



# Parliamentary Joint Committee on Human Rights

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Human rights scrutiny report

Report 5 of 2024

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Mr Henry Pike MP, Deputy Chair	Bowman, Queensland, LNP
Senator Lisa Darmanin	Victoria, ALP
Senator Matt O'Sullivan	Western Australia, LP
Ms Alicia Payne MP	Canberra, Australian Capital Territory, ALP
Mr Graham Perrett MP	Moreton, Queensland, ALP
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Senator Lidia Thorpe	Victoria, IND
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## Committee information

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

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

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

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

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

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

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

## Report snapshot<sup>3</sup>

In this report the committee has examined the following bills and legislative instruments for compatibility with human rights. The committee's full consideration of legislation commented on in the report is set out in Chapters 1 and 2.

### Bills

#### Chapter 1: New and continuing matters

Bills introduced 14 May to 6 June 2024	23
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Private members or senators' bills that may engage and limit human rights	1

#### Chapter 2: Concluded

Bills committee has concluded its examination of following receipt of ministerial response	1
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### Appropriation Bills<sup>5</sup>

The committee reiterates its long-held view (set out most recently in [Report 8 of 2023](#)) that the appropriation of funds facilitates the taking of actions which may promote, or fail to fulfil, Australia's obligations under international human rights law, which is not recognised in the statements of compatibility accompanying these bills. The committee's expectation is that statements of compatibility accompanying appropriations bills should address the compatibility of measures which directly impact human rights. In particular, the committee expects that if appropriations bills propose a real reduction in funds available for expenditure on certain portfolios or activities that may impact human rights, the statement of compatibility should identify this and explain why this is a permissible limit.

<sup>3</sup> This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 5 of 2024*; [2024] AUPJCHR 33.

<sup>4</sup> The committee makes no comment on the remaining bills on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

<sup>5</sup> Appropriation Bill (No. 1) 2024-2025; Appropriation Bill (No. 2) 2024-2025; Appropriation Bill (No. 5) 2023-2024; Appropriation Bill (No. 6) 2023-2024; Appropriation (Parliamentary Departments) Bill (No. 1) 2024-2025.

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**Capital Works (Build to Rent Misuse Tax) Bill 2024**

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No comment

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**Commission of Inquiry into Antisemitism at Australian Universities Bill 2024**

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The committee notes that this non-government bill is intended to prevent antisemitism from occurring at Australian universities, which may promote a number of human rights. The committee also notes that the bill appears to engage and may limit human rights to the extent that the bill applies the powers in the *Royal Commissions Act 1902*. The committee has previously recommended that a foundational assessment of the human rights compatibility of the Royal Commissions Act 1902 be conducted. Should this bill proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill.

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**Creative Australia Amendment (Implementation of Revive) Bill 2024**

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No comment

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**Criminal Code Amendment (Deepfake Sexual Material) Bill 2024**

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No comment

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**Defence Amendment (Parliamentary Joint Committee on Defence) Bill 2024**

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*Seeking Information*

**Secrecy offences***Rights to privacy and freedom of expression*

This bill seeks to establish a Parliamentary Joint Committee on Defence (PJCD), responsible for reviewing, monitoring and reporting on the administration and operations of all Australian defence agencies. It establishes two secrecy offences prohibiting the disclosure of information and documents provided to the PJCD in confidence.

Prohibiting the disclosure of information, to the extent that it contains personal information, promotes the right to privacy. However, in restricting the disclosure of such information or documents this also limits the right to freedom of expression.

The committee considers further information is required to assess the compatibility of this measure with the right to freedom of expression, particularly as to why these offences do not contain additional safeguards as recommended by the recent review of secrecy provisions by the Attorney-General's Department. As such it is seeking further information from the Minister for Defence in relation to this.

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### Education Services for Overseas Students Amendment (Quality and Integrity) Bill 2024

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The committee notes that this bill, in enabling the personal information of individuals to be collected as part of the assessment of education agents and of the register of education providers, engages and appears to limit the right to privacy. This was not identified in the statement of compatibility accompanying this bill. The committee has authorised its secretariat to notify departments where statements of compatibility appear to be inadequate. As such, the committee's secretariat has written to the department in relation to this matter. The committee otherwise makes no comment in relation to this bill.

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### Excise and Customs Legislation Amendment (Streamlining Administration) Bill 2024

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No comment

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### Export Control Amendment (Ending Live Sheep Exports by Sea) Bill 2024

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No comment

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### Health Insurance Legislation Amendment (Assignment of Medicare Benefits) Bill 2024

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No comment

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### Keeping Cash Transactions in Australia Bill 2024

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No comment

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### National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024

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#### *Advice to Parliament*

#### **Definition of NDIS support**

*Rights of persons with disability; rights to an adequate standard of living, health and social security; and rights of the child*

The measure would introduce a new definition of NDIS support, with most of the detail to be set out in future NDIS rules. To the extent that the measure would have the effect of reducing the type of supports that will be funded by the NDIS and thus available for participants, it would engage and may limit the rights of persons with disability as well as the rights to an adequate standard of living and health. Insofar as the NDIS may be considered a form of social security, the measure would also engage and may limit the right to social security. Additionally, to the extent that the measure applies to children, the rights of the child would be engaged and possibly limited.

