# Chapter 2

## Concluded matters

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

2.2 Correspondence relating to these matters is available on the committee's website.[1]

## Bills and legislative instruments

### Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021[2]

### Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923]

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| **Purpose** | The Aged Care and Other Legislation Amendment (Royal Commission No. 1) Bill 2021 seeks to amend the *Aged Care Act 1997* and the *Aged Care Quality and Safety Commission Act 2018* to:<br>• set out requirements and preconditions in relation to the use of restrictive practices;<br>• empower the secretary of the Department of Health to conduct reviews in relation to the delivery and administration of home care arrangements; and<br>• remove the requirement for the minister to establish a committee to be known as the Aged Care Financing Authority<br>The Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 amends the *Quality of Care Principles 2014* to set out requirements in relation to the use of |

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 and Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], *Report 10 of 2021*; [2021] AUPJCHR 101.

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| | restrictive practices and responsibilities of approved providers relating to behaviour support plans. |
| **Portfolio** | Health |
| **Bill introduced** | House of Representatives, 27 May 2021<br>*Received Royal Assent 28 June 2021* |
| **Last day to disallow legislative instrument** | 15 sitting days after tabling (tabled in the Senate and the House of Representatives on 3 August 2021). Notice of motion to disallow must be given by 18 October 2021[3] |
| **Rights** | Prohibition against torture and other cruel, inhuman or degrading treatment; rights to health; privacy; freedom of movement; liberty; equality and non-discrimination; rights of persons with disability |

2.3 The committee requested a response from the minister in relation to the bill in *Report 7 of 2021*.[4]

## Background

2.4 The Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019[5] came into force on 1 July 2019. This legislative instrument regulates the use of physical and chemical restraints by approved providers of residential aged care and short-term restorative care in a residential setting. The Parliamentary Joint Committee on Human Rights undertook an inquiry (2019 inquiry) into the instrument, as part of its function of examining legislation for compatibility with human rights, and reported on 13 November 2019.[6] Among other things the committee recommended that there be better regulation of the use of restraints in residential aged care facilities, including in relation to exhausting alternatives to restraint, taking preventative measures and using restraint as a last resort; obtaining or confirming informed consent; improving oversight of the use of restraints; and having mandatory reporting requirements for the use of all types of restraint.[7] In response to this report the government introduced amendments to the Quality of Care Principles to make it clear that restraint must be used as a last resort, refer to state and territory laws regulating

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

4 Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2021), pp. 2-10.

5 F2019L00511.

6 Parliamentary Joint Committee on Human Rights, Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 (13 November 2019).

7 Parliamentary Joint Committee on Human Rights, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (13 November 2019), recommendation 2, pp. 54–55.

consent and require a review of the first 12 months operation of the new law.[8] The review, finalised in December 2020, made a number of recommendations, including to clarify consent requirements, strengthen requirements for alternative strategies, require an assessment of the need for restraint in individual cases and for monitoring and reviewing the use of restraint.[9]

2.5 In addition, the Royal Commission into Aged Care Quality and Safety considered the use of restrictive practices. The final report of the Counsel Assisting the Commission recommended new requirements be introduced to regulate the use of restraints in residential aged care and that these requirements should be informed by the report of the independent review, the committee's 2019 inquiry report and the approach taken by the National Disability Insurance Scheme Rules.[10] The Royal Commission into Aged Care Quality and Safety's Final Report made a number of recommendations to regulate the use of restraints.[11] The Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 (the bill) is stated to be in response to the recommendations of the Royal Commission and the independent review. [12] The bill received Royal Assent on 28 June 2021 and the Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 (the instrument) was made the same day.

## Regulation of the use of restrictive practices in aged care

2.6 This bill (now Act) amended the *Aged Care Act 1997* (the Act) to require that the Quality of Care Principles must set out certain requirements regarding the use of

8 See Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019. See also Australian Government response to the Parliamentary Joint Committee on Human Rights report on the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019*, 18 March 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/QualityCareAmendment/Government_Response (accessed 9 June 2021).

9 See Australian Healthcare Associates, *Independent review of legislative provisions governing the use of restraint in residential aged care: Final report*, December 2020, https://www.health.gov.au/sites/default/files/documents/2021/02/independent-review-of-legislative-provisions-governing-the-use-of-restraint-in-residential-aged-care-final-report.pdf (accessed 9 June 2021).

10 See *Royal Commission into Aged Care Quality and Safety Counsel Assisting's Final Submissions*, 22 October 2020, recommendation 29, p. 151, https://agedcare.royalcommission.gov.au/sites/default/files/2021-02/RCD.9999.0541.0001.pdf (accessed 9 June 2021).

11 See Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect – Volume 3A, The New System*, 2021, recommendation 17, pp. 109–110, https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-3a_0.pdf (accessed 9 June 2021).

12 Explanatory memorandum, p. 1.

restrictive practices. It inserted a definition into the Act of what constitutes a 'restrictive practice' – namely, any practice or intervention that has the effect of restricting the rights or freedom of movement of the care recipient.[13] The amendments in the bill ensure that the Quality of Care Principles must:

- require that a restrictive practice is only used as a last resort to prevent harm and after consideration of the likely impact of the practice on the care recipient;
- require that, to the extent possible, alternative strategies are used and any alternative strategies used or considered are documented;
- require that a restrictive practice is used only to the extent that it is necessary and in proportion to the risk of harm;
- require that if a restrictive practice is used it is used in the least restrictive form, and for the shortest time, necessary to prevent harm;
- require that informed consent is given to the use of a restrictive practice;
- require that the use of a restrictive practice is not inconsistent with any rights and responsibilities specified in the User Rights Principles; and
- provide for the monitoring and review of the use of a restrictive practice in relation to a care recipient.[14]

2.7 The bill also provided that the Quality of Care Principles may provide that a requirement specified in the Principles does not apply if the use of a restrictive practice is necessary in an emergency.[15]

2.8 The instrument sets out the detailed circumstances in which a restrictive practice can be used in relation to a care recipient and the responsibilities of approved providers relating to restrictive practices and behaviour support plans.[16] A restrictive practice includes the use of a chemical restraint, environmental restraint, mechanical

13 Schedule 1, item 3, proposed new section 54-9.

14 Schedule 1, item 3, proposed new subsection 54-10(1).

15 Schedule 1, item 3, proposed new subsection 54-10(2).

16 The responsibilities of approved providers relating to restrictive practices are set out in schedule 1 and commence from 1 July 2021. The responsibilities of approved providers relating to behaviour support plans are set out in schedule 2 and commence from 1 September 2021. The explanatory statement states that the amended behaviour support plan requirements commence from 1 September 2021 to allow sufficient time for aged care providers to prepare to meet these requirements: p. 2.

restraint, physical restraint or seclusion in relation to a care recipient.[17] A restrictive practice may be used by an approved provider where the specified requirements set out in the instrument are satisfied.[18]

2.9 The instrument also sets out additional requirements regarding the assessment of the necessity of the use of restrictive practices. For the use of restrictive practices other than chemical restraint, an approved health practitioner (meaning a medical practitioner, nurse practitioner or registered nurse) who has day-to-day knowledge of the care recipient must have assessed the recipient as posing a risk of harm to themselves or others, assessed the use of restrictive practice as necessary, and documented the assessments.[19] For the use of chemical restraints, a medical practitioner or nurse practitioner must have assessed the care recipient as posing a risk of harm to themselves or others, assessed the use of chemical restraint as necessary, and prescribed medication for the purpose of using the chemical restraint.[20] This assessment, as well as other specified matters, such as the reasons why chemical restraint is necessary, must be documented in the care and services plan/behaviour support plan.[21] Additionally, the approved provider must be satisfied that the care recipient or the restrictive practices substituted decision-maker has given informed consent to the prescribing of medication.[22]

2.10 However, certain requirements relating to the use of restrictive practices, such as requiring the restrictive practice to be used as a last resort or with the informed consent of the care recipient, do not apply if the restrictive practice is necessary in an emergency.[23] The exemption of certain requirements only applies while the

17 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, section 15E. Each type of restrictive practice is defined in subsections 15E(2)–(6).

18 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, sections 15F and 15FA.

19 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, subsection 15FB(1).

20 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, subsection 15FC(1).

21 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, paragraph 15FC(1)(b).

22 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, paragraph 15FC(1)(c). The instrument notes that codes of appropriate professional practice for medical practitioners and nurse practitioners require practitioners to obtain informed consent before prescribing medication.

23 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, subsections 15FA(2), 15FB(2) and 15FC(2).

emergency exists, noting that if there is a need for the ongoing use of a restrictive practice it must be set out in the behaviour support plan.[24]

2.11 The instrument also sets out the responsibilities of approved providers while restrictive practices are being used, such as monitoring the care recipient and the necessity for the restrictive practice, and following the emergency use of a restrictive practice, such as informing the restrictive practices substitute decision maker and ensuring specified matters are documented in the care and services plan/behaviour support plan.[25] While the instrument requires certain matters relating to the use of restrictive practice to be documented, if the use is in accordance with the Quality of Care Principles, including the amendments made by this instrument, it is not a reportable incident.[26]

2.12 Finally, from 1 September 2021, the instrument introduces other responsibilities of approved providers relating to behaviour support plans.[27] Behaviour support plans are prepared by the approved provider, in consultation with the care recipient and relevant health practitioners, and must include specified matters, including information about the care recipient's behaviour and support needs and alternative strategies for addressing behaviours of concern.[28] Where the use of restrictive practice is assessed as necessary by an approved health, medical or nurse practitioner, additional matters must be set out in the behaviour support plan, including the care recipient's behaviours of concern that necessitate the use of the restrictive practice; how the restrictive practice is to be used, including duration, frequency and intended outcome; best practice alternative strategies that must be used before using the restrictive practice; monitoring and review requirements; and a record of the giving of informed consent by the care recipient or their restrictive practices substituted decision-maker.[29] The behaviour support plan must also set out additional specified matters if a restrictive practice is used and if there is a need for

24 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, subsections 15FA(3), 15FB(3) and 15FC(3); schedule 2, item 9, section 15HE.

25 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, sections 15GA and 15GB; schedule 2, items 6–8, subparagraphs 15GB(b)–(d).

26 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 11, subsection 15MB(2).

27 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 2.

28 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 2, item 9, sections 15HA, 15HB and 15HG.

29 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 2, item 9, section 15HC.

ongoing use of a restrictive practice.[30] The approved provider must also review a behaviour support plan on a regular basis and as soon as practicable after any change in the care recipient's circumstances.[31]

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Multiple rights*

2.13 Setting out requirements relating to when restrictive practices can be used by aged care providers engages a number of human rights. To the extent that the bill strengthens the responsibilities of approved providers by enhancing safeguards regarding the use of restrictive practices, the measure may assist in ensuring rights are not limited and may promote other rights,[32] including:

- ***the prohibition on torture or cruel, inhuman or degrading treatment or punishment***:[33] the United Nations (UN) Committee on the Rights of Persons with Disabilities has stated that Australia's use of restrictive practices (which includes chemical and physical restraints) on persons with disability 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.[34] The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also raised concerns and called for a ban on the use of restraints in the health-care context, noting that such restraint may constitute torture and ill-treatment in certain circumstances;[35]

30 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 2, item 9, sections 15HD and 15HE.

31 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 2, item 9, section 15HF.

32 As identified in the statement of compatibility, pp. 4–6.

33 International Covenant on Civil and Political Rights, article 7; Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5.

34 United Nations (UN) 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].

35 UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, A/HRC/22/53 (2013) [63]; UN General Assembly, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*, A/63/175 (2008) [55].

- ***the right to health***: which includes the right to be free from non-consensual medical treatment.[36] Australia also has obligations to provide persons with disability with the same range, quality and standard of health care and programmes as provided to other persons;[37]
- ***the right to privacy***: which includes the right to personal autonomy and physical and psychological integrity, and extends to protecting a person's bodily integrity against compulsory procedures.[38] Similarly, no person with disability shall be subjected to arbitrary or unlawful interference with their privacy;[39]
- ***the right to freedom of movement and liberty***: the right to liberty prohibits States from depriving a person of their liberty except in accordance with the law, and provides that no one shall be subject to arbitrary detention.[40] The existence of a disability shall also, in no case, justify a deprivation of liberty.[41] The right to freedom of movement includes the right to liberty of movement within a country.[42] A restriction on a person's movement may be to such a degree and intensity that it would constitute a 'deprivation' of liberty, particularly if an element of coercion is present.[43] These rights may be engaged and limited by intentional restrictions of voluntary movement or

36 International Covenant on Economic, Social and Cultural Rights, article 12. See UN Committee on Economic, Social and Cultural Rights, *General Comment No.14: The Right to the Highest Attainable Standard of Health* (2000) [8].

37 Convention on the Rights of Persons with Disabilities. See also UN Committee on Economic, Social and Cultural Rights, *General Comment No.14: The Right to the Highest Attainable Standard of Health* (2000), [8]. The rights of persons with disabilities are relevant insofar as some aged care residents may have physical or mental impairments that constitute a disability.

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

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

40 International Covenant on Civil and Political Rights, article 9. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

41 Convention on the Rights of Persons with Disabilities, article 14.

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

43 United Nations Human Rights Committee, *General Comment No.27: Article 12 (Freedom of Movement)* (1999) [7]; see also United Nations Human Rights Council, *Report of the Working Group on Arbitrary Detention*, A/HRC/22.44 (2012) [55] and [57]; *Foka v Turkey*, European Court of Human Rights Application No.28940/95, Judgment (2008) [78]; *Gillan and Quinton v United Kingdom*, European Court of Human Rights Application No.4158/05, Judgment (2010) [54]-[57]; *Austin v United Kingdom*, European Court of Human Rights Application Nos. 39692/09, 40713/09 and 41008/09, Grand Chamber (2012) [57]; *Gahramanov v Azerbaijan*, European Court of Human Rights Application No.26291/06, Judgment (2013) [38]-[45].

behaviour by the use of a device, or removal of mobility aids, or physical force, and limiting a care recipient to a particular environment;

- ***the rights of persons with disability***: as set out in the Convention on the Rights of Persons with Disabilities, including the right to equal recognition before the law and to exercise legal capacity;[44] the right of persons with disabilities to physical and mental integrity on an equal basis with others;[45] and the right to freedom from exploitation, violence and abuse;[46] and
- ***the right to equality and non-discrimination***: which provides that everyone is entitled to enjoy their rights without discrimination of any kind, including on the basis of age or disability.[47]

2.14 However, noting the complex interplay of existing laws regulating the use of restraints by approved providers, if the regulation of restraints for aged care providers leads to confusion as to when restraint is, or is not, permitted in residential aged care facilities, the practical operation and effect of the measure may mean, depending on the adequacy of the safeguards, that in practice this measure could limit the human rights set out above. As such, it is necessary to consider if the safeguards and protections set out in the bill ensure sufficient protection so as not to limit the human rights of aged care recipients.

