported by their parent/s or guardian/s) may choose to pursue civil litigation. Once a determination to approve, or not approve, the application has been made, child applicants will be able to seek a review of the determination, consistent with all other determinations, as outlined in Chapter 4, Part 4-1 of the National Act.

Thank you again for raising this matter with me.

Yours sincerely

DAN TEHAN

Appendix 4

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- 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 All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia’s jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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1 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

2 For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

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[3] The Attorney-General's Department guidance may be found at https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx.

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on a human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011 edition, available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf.

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

[4] See, for example, A v Australia (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the civil penalty provision carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that 'civil; penalties may be 'criminal' for the purpose of human rights law, see, for example, *Osiyuk v Belarus* (1311/04); Sayadi and *Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out the articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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