The committee has considered the measure as originally drafted and as amended. While the committee considers that the measure pursues a legitimate objective, depending on how the NDIS rules are drafted, there is a risk that the measure may not be sufficiently flexible to ensure that any limitation on rights is proportionate in

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each case. As part of its usual scrutiny process, the committee will scrutinise any future NDIS rules and related legislative instruments for their compatibility with human rights.

The committee considers the proportionality of this measure may be assisted were such future NDIS rules to contain sufficient flexibility such that where a support is either not declared to be an NDIS support or is declared to not be an NDIS support, the National Disability Insurance Agency (NDIA) may nevertheless exercise discretion to approve the provision of that support through the NDIS if the participant has demonstrated a need for the support as a result of their disability. The committee otherwise draws these human rights concerns to the attention of the Minister for the National Disability Insurance Scheme and the Parliament.

### **Requests for information**

#### *Right to privacy*

The measure seeks to expand the circumstances in which the Chief Executive Officer (CEO) of the NDIA may request information and reports from a participant, including for the purposes of deciding whether or not to revoke a participant's status and assessing whether or not a participant meets the access requirements for the NDIS. The CEO may request that the participant provide information that is reasonably necessary for the purpose of making the particular decision and undergo an assessment or medical examination and provide the report to the CEO. By allowing the CEO to request information and reports from a participant, including sensitive medical information, the measure engages and may limit the right to privacy.

The committee considers that the measure pursues a legitimate objective and is rationally connected to that objective. Based on the information provided by the minister, the committee considers that the circumstances in which the right to privacy is likely to be limited are sufficiently circumscribed. The committee considers that the measure is accompanied by sufficient safeguards to ensure that the limitation on the right to privacy is proportionate.

The committee considers that its concerns have therefore been addressed. The committee recommends that the statement of compatibility be updated to reflect the information provided by the Minister for the National Disability Insurance Scheme and otherwise makes no further comment in relation to this measure.

### **Working out total funding amounts for NDIS participants**

#### *Rights of persons with disability; rights to an adequate standard of living, health and social security; and rights of the child*

The measures seek to require the minister to have regard to the financial sustainability of the NDIS in determining matters relating to working out total funding amounts and assessing participants' need for supports. To the extent that this results in fewer supports being approved and funded for participants and has an adverse impact on

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participants' independence and quality of life, the measures would engage and may limit the rights of persons with disability, the rights to an adequate standard of living, health and social security as well as the rights of the child (if the measures applied to children).

While ensuring the financial sustainability of the NDIS is an important policy aim, given the high threshold that must be met to justify retrogressive measures under international human rights law, the committee considers that it is not clear whether this stated objective would, in itself, be considered legitimate for the purposes of international law. The committee considers that there remains a risk that the measures may be retrogressive in practice and there do not appear to be sufficient safeguards accompanying the measures to mitigate this risk. The committee therefore considers that it has not been demonstrated that the proposed limitations on rights would be proportionate in all cases. Further, the committee notes that under international human rights law, where children are involved, the best interests of the child must be a primary consideration. As the best interests of the child are not required to be considered, the committee considers that the measures do not appear to be compatible with this right.

The committee considers the proportionality of the measures may be assisted were guidance prepared in consultation with, and co-designed by, people with disability, to assist the minister in exercising this power; and the best interests of the child included as a primary matter that the minister must have regard to in making a determination. The committee has also recommended that the statement of compatibility be updated and otherwise draws these concerns to the attention of the Minister for the National Disability Insurance Scheme and the Parliament.

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### **National Health Amendment (Supporting Patient Access to Cheaper Medicines and Other Measures) Bill 2024**

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No comment

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### **Nature Positive (Environment Information Australia) Bill 2024**

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No comment

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### **Nature Positive (Environment Protection Australia) Bill 2024**

### **Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024**

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These bills seek to establish the new statutory Commonwealth entity, known as Environment Protection Australia (EPA), and confer on the CEO of the EPA various functions and powers, including those that exist under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and a range of other federal environmental laws. Some of these existing functions and powers engage and may limit a number of human rights. For instance, the bills would establish a framework for the use and disclosure of information, including personal information, which would engage and limit the right to privacy.

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As the EPBC Act and other environmental legislation were introduced prior to the establishment of this committee, a foundational human rights assessment of this legislation has not been undertaken. The committee considers that such a foundational assessment is required in order to fully assess the compatibility of the legislation with human rights. However, as these bills do not amend the scope or content of existing functions and powers under these Acts, but rather confer the existing functions and powers on a different entity (namely the CEO of the EPA), the committee makes no further comment on these bills.