2.15 In order to fully assess the compatibility of this bill with human rights, further information is required, in particular:

(a) why the bill does not prohibit the use of restrictive practices unless used in accordance with a behavioural support plan;

(b) who determines that the requirements for the use of a restrictive practice is met, for example who determines that a restrictive practice is the last resort, the least restrictive and used to the extent that is necessary and proportionate;

(c) what are the criteria for determining whether a situation constitutes an 'emergency' and who makes this determination;

(d) why is it appropriate to enable the Quality of Care Principles to override any of the requirements set out in the bill in an emergency, in particular the requirements that the restrictive practice: be used only to the extent

44 Convention on the Rights of Persons with Disabilities, article 12. This includes an obligation to ensure that all measures that relate to legal capacity provide for appropriate and effective safeguards to prevent abuse.

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

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

47 International Covenant on Civil and Political Rights, article 26.

necessary and in proportion to the risk of harm; be used in the least restrictive form and for the shortest time; and be monitored and reviewed;

(e) in requiring informed consent for the use of a restrictive practice, how long does such consent remain valid and, in the case of chemical restraint, is consent required only when medication is prescribed, or is it also required (or required to be confirmed) when medication is administered;

(f) who will monitor and review the use of restrictive practices, and will they be independent from the person who used the restrictive practice;

(g) why does the bill not appear to provide that each use of a restrictive practice must be documented; and

(h) will a restrictive practice undertaken in an emergency and therefore not in accordance with the requirements be a reportable incident.

***Committee's initial view***

2.16 The committee welcomed these proposed amendments as it considered these offered much stronger protections regarding minimising the use of restraints against vulnerable aged care residents. The committee considered this bill may assist in ensuring there are appropriate safeguards to protect the right not to be subjected to torture and other cruel, inhuman or degrading treatment, and may also promote the rights to health, privacy, freedom of movement, liberty, equality and non-discrimination and the rights of persons with disability.

2.17 However, some questions remained as to how some of these restrictions on the use of restraints will operate in practice, and so the committee sought the minister's advice as to the matters set out at paragraph [2.14].

2.18 The full initial analysis is set out in *Report 7 of 2021*.

## Minister's response[48]

2.19 The minister advised:

> As stated in the scrutiny report the Royal Commission Response Bill No. 1 provides that the *Quality of Care Principles 2014* can make provisions for the requirements of approved providers of residential aged care (approved providers) for the use of restrictive practices. The operationalised specific details of approved provider requirements have been included in the

48 The minister's response to the committee's inquiries was received on 22 June 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

proposed amendments to the Quality of Care Principles. The exposure draft of the principles, the Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 is now publicly available on the Department of Health's website and should be read in conjunction with the Royal Commission Response Bill No.1.

*Behaviour Support Plans*

From 1 September 2021, the proposed amendments to the Quality of Care Principles will introduce new responsibilities for approved providers to implement behaviour support plans for care recipients that need them. Under these responsibilities, a restrictive practice may not be used unless assessed as necessary in the behaviour support plan. The only exception to this is where there is a situation which may be deemed an emergency. The Quality of Care Principles specify details of what needs to be included in a behaviour support plan, including having best practice behaviour support strategies that are responsive to the care recipient's needs and seek to reduce or eliminate the need for restrictive practices. These supports should be individualised and address the underlying causes of the behaviours of concerns, while safeguarding the quality of life of care recipients.

Behaviour support plans also need to specify where the use of a restrictive practice has been assessed or necessary and where a restrictive practice is being used. While approved health practitioners (a medical practitioner, nurse practitioner or registered nurse) may assess a restrictive practice as necessary, it is important to note that comprehensive behaviour support planning and management is intended to reduce the use of restrictive practices.

Behaviour support plans should be developed in consultation with the care recipient, their nominated representative, any relevant health practitioners, and their restrictive practice substitute decision-maker if the care recipient lacks the capacity to provide informed consent.

The intention of these provisions in the Quality of Care Principles is to ensure the approved provider takes a more preventative approach in relation to the use of restrictive practices by considering alternative strategies in the first instance, while examining and seeking to understand the cause of the behaviours. The approved provider should consider any past events or experiences that led to behaviours of concern to help prevent future behaviours of concern occurring that may be related, to these causes or triggers.

If a behaviour support plan includes a restrictive practice that has been assessed as necessary, any use of a restrictive practice must be reviewed regularly or as soon as practicable after any change in the care recipient's circumstances. This includes any circumstance where a restrictive practice is used in an emergency. Any changes in behaviour should mean that the use of the restrictive practice should be reconsidered and reduced or stopped as soon as practicably possible.

*Who can assess a restrictive practice as necessary?*

The proposed amendments to the Quality of Care Principles set that an approved health practitioner who has day-to-day knowledge of the care recipient can assess that the use of a restrictive practice, other than chemical restraint, is necessary and that the care recipient poses a risk of harm to themselves or others. An approved health practitioner is defined as medical practitioner, a nurse practitioner or a registered nurse as defined by the *Health Insurance Act 1973*. Additionally, these assessments need to be documented.

The proposed amendments to the Quality of Care Principles set that only a medical practitioner or nurse practitioner can assess whether a chemical restraint is necessary. These professions are required to comply with their appropriate professional codes of practice and any applicable state and territory legislation in the state they practice. Prescribing medical or nurse practitioners are required to document the reason they have prescribed medication for the purpose of chemical restraint and they must have obtained informed consent from the care recipient or, if the care recipient lacks capacity, from their restrictive practice substitute decision-maker.

If medication has been prescribed as a chemical restraint, approved providers must engage with the prescribing practitioner and the care recipient to communicate the impact and effectiveness of the restraint and any conditions around its use. The approved provider is required to satisfy themselves that the prescribing practitioner has obtained informed consent for the use of the medication as a chemical restraint.

*Emergency use of restrictive practices*

The term 'emergency' in new subsection 54-10(2) is not expressly defined, and therefore has its ordinary meaning. In aged care the scope of emergency situations can be quite broad and adopting a prescriptive definition is likely to result in unintended consequences and may exclude situations of genuine emergency. This could foreseeably have the impact of placing the safety, health and wellbeing of care recipients and others at risk.

An emergency situation only applies while there is an immediate risk or harm to a care recipient or other person. Once this risk has ceased the emergency situation has passed, emergencies are not intended to last for long periods of time and are not a mechanism for approved providers to justify the continuous use of a restrictive practice.

If a restrictive practice is required after the immediate risk of harm has passed, this would be considered ongoing use and is not subject to emergency exemptions. Additionally, ongoing use of a restraint requires informed consent prior to its use.

The proposed amendments to the Quality of Care Principles detail the responsibilities that must be met following the emergency use of restrictive practices. This includes:

- informing the restrictive practices substitute decision maker about the use of the restrictive practice, if the care recipient lacked capacity to consent to the use of the restrictive practice; and
- documenting the reasons for the restrictive practice and the alternative strategies that were considered or used prior.

These responsibilities must be met as soon as practicable after the restrictive practice starts to be used.

During an emergency approved providers must still seek to ensure the least restrictive form of a restrictive practice is being applied and that it is used for the shortest time possible. Approved providers must also continually seek to consider whether an alternative strategy can be used and whether the restrictive practice can be reduced or stopped. These requirements are intended to ensure the use of restrictive practices are reduced and the inappropriate use of restrictive practices are eliminated.

Approved providers should be actively engaged in care recipients' behaviour support planning, which should significantly reduce the occurrence of emergencies. Approved providers must consider and manage triggers for care recipients' behaviour to prevent an emergency in the care planning for care recipients.

In practice, the Aged Care Quality and Safety Commission (the Commission) will be able to question the circumstances in which emergency use of a restrictive practice was activated.

*Informed consent arrangement for the use of restrictive practices*

The proposed amendments to the Quality of Care Principles inserts a new term, restrictive practices substitute decision-maker. A restrictive practices substitute decision-maker, for a restrictive practice in relation to a care recipient, means a person or body that, under the law of the state or territory in which the care recipient is provided with aged care, can give informed consent to the following if the care recipient lacks the capacity to give that consent:

- the use of the restrictive practice in relation to the care recipient; and
- if the restrictive practice is chemical restraint, the prescribing of medication for the purpose of using the chemical restraint.

State and territory legislation regulates who can give informed consent to the use of a restrictive practice and the prescribing of medication for the purpose of using that medication as a chemical restraint. The proposed amendments to the Quality of Care Principles do not affect the operation of any law of a state or territory in relation to restrictive practices. They seek to complement and clarify those state and territory laws that protect individuals from interference from their personal rights and liberties.

Care recipients must provide informed consent to the use of a restrictive practice wherever possible. If a care recipient does not have capacity to

consent, consent must be obtained from someone with authority to provide it, in this case, a restrictive practices substitute decision-maker.

Informed consent must be obtained before the restrictive practice is used, unless the restrictive practice is necessary in an emergency. If the use of a restrictive practice was used in an emergency and the care recipient lacked capacity to consent to the use of the restrictive practice, the restrictive practice substitute decision-maker must be informed as soon as practicable after the restrictive practice starts to be used.

If the ongoing use of a restrictive practice is assessed as necessary, informed consent for the ongoing use of the practice is required. Perpetual or ongoing approval cannot be given to the use of a restrictive practice. The care recipient or their restrictive practice substitute decision maker may withdraw their consent at any time. Therefore, the approved provider should take steps to regularly communicate with the care recipient or their restrictive practices substitute decision-maker, and obtain informed consent contemporaneously.

*Monitoring and review of the use of a restrictive practice*

The proposed amendments to the Quality of Care Principles stipulate that the use of restrictive practice must be regularly monitored, reviewed, and documented.

An approved provider must monitor a care recipient while a restrictive practice is being used, including monitoring of the following:

- signs of distress or harm;
- side effects and adverse events;
- changes in mode or behaviour;
- changes in well-being, including the care recipient's ability to engage in activities that enhance quality of life and are meaningful and pleasurable;
- changes in the care recipient's ability to maintain independent function (to the extent possible), and
- changes in the care recipient's ability to engage in activities of daily living (to the extent possible).

The proposed amendments to the Quality of Care Principles will also outline how the use of restrictive practices are to be reviewed, which includes consideration of:

- the outcome of its use and whether he intended outcome was achieved;
- whether an alternative strategy could be used to address the care recipient's behaviours of concern;

- whether a less restrictive form of the restrictive practice could be used to address the care recipient's behaviours of concern;
- whether there is an ongoing need for its use; and
- if the restrictive practice is chemical restraint–whether the medication prescribed for the purpose of using the chemical restraint can or should be reduced or stopped.

An approved provider must also review a behaviour support plan for a care recipient and make any necessary revisions on a regular basis and as soon as practicable after any change in the care recipient's circumstances.

Additionally, the use of a restrictive practice must also be continually monitored, reviewed and documented. If there is a change to a care recipient's circumstances or behaviour, a review should be completed to understand what has changed and whether the existing strategies remain best practice for the care recipient. This includes any circumstance where a restrictive practice is used in an emergency.

From 1 July 2021 all use of restraint, including the use of anti-psychotics will be reported to the Department of Health through My Aged Care under the National Aged Care Mandatory Quality Indicator Program.

Any use of restrictive practices that is inconsistent with their legislative requirements will need to be reported by an approved provider to the Commission under the Serious Incident Response Scheme. This ensures the Commission is able to focus on the incidents that pose the greatest risk to care recipients.

The Commission's oversight of restrictive practices is being strengthened through the appointment of a Senior Practitioner. Additionally, the Commission's powers will be expanded with the ability to impose civil penalties where an approved provider is not meeting its restrictive practice obligations.

*Documenting and reporting restrictive practice use*

Aged care providers are required to document and address the care needs of their care recipients under the *Aged Care Act 1997*. However, the proposed amendments to the Quality of Care Principles detail the specific matters required to be documented in relation to the use of restrictive practices and alternative strategies that have been used or considered, including their effectiveness.

## Concluding comments

### *International human rights legal advice*

*Multiple Rights*

2.20 As noted in the preliminary analysis, to the extent that the bill, and the legislative instrument, strengthen the responsibilities of approved providers by

enhancing safeguards regarding the use of restrictive practices, the measure may assist in ensuring rights are not limited and may promote other rights.[49] The preliminary analysis stated that the measure may not itself directly limit human rights, noting that the regulation of the use of restraints in the Quality of Care Principles adds a layer of regulation on approved providers, but does not appear to affect existing state and territory laws and the common law regarding the use of restraints and informed consent.[50] However, noting the complex interplay of existing laws regulating the use of restraints by approved providers, if the regulation of restraints for aged care providers leads to confusion as to when restraint is, or is not, permitted in residential aged care facilities, the practical operation and effect of the measure may mean, depending on the adequacy of the safeguards, that in practice this measure could limit a number of human rights.[51] As such, it is necessary to consider if the safeguards and protections set out in both the bill and the legislative instrument ensure sufficient protection so as not to limit the human rights of aged care recipients.

2.21 The measure provides significant protections which are aimed at reducing the use of restraint, ensuring that informed consent is obtained prior to the use of restraint, and monitoring and reviewing the use of restraint. In particular, the

49 As identified in the *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021*, statement of compatibility, pp. 4–6. These rights include the rights to health, privacy, liberty, freedom of movement, equality and discrimination, the rights of people with disability, and the prohibition on torture or cruel, inhuman or degrading treatment of punishment.

50 See Parliamentary Joint Committee on Human Rights, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (13 November 2019), pp. 45–47. Note also in relation to the *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021* that the explanatory memorandum, at p. 10, states: 'This Bill is not intended to affect the operation of those state and territory laws, which protect individuals from undue interference with their personal rights and liberties in relation to the use of restrictive practices'. Note in relation to the *Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021* [F2021L00923], at p. 15, the explanatory statement states: 'The amendments introduced by the Amending Principles do not affect the operation of those state and territory laws [that regulate who can give informed consent to the use of restrictive practices, including chemical restraint], which protect individuals from undue interference with their personal rights and liberties in relation to the use of restrictive practices'.

51 For a discussion on the issue of legal vagueness in relation to the rights implications of a legislative instrument, see Parliamentary Joint Committee on Human Rights, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (13 November 2019), pp. 45–47. The High Court has found that vagueness remains a significant issue in considering the 'practical operation and effect' of legislation. In considering the impact of legislation on rights and freedoms, for example, the High Court has found that it is this *practical operation and effect* of any impugned measures that must be justified, regardless of any ultimate judicial interpretation of their proper construction: *Brown v Tasmania* (2017) 261 CLR 328 (Kiefel CJ, Bell and Keane JJ), [37], [77] and [79], [117]-[118] and [148]-[151].

requirements that restrictive practices only be used as a last resort; after considering all alternative strategies; to the extent necessary and proportionate; in the least restrictive form and for the shortest time; in accordance with the care and services plan/behaviour support plan; and after informed consent is given, would likely serve as important safeguards to ensure better protection around the use of restraints in aged care facilities.

2.22 However, the strength of these safeguards will depend on how they operate in practice. In this regard, some questions remain in relation to the development and implementation of behaviour support plans; the use of restraints in an emergency; the requirement of informed consent; and the monitoring and review of the use of restrictive practices.