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#### **Payment Times Reporting Amendment Bill 2024**

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No comment

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#### **Social Services and Other Legislation Amendment (More Support in the Safety Net) Bill 2024**

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No comment

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#### **Treasury Laws Amendment (Extending the FBT Exemption for Plug-In Hybrid Electric Vehicles) Bill 2024**

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No comment

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#### **Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024**

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No comment

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## Legislative instruments

### Chapter 1: New and continuing matters

Legislative instruments registered on the [Federal Register of Legislation](#) between 5 May to 20 May 2024<sup>6</sup> 45

Legislative instruments substantively commented on in report<sup>7</sup> 0

### Chapter 2: Concluded

Legislative instruments committee has concluded its examination of following receipt of ministerial response 1

### Defence (Non-foreign work restricted individual) Determination 2024

### Defence (Non-relevant foreign country) Determination 2024

These legislative instruments specify classes of defence workers who are *not* subject to the prohibition in Part IXAA the *Defence Act 1903* on former defence workers performing certain work or training for a foreign country without a foreign work authorisation. They also designate four foreign countries in relation to which foreign work restrictions (and corresponding criminal offences) do not apply.

In [Report 11 of 2023](#), the committee considered that the restrictions in the *Defence Act 1903* on foreign work engage and limit the rights to work and privacy. It raised concerns that it was not clear whether these restrictions would constitute a proportionate limit on these rights, and stated that much would depend on exemptions set out by delegated legislation. The committee notes that these two legislative instruments appear to provide for numerous exemptions from the scheme for various workers, albeit subject to a range of time periods which must have elapsed since the worker ceased working for Defence. However, as there would be workers who are still subject to the blanket ban (unless they have a ministerial authorisation to undertake foreign work), and noting that only four countries are exempted from the scheme, the committee draws attention to its broader concerns in its previous report regarding the proportionality of the measure.

<sup>6</sup> The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, use the advanced search function on the [Federal Register of Legislation](#), and select 'Collections' to be 'legislative instruments'; 'type' to be 'as made'; and date to be 'registered' and 'between' the date range listed above.

<sup>7</sup> Unless otherwise indicated, the committee makes no comment on the remaining legislative instruments on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the instrument and relevant information provided in the statement of compatibility (where applicable). The committee may have determined not to comment on an instrument notwithstanding that the statement of compatibility accompanying the instrument may be inadequate.

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## Social Security (Remote Engagement Program Payment) Determination 2023

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### *Advice to Parliament*

This legislative instrument determined the arrangements for a remote engagement program, including the fee payable to participants. The committee had previously concluded its consideration of the human rights compatibility of this instrument and made a number of recommendations to improve compatibility.

The Minister for Indigenous Affairs has now advised that the remote engagement program trial will shortly end. The committee welcomes the minister's advice that she has asked the National Indigenous Australians Agency to consider the committee's findings when designing a new Remote Jobs and Economic Development Program and a new employment service for remote Australia.

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## Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2024

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This instrument declares the NSW Department of Communities and Justice to be an enforcement agency, and each staff member of Corrective Services NSW to be an officer, for the purpose of the *Telecommunications (Interception and Access) Act 1979* (TIA Act), meaning employees of Corrective Services NSW may access telecommunications data. The committee previously commented on an equivalent declaration in [Report 6 of 2023](#) and [Report 8 of 2023](#), concluding that it was not compatible with the right to privacy as the necessity of the power had not been established, noting that all other corrective services agencies access telecommunications data via the police, and the power was insufficiently defined, noting that as a matter of law thousands of employees could access the data. The committee previously recommended that at a minimum the declaration be amended to specify only those staff members who require access to telecommunications data to be officers for the purposes of the TIA Act. As this instrument is essentially the same as the 2023 declaration and the committee's previous recommendation has not been implemented, the committee considers that the same human rights concerns apply and draws these concerns to the attention of the Attorney-General and the Parliament.

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## Instruments imposing sanctions on individuals<sup>8</sup>

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A number of legislative instruments impose sanctions on individuals. The committee has considered the human rights compatibility of similar instruments on a number of occasions, and retains scrutiny concerns about the compatibility of the sanctions regime with human rights.<sup>9</sup> However, as these legislative instruments do not appear to designate or declare any individuals who are currently within Australia's jurisdiction, the committee makes no comment in relation to these instruments at this stage.

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<sup>8</sup> See Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Amendment (No. 1) Instrument 2024 [[F2024L00540](#)]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Thematic Sanctions) Amendment (No. 3) Instrument 2024 [[F2024L00522](#)].

<sup>9</sup> See, most recently, Parliamentary Joint Committee on Human Rights, [Report 2 of 2024](#) (20 March 2024) pp. 14–20 and [Report 15 of 2021](#) (8 December 2021), pp. 2–11.

## Chapter 1

### New and ongoing matters

1.1 The committee comments on the following bill and seeks a response with further information from the relevant minister.

### Bills

#### Defence Amendment (Parliamentary Joint Committee on Defence) Bill 2024<sup>10</sup>

<b>Purpose</b>	This bill seeks to establish a Parliamentary Joint Committee on Defence and provides for its powers and functions and creates criminal offences for dealing with information received by the proposed committee
<b>Portfolio</b>	Defence
<b>Introduced</b>	House of Representatives, 30 May 2024
<b>Rights</b>	Freedom of expression; privacy

#### Secrecy offences

1.2 This bill seeks to establish a Parliamentary Joint Committee on Defence (PJCD), responsible for reviewing, monitoring and reporting on the administration and operations of all Australian defence agencies. It seeks to establish two new criminal offences:

- the first offence, applicable to all persons, of unauthorised disclosure or publication of non-public evidence taken by the PJCD, or documents produced to the PJCD, in private. This offence would not apply if the person became aware of the relevant information otherwise than because of the PJCD proceedings. It would be subject to a maximum penalty of imprisonment for two years or 120 penalty units or both;<sup>11</sup>
- the second offence, applicable only to former or current PJCD members, their staff or the PJCD secretariat, of directly or indirectly making a record of, or disclosing or communicating to a person, any information acquired because of holding that office or employment or producing a committee document, if it is not done for the purposes of enabling the PJCD to perform

<sup>10</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, Defence Amendment (Parliamentary Joint Committee on Defence) Bill 2024, *Report 5 of 2024*; [2023] AUPJCHR 34.

<sup>11</sup> Schedule 1, item 2, proposed section 110ADA.

its functions. No defences would apply. It would be subject to a maximum penalty of imprisonment for 5 years or 300 penalty units, or both.<sup>12</sup>

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

### ***Rights to freedom of expression and privacy***

1.3 These secrecy offences are designed to ensure information and documents provided to the committee are not disclosed unless authorised or for the purpose of enabling the proposed PJCD to perform its functions. To the extent that this information or documents could contain personal information these offences would promote the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.<sup>13</sup> It also includes the right to control the dissemination of information about one's private life.

1.4 However, in restricting the disclosure of such information or documents, this also limits the right to freedom of expression. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.<sup>14</sup>

1.5 The statement of compatibility identifies that the right to freedom of expression is engaged by these measures. This right may be subject to limitations that are necessary to protect the rights or reputations of others,<sup>15</sup> national security,<sup>16</sup>

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<sup>12</sup> Schedule 1, item 2, proposed section 110ADG.

<sup>13</sup> International Covenant on Civil and Political Rights, article 17.

<sup>14</sup> International Covenant on Civil and Political Rights, article 19(2).

<sup>15</sup> Restrictions on this ground must be constructed with care. For example, while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

<sup>16</sup> Extreme care must be taken by State parties to ensure that treason laws and similar provisions relating to national security are crafted and applied in a manner that conforms to the strict requirements of paragraph 12(3) of the International Covenant on Civil and Political Rights. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [30].



public order, or public health or morals.<sup>17</sup> Additionally, such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.<sup>18</sup>

1.6 In determining whether limitations on the freedom of expression are proportionate, the United Nations Human Rights Committee has noted that restrictions on freedom of expression must not be overly broad.<sup>19</sup> In particular, it has observed that:

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.<sup>20</sup>

1.7 The statement of compatibility states that the objective sought to be achieved by both measures is the protection of national security, as the disclosure of information provided to the PJCD 'may include extremely sensitive information where disclosure could have detrimental impacts on the security, defence or international relations of Australia'. The statement of compatibility also states that these offences are necessary to maintain confidence in the PJCD's ability to protect the sensitive information it obtains, as if that trust was undermined it could inhibit the PJCD to perform its functions effectively in the longer term.<sup>21</sup> In regard to the second justification, it is noted that as a parliamentary committee, the PJCD would have contempt of Parliament powers (in addition to this offence provision) regarding any unauthorised disclosure of committee documents, meaning it is not clear that these additional offences are strictly required. However, in relation to the first justification, protecting national security is a legitimate objective in the context of limiting the right to freedom of expression, and these offences would likely be rationally connected to that objective where the information disclosed could affect national security.

1.8 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently

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<sup>17</sup> The concept of 'morals' here derives from myriad social, philosophical and religious traditions. This means that limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32].

<sup>18</sup> UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

<sup>19</sup> UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34].

<sup>20</sup> UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [35].

<sup>21</sup> Statement of compatibility, p. 28.

circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective. In relation to proportionality, the statement of compatibility states that the exception in the first offence (that the offence of disclosure or publication does not apply if the person became aware of the relevant information otherwise than from the PJCD context) ensures that the offence is no broader than necessary. In relation to the second offence, it states that it is proportionate as the offence is limited to the narrower class of PJCD members, their staff, and secretariat staff so that the offence does not apply more broadly than necessary.<sup>22</sup>

1.9 These provisions assist somewhat with proportionality and the question of whether the measure is sufficiently circumscribed. However, it is not clear why further safeguards have not been provided in relation to these secrecy offences. In this regard it is noted that the recent review of Commonwealth secrecy provisions by the Attorney-General's Department (the review) recommended that secrecy offences should include defences where the relevant conduct is excused or justified. In particular, it recommended that the defences that are available for the general secrecy offences in Part 5.6 of the *Criminal Code Act 1995* should be considered when framing specific secrecy offences, such as those in this bill:

As a starting point, the following offence-specific defences should generally be included:

- disclosures made in the course of an officer's functions or duties
- information that is lawfully in the public domain, and
- information communicated by persons engaged in the business of reporting news (the public interest journalism defence), where the offence could apply to a journalist.