Behaviour support plans

2.23 While the bill itself does not prohibit the use of restrictive practices unless used in accordance with a behaviour support plan, the legislative instrument clarifies that the use of a restrictive practice must comply with any relevant provisions in the care and services plan/behaviour support plan.[52] This is an important safeguard as the behaviour support plan sets out an individualised approach to the use of restrictive practice in relation to a care recipient. The matters to be included in a behaviour support plan are relatively comprehensive (as outlined in paragraph [2.12]) and would likely help to reduce the use of restrictive practices and ensure that the least rights restrictive approach is implemented.[53] Although, noting the effect of this instrument is to prohibit, except in an emergency, the use of a restrictive practice unless used in accordance with a behaviour support plan, it remains unclear why this was not provided for in the bill itself.

2.24 However, there are some questions regarding the practical operation of a behaviour support plan. In particular, it is not clear who assesses a restrictive practice as necessary for the purposes of inclusion in a behaviour support plan; who develops and implements a behaviour support plan; and who decides when the requirements, including that the restrictive practice be used in compliance with the plan, apply. The instrument provides that it is a requirement for the use of a restrictive practice that it be assessed as necessary by an approved health practitioner who has day-to-day knowledge of the care recipient or a medical practitioner or nurse practitioner in the

52 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, paragraph 15FA(1)(g); schedule 2, item 2, paragraph 15FA(1)(g).

53 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 2, item 9, section 15HC.

case of chemical restraint.[54] If a restrictive practice is assessed as necessary by a health, medical or nurse practitioner, the specific details regarding the use of the restrictive practice must be set out in the behaviour support plan. The plan is prepared, reviewed and revised by the approved provider in consultation with the care recipient or their representative (if they lack capacity to be consulted) and the relevant health practitioners, including the approved health practitioner who made the assessment regarding the necessity of using the restrictive practice. The approved provider, as opposed to the relevant health practitioner, decides whether the requirements set out in the instrument are satisfied in relation to the use of a restrictive practice. It remains unclear who within the approved provider would make these decisions in practice, for example, does the person require certain training or qualifications in order to determine whether the use of a restrictive practice is a last resort, the least restrictive and used only to the extent that is necessary and proportionate as well as in compliance with the matters set out in the behaviour support plan. The minister's response did not clarify this issue. As it remains unclear who determines whether a restrictive practice is the 'least restrictive' and 'proportionate', and the criteria relevant to making such a determination, much will depend on how use of restrictive practices pursuant to behaviour support plans occurs in practice. In relation to similar issues raised in the context of NDIS providers, the committee has previously stated that the government may need to monitor behaviour support plans to ensure that their use is compatible with Australia's human rights obligations.[55]

2.25 Another relevant consideration is how the matters in the behaviour support plan interact with the other requirements for the use of restrictive practices. The behaviour support plan may set out matters relating to the ongoing use of a restrictive practice where it is indicated as necessary following a review. It is not clear that an approved health practitioner is required to assess the ongoing use of restrictive practice as necessary, as a review of a behaviour support plan is undertaken by an approved provider, although the relevant health practitioner must be consulted. Where a behaviour support plan indicates a need for the ongoing use of a restrictive practice, it is unclear how the requirement to comply with these matters in a behaviour support plan would interact with the other requirements that a restrictive practice only be used as a last resort to prevent harm, to the extant necessary and proportionate to the risk of harm and in the least restrictive form, and for the shortest time necessary, to prevent harm. There appears to be some inconsistency between requiring compliance with a behaviour support plan that allows for the ongoing use of a restrictive practice and the requirements that a restrictive practice is only used as a last resort, to the extent necessary and proportionate, in the least restrictive form and

54 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, sections 15B and 15C.

55 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) p. 48.

for the shortest time necessary. This apparent inconsistency may create uncertainty around the practical implementation of the requirements.

Use of restraints in an emergency

2.26 Certain requirements relating to the use of restrictive practices do not apply if such practices are necessary in an emergency (as discussed at paragraph [2.10]). As noted in the preliminary analysis, this may create a gap in protection for the use of restrictive practices and undermine the overall effectiveness of the requirements as a safeguard. What constitutes an emergency is not defined in the bill or legislative instrument. The minister stated that the term 'emergency' is not expressly defined and has its ordinary meaning. The minister noted that the scope of emergency situations can be quite broad and adopting a prescriptive definition is likely to result in unintended consequences and may exclude situations of genuine emergency, thereby creating a risk to the safety, health and wellbeing of care recipients. While noting that the lack of definition of 'emergency' in the legislation may provide flexibility and allow different cases to be treated differently based on individual needs and circumstances, there is also a risk that without sufficient clarity as to the scope of any such power or discretion, broad powers may be exercised in such a way as to be incompatible with human rights.

2.27 The minister also noted that some requirements continue to operate during an emergency. For example, the restrictive practice must still be used only to the extent necessary and proportionate to the risk of harm, and in the least restrictive form, and for the shortest time, necessary to prevent harm. The continued operation of certain requirements would likely serve as a safeguard to ensure that restraints are used in the least rights-restrictive way even in an emergency. In addition, the minister stated that an emergency only applies while there is an immediate risk of harm to a care recipient or other person and once this risk has ceased, the emergency exemptions do not apply. If there is a need for ongoing use of a restrictive practice, this is subject to the requirements set out in the instrument. The provisions specifying that the emergency exemptions only apply while the emergency exists may assist with the proportionality of this measure by ensuring that the exemptions are time limited. Although, noting the lack of definition of emergency, the strength of this safeguard will depend on the length and frequency of emergencies in practice.

2.28 Furthermore, the responsibilities of approved providers following the emergency use of restrictive practices and the requirement to set out matters in behaviour support plans if a restrictive practice was used, including in an emergency, may also operate as safeguards in relation to the emergency use of restraints. The requirement to document matters in the behaviour support plan relating to the emergency use of restraint, such as the behaviours that necessitated the use of the restrictive practice and alternative strategies that were considered or used prior to the use of restraint, would ensure that relevant information is recorded for the purposes of monitoring and review. This could operate as a useful accountability mechanism. In

this regard, the minister advised that the Aged Care Quality and Safety Commission will be able to question the circumstances in which emergency use of a restrictive practice occurred. The explanatory statement to the instrument also states that a lack of evidence of the approved provider obtaining consent prior to the use of restraint (noting that informed consent does not need to be obtained in an emergency) may lead to the Commission investigating the approved provider for non-compliance.[56] It stated that if emergencies are recurring and for extended periods of time, this may indicate to the Commission that the approved provider has not provided a safe environment for care recipients.[57] While this oversight framework would likely be an important safeguard, it does not appear to be provided for in the legislation. In the absence of a legislative requirement for the emergency use of restraints to be reviewed and monitored by the Commission, such a discretionary safeguard may not be sufficient of itself.

Informed consent

2.29 A key protection contained in the measure is the requirement that informed consent be given to the use of a restrictive practice. Informed consent may be given by the care recipient or where they lack capacity to give that consent, the restrictive practices substitute decision-maker. A restrictive practices substitute decision-maker means a person or body that can give informed consent to the use of a restrictive practice in relation to the care recipient and to the prescribing of medication for the purpose of using a chemical restraint, if the care recipient lacks the capacity to give that consent.[58] The explanatory statement to the instrument states that state and territory legislation regulates who can give informed consent to the use of a restrictive practice and the prescribing of medication for chemical restraints.[59] It notes that the instrument complements but does not affect the operation of these laws.[60] Regarding the timing of consent, the effect of the instrument appears to be that informed consent must have been given before the use of any restrictive practice, unless the use is necessary in an emergency. In the case of an emergency and where the care recipient lacks the capacity to consent to the use of restrictive practice, the approved

56 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, p. 18.

57 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, p. 18.

58 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 2, section 4.

59 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, p. 8.

60 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, pp. 8 and 15.

provider must, as soon as practicable after the restraint is used on a care recipient, inform the restrictive practices substitute decision-maker about that use.

2.30 Regarding the ongoing use of a restrictive practice, the behaviour support plan must record the giving of informed consent to the ongoing use of the restrictive practice by the care recipient or their substitute decision-maker. However, it is not clear how informed consent would be obtained for the ongoing use of a restrictive practice, noting that this would seemingly require consent to be given for all future uses of a restraint. The explanatory statement to the instrument states that the approved provider should take steps to regularly communicate with the care recipient or their substitute decision-maker and obtain informed consent contemporaneously.[61] It states that informed consent for the ongoing use of a restrictive practice is required but perpetual or ongoing approval cannot be given to the use of a restrictive practice.[62] It is unclear whether the approved provider is required to obtain informed consent prior to each use of a restrictive practice, even where that restrictive practice is used on an ongoing basis in accordance with the care recipient's behaviour support plan. Clarification of this in the legislation would likely assist approved providers in complying with the requirement to obtain informed consent.

2.31 The requirement to obtain informed consent contemporaneously before the use of a restrictive practice (except in an emergency) is an important safeguard to ensure that the human rights of care recipients are not limited. The use of physical and chemical restraints against a person without their consent may engage and limit the right to privacy, which includes the right to personal autonomy and physical and

61 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, p. 15.

62 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, pp. 31–32.

psychological integrity, and protects against compulsory procedures.[63] The requirement to obtain informed consent may therefore protect these rights as well as the rights of people with disability,[64] noting that some aged care recipients would be considered persons with disabilities for the purposes of the Convention on the Rights of Persons with Disabilities.[65] In this regard, the Committee on the Rights of Persons with Disabilities has emphasised that prior to the provision of medical treatment or health care or the making of decisions relating to a person's physical or mental integrity, decision-makers must obtain the free and informed consent of persons with disabilities.[66] Consent should be obtained through appropriate consultation and not as a result of undue influence.[67]

2.32 While the requirement to obtain informed consent is an important protection, there are concerns that the ability to obtain this consent from a restrictive practices

63 See, *MG v Germany*, UN Human Rights Committee Communication No. 1428/06 (2008) [10.1]. Note also that article 7 of the International Covenant on Civil and Political Rights expressly prohibits medical or scientific experimentation without the free consent of the person concerned. Article 7 may not be engaged in relation to non-experimental medical treatment, even when given without consent, unless it reaches a certain level of severity. See *Brough V Australia*, UN Human Rights Committee Communication No. 1184/03 (2006) [9.5], where the Committee concluded that the prescription of anti-psychotic medication to the author without his consent did not violate article 7, noting that the medication was intended to control the author's self-destructive behaviour and treatment was prescribed by a General Practitioner and continued after examination by a psychiatrist. However, with respect to persons with disability, the UN Committee on the Rights of Persons with Disabilities has held that 'forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law an infringement of the rights to personal integrity (art. 17); freedom from torture (art. 15); and freedom from violence, exploitation and abuse (art. 16). This practice denies the legal capacity of a person to choose medical treatment and is therefore a violation of article 12 of the Convention': *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [42].

64 These rights include the rights to equality and non-discrimination and equal recognition before the law; the right to respect a person's physical and mental integrity; the right to consent to medical treatment; and the right not to be forced to undergo mental health treatment. See Convention on the Rights of Persons with Disabilities, articles 5, 12, 14, 17 and 25(d). See also Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [31].

65 Convention on the Rights of Persons with Disabilities, article 1, which states that 'persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

66 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [41]–[42].

67 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [41].

substituted decision-maker may weaken this protection. It is acknowledged that while the instrument, which introduces the term 'restrictive practices substitute decision-maker', does not affect the operation of state and territory legislation that regulates substituted decision-making (including who can give informed consent), it does complement and clarify those laws and is therefore relevant in assessing the safeguard value of the informed consent requirement.

2.33 Article 12 of the Convention on the Rights of Persons with Disabilities provides that persons with disabilities have the right to equal recognition before the law, which includes the right to enjoy legal capacity on an equal basis with others in all aspects of life. It also requires States parties to take appropriate measures to provide access to support for persons with disabilities in exercising their legal capacity. The Committee on the Rights of Persons with Disabilities has confirmed that there can be no derogation from article 12, which describes the content of the general right to equality before the law under the International Covenant on Civil and Political Rights.[68] In other words, 'there are no permissible circumstances under international human rights law in which this right may be limited'.[69] The denial of legal capacity to care recipients through the provision of a restrictive practices substituted decision-maker would therefore engage this right.[70] The Committee on the Rights of Persons with Disabilities has stated that substituted decision-making should be replaced by supported decision-making.[71] Supports may include peer support, advocacy, assistance with communication or advance planning, whereby a person can state their will and preferences in advance should they be unable to do so at a later point in time. The Committee on the Rights of Persons with Disabilities has noted that 'where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must

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

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

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

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

replace the "best interests" determinations'.[72] States are also required to create appropriate and effective safeguards for the exercise of legal capacity to protect people with disability from abuse.[73]

2.34 The explanatory statement to the instrument notes that the care recipient should be supported or assisted to make their own decisions, including communicating with them in a way they can understand and providing them with an opportunity to discuss their concerns and expectations.[74] While encouraging supported decision-making is a positive step, it is not a legislative requirement and thus may not effectively protect the right to equal recognition before the law in practice. As such, while requiring informed consent from the care recipient before the use of restrictive practice would protect article 12, in the absence of effective safeguards for the exercise of legal capacity, the ability for a substituted decision-maker to consent to a restrictive practice in relation to the care recipient would appear to undermine this protection.

Monitoring, review, and oversight

2.35 While a restrictive practice is being used, the approved provider is required to monitor the care recipient for certain things, such as for signs of distress or harm; regularly monitor, review and document the necessity of the restrictive practice; and monitor the effectiveness of the restrictive practice.[75] Following the use of an emergency restrictive practice, the approved provider must document in the care and services plan/behaviour support plan certain matters, including the reasons the emergency restraint was necessary.[76] Regarding review of a behaviour support plan, the plan must be reviewed on a regular basis and as soon as practicable after any change in the care recipient's circumstances. It is unclear what constitutes review on a 'regular basis'. The explanatory statement states that if a care recipient's behaviour needs are stable and do not change over a 12-month period, 'a review must be

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

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

74 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, p. 15.

75 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, section 15GA.

76 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, section 15GB.

completed within the 12 months'.[77] It further states that it is expected that a plan will be reviewed 'significantly more frequently than every 12 months'.[78] It is unclear, however, why the legislation does not reflect this expectation, for example by stating that a review must be completed within a specified timeframe, such as at least every 12 months, noting that discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time.

2.36 While these review and monitoring frameworks appear to be an important safeguard, there remain concerns about the approved provider being both the person using the restrictive practice and the person documenting, monitoring and reviewing the use of the restrictive practice. This lack of independence may undermine the effectiveness of the monitoring and review mechanisms. In terms of external oversight, the Aged Care Quality and Safety Commissioner will only be notified of reportable incidents. The instrument clarifies that the use of a restrictive practice will not be a reportable incident if it is used in a transition care program in a residential care setting and in accordance with the Quality of Care Principles.[79] Therefore, if a restrictive practice is used in accordance with the requirements set out in the instrument (including in an emergency), it would not be a reportable incident and the Commissioner would not be notified of its use. As discussed at paragraph [2.28], there appears to be little oversight by the Aged Care Quality and Safety Commission of emergency use of restraints.

2.37 Furthermore, the minister noted that from 1 July 2021, all use of restraint, including chemical restraint, will be reported to the Department of Health through My Aged Care under the National Aged Care Mandatory Quality Indicator Program. However, as this information will presumably be reported by the approved providers, this reporting process does not address concerns regarding the lack of independence of those using, monitoring and reporting incidents of the use of restraint.