Additionally, the Review recommends that the following additional defences, which are available for the general secrecy offences, should be considered when drafting specific secrecy offences:

- disclosures made for the purpose of communicating information to a relevant oversight or integrity agency
- information communicated in accordance with the [*Public Interest Disclosure Act 2013*] and [*Freedom of Information Act 1982*]
- information communicated for the purpose of reporting offences and maladministration
- information communicated to a court, tribunal or Royal Commission
- information communicated for the purposes of obtaining or providing legal advice

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<sup>22</sup> Statement of compatibility, p. 28.

- information that has been previously communicated, or
- information communicated to a person to whom the information relates.<sup>23</sup>

1.10 The statement of compatibility does not identify why all of these additional defences do not apply in relation to the proposed offences in this bill.

1.11 The review also specified that a harms-based approach should be taken in framing secrecy offences, and offences should either:

- contain an express harm element;
- cover a narrowly defined category of information and the harm to an essential public interest is implicit; or
- protect against harm to the relationship of trust between individuals and the government integral to the regulatory functions of government.

1.12 The review stated that this would ensure that ‘criminal liability is only applied where harm is or could be caused to an essential public interest’.<sup>24</sup> It is not clear why the proposed offences in this bill do not appear to take a harms-based approach. In particular, the offences apply to all types of information, not just those which may cause harm. Further, the second offence makes it an offence for a person to ‘directly or indirectly’ make a record of something – even if the person does not intend to disclose it. This would appear to mean, for example, that a member of the PJCD who photocopies something for their own education (with no intention of disclosing it to anyone) would be guilty of an offence punishable by up to five years imprisonment. It is not clear why the offences could not be restricted to apply only to ‘protected information’ or ‘operationally sensitive information’ (as defined in the bill) rather than *all* information or documents, some of which may contain no sensitivity.

1.13 Further, as the statement of compatibility makes no reference to disclosure on the basis of the public interest, it is not clear why there is no general public interest disclosure defence, noting that concerns have been raised as to the adequacy of the defences in the *Public Interest Disclosure Act 2013*.<sup>25</sup>

1.14 This further information is required to fully assess the compatibility of this measure with the right to privacy.

### **Committee view**

1.15 The committee considers that the creation of secrecy offences to prohibit the disclosure of information and documents provided in confidence to the proposed

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<sup>23</sup> Attorney-General’s Department, [Review of secrecy provisions, Final Report](#) (2023) p. 29.

<sup>24</sup> Attorney-General’s Department, [Review of secrecy provisions, Final Report](#) (2023) p. 21

<sup>25</sup> See Brown, A. J. & Pender, K, [Protecting Australia’s Whistleblowers: The Federal Roadmap](#) (2022, updated in 2023), Griffith University, Human Rights Law Centre and Transparency International Australia: Brisbane and Melbourne.

Parliamentary Joint Committee on Defence, may promote the right to privacy but it also limits the right to freedom of expression.

1.16 The committee considers further information is required to assess the compatibility of this measure with the right to freedom of expression, and as such seeks the minister's advice in relation to why the proposed secrecy offences:

- (a) do not contain additional defences as recommended by the Attorney-General's Department's recent review into secrecy provisions<sup>26</sup> (by reference to each of the proposed protections and why each one is, or is not, appropriate for inclusion);
- (b) do not take a 'harms-based' approach and are not restricted to apply only to 'protected information' or 'operationally sensitive information' (as defined in the bill) rather than *all* information or documents; and
- (c) do not include a general public interest disclosure defence.

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<sup>26</sup> See Attorney-General's Department, [Review of secrecy provisions, Final Report](#) (2023).

## Chapter 2

### Concluded matters

2.1 The committee considers a response to matters raised previously by the committee.

2.2 Correspondence relating to these matters is available on the committee's website.<sup>1</sup>

### Bills

#### National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024<sup>2</sup>

<b>Purpose</b>	The bill seeks to make various amendments to the <i>National Disability Insurance Scheme Act 2013</i> , including to introduce a new definition of 'NDIS supports'; expand National Disability Insurance Scheme rules relating to access requirements; empower the CEO to request information and reports relating to the participant; provide for new framework plans; and allow for the imposition of conditions on approval of quality auditors
<b>Portfolio</b>	National Disability Insurance Scheme
<b>Introduced</b>	House of Representatives, 27 March 2024
<b>Rights</b>	Adequate standard of living; children's rights; health; privacy; rights of persons with disability; social security; work

2.3 The committee requested a response from the minister in relation to the bill in [Report 4 of 2024](#).<sup>3</sup>

#### Definition of NDIS support

2.4 The bill seeks to introduce a new definition of 'NDIS support'.<sup>4</sup> A support will be an NDIS support if:

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

<sup>2</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, *Report 5 of 2024*; [2024] AUPJCHR 35.

<sup>3</sup> Parliamentary Joint Committee on Human Rights, [Report 4 of 2024](#) (15 May 2024), pp. 24–46.

<sup>4</sup> Schedule 1, item 14.

- the support meets one or more exhaustive criteria, such as the support will facilitate personal mobility of the person, is a health service that the person needs because of the person's impairment, or is a rehabilitation service;<sup>5</sup> and
- the support is declared by the National Disability Insurance Scheme (NDIS) rules to be a support that is appropriately funded or provided through the NDIS; and
- the support is not a support declared by the NDIS rules to be a support that is *not* appropriately funded or provided through the NDIS.

2.5 Currently, the NDIS will fund 'reasonable and necessary supports' for participants provided the Chief Executive Officer (CEO) is satisfied of specified matters in relation to the funding of each support.<sup>6</sup> These matters are set out in section 34 of the *National Disability Insurance Scheme Act 2013* (the Act). This bill seeks to amend section 34 of the Act to insert additional matters that the CEO must be satisfied of in relation to the funding of reasonable and necessary supports. These additional matters are that 'the support is necessary to address needs of the participant arising from an impairment in relation to which the participant meets the disability requirements (see section 24) or the early intervention requirements (see section 25)' and 'the support is an NDIS support for the participant' (as per the new definition that the bill seeks to introduce).<sup>7</sup>

2.6 Additionally, the bill would amend the provision requiring a participant to spend an NDIS amount in accordance with their plan to also require that the participant spend money only on NDIS supports.<sup>8</sup>

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights of persons with disability; rights to an adequate standard of living, health and social security; and rights of the child*

2.7 By defining NDIS supports and allowing NDIS rules to potentially narrow the scope of that definition, the measure may have the effect of reducing the type of supports that will be funded by the NDIS and thus available for participants. In doing so, the measure may have an adverse impact on participants' independence and quality of life, and so would engage and may limit the rights of persons with disability as well as the rights to an adequate standard of living and health. Insofar as the NDIS may be considered a form of social security in that it provides a benefit to people with disability to ensure disability supports and services are accessible and affordable, the

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<sup>5</sup> These criteria are set out in Schedule 1, item 14, new subsection 10(a).

<sup>6</sup> *National Disability Insurance Scheme Act 2013* (NDIS Act), sections 33 and 34.

<sup>7</sup> Schedule 1, items 46 and 47, new paragraphs 34(1)(aa) and (f).

<sup>8</sup> Schedule 1, item 75.

measure would also engage and may limit the right to social security. Additionally, to the extent that the measure applies to children, the rights of the child would be engaged and possibly limited.

2.8 The Convention on the Rights of Persons with Disabilities (CRPD) reaffirms that all persons with disability are guaranteed all human rights without discrimination, including those rights set out in other human rights treaties. Of particular relevance to this measure are the rights to live independently and be included in the community, the right to personal mobility and the right to habilitation and rehabilitation.<sup>9</sup> These rights require States parties to take effective measures to facilitate full enjoyment of these rights, including by:

- ensuring that people with disability have ‘access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community’;<sup>10</sup>
- ensuring that people with disability have access to ‘quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost’;<sup>11</sup>
- ‘facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost’; and
- enabling people with disability to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life through organising, strengthening and extending comprehensive habilitation and rehabilitation services and programmes.<sup>12</sup>

2.9 The right to an adequate standard of living requires that the State party take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.<sup>13</sup> The CRPD elaborates on the content of this right for people with disability, providing that States parties should take appropriate steps to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs and, for those living in poverty, access to assistance from the State with disability-related expenses.<sup>14</sup> The right to health is the right to enjoy the highest attainable standard of physical and mental health and includes the right to access adequate health care as well as to live in conditions that

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<sup>9</sup> Convention on the Rights of Persons with Disabilities, articles 19, 20 and 26.

<sup>10</sup> Convention on the Rights of Persons with Disabilities, article 19(b).

<sup>11</sup> Convention on the Rights of Persons with Disabilities, article 20(b).

<sup>12</sup> Convention on the Rights of Persons with Disabilities, article 20(a).

<sup>13</sup> International Covenant on Economic, Social and Cultural Rights, article 11.

<sup>14</sup> Convention on the Rights of Persons with Disabilities, article 28.

promote a healthy life (such as access to safe drinking water, housing, food, and a healthy environment).<sup>15</sup> With respect to people with disability, the CRPD reaffirms that this right is to be guaranteed without discrimination and obliges States parties to provide ‘those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons’.<sup>16</sup> The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty.<sup>17</sup> This right plays an important role in realising many other economic, social and cultural rights, including the other rights engaged by this measure.