Concluding remarks

2.38 The effect of the instrument is to prohibit, except in an emergency, the use of a restrictive practice unless the use complies with the requirements specified in the instrument, including compliance with a behaviour support plan. To the extent that these requirements strengthen the responsibilities of approved providers by enhancing safeguards regarding the use of restrictive practices, the measure may assist in ensuring rights are not limited and may promote other rights. However,

77 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, p. 32.

78 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, p. 32.

79 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 11, section 15NB(2).

depending on the adequacy of the safeguards and noting the complex interplay of existing laws regulating the use of restraints by approved providers, the practical operation and effect of the measure could limit a number of human rights.

2.39 The measure contains a number of important safeguards that would likely provide protection so as to help protect the human rights of aged care recipients. These include the requirements set out in the instrument, including using restraint as a last resort, to the extent necessary and proportionate, in the least restrictive form and for the shortest time; the behaviour support plans; and the monitoring and review frameworks. The strength of these safeguards, however, will depend on how they are applied in practice. Questions remain as to how the behaviour support plans will be implemented in practice, including who within the approved provider would make decisions about the use of restrictive practices, and how certain matters in the behaviour support plan would interact with other requirements for the use of restrictive practices. There are also concerns regarding the use of restraints in an emergency, noting that certain requirements do not apply to such use, and the lack of independence of those who use, monitor and review the use of restrictive practices. Other factors, such as staffing ratios, may also undermine the effectiveness of these protections in practice.[80]

## Committee view

**2.40 The committee notes that this bill (now Act, noting that it has passed both Houses of Parliament) set out certain requirements regarding the use of restrictive practices in aged care facilities. These requirements were subsequently included in recent amendments to the Quality of Care Principles, as set out in the Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021. This instrument strengthens existing requirements, and provides that restraints may only be used in aged care facilities: as a last resort; after considering all alternative strategies; to the extent necessary and proportionate; in the least restrictive form and for the shortest time; after informed consent is given; in accordance with a behaviour support plan; and that the use of a restrictive practice is monitored and reviewed. However, certain requirements do not apply in 'emergency' situations.**

**2.41 The committee welcomes these amendments to the Quality of Care Principles, noting that many of these amendments directly address recommendations made by the committee in its 2019 inquiry into the regulation of restraints under the Quality of Care Principles, particularly that restraints should**

80 Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect – Volume 3A, The New System*, 2021, recommendation 17, pp. 109–110. At page 111, the report noted that changed behaviours of care recipients can be 'very difficult to manage, particularly in residential aged care facilities where there are inadequate numbers of staff and inadequate access to expertise and resources'.

**only be used as a last resort and after all other alternatives to restraint have been exhausted.**

**2.42 The committee notes that to the extent that these requirements strengthen the responsibilities of approved providers by enhancing safeguards regarding the use of restrictive practices, the measure may assist in ensuring rights are not limited and may promote other rights. In particular, the committee considers the measure may assist in ensuring there are appropriate safeguards to protect the right not to be subjected to torture and other cruel, inhuman or degrading treatment, and may also promote the rights to health, privacy, freedom of movement, liberty, equality and non-discrimination and the rights of persons with disability.**

**2.43 However, some questions remain as to how some of these restrictions on the use of restraints will operate in practice, particularly in relation to the development and implementation of behaviour support plans, the use of restraints in an emergency, the requirement of informed consent, and the monitoring and review of the use of restrictive practice. The committee notes that the strength of the safeguards accompanying this measure will depend on how they are applied in practice.**

### Suggested action

**2.44 The committee considers that the compatibility of the measure with human rights may be assisted were the instrument amended to:**

**(a) specify who within the approved provider may make decisions regarding the use of a restrictive practice, and the criteria on which those decisions are to be made;**

**(b) require all emergency uses of restrictive practices to be reported to the Aged Care Quality and Safety Commission Care Commission;**

**(c) set out a model of supported, rather than substituted, decision-making in relation to obtaining informed consent for the use of a restrictive practice;**

**(d) require that the person or body who monitors and reviews the use of a restrictive practice must be independent from the person who used the restrictive practice, or at a minimum, ensure that a more senior practitioner monitor and review the use of the restrictive practice; and**

**(e) require the Department of Health to table a report in Parliament, at least annually, on the use of restrictive practices in relation to care recipients, including the proportion of restrictive practices used in an emergency.**

**2.45 The committee recommends that the explanatory statement to the legislative instrument be updated to reflect the information which has been provided by the minister.**

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

# Crimes Legislation Amendment (Economic Disruption) Regulations 2021 [F2021L00541][1]

| | |
|---|---|
| **Purpose** | This legislative instrument allows the Official Trustee in Bankruptcy to recoup costs, charges, expenses and remuneration incurred in exercising its statutory functions, duties and powers. It also updates definitions, repeals duplicate sections and specifies certain offences as serious offences for the purposes of the *Proceeds of Crime Act 2002* |
| **Portfolio** | Home Affairs |
| **Authorising legislation** | *Crimes Act 1914* and *Proceeds of Crime Act 2002* |
| **Last day to disallow** | 15 sitting days after tabling (tabled in the Senate and the House of Representatives on 11 May 2021). |
| **Rights** | Fair trial and fair hearing; privacy |

2.47 The committee requested a response from the minister in relation to these regulations in *Report 8 of 2021*.[2]

## Expansion of the application of the *Proceeds of Crime Act 2002*

2.48 The *Proceeds of Crime Act 2002* (Proceeds of Crime Act) establishes a scheme to confiscate the proceeds of crime. It sets out a number of processes relating to the confiscation of property, many of which relate to whether a person has, or is suspected of having, committed a 'serious offence'. If a person is reasonably suspected of committing a 'serious offence', a court is able to make a restraining order against property under a person's effective control and to forfeit this property unless the person can establish that, on the balance of probabilities, it was not derived from unlawful activity.[3] In addition, if a person is convicted of a serious offence, all property subject to a restraining order will automatically forfeit six months after the date of conviction unless the person can prove it was not the proceeds of unlawful activity or an instrument of a serious offence.[4] What constitutes a 'serious offence' is defined to include offences subject to a certain period of imprisonment involving unlawful

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Economic Disruption) Regulations 2021 [F2021L00541], *Report 10 of 2021*; [2021] AUPJCHR 102.

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2021* (23 June 2021), pp. 13-20.

3 *Proceeds of Crime Act 2002*, sections 18, 29, 47 and 73.

4 *Proceeds of Crime Act 2002*, sections 29, 92 and 94. See summary of this from explanatory memorandum, p. 74.

conduct that causes a 'benefit' (including a service or advantage) to a person of a certain value.[5] These regulations amend the definition of 'serious offence' to include various offences relating to child sexual abuse for the purposes of the Proceeds of Crime Act.[6] This has the effect of expanding the application of the Proceeds of Crime Act.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights to a fair trial and fair hearing and privacy*

2.49 The expansion of the Proceeds of Crime Act to cover additional offences may engage and limit the right to a fair trial and fair hearing and the right to privacy.[7] The right to a fair trial and fair hearing is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Specific guarantees of the right to a fair trial in relation to a criminal charge include the presumption of innocence,[8] the right not to incriminate oneself,[9] and the guarantee against retrospective criminal laws.[10] The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[11] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.[12]

2.50 Given the potential severity of forfeiting and selling an individual's property, without a finding of guilt, forfeiture orders could be considered a penalty, and if this were the case, then the Proceeds of Crime Act regime would engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights. The committee has previously raised concerns that the underlying regime established by the Proceeds of Crime Act for the freezing, restraint or forfeiture of property may be considered 'criminal' for the purposes of international human

5 *Proceeds of Crime Act 2002*, section 338 (definition of 'serious offence').

6 Schedule 1, items 10–18.

7 International Covenant on Civil and Political Rights, articles 14, 15 and 17.

8 International Covenant on Civil and Political Rights, article 14(2).

9 International Covenant on Civil and Political Rights, article 14(3)(g).

10 International Covenant on Civil and Political Rights, article 15(1).

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

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

rights law.[13] For example, a forfeiture order may be made against property where (relevantly) a court is satisfied that the property is 'proceeds' of an indictable offence or an 'instrument' of one or more serious offences.[14] The fact a person has been acquitted of an offence with which the person has been charged does not affect the court's power to make such a forfeiture order.[15] Further, a finding need not be based on a finding that a particular person committed any offence.[16]

2.51 Considering existing human rights concerns with the regime established by the Proceeds of Crime Act, any amendments to that regime by these regulations may raise similar concerns. In particular, expanding the application of the regime to cover additional conduct and offences, without a finding of criminal guilt beyond reasonable doubt, may limit the right to be presumed innocent and the prohibition against double punishment. In this regard, if the forfeiture and sale of a person's property may properly be regarded as a penalty, it may be that, as a matter of international human rights law, these processes would constitute a criminal penalty, such that the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights would apply.

2.52 The test for whether a matter should be characterised as a 'criminal charge' for the purposes of international human rights law relies on three criteria:

(a) the domestic classification of the offence;

(b) the nature of the offence; and

(c) the severity of the penalty.[17]

2.53 In relation to (a), it is clear that the forfeiture regime is defined under Australian domestic law as civil in nature. However, the term 'criminal' has an autonomous meaning in human rights law, such that a penalty or other sanction may be 'criminal' for the purposes of the International Covenant on Civil and Political Rights even though it is considered to be 'civil' under Australian domestic law.

2.54 In relation to (b), a penalty will likely be considered criminal under international human rights law if it is intended to punish and deter and the penalty

13 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44th Parliament* (24 November 2015) pp. 43–44; *Twenty-Sixth Report of the 44th Parliament* (18 August 2015) pp. 7–11*; Report 1 of 2017* (16 February 2017) pp. 29–31; *Report 2 of 2017* (21 March 2017) p. 6; *Report 4 of 2017* (9 May 2017) pp. 92–93; *Report 1 of 2018* (6 February 2018) pp. 112–122; *Report 11 of 2020* (24 September 2020) pp. 36–41; *Report 13 of 2020* (13 November 2020) pp. 74–79.

14 *Proceeds of Crime Act 2002*, section 49.

15 *Proceeds of Crime Act 2002*, sections 51 and 80.

16 *Proceeds of Crime Act 2002*, section 49(2)(a).

17 For further detail, see the Parliamentary Joint Committee on Human Rights, *Guidance Note 2*: *Offence provisions, civil penalties and human rights* (December 2014).

applies to the public in general as opposed to being in a particular regulatory or disciplinary context. It is clear that the Proceeds of Crime Act has wide application and applies to general criminal conduct that may occur across the public at large. The Proceeds of Crime Act sets out the objectives of the Act which include 'to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories'.[18] While deterrence and punishment may not be the only objective of the Proceeds of Crime Act regime, it is clearly one of the objectives,[19] and as such would appear to meet the test that it is intended to punish and deter.

2.55 Moreover, the Proceeds of Crime Act is structured such that a forfeiture order under the Act is conditional on a person having been convicted of a serious criminal offence, or a court being satisfied on the balance of probabilities that a person has engaged in conduct constituting a 'serious criminal offence'. Such a judgment would appear to entail a finding of 'blameworthiness' or 'culpability' on the part of the respondent, which, having regard to a number of English authorities, would suggest that the provision may be criminal in character.[20] In addition, the Canadian courts have considered confiscation, or 'forfeiture proceedings', as being a form of punishment, and characterised them as a 'penal consequence' of conviction.[21]

2.56 In relation to (c), the severity of the penalty, forfeiture orders can involve significant sums of money, sometimes far in excess of any financial penalty that could be applied under the criminal law. For example, the Australian Federal Police's (AFP) 2012-13 Annual Report notes that one single operation resulted in $9 million worth of assets being forfeited.[22] More recently, in a 2019 operation, the AFP forfeited three properties valued at $4.2 million.[23] As such, in certain instances, the proceeds of crime orders may be so severe as to be considered a criminal penalty.

2.57 As such, it may be that proceedings for the forfeiture and sale of a person's assets may be considered criminal for the purposes of international human rights law, because of the nature of the offence and the severity of the penalty. However, it is difficult to reach a concluded view on this matter without undertaking a full review of the provisions of the Proceeds of Crime Act, noting that the Act was introduced prior to the establishment of the Parliamentary Joint Committee on Human Rights and as such, was not accompanied by a statement of compatibility with human rights.

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18 *Proceeds of Crime Act 2002*, section 5(2).

19 *Proceeds of Crime Act 2002*, paragraph 5(c).

20 See *Goldsmith v Customs and Excise Commissioners* [2001] 1 WLR 16733; *R v Dover Magistrates Court* [2003] Q.B. 1238.

21 *R v Green* [1983] 9 C.R.R. 78; *Johnston v British Columbia* [1987] 27 C.R.R. 206.

22 Australian Federal Police, *Annual Report 2012-13*, 101.

23 Australian Federal Police, *$4.2 million in assets forfeited to the Commonwealth*, 8 June 2019, https://www.afp.gov.au/news-media/media-releases/42-million-assets-forfeited-commonwealth (accessed 15 June 2021).

Assessing the forfeiture orders under the Proceeds of Crime Act as involving the determination of a criminal charge does not suggest that, in all instances, such measures will be incompatible with human rights. Rather, it requires that such measures are demonstrated to be consistent with the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights.

2.58 The rights to a fair trial and fair hearing and privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. The statement of compatibility acknowledges that the regulations limit the right to privacy insofar as they expand the definition of 'serious offences', thereby enhancing restraint and confiscation action under the Proceeds of Crime Act.[24] However, it does not address the implications of the measure on the right to a fair trial and fair hearing.

***Committee's initial view***

2.59 The committee noted that in light of its previous concerns regarding the compatibility of the Proceeds of Crime Act with the rights to a fair trial and fair hearing and privacy, there is a risk that the amendments to this regime by these regulations raise similar human rights concerns.

2.60 The committee considered that the measure likely pursues a legitimate objective and would appear to be rationally connected to this objective. However, in the absence of a foundational human rights assessment of the Proceeds of Crime Act, the committee noted that it is difficult to assess the adequacy of the safeguards identified in the statement of compatibility. As such, the committee sought the minister's advice as to whether the measure is proportionate.

2.61 The full initial analysis is set out in *Report 8 of 2021*.

## Minister's response[25]

2.62 The minister advised:

> The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving legitimate objectives, for the following reasons:

24 Statement of compatibility, pp. 18–25.

25 The minister's response to the committee's inquiries was received on 21 July 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

The POC Act is civil in nature

The restraint and forfeiture powers available to law enforcement where property is linked to, or a person commits, a 'serious offence' (as expanded by the Regulations) are properly characterised as civil for the purposes of international human rights law. Proceedings under the POC Act are subject to civil rules of evidence and are conducted in accordance with civil, not criminal, procedure.

The Committee's Guidance Note 2 states that the test for whether a penalty can be classified as 'criminal' relies on three criteria:

- the domestic classification of the penalty;
- the nature and purpose of the penalty; and
- the severity of the penalty.

On the domestic classification of the penalty, section 315 of the POC Act expressly provides that the relevant restraint and forfeiture powers are characterised as civil in nature under Commonwealth law.