2.10 Children have special rights under human rights law taking into account their particular vulnerabilities.<sup>18</sup> Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, including all rights set out above, without discrimination on any grounds.<sup>19</sup>

2.11 Under international human rights law, Australia has obligations to progressively realise social and economic rights, which includes aspects of the rights of persons with disabilities (such as the right to access individualised, assessed support services and service facilities) as well as the rights to an adequate standard of living and health, using the maximum of resources available.<sup>20</sup> Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.<sup>21</sup> A retrogressive measure is a type of limitation on an economic or social right.<sup>22</sup> If this measure had the effect of reducing the availability of supports for people with disability, it may constitute a retrogressive measure.

2.12 Limitations on the above rights, including retrogressive measures, may be permissible provided that they address a legitimate objective, are effective to achieve

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<sup>15</sup> International Covenant on Economic, Social and Cultural Rights, article 12(1). See also UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [4].

<sup>16</sup> Convention on the Rights of Persons with Disabilities, article 25.

<sup>17</sup> International Covenant on Economic, Social and Cultural Rights, article 9.

<sup>18</sup> Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

<sup>19</sup> UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also International Covenant on Civil and Political Rights, articles 2 and 26.

<sup>20</sup> See, UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [39]–[41].

<sup>21</sup> See, for example, UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [43]–[45].

<sup>22</sup> See, for example, UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [38(f)], [44].



(that is, rationally connected to) that objective and are a proportionate means to achieve that objective. In this context, the Committee on the on the Rights of Persons with Disabilities has stated that ‘the State is obliged to demonstrate that such [retrogressive] measures are temporary, necessary and non-discriminatory and that they respect its core obligations’.<sup>23</sup>

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

2.13 The committee noted that by introducing a definition of NDIS support and allowing NDIS rules to potentially narrow the scope of that definition, the measure may have the effect of reducing the type of supports that will be funded by the NDIS and thus available for participants. To the extent that this results in an adverse impact on participants’ independence and quality of life, the measure would engage and may limit the rights of persons with disability as well as the rights to an adequate standard of living, health, social security and, to the extent that the measure applies to children, the rights of the child. The committee sought the advice of the Minister for the National Disability Insurance Scheme of Australia regarding the compatibility of this measure with these rights.

2.14 The full initial analysis is set out in [Report 4 of 2024](#).

### **Minister's response<sup>24</sup>**

2.15 The minister advised:

*(a) of those items listed in the explanatory memorandum as not qualifying as NDIS supports, including holidays, groceries, payment of utility bills, online gambling, perfume, cosmetics, standard household appliances and whitegoods, which items, if any, are currently funded through the NDIS*

Funding provided under the National Disability Insurance Scheme (NDIS) may only be used for supports that are constitutionally supportable and appropriately funded by the NDIS. In order to be capable of being funded under the NDIS, the support or services must be needed by a participant as a result of their disability. Currently those supports must be 'reasonable and necessary' and meet the criteria under section 34 of the *National Disability Insurance Scheme Act 2013* (the Act).

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<sup>23</sup> UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [43]. See more generally UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999) [45].

<sup>24</sup> The minister's response to the committee's inquiries was received on 30 May 2024. This is an extract of the response. The minister also provided information in relation to measures that the committee did not seek further information. The response is available in full, including in relation to these other measures, on the committee's [webpage](#).

The items listed in the explanatory memorandum are items that are not intended to be funded by the NDIS. However there have been instances where NDIS funds have been used to purchase items or supports that are not appropriately funded under the NDIS such as those listed in the explanatory memorandum. While in some instances this has been a purposeful misuse of NDIS funding, for the most part it arises as a result of a misunderstanding of what is appropriately funded by the NDIS.

It is clear that things such as holidays and online gambling are not appropriately funded by the NDIS. However, there are situations where it is less clear for a participant. For example, standard household appliances and whitegoods are not appropriately funded by the NDIS as they are everyday items and do not relate to a person's disability. However, if a person has a need for a particular appliance as a result of their disability and they otherwise would not require that appliance, then it may be an NDIS support for that person. For example, for a person with dysphasia who experiences difficulty swallowing, a doctor may recommend a soft food diet for which a blender may be purchased using NDIS funding.

Funding provided under the NDIS is not income support or a social security payment that can be used to purchase any item or service a person could spend their own money on. It is specifically and directly intended to obtain supports that a participant needs as a result of their disability to allow them to realise their full potential for physical, social, emotional and intellectual development, as well as participate in and contribute to social and economic life.

This new definition of NDIS supports will provide clarity and certainty for people with disability when selecting their supports but it does not change the types of supports that have always been appropriate to purchase with NDIS funding. The overarching test will remain whether a person has a need for the support as a result of their disability, and whether the support is most appropriately funded by the NDIS.