On the nature and purpose of the penalty, the predominant purpose of the POC Act is not to deter or punish persons for breaching laws. Paragraphs 5(a)-(ba) of that Act make it clear that the focus is primarily on remedying the unjust enrichment of persons who profit at society's expense, while paragraphs (d)-(da) are focussed on the removal of illicit funds from the legitimate economy. In addition, actions taken under the POC Act make no determination of a person's guilt or innocence and can be taken against assets without finding any form of culpability against a particular individual (see sections 19 and 49 of the POC Act).

On the severity of the penalty, Guidance Note 2 provides that a penalty is likely to be considered criminal for the purposes of human rights law if the penalty is imprisonment or a substantial pecuniary sanction. Proceedings under the POC Act cannot in themselves create any criminal liability and do not expose individuals to criminal sanctions (or a subsequent criminal record). Further, orders made under the POC Act cannot be commuted into a period of imprisonment.

On whether the penalty is substantial, the POC Act contains mechanisms to allow an affected party to exclude property from an order where it is not the proceeds or instrument of a crime, or to compensate a person for the lawfully derived component of their property (see, for example, the compensation orders at sections 77 and 94A of the POC Act). This ensures that the property that is ultimately taken from the suspect reflects the quantum that has been derived or realised from crime, ensuring that orders are aimed primarily at preventing the retention of ill-gotten gains, rather than the imposition of a punishment or sanction.

In assessing the POC Act against Guidance Note 2, for the reasons stated, it does not meet the criteria for a penalty being classified as 'criminal' and therefore in the Department's view is considered to be civil in nature.

*Right to a fair trial and fair hearing*

The relevant restraint and forfeiture powers are properly characterised as civil in nature for the purposes of international human rights law. These powers do not engage the criminal process guarantees as set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) and are otherwise consistent with the right to a fair trial and fair hearing under the ICCPR.

Proceedings under the POC Act are civil proceedings heard by Commonwealth, State and Territory Courts in accordance with the relevant civil procedures of those courts and under civil rules of evidence. This affords an affected person adequate opportunity to present their case, such that the right to a fair hearing is not limited. The Regulations do not affect the civil court procedures applicable to proceedings under the POC Act.

Affected persons will also be given notice of applications under the POC Act. Where the POC Act allows an order to proceed without notice, there are justifiable reasons for doing so. For example, restraining orders (which are interim in nature) can be made over property *ex parte* to ensure that a subject is not tipped-off to law enforcement suspicions, and cannot dispose of the property before the order can be made.

*Right to privacy*

The Committee has questioned whether prescribing the offences specified in items 10-18 of the Regulations as 'serious offences' for the purposes of the POC Act is proportionate in achieving its legitimate objectives, noting that a person can be required to forfeit property linked to an offence where they have been acquitted of this offence or their conviction has been subsequently quashed.

As noted in the Explanatory Statement, the Regulations are compatible with the right to privacy. The POC Act already contains extensive safeguards that ensure the Regulations are the "least rights restrictive option" that still achieves the legitimate objective of preserving public order and the rights and freedoms of those subject to serious criminal behaviour.

These include:

- if an individual's property is subject to a restraining order, a court may be able to make allowances for expenses to be met out of property covered by the restraining order (section 24), exclude property from the scope of the order or revoke the order (sections 24A, 29, 42), or refuse to make the order where it is not in the public interest to do so (sections 17(4) and 19(3))
- if an individual's property is restrained and subject to a forfeiture order or automatic forfeiture, a court can exclude the person's interest from the scope of the order or from automatic forfeiture (sections 73, 94 and 102)

- a court can refuse to make an order in relation to an 'instrument' of an offence in certain circumstances, including where making the order is not in the public interest (sections 47(4), 48(2) and 49(4))
- an individual may also seek a compensation order for the proportion of the value of the property they did not derive or realise from the commission of an offence (sections 77 and 94A) or a buy back order (sections 57 and 103), and
- where an individual acquires property that constituted 'proceeds' or an 'instrument' of crime in the legitimate situations outlined under section 330(4), this property ceases to be 'proceeds' or an 'instrument' of crime and generally cannot be subject to restraint or forfeiture. This ensures that third parties who acquire property legitimately are adequately protected.

In addition, section 322 of the POC Act provides persons against whom a confiscation order has been made, or who have an interest in forfeited property, with the right to appeal the order. The POC Act also includes protections preventing the destruction or disposal of property that is under a forfeiture order, forfeited by operation of the Act or is subject to a pecuniary penalty order, a literary proceeds order, or an unexplained wealth order, until the conclusion of any relevant appeal period, except in limited circumstances. This is an important safeguard to ensure that a person's property is not destroyed or disposed of prematurely.

Proceeds of crime authorities are Commonwealth agencies that are bound by an obligation to act as model litigants, and must not commence legal proceedings unless satisfied that litigation is the most suitable method of dispute resolution (paragraph 4.2 of Schedule 1 and Appendix B of the Legal Services Directions 2017). They are required to act honestly and fairly in handling litigation, including litigation brought under the POC Act. This requirement includes, but is not limited to, an obligation not to take advantage of a claimant who lacks resources to litigate a claim and not to rely on technical defences except in limited circumstances.

For these reasons, to the extent that the amendments to the Regulations, in amending the definition of what constitutes a 'serious offence', limit the right to a fair trial, the right to a fair hearing, and the right to privacy, those limitations are proportionate to achieving a legitimate objective.

## Concluding comments

### *International human rights legal advice*

*Rights to a fair trial and fair hearing and privacy*

2.63 The preliminary analysis noted that insofar as the measure expands the application of the Proceeds of Crime Act regime to additional conduct and offences without a finding of guilt against the individual, it engages and appears to limit the right to privacy and the right to a fair hearing and fair trial, including the right to be presumed innocent and the prohibition against double punishment (where the

penalty is considered 'criminal' for the purposes of international human rights law). While the measure likely pursues a legitimate objective and would appear to be rationally connected to that objective, the preliminary analysis raised questions as to whether the measure is proportionate.

2.64 With respect to the right to privacy, the minister referenced the safeguards contained in the Proceeds of Crime Act and stated that these safeguards ensure the measure is the least rights restrictive option. The safeguards identified by the minister are those provisions in the Proceeds of Crime Act outlined in the preliminary analysis.[26] As noted in the preliminary analysis, these provisions may operate as safeguards and would appear to provide the court with some flexibility to treat different cases differently, having regard to the individual circumstances of each case. For instance, a court may make allowances for living expenses to be met or may exclude a specified interest in the property if satisfied the interest is neither the proceeds of unlawful activity nor an instrument of any serious offence.[27] Depending on the scope and nature of the forfeiture order, these provisions may also assist to minimise the potential interference with rights, noting that the greater the interference with human rights, the less likely the measure is to be considered proportionate. The right to appeal against an order and protections against the premature destruction or disposal of forfeited property before the appeal period has concluded may also assist with the proportionality of this measure.

2.65 However, as noted in the preliminary analysis, it is not clear that these safeguards alone would be sufficient for the purposes of ensuring that the limitation on rights is proportionate under international human rights law. In particular, it does not appear that the safeguards relating to the right to privacy (as discussed above at paragraph [2.64]) would also serve as safeguards in relation to the limit on the right to a fair hearing and fair trial. The minister states that proceedings under the Proceeds of Crime Act are civil in nature and civil court procedures and rules of evidence would ensure the affected person is afforded an adequate opportunity to present their case. The opportunity for an affected individual to present their case to an independent court in a public hearing and appeal an unfavourable decision would serve as a general safeguard with respect to the right to a fair hearing.[28] However, in cases where the forfeiture and sale of a person's property may properly be regarded as a criminal

26 Parliamentary Joint Committee on Human Rights, *Report 8 of 2021* (23 June 2021) p. 18. See also statement of compatibility, para [60].

27 *Proceeds of Crime Act 2002*, sections 17(4), 19(3), 24, 24A, 29, 42, 57, 73, 94, 102 and 103.

28 In assessing the human rights compatibility of measures that interfere with a person's property, such as non-conviction based confiscation orders, the European Court of Human Rights has suggested that procedural safeguards, such as the opportunity for an affected individual to put their case to a court in adversarial proceedings, may assist with the proportionality of such a measure. See, eg, *Gogitidze and Others v Georgia,* European Court of Human Rights, Applicant no. 36862/05 (2015), at [114]–[115].

penalty due to the nature of the offence and the severity of the penalty (noting that in some cases, forfeiture orders can involve sums of money far in excess of any financial penalty that could be applied under criminal law),[29] these civil court procedures may not be an adequate safeguard in relation to the right to a fair trial and criminal process rights.[30]

2.66 Further, concerns remain that confiscating, forfeiting and selling assets, without any conviction of criminal guilt, may not necessarily be the least rights restrictive option to achieve the stated objective. This is particularly the case where a forfeiture order is made against a person who has been acquitted of an offence or had their conviction quashed.[31] It is unclear the extent to which the safeguards referenced above (at paragraph [2.64]) would ensure the least rights restrictive option is applied, as much will depend on how these provisions are applied in practice. In this regard, it is noted that some of these safeguards are discretionary, for example, a court *may* make allowances for expenses to be met out of the forfeited property but is not required to do so.[32] Where a measure limits a human right, discretionary safeguards alone may not be sufficient for the purpose of a permissible limitation under

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29 For example, the Australian Federal Police's (AFP) 2012-13 Annual Report notes that one single operation resulted in $9 million worth of assets being forfeited. More recently, in a 2019 operation, the AFP forfeited three properties valued at $4.2 million. See Australian Federal Police, *Annual Report 2012-13*, 101 and Australian Federal Police, *$4.2 million in assets forfeited to the Commonwealth*, 8 June 2019, https://www.afp.gov.au/news-media/media-releases/42-million-assets-forfeited-commonwealth (accessed 15 June 2021).

30 The committee has previously raised concerns that the underlying regime established by the Proceeds of Crime Act for the freezing, restraint or forfeiture of property may be considered 'criminal' for the purposes of international human rights law. See Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44th Parliament* (24 November 2015) pp. 43–44; *Twenty-Sixth Report of the 44th Parliament* (18 August 2015) pp. 7–11*; Report 1 of 2017* (16 February 2017) pp. 29–31; *Report 2 of 2017* (21 March 2017) p. 6; *Report 4 of 2017* (9 May 2017) pp. 92–93; *Report 1 of 2018* (6 February 2018) pp. 112–122; *Report 11 of 2020* (24 September 2020) pp. 36–41; *Report 13 of 2020* (13 November 2020) pp. 74–79.

31 *Proceeds of Crime Act 2002*, section 80. The jurisprudence of the European Court of Human Rights indicates that in cases where an administrative confiscation order is considered to be a criminal penalty, such an order may be incompatible with the prohibition against retrospective criminal laws and the right to be presumed innocent where the affected individual has not been convicted of a criminal offence. See, eg, *Varvara v Italy,* European Court of Human Rights, Application No. 17475/09 (2013). At [66]–[67], the European Court of Human Rights stated: 'a system which punished persons for an offence committed by another would be inconceivable. Nor can one conceive of a system whereby a penalty may be imposed on a person who has been proved innocent, or in any case, in respect of whom no criminal liability has been established by a finding of guilt'. At [72]–[73], the Court held that the confiscation order, which was considered to be a criminal penalty and which was imposed on the applicant despite no finding of guilt, was 'incompatible with the principle that only the law can define a crime and prescribe a penalty'.

32 *Proceeds of Crime Act 2002*, section 24. See also, eg, sections 17(4), 24A, 42, 47(4) and 57.

international human rights law.[33] This is because discretionary safeguards are less stringent than the protection of statutory processes and the strength of such safeguards will depend on how they are exercised in practice.

*Concluding remarks*

2.67 In light of the existing human rights concerns with the Proceeds of Crime Act regime as a whole, as outlined in the preliminary analysis, there remains a risk that the amendments to this regime by this measure raise similar human rights concerns. In particular, questions remain as to whether the measure is proportionate, noting that much will depend on whether the penalty is considered 'criminal' for the purposes of international human rights law. It is not clear that the safeguards contained in the Proceeds of Crime Act, many of which are discretionary, would be sufficient in all circumstances to ensure that any limitation on rights is proportionate. It is also not clear that the measure pursues the least rights restrictive option, particularly in circumstances where a forfeiture order is made against a person who has been acquitted of an offence or had their conviction quashed. It is therefore not possible to conclude that the measure is compatible with the rights to a fair trial and privacy.

## Committee view

**2.68 The committee thanks the minister for this response. The committee notes that these regulations amend the definition of what constitutes a 'serious offence' for the purposes of the Proceeds of Crime Act, which have the effect of broadening the application of the restraint and forfeiture provisions under that Act.**

**2.69 The committee notes its previous concerns regarding the compatibility of the Proceeds of Crime Act with the rights to a fair trial and fair hearing and privacy and considers that there remains a risk that this measure raises similar human rights concerns. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.**

**2.70 The committee considers that the Proceeds of Crime Act regime provides law enforcement agencies with important and necessary tools in the fight against crime. In this regard, the committee considers that the measure likely pursues the legitimate objective of protecting public order and the rights and freedoms of others, particularly children, and would appear to be rationally connected to this objective.**

**2.71 However, the committee considers that questions remain as to whether the measure is proportionate. The committee notes that while there are some safeguards contained in the Proceeds of Crime Act which may assist with the proportionality of the measure, many of these safeguards are discretionary and it is not clear that they would be sufficient in all circumstances to ensure that any limitation on rights is proportionate. It is also not clear to the committee that the**

33 See, for example, Human Rights Committee, *General Comment 27, Freedom of movement (Art.12)* (1999).

**measure pursues the least rights restrictive option, particularly in circumstances where a forfeiture order is made against a person who has been acquitted of an offence or their conviction quashed. As such, the committee considers that it is not possible to conclude that the measure is compatible with the rights to a fair trial and privacy.**

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

# Health Insurance (General Medical Services Table) Regulations 2021 [F2021L00678]

# Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021 [F2021L00681][1]

| | |
|---|---|
| **Purpose** | The Health Insurance (General Medical Services Table) Regulations 2021 implements annual Medicare indexation and recommendations from the MBS Review Taskforce relating to general surgery and orthopaedic services (the first instrument)<br><br>The Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021 amends cardiac services and indexes diagnostic imaging services and two items for the management of bulk-billing pathology services (the second instrument) |
| **Portfolio** | Health and Aged Care |
| **Authorising legislation** | *Health Insurance Act 1973* |
| **Last day to disallow** | 15 sitting days after tabling (tabled in the House of Representatives on 3 June 2021 and the Senate 15 June 2021). |
| **Rights** | Health; social security |

2.73 The committee requested a response from the minister in relation to these legislative instruments in *Report 8 of 2021*.[2]

## Amendments to the Medicare Benefits Schedule

2.74 These two legislative instruments make changes to the Medicare Benefits Schedule (MBS), which is the list of health professional services that the Australian Government subsidises. Both apply an indexation rate of 0.9 per cent to relevant listed items. The first instrument makes a total of 752 amendments to the MBS in relation to general surgery and orthopaedic services by adding 202 items, amending 334 items, and deleting 216 items. The second instrument makes several amendments, including consolidating and removing some procedures related to cardiac services on the MBS.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Health Insurance (General Medical Services Table) Regulations 2021 [F2021L00678] and Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021 [F2021L00681], *Report 10 of 2021*; [2021] AUPJCHR 103.

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2020* (23 2021), pp. 21-26.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights to health and social security*

2.75 By providing for a number of surgeries to be available to individuals at a subsidised rate (and applying an indexation of 0.9 per cent to those items), this measure appears to promote the rights to health and social security. The right to health refers to the right to enjoy the highest attainable standard of physical and mental health.[3] In particular, in relation to accessibility, the United Nations Economic, Social and Cultural Rights Committee has noted that 'health facilities, goods and services must be affordable for all…including socially disadvantaged groups'.[4] 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.[5]

2.76 However, as these instruments make a significant number of detailed amendments to the MBS, questions arise as to whether they may have the effect of reducing access to existing subsidised healthcare services and/or reducing the rebate ultimately available to patients receiving relevant treatment. The first instrument makes a total of 752 amendments, including deleting 216 items and amending 334 items. The second instrument introduces new items and removes cardiac surgical procedures that are stated to no longer represent best practice.[6] The statements of compatibility for both instruments are brief and provide no detailed analysis of the effect of the instruments. They state only that the instruments maintain existing arrangements and the protection of human rights by ensuring access to publicly subsidised medical services which are clinically appropriate and reflective of modern clinical practice.[7]

2.77 The explanatory materials state that these amendments have been made in response to the findings of the MBS Review Taskforce relating to restructuring the

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

4 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (2000) [12].

5 International Covenant on Economic, Social and Cultural Rights, article 9. See also, UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008).

6 Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021, explanatory statement, p. 32.

7 Health Insurance (General Medical Services Table) Regulations 2021 [F2021L00678], statement of compatibility, p. 29; and Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021 [F2021L00681], statement of compatibility, p. 33.

MBS, incentivising best clinical practice and combining like procedures.[8] However, it is not clear whether this process of consolidation and amendment may have the effect that some procedures are ultimately more expensive for patients (for example, if a surgical procedure would previously have been covered by multiple MBS items, which will now be consolidated and provide the patient with a lower rebate than they currently receive), or if some procedures will no longer be subsidised at all, and no equivalent procedure is now subsidised. As such, it is not clear whether elements of this instrument may constitute a retrogressive measure with respect to the rights to health and social security, and if so, require justification.

*Retrogressive measures*

2.78 Australia has obligations to progressively realise economic, social and cultural rights using the maximum of resources available,[9] and has a corresponding duty to refrain from taking retrogressive measures, or backwards steps with respect to their realisation.[10] Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

2.79 With respect to a legitimate objective, article 4 of the International Covenant on Economic, Social and Cultural Rights establishes that States Parties may limit economic, social and cultural rights only insofar as this may be compatible with the nature of those rights,[11] and 'solely for the purpose of promoting the general welfare in a democratic society'.[12] This means that the only legitimate objective in the context of the International Covenant on Economic, Social and Cultural Rights is a limitation for the 'promotion of general welfare'. The term 'general welfare' refers primarily to

8 See, Health Insurance (General Medical Services Table) Regulations 2021 [F2021L00678], statement of compatibility, p. 28. Information about the review can be found here: https://www.health.gov.au/initiatives-and-programs/mbs-review?utm_source=health.gov.au&utm_medium=callout-auto-custom&utm_campaign=digital_transformation [Accessed 17 June 2021].

9 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)* (1990) [9]. The obligation to progressively realise the rights recognised in the ICESCR imposes an obligation on States to move 'as expeditiously and effectively as possible' towards the goal of fully realising those rights.

10 International Covenant on Economic, Social and Cultural Rights, article 2.

11 That is, the measure would not constitute a non-fulfilment of the minimum core obligations associated with economic, social and cultural rights. See, CESCR, *General Comment No. 3: the nature of states parties' obligations* (14 December 1990) E/1991/23(Supp) [10]. See also Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review* vol. 9, no. 4, 2009, pp. 580–581.

12 Article 4.

the economic and social well-being of the people and the community as a whole, meaning that a limitation on a right which disproportionality impacts a vulnerable group may not meet the definition of promoting 'general welfare'.[13] The United Nations Committee on Economic, Social and Cultural Rights has indicated that if any deliberately retrogressive measures are taken, the state has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State's maximum available resources.[14]

2.80 The statements of compatibility provide a brief descriptive outline of the requirements associated with a retrogressive measure, but do not analyse whether and in what manner those requirements are engaged by either instrument, nor an analysis of whether, if any of the measures are retrogressive, they are justified under international human rights law.

2.81 As such, in order to assess the compatibility of this measure with the rights to health and social security further information is required, and in particular:

(a) whether these instruments reduce the quantum of benefits available for any specific MBS items, that could adversely affect the rebate payable to patients;

(b) where these instruments remove MBS items entirely, whether any of those items are not covered by, or replaced with, alternative MBS items;

(c) whether these instruments have the effect of reducing the quantum of benefit for specific medical procedures, including those procedures which are currently covered by multiple MBS items and will now be covered by one item;

(d) what is the objective sought to be achieved by the instruments, and whether this constitutes a legitimate objective (being one which is solely for the purpose of promoting general welfare);

(e) whether and how the measures are rationally connected to (that is, effective to achieve) that objective; and

13 Limburg Principles on the Implementation of the ICESCR, June 1986 [52]. See also, Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review* vol. 9, no. 4, 2009, p. 573; Erica-Irene A Daes, The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, *Study of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, E/CN.4/Sub.2/432/Rev.2 (1983), pp. 123–4.

14 UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999) [45].

(f) whether and how the measures constitute a proportionate means by which to achieve the objective (having regard to whether the measures are accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same objective; and the possibility of oversight and the availability of review).

***Committee's initial view***

2.82 The committee noted that having regard to the significant number of detailed changes to the MBS, and the complex nature of the surgeries and services involved, it is not clear whether these instruments may have the effect of either reducing access to subsidised surgical services, or reducing the rebate provided to patients receiving some services. If this were the case, this may constitute a retrogressive measure, a type of limitation under international human rights law. The committee considered further information was required to assess the human rights implications of the instruments, and as such sought the minister's advice as to the matters set out at paragraph [2.81].[15]

2.83 The full initial analysis is set out in *Report 8 of 2021*.

## Minister's response[16]

2.84 The minister advised:

> **Information on cardiac changes made in the *Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021***
>
> *(a) Whether this instrument reduces the quantum of benefits available for any specific MBS items, that could adversely affect the rebate payable to patients*
>
> A total of four cardiac items (38285, 38286, 38274 and 38358), which are for the primary procedural services, have had a schedule fee reduction, and therefore a reduced rebate payable to patients. These reductions on fees have been based on expert advice from the profession and clinical experts. A summary of the fee changes is as follows:
>
> - The fee for item 38285 was reduced from $198.95 to $160.55.
> - The fee for item 38286 was reduced from $179.20 to $144.60
> - The fee for item 38274 was reduced from $940.80 to $777.60

15 The committee's expectations as to the content of statements of compatibility are set out in its *Guidance Note 1*. See, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

16 The minister's response to the committee's inquiries was received on 3 August 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

- The fee for item 38358 was reduced from $2,957.65 to $2,089.00

The schedule fee has been reduced, based on clinical advice, for two procedural services for the insertion and removal of implanted loop recorders:

- the fee for item 38285 has been reduced from $198.95 to $160.55 (a reduction of 20 per cent)
- the fee for item 38286 has been reduced from $179.20 to $144.60 (a reduction of 20 per cent).

These changes reflect a reduction in the complexity for the insertion and removal of implanted loop recorders due to improvements in technology of the device. These procedures can also now be provided to patients in the outpatient setting, potentially reducing exposure to out-of-pocket cost related to a hospital admission.

Item 38274, which is for the transcatheter closure of ventricular septal defect, has been amended to remove the imaging component of the procedure (which is provided under item 55130). Although the schedule fee for item 38274 has been reduced from $940.80 to $777.60, if the provider is required to provide the imaging component, they are able to claim the imaging service under item 55130 (which has an indexed fee $174.10), as well as the fee for item 38274. Under this change, patients will still receive the same total rebate (plus the increase for indexation) prior to the 1 July 2021 changes.

Item 38358, which is for the extraction of chronically implanted leads, has been amended to clarify the service is to be performed by an appropriately trained provider. The fee has been amended, as this service is also provided with item 90300, which is for a standby cardiothoracic surgeon to ensure patient safety for this complex procedure. Under this change, patients will still receive the same total rebate (plus the increase for indexation) prior to the 1 July 2021 changes.

*(b) Where this instrument removes MBS items entirely, whether any of those items are not covered by, or replaced with, alternative MBS items*

As part of phase 2 of cardiac changes which were recommended by the MBS Review Taskforce, a total of 59 cardiac items were removed.

A significant finding from the review of cardiac services items was the need to modernise the cardiac services section of the MBS to reflect contemporary clinical practice, clarify appropriate use of the items, differentiate clinical indications and ensure patients receive procedures in line with current best practice.

The MBS Review Taskforce made 65 recommendations to improve the appropriate use and criteria under which cardiac services are delivered. The items marked for deletion are intended to provide for the following scenarios, either independently or in combination in the revised schedule:

- Combine similar surgical procedures
- lncentivise advanced techniques
- Remove procedures that no longer represent best practice or are unsafe
- Reduce low value interventions

Therefore, deleted items are captured either in new items or amended items, or are being removed because they no longer reflect current evidence-based practice.

*(c) Whether this instrument has the effect of reducing the quantum of benefit for specific medical procedures, including those procedures which are currently covered by multiple MBS items and will now be covered by one item*

Apart from the four items which have had an amended fee (items 38285, 38286, 38274 and 38358), the changes to cardiac services, which include the bundling of multiple items into a single item, provide rebates that have been calculated in either a cost neutral way (with the net rebate remaining the same), or an increase to the schedule fee to reflect complexity (and therefore an increase to the patient rebate).

*(d) What is the objective sought to be achieved by the instrument and whether this constitutes a legitimate objective (being one which is solely for the purpose of promoting general welfare)*

The following changes to cardiac services aim to promote patient welfare:

- **Combining similar surgical procedures:** this improve the consistency of billing between providers and therefore the consistency of rebates for patients.
- **lncentivising advanced techniques:** higher fees (and therefore rebates) will be provided to encourage providers to employ advanced surgical techniques that improve patient outcomes and reduce complications.
- **Removing procedures that no longer represent best practice or are unsafe:** Patients will more likely receive improved interventions and no longer be exposed to outdated techniques that are no longer supported by evidence.
- **Reduction in low value interventions:** Patients are much less likely to undergo procedures that are not required or may be better provided for by another service.

Furthermore, in many instances, service providers will be able to receive rebates for procedures that will now be aligned with Australian and international best practice clinical guidelines.

*(e) Whether and how the measures are rationally connected to (that is, effective to achieve) that objective*

The majority of the cardiac items from 1 July 2021 will align with the latest Australian and international best practice clinical guidelines.

The new cardiac changes made in the regulation amendment sees a change to cardiac procedural services where providers will be required to practice in alignment with the latest evidence-based guidelines that reduce procedural complications, reduce recovery time and improve long-term health outcomes. These changes are supported by the representative stakeholder groups relevant to cardiac service provision.

*(f) Whether and how the measures constitute a proportionate means by which to achieve the objective (having regard to whether the measures are accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same objective; and the possibility of oversight and the availability of review)*

The cardiac changes made in the regulation amendment will achieve the objective of providing high-value, evidence-based medicine to the Australian public. These changes are accompanied by sufficient safeguards that allow for revision procedures when required and clear alignment with best practice.

The Department of Health will monitor the changes and will conduct a standard post implementation review in the appropriate timeframes.

**Information on general surgery changes made in the *Health Insurance (General Medical Services Table) Regulations 2021***

*(a) Whether this instrument reduces the quantum of benefits available for any specific MBS items, that could adversely affect the rebate payable to patients*

Fee changes arising from implementation of the Government's response to the MBS Review Taskforce (the Taskforce) for general surgery services aim to better reflect the relative complexity of performing the medical procedures provided by the items. Fees were determined based on expert advice from the medical profession, clinical experts and consumer representatives.

Five general surgery items (amended items 30388, 30574 and 30443, and new items 30791 and 31585) which provided for laparotomy, appendicectomy, subsequent necrosectomy, cholecystectomy and removal of gastric band have reduced fees in recognition of being simpler procedures relative to existing MBS services. A summary of the fee changes is as follows:

- The fee for item 30388 reduced from $1,647.45 to $1,108.20.
- The fee for item 30574 reduced from $127.10 to $64.10.

- The fee for item 30443 reduced from $762.45 to $668.45.
- The fee for new item 30791 is $453.35. This item is for a subsequent necrosectomy, which used to be billed under item 30577, which has a current fee of $1,133.30.
- The fee for new item 31585 has a fee of $865.85. This item is for the removal of adjustable gastric band, which used to be billed under item 31584 that has a current fee of $1,601.50.

Savings generated through the reduced fees for these items have been reinvested into other more complex general surgery items.

*(b) Where this instrument removes MBS items entirely, whether any of those items are not covered by, or replaced with, alternative MBS items*

The services covered by the removed general surgery items have either been combined into new; considered to be provided more appropriately under other existing items; or determined to be obsolete as they no longer reflect modern clinical practice.

*(c) Whether this instrument has the effect of reducing the quantum of benefit for specific medical procedures, including those procedures which are currently covered by multiple MBS items and will now be covered by one item*

The MBS Review aimed to simplify the Medicare Benefits Schedule (MBS) by developing items that represent complete medical services (through the consolidation of similar items). In these cases, fees were determined based on the weighted average of the component services.

*(d) What is the objective sought to be achieved by the instrument and whether this constitutes a legitimate objective (being one which is solely for the purpose of promoting general welfare)*

The changes to the general surgery items implement the Government's response to the recommendations of the MBS Review Taskforce for general surgery services. The changes promote patient welfare through:

- updating services to support evidence-based practice;
- providing greater flexibility in procedure approach which will support surgeons to provide best practice treatment tailored to individual patient needs;
- combining services that are similar procedures separated by means of access to simplify the MBS and improve billing transparency for patients; or
- removing services that no longer represent best practice.

*(e) Whether and how the measures are rationally connected to (that is, effective to achieve) that objective*

The measure implements the recommendations made by the clinician-led MBS Review Taskforce.

*(f) Whether and how the measures constitute a proportionate means by which to achieve the objective (having regard to whether the measures are accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same objective; and the possibility of oversight and the availability of review)*

The implemented recommendations of the Taskforce for general surgery services will contribute to the Government's objective of providing high-value, evidence-based medical services to the Australian public. Consultation with relevant clinical bodies and consumer representatives during implementation provides assurance that the measure is proportionate to the recommendations of the Taskforce.

The Department will closely monitor the impact of the changes on patients, in consultation with the sector, through a post implementation review process.

**Information on orthopaedic changes made in the *Health Insurance (General Medical Services Table) Regulations 2021***

*(a) Whether this instrument reduces the quantum of benefits available for any specific MBS items, that could adversely affect the rebate payable to patients*

Fee changes to items for orthopaedic surgery arising from the implementation of the Government's response to recommendations of the MBS Review Taskforce (the Taskforce) aim to better reflect the relative complexity of performing the relevant medical services. Fees were determined based on expert advice from the medical profession, clinical experts and consumer representatives.

One orthopaedic surgery item (49527) has a reduced fee from $1,650.65 to $1,371.25, to better reflect the intended purpose of the item descriptor for the provision of minor revision knee replacement procedures. The fee has been reduced because the described procedure is now less complex, relative to the more complex revision knee replacement (49533). This reduction of this fee was based on expert advice from the profession and clinical experts.

Savings generated through this fee reduction have been reinvested into item 49533.

*(b) Where this instrument removes MBS items entirely, whether any of those items are not covered by, or replaced with, alternative MBS items*

The services covered by the removed orthopaedic items have either been combined into new items; considered to be provided more appropriately under other existing items; or determined to be obsolete as they no longer reflect modern clinical practice.

*(c) Whether this instrument has the effect of reducing the quantum of benefit for specific medical procedures, including those procedures which are currently covered by multiple MBS items and will now be covered by one item*

The MBS Review aimed to simplify the Medicare Benefits Schedule (MBS) by developing items that represent complete medical services (through the consolidation of similar items).in these cases, fees were determined based on the weighted average of the component services.

*(d) What is the objective sought to be achieved by the instrument and whether this constitutes a legitimate objective (being one which is solely for the purpose of promoting general welfare)*

The changes to the orthopaedic items implement the Government's response to the recommendations of the MBS Review Taskforce for orthopaedic services. The changes promote patient welfare through:

- updating services to support evidence-based practice;
- providing greater flexibility in procedure approach which will support surgeons to provide best practice treatment tailored to individual patient needs;
- combining services that are similar procedures separated by means of access to simplify the MBS and improve billing transparency for patients; or
- removing services that no longer represent best practice.

*(e) Whether and how the measures are rationally connected to (that is, effective to achieve) that objective*

The measure implements the recommendations made by the clinician-led MBS Review Taskforce.

*(f) Whether and how the measures constitute a proportionate means by which to achieve the objective (having regard to whether the measures are accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same objective; and the possibility of oversight and the availability of review)*

The implemented recommendations of the Taskforce for orthopaedic services will contribute to the Government's objective of providing high-value, evidence-based medical services to the Australian public. Consultation with relevant clinical bodies and consumer representatives during implementation provides assurance that the measure is proportionate to the recommendations of the Taskforce.

The Department will closely monitor the impact of the changes on patients, in consultation with the sector, through a post implementation review process. In addition, given the scale and complexity of the changes made to the orthopaedic items, the post-implementation review process will be

expedited to ensure there are no unintended consequences or service gaps for patients.

## Concluding comments

### *International human rights legal advice*

*Rights to health and social security*

2.85 With respect to the Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021, the minister advised that Medicare benefits have been reduced with respect to four relevant procedures based on advances in technology, and the possibility for some procedures to be performed on an outpatient basis (rather than hospital admission), which may have the effect of reducing out-of-pocket expenses for patients. The minister also advised that the instrument removes 59 items, stating that these changes are intended to provide for combined procedures, incentivise the use of different procedures, remove outdated procedures, and reduce rates of low-value interventions. The minister stated that the instrument will not, otherwise, reduce the quantum of benefits payable for relevant procedures.

2.86 With respect to the Health Insurance (General Medical Services Table) Regulations 2021, the minister advised that 216 deleted items had either been combined into new items, considered to be provided more appropriately under other existing items, or determined to be obsolete as they no longer reflect modern clinical practice. He stated that fees had been reduced with respect to six items, because of simplified procedures associated with those items, and noted that the savings from those reductions were being re-invested into more complex surgery items. As to whether this instrument has the effect of reducing the quantum of benefit for specific medical procedures, (including those procedures which were covered by multiple MBS items and will now be covered by one item), the minister stated that the MBS Review aimed to simplify the MBS by developing items that represent complete medical services (through the consolidation of similar items), and that in these cases, fees were determined based on the weighted average of the component services.

2.87 Insofar as these changes mean a patient has reduced access to a specific subsidised surgical service, or receives a lower rebate for some services, it would appear that there is some risk that, for some patients, these amendments may constitute a retrogressive measure with respect to the right to health and social security. Being a type of limitation under international human rights law, a retrogressive measure may be permissible where it seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) the objective, and constitutes a proportionate means by which to achieve the objective.

2.88 The minister advised that the objective behind these amendments is to promote patient welfare by: combining similar surgical procedures (to improve billing consistency); incentivise the use of advanced techniques; remove procedures that no longer represent best practice (or are unsafe); and reduce low value interventions.

Improving general health outcomes, and the provision of advanced healthcare services, is likely to constitute a legitimate objective for the purposes of international human rights law, and it would appear that these amendments may be rationally connected to those objectives.

2.89 With respect to proportionality, the minister stated that consultation with relevant clinical bodies and consumer representatives during the implementation of these amendments provides assurance that the measures are proportionate to the recommendations of the MBS Taskforce, and stated that the department will monitor the impact of the changes through a post implementation review process. These two processes have the capacity to serve as important safeguards. However, it is noted that it is not clear if individual patients, who in some instances may now have to pay a higher gap fee payment, can apply to pay a reduced rate based on their financial circumstances.

2.90 In general, by providing for a number of surgeries to be available to individuals at a subsidised rate (and applying an indexation of 0.9 per cent to those items), this measure appears to promote the rights to health and social security. However, as noted, for some patients, the reduction (or removal) of Medicare item benefits for specific procedures may have the effect of reducing their access to subsidised medical services, or otherwise reducing the subsidy payable to them. Given the breadth and complexity of the amendments made by these two legislative instruments, it is difficult to determine the extent of any such cohort. Much will depend on how the amendments operate in practice, and monitoring and review of these changes will be important to ensure any reduction in social security benefits remains proportionate to the objectives sought to be achieved.

## Committee view

**2.91 The committee thanks the minister for this response. The committee notes that these two legislative instruments make a significant number of amendments to the Medicare Benefits Schedule (MBS) in relation to general surgery, orthopaedic services and cardiac services, and apply an indexation of 0.9 per cent to those services.**

**2.92 The committee considers that applying an indexation to MBS services, and providing for a number of surgeries to be made available to individuals at a subsidised rate, promotes the rights to health and social security. The committee also notes that where these instruments reduce access to subsidised surgical services, or reduce the rebate provided to patients receiving some services, this may constitute a retrogressive measure (or backwards step) with respect to those rights. The committee notes that a retrogressive measure may be permissible where it seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) the objective, and constitutes a proportionate means by which to achieve the objective.**

**2.93 The committee notes that these amendments are intended to promote patient welfare by combining similar surgical procedures (to improve billing consistency) and incentivise the use of advanced techniques. The committee considers that these are legitimate objectives, and that these instruments are rationally connected to them. With respect to proportionality, the committee considers that the extent to which the amendments may have the effect of reducing access to subsidised surgical services, or reducing the rebate provided to patients receiving some services, will depend on how they operate in practice. In this regard, the committee welcomes the minister's advice that these amendments, and their effects on patients, will be monitored and reviewed.**

**2.94 The committee considers that it would be of great assistances to its scrutiny of legislative instruments which make complex changes to medical benefits if the explanatory materials accompanying these instruments included the type of detailed information provided in this response.**

### Suggested action

**2.95 The committee recommends that the statement of compatibility with human rights be updated to include the information provided in this response.**

# Instruments made under the *Charter of the United Nations Act 1945*

## Charter of the United Nations Amendment Bill 2021[1]

| | |
|---|---|
| **Purpose** | These 12 legislative instruments[2] impose sanctions on individuals and entities under the *Charter of the United Nations Act 1945.*<br><br>This bill seeks to amend the *Charter of the United Nations Act 1945* to specify that listings and revocations made under the Act be made by legislative instrument, and seeks to confirm the validity of action that has been taken, or which may in the future need to be taken, in respect of conduct relating to existing listings that were made but not registered on the Federal Register of Legislation at the time of their making. |
| **Portfolio** | Foreign Affairs and Trade |
| **Bill introduced** | House of Representatives, 11 August 2021 |
| **Last day to disallow legislative instruments** | 15 sitting days after tabling (tabled in the House of Representatives on 27 May 2021 and the Senate on 15 June 2021).[3] |
| **Rights** | Privacy; fair hearing; effective remedy |

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Instruments made under the *Charter of the United Nations Act 1945* and Charter of the United Nations Amendment Bill 2021, *Report 10 of 2021*; [2021] AUPJCHR 104.

2 The 12 legislative instruments, all made under the *Charter of the United Nations Act 1945*, have the following registration numbers: [F2021L00626]; [F2021L00627]; [F2021L00628]; [F2021L00631]; [F2021L00636]; [F2021L00638]; [F2021L00639]; [F2021L00641]; [F2021L00644]; [F2021L00647];[F2021L00648]; [F2021L00649] (collectively known as 'the legislative instruments'). Note that there were a further nine legislative instruments registered on the same date made under the *Charter of the United Nations Act 1945*, however, as these related solely to organisations, and not individuals, the committee makes no comment on these: see [F2021L00632]; [F2021L00633]; [F2021L00634]; [F2021L00635]; [F2021L00637]; [F2021L00640]; [F2021L00642]; [F2021L00643]; [F2021L00645].

3 Note that the legislative instruments were originally classified as exempt from disallowance, however, on 2 August were reclassified as disallowable.

2.96 The committee requested a response from the minister in relation to the instruments in *Report 8 of 2021*.[4]

## Freezing of individuals' assets

2.97 The *Charter of the United Nations Act 1945* (Charter of the UN Act), in conjunction with various instruments made under that Act,[5] gives the Australian government the power to apply sanctions to give effect to decisions of the United Nations (UN) Security Council. Australia is bound by the *Charter of the United Nations 1945* (UN Charter) to implement UN Security Council decisions.[6] Obligations under the UN Charter may override Australia's obligations under international human rights treaties.[7] However, the European Court of Human Rights has stated there is presumption that UN Security Council Resolutions are to be interpreted on the basis that they are compatible with human rights, and that domestic courts should have the ability to exercise scrutiny of sanctions so that arbitrariness can be avoided.[8]

2.98 These 12 legislative instruments list almost 300 individuals as subject to sanctions, the effect of which is that their existing money and assets are frozen and it is an offence for a person to provide any future assets to these persons. The legislative instruments are stated as giving effect to UN Security Council resolution 1373, which requires Australia, as a UN Member State, to freeze the assets of persons 'who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts'.[9] The legislative instruments were made between 2001 and 2020 but were only registered on the Federal Register of Legislation on 26 May 2021. They were previously gazetted, but not registered – the effect of which appears to be that before they were registered the instruments did not apply to a person to the extent that they disadvantaged or imposed liabilities on the person.[10]

4 Parliamentary Joint Committee on Human Rights, *Report 8 of 2020* (23 June 2021), pp. 27-35.

5 See, in particular, the Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2019C00308].

6 *Charter of the United Nations 1945*, articles 2 and 41.

7 *Charter of the United Nations 1945*, section 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

8 *Al-Dulimi and Montana Management Inc. v Switzerland,* European Court of Human Rights (Grand Chamber), Application No. 5809/08 (2016) [140] and [146].

9 United Nations Security Council, Resolution 1373(1)(c), S/RES/1373 (2001), made on 28 September 2001.

10 See *Legislation Act 2003*, subsection 12(2) and the explanatory statements accompanying the legislative instruments.

2.99 The Charter of the United Nations Amendment Bill 2021 seeks to confirm the validity of action that has been taken, or which may in the future need to be taken, in respect of conduct relating to listings that were not registered on the Federal Register of Legislation at the time of their making. It also seeks to provide that anything that would have been invalid but for these amendments is taken to have been valid despite any effect that may have on the accrued rights of any person, and this applies in relation to civil and criminal proceedings, including proceedings that are pending or concluded.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights to privacy and fair hearing*

2.100 As the committee has previously set out,[11] sanctions may operate variously to both limit and promote human rights. For example, sanctions prohibiting the proliferation of weapons of mass destruction will promote the right to life. Sanctions could also promote human rights globally. However, the committee's examination of Australia's sanctions regimes has been, and is, focused solely on measures that impose restrictions on individuals that may be located in Australia. It is not clear whether any of the listings in these legislative instruments has affected individuals in Australia, but it is clear that some of the listings apply in relation to Australian citizens (or former citizens).[12]

2.101 The effect of a listing is that it is an offence for a person to make an asset directly or indirectly available to, or for the benefit of, a listed person.[13] A person's assets are therefore effectively 'frozen' as a result of being listed. For example, a financial institution is prohibited from allowing a listed person to access their bank account. This can apply to persons living in Australia or could apply to persons outside Australia. A listing by the minister is not subject to merits review, and there is no requirement that an affected person be given any reasons for why a decision to list a person has been made.

11 This includes consideration of sanctions imposed under the *Autonomous Sanctions Act 2011.* See, most recently, Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 112–122. See also *Report 6 of 2018* (26 June 2018) pp. 104–131; *Report 4 of 2018* (8 May 2018) pp. 64–83; *Report 3 of 2018* (26 March 2018) pp. 82–96; *Report 9 of 2016* (22 November 2016) pp. 41–55; *Thirty-third Report of the 44th Parliament* (2 February 2016) pp. 17–25; *Twenty-eighth Report of the 44th Parliament* (17 September 2015) pp. 15–38; *Tenth Report of 2013* (26 June 2013) pp. 13–19; *Sixth Report of 2013* (15 May 2013) pp. 135–137.

12 See for example Charter of the United Nations Act 1945 Listing 2018 (No. 2) [F2021L00639]; Charter of the United Nations Act 1945 Listing 2015 (No. 3) F2021L00648]; and Charter of the United Nations Act 1945 Listing 2019 (No. 1) [F2021L00649].

13 *Charter of the United Nations Act 1945*, section 21.

2.102 The scheme provides that the minister may grant a permit authorising the making available of certain assets to a listed person.[14] An application for a permit can only be made for basic expenses; a legally required dealing; where a payment is contractually required; or an extraordinary expense dealing.[15] A basic expense includes foodstuffs; rent or mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.[16]

2.103 The listing of a person under the sanctions regime may therefore limit a range of human rights, in particular the right to a private life; right to an adequate standard of living; and right to a fair hearing.

*Right to privacy*

2.104 Article 17 of the International Covenant on Civil and Political Rights prohibits arbitrary or unlawful interference with an individual's privacy, family, correspondence or home. The freezing of a person's assets and the requirement for a listed person to seek the permission of the minister to access their funds for basic expenses imposes a limit on that person's right to a private life, free from interference by the State. The measures may also limit the right to privacy of close family members of a listed person. Once a person is listed under the sanctions regime, the effect of the listing is that it is an offence for a person to directly or indirectly make any asset available to, or for the benefit of, a listed person (unless it is authorised under a permit to do so). This could mean that close family members who live with a listed person will not be able to access their own funds without needing to account for all expenditure, on the basis that any of their funds may indirectly benefit a listed person (for example, if a spouse's funds are used to buy food or public utilities for the household that the listed person lives in).

2.105 The need to get permission from the minister to access money for basic expenses could, in practice, impact greatly on a person's private and family life. For example, it could mean that a person whose assets are frozen would need to apply to the minister whenever they require funds to purchase medicines, travel or meet other basic expenses. The permit may also include a number of conditions. These conditions are not specified in the legislation and accordingly, there is wide discretion available to the minister when imposing conditions on the granting of a permit.

*Right to a fair hearing*

2.106 The right to a fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights. The right applies both to criminal and civil proceedings, to cases before both courts and tribunals. The right applies where rights

14 *Charter of the United Nations Act 1945*, section 22.

15 Charter of the United Nations (Dealing with Assets) Regulations 2008, section 5.

16 Charter of the United Nations (Dealing with Assets) Regulations 2008, subsection 5(3).

and obligations, such as personal property and other private rights, are to be determined. In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal and have a reasonable opportunity to present their case. Ordinarily, the hearing must be public, but in certain circumstances, a fair hearing may be conducted in private. When a person is listed by the minister there is no requirement that the minister hear from the affected person before a listing is made or continued; no requirement for reasons to be provided to the affected person; no provision for merits review of the minister's decision; and no review of the minister's decision to grant, or not grant, a permit allowing access to funds, or review of any conditions imposed.

*Limitations on human rights*

2.107 The rights to a private life and a fair hearing may be subject to permissible limitations under international human rights law. In order to be permissible, the measure must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective. In the case of executive powers which seriously disrupt the lives of individuals subjected to them, the existence of safeguards is important to prevent arbitrariness and error, and ensure that the powers are exercised only in the appropriate circumstances.

2.108 The use of international sanctions regimes to apply pressure to governments and individuals in order to end the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law. However, there are concerns that the sanctions regime may not be regarded as proportionate, in particular because of a lack of effective safeguards to ensure that the regime, given its potential serious effects on those subject to it, is not applied in error or in a manner which is overly broad in the individual circumstances.

2.109 On the basis of the significant human rights concerns identified by the committee previously in relation to sanctions regimes that apply to individuals, the committee has previously recommended[17] that consideration be given to the following measures, several of which have been implemented in relation to a comparable regime in the United Kingdom, to ensure the compatibility of the sanctions regimes with human rights:

- the provision of publicly available guidance in legislation setting out in detail the basis on which the minister decides to list a person;
- regular reports to Parliament in relation to the regimes including the basis on which persons have been listed and what assets, or the amount of assets, that have been frozen;

17 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 53; *Report 6 of 2018* (26 June 2018) pp. 128–129; and *Report 2 of 2019* (2 April 2019) p. 122.

- provision for merits review before a court or tribunal of the minister's decision to list a person;
- provision of merits review before a court or tribunal of an automatic designation where an individual is specifically listed by the UN Security Council Committee;
- regular periodic reviews of listings;
- automatic reconsideration of a listing if new evidence or information comes to light;
- limits on the power of the minister to impose conditions on a permit for access to funds to meet basic expenses;
- review of individual listings by the Independent National Security Legislation Monitor;
- provision that any prohibition on making funds available does not apply to social security payments to family members of a listed person (to protect those family members); and
- consultation with operational partners such as the police regarding other alternatives to the imposition of sanctions.

2.110 In order to assess the human rights compatibility of these legislative instruments, further information is required, in particular:

(a) whether consideration has been given to, and any action taken to implement, the committee's previous recommendations as set out at paragraph [2.109];

(b) whether any of the individuals subject to listing under these legislative instruments have been, at any time during their listing, in Australia, and if so, how many;

(c) how many of the listings in these legislative instruments are currently valid; and

(d) noting that these listings, some dating back almost 20 years, have only recently been registered, and noting that the *Legislation Act 2003* provides that a legislative instrument will not apply before the instrument is registered to the extent that a person's rights would be disadvantaged, what remedies, if any, does a person against whom action has been taken pursuant to these listings have.

***Committee's initial view***

2.111 The committee considered these listings engage and limit the right to a fair hearing and private life for those in Australia. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and

proportionate. The committee considered further information was required to assess the human rights implications, and as such sought the minister's advice as to the matters set out at paragraph [2.110].

2.112 The full initial analysis is set out in *Report 8 of 2021*.

## Minister's response[18]

2.113 The minister advised:

> The Department of Foreign Affairs and Trade (the Department) will ensure that a Statement of Compatibility with Human Rights is prepared for all future counter-terrorism financial sanctions listings to assist the Committee with its consideration of the human rights implications of such listings.
>
> All listings included in the legislative instruments registered on 26 May 2021 have been validly made in accordance with the requirements of the Act. The legislative instruments have been registered to put beyond doubt any question as to the enforceability of the validly made listings contained within the instruments. The legislative instruments have been registered in the same form in which they were first published in the Commonwealth Gazette and, therefore, include both current and historical listings dating back to 2001. The legislative instruments include 37 individuals currently subject to Australian counterterrorism financial sanctions. None of these individuals have been in Australia at any time during their listing. The legislative instruments also contain the names of individuals whose listings have since lapsed or been revoked.
>
> As required by regulation 40 of the *Charter of the United Nations (Dealing with Assets) Regulations 2008,* all persons and entities subject to financial sanctions under Australian sanctions law are set out in a Consolidated List, available on the DFAT website.
>
> Registration of these listings as legislative instruments does not alter the scheme established by the Act or any rights owed to persons under the scheme to seek review or revocation of a listing, or compensation for persons wrongly affected. To the extent that a person considers that they were disadvantaged as a result of action taken in reliance on a listing that person may seek judicial review of the action. Any such application would be determined on a case by case basis.
>
> The Department acknowledges the Committee's advice that the instruments are subject to disallowance. At the time of registration, DFAT acted on advice that the instruments were not subject to disallowance,

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

noting that the instruments give effect to Australia's obligations under international law. In this regard, and in response to the Committee's broader comments about the operation of the scheme more generally, it is important to note that the framework established by Part 4 of the Act gives effect to Australia's obligations under United Nations Security Council (UNSC) Resolution 1373 (Resolution 1373) and provides a robust and agile framework to counter the financing of terrorism.

Australia is required to give effect to UNSC resolutions as a matter of international law. Consistent with these obligations, the Minister is required under international law to list an individual or entity for counter-terrorist financial sanctions if reasonably satisfied that the listing criteria are met. The listing criteria for counter-terrorism financial sanctions are set out in Resolution 1373 and implemented in Australia law by Regulation 20 of *United Nations (Dealing with Assets) Regulations 2008,* which provides that:

> *the Minister must list a person or entity if the Minister is satisfied that the person or entity is a person or entity mentioned in paragraph 1 (c) of Resolution 1373;*

that is:

- a person who commits, or attempts to commit, terrorist acts or participates in or facilitates the commission of terrorist acts;
- an entity owned or controlled directly or indirectly by such persons; or
- a person or an entity acting on behalf of, or at the direction of such persons and entities.

Counter-terrorism financial sanctions listings are publicly available. Historically, and in accordance with the process set out in the Act, they have been gazetted in the Commonwealth Gazette. As noted above, all persons and entities currently subject to targeted financial sanctions, including individuals subject to counter-terrorism financial sanctions, are listed on the Consolidated List, which is available on DFAT's website.

In recognition of the potentially significant implications of counter-terrorism financial sanctions decisions, section 15A of the Act provides for the automatic repeal of listings after three years, if not otherwise continued by the Minister deciding to relist. The automatic repeal mechanism does not prevent the Minister from reviewing a listing at any time. In advance of any relisting, the Department invites submissions from affected persons or their authorised representatives to inform the Minister's decision.

A person can apply at any time to have their listing revoked or seek judicial review of a listing decision. The Act does not provide for merits review. The exclusion of merits review in relation to sanctions-related decisions is warranted by the seriousness of the foreign policy and national security

considerations involved, as well as the sensitive nature of the evidence relied on in reaching those decisions.

The Government considers that counter-terrorism financial sanctions listings are subject to the appropriate level of reporting, transparency and oversight given their nature as international obligations. The listings are subject to: automatic repeal after three years unless continued by the Minister deciding to relist; Senate Estimates scrutiny; parliamentary disallowance; parliamentary committee scrutiny; Independent National Security Legislation Monitor self-initiated 'own motion reviews'; Joint Standing Committee on Foreign Affairs and Trade requests for private briefings; and judicial review.

The Act provides the Minister with certain permit granting powers, consistent with the scope of UNSCR 1373 and subsequent relevant resolutions, including UNSC Resolution 1452 (2002) (UNSCR 1452). The Minister has a broad discretion to issue, on her own initiative, permits authorising the provision of specified assets to a listed person or the use of or dealing with assets owned or controlled by a listed person. Requests by asset owners or holders for authorisation to use or deal with assets owned or controlled by listed persons must be for basic expense dealings, contractual dealings or extraordinary expense dealings. The restrictions in relation to authorised dealings, as set out in Part 3 of the *Charter of the United Nations (Dealing with Assets) Regulations 2008,* are in accordance with our international obligations under UNSCR 1373 and UNSCR 1452.

The Government is satisfied that Australia's United Nations sanctions regimes are compatible with human rights. The Government keeps its sanctions regimes under regular review.

## Concluding comments

### *International human rights legal advice*

*Rights to privacy and fair hearing*

2.114 The initial analysis noted that while sanctions can promote human rights globally, the committee's examination of Australia's sanctions regimes has been, and is, focused on measures that impose restrictions on individuals that may be located in Australia. As such, further information was sought as to whether any of the individuals subject to listing under these legislative instruments have been, at any time during their listing, in Australia, and if so, how many. The minister advised that the legislative instruments include 37 individuals currently subject to Australian counterterrorism financial sanctions, and that none of these individuals have been in Australia at any time during their listing. As such, in relation to those currently subject to listing, this

limits the scope of Australia's human rights obligations to these individuals[19] and it is unlikely that sanctions on them would breach Australia's human rights obligations. However, it is noted that the minister's response did not address the question as to whether any individuals listed over the past 20 years have been in Australia, and as such it is not possible to assess whether any previously listed individuals were owed human rights obligations.

2.115 Noting that the listings were previously gazetted, but not registered – the effect of which appears to be that before they were registered the instruments did not apply to a person to the extent that they disadvantaged or imposed liabilities on the person[20] – further advice was sought as to what remedies, if any, a person against whom action has been taken pursuant to these listings has. The minister advised that compensation is available for persons wrongly affected by the listing and a person may seek judicial review if disadvantaged by any action taken in reliance of a listing. However, since this advice was provided, a bill has been introduced that seeks to retrospectively validate listings (which would include these listings) which had not been correctly registered.[21] It also seeks to provide that anything that would have been invalid but for these amendments is taken to have been valid despite any effect that may have on the accrued rights of any person, and this applies in relation to civil and criminal proceedings.[22] As such, if this bill becomes law it would appear that compensation would not be available for anyone adversely affected by the listing. As such, it is not clear that persons affected by the earlier listings would have access to an effective remedy for any potential violation of their rights, noting that judicial review alone may not be sufficient.[23]

2.116 The minister's response did not directly address the question of whether consideration has been given to, and any action taken to implement, the committee's previous recommendations regarding the sanctions regime. Instead, the minister advised the government considers the sanctions regime is compatible with human

19 Noting that the scope of a State party's obligations under human rights treaties extends to all those within the State's jurisdiction. For instance, article 2(1) of the International Covenant on Civil and Political Rights requires states parties 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.

20 See *Legislation Act 2003*, subsection 12(2) and the explanatory statements accompanying the legislative instruments.

21 See Charter of the United Nations Amendment Bill 2021 introduced into the House of Representatives on 11 August 2021.

22 Charter of the United Nations Amendment Bill 2021, Item 6, proposed subsection 38A(5).

23 See article 2(3) of the International Covenant on Civil and Political Rights which requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the Covenant.

rights, noting that: sanctions are automatically repealed after three years (unless the minister decides to relist); while merits review is unavailable, judicial review is available; and a person can apply to the minister to have their listing revoked. Additionally, the minister noted there is parliamentary oversight of the listings, and the potential for the Independent National Security Legislation Monitor to self-initiate 'own motion reviews'.

2.117 As the committee has previously found, the sanctions regime may not be regarded as proportionately limiting the right to privacy and fair hearing, in relation to those located in Australia. This is particularly because of a lack of effective safeguards to ensure that the regime, given its potential serious effects on those subject to it, is not applied in error or in a manner which is overly broad in the individual circumstances.[24] However, noting the advice that none of the persons who are currently subject to the sanctions have ever been in Australia, it would appear that none of the current listings risk being incompatible with Australia's human rights obligations.

## Committee view

**2.118 The committee thanks the minister for this response. The committee notes that these 12 legislative instruments list almost 300 individuals as subject to sanctions, the effect of which is that their money and assets are frozen. The committee notes with some concern that while the legislative instruments were made over the last 20 years, they were only recently registered on the Federal Register of Legislation.**

**2.119 The committee considers that sanctions regimes operate as important mechanisms for applying pressure to regimes and individuals with a view to ending the repression of human rights internationally. The committee notes the importance of Australia acting in concert with the international community to prevent egregious human rights abuses arising from situations of international concern.**

**2.120 However, the committee regards it as important to recognise that the sanctions regime operates independently of the criminal justice system, and may be used regardless of whether a listed person has been charged with or convicted of a criminal offence. For those in Australia who may be subject to sanctions, requiring ministerial permission to access money for basic expenses could, in practice, impact greatly on a person's private and family life. Further, as the minister, in making a listing, is not required to hear from the affected person or provide reasons for the listing, and there is no merits review of any of the minister's decisions, such listings engage and limit the right to a fair hearing for those in Australia. The committee**

24 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2020* (23 June 2021), pp. 27-35.

**notes it has previously made a number of recommendations to improve the proportionality of the sanctions regime.[25]**

**2.121 Noting the minister's advice that none of the persons who are currently subject to listing are in Australia, the committee considers that none of the current listings would risk being incompatible with Australia's human rights obligations. As no information was provided as to whether persons previously subject to listings were in Australia during the period of their listing, it is not possible to conclude as to whether the expired listings were compatible with Australia's human rights obligations.**

**2.122 Noting that the Charter of the United Nations Amendment Bill 2021 seeks to retrospectively validate these listings and ensure the listings are taken to have been valid despite any effect this may have on the accrued rights of any person, it appears that compensation would not be available for anyone adversely affected by the listing. As such, it is not clear that persons affected by the earlier listings would have access to an effective remedy for any potential violation of their rights, noting that judicial review alone may not be sufficient.**

**2.123 The committee welcomes the department's commitment to ensure that a statement of compatibility with human rights is prepared for all future counter-terrorism financial sanctions listings to assist the committee with its consideration of the human rights implications of such listings, noting that such statements are required as a matter of law.[26]**

**2.124 The committee has concluded its examination of these legislative instruments.**

**Dr Anne Webster MP**

**Chair**

25 See Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 53; *Report 6 of 2018* (26 June 2018) pp. 128–129; and *Report 2 of 2019* (2 April 2019) p. 122.

26 See *Human Rights Parliamentary Scrutiny Act 2011*, section 9 and *Legislation Act 2003*, paragraph 15J(2)(f)