*(b) if a support that is currently funded through the NDIS does not meet the new definition of NDIS support (for example the item is declared by NDIS rules to be a support that is not appropriately funded through the NDIS), will that support be taken away from an existing participant or no longer funded*

Any item that has already been purchased or provided to a participant will not be taken away from a participant. However, if a participant is using funds to obtain supports that should not be provided by the NDIS (and are therefore not NDIS supports), they will no longer be able to use NDIS funding to continue to obtain those supports.

It is important to note this is not about denying people with disability supports they have a genuine need for as a result of their disability. It is about ensuring that Commonwealth expenditure has a constitutional basis and that NDIS funding is used for the purpose for which it is intended. For

example, NDIS funding should not be used for pharmaceuticals and medication funded through the health system or the pharmaceutical benefits scheme.

This is not a retrogressive measure. Any supports that a person may no longer have access to under the NDIS will be supports that should never have been purchased using NDIS funding. Clarifying the existing boundaries of the NDIS is a legitimate objective in implementing this definition.

*(c) whether there is flexibility to take into account a participant's individual support needs in assessing whether a support meets the definition of an NDIS support*

The definition of NDIS support is necessarily individualised. What is an NDIS support for one person, may not be an NDIS support for another. The test is whether a person has a need for the support as a result of their disability. For example, a participant who does not experience impacts on their mobility as a result of their disability will not require mobility aids.

There will be items that will never be an NDIS support for any participant, such as online gambling however in general, the approach is entirely needs based and therefore specific to each individual participant.

*(d) why is it necessary to enable the definition of NDIS support to be narrowed by way of NDIS rules (as per subsections 10(b) and (c))*

As the Committee has identified, the new definition of NDIS support serves two purposes:

- It makes clear the constitutional basis for the new budget setting framework recommended by the *Independent Review into the National Disability Insurance Scheme* (NDIS Review), and helps to clarify and identify the constitutional basis of the NDIS as a whole.
- It assists participants and the disability community to understand what is (and always has been) capable of being funded by the NDIS having regard to intergovernmental agreements and constitutional considerations.

The constitutional boundaries of what the NDIS may fund are far broader than those that are appropriately funded by the NDIS. Other Commonwealth and State and Territory systems and programs, such as Medicare and the State and Territory health systems are responsible for funding a range of supports for people with disability that could be constitutionally supported. It is necessary for these kinds of supports to be excluded from what may be funded by the NDIS.

The NDIS Act currently limits available supports to those that are reasonable and necessary for the particular participant. This limitation means the responsibility of identifying constitutionally valid supports, and supports that are appropriately funded by the NDIS, lies with the National Disability Insurance Agency (NDIA).

Once the new budget-based planning framework commences, participants will no longer receive funding in relation to specific reasonable and necessary supports. Instead, participants will receive a flexible budget (along with a limited number of identified supports that will be stated in their plan). Without rules clarifying what may be NDIS supports, the onus would be on a participant to identify whether supports are lawfully (constitutionally valid) or appropriately funded by the NDIS.

Requiring the Minister to make NDIS rules specifying what is an NDIS support puts the onus of identifying what can be funded by the NDIS in law, rather than the participant. The rules will make it much clearer for participants about what supports can, and cannot, be purchased using funding under their plan. This will also assist participants to understand what supports may more appropriately be funded and provided through other service systems so they are able to access those supports through alternative means and use their funding for appropriate disability supports.

## Concluding comments

### *International human rights legal advice*

2.16 It is noted that following the committee's preliminary analysis, a number of amendments to the bill were agreed to, including in relation to this measure.<sup>25</sup> The following concluding comments first deal with the minister's response in relation to the bill as it was originally introduced and then consider the amendments that are relevant to this measure, particularly the substituted definition of NDIS support.

2.17 As noted in the preliminary analysis, the measure pursues the legitimate objective of providing greater clarity as to what supports are to be funded by the NDIS and the measure appears to be rationally connected to that objective. The key question is whether the measure is proportionate. A relevant consideration in this regard is the breadth of the measure and whether there is sufficient flexibility to treat different cases differently. While the first criterion of the definition of NDIS support was drafted in relatively broad terms and thus may have covered a wide range of supports, the measure would have also enabled the NDIS rules to narrow the scope of supports that would be funded by the NDIS.<sup>26</sup> For example, the explanatory memorandum states that 'things such as holidays, groceries, payment of utility bills, online gambling, perfume, cosmetics, standard household appliances and whitegoods will not qualify as NDIS supports'.<sup>27</sup> As to whether these items are currently being funded by the NDIS and if so, whether they would be consequently taken away from an existing participant if they were to no longer meet the new definition of NDIS support, the minister advised that some of these items have been funded by the NDIS

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<sup>25</sup> The committee's preliminary analysis in [Report 4 of 2024](#) was tabled on 15 May 2024 and 29 Government and 1 Crossbench amendments to the bill were agreed to on 5 June 2024.

<sup>26</sup> Schedule 1, item 14, new subsections 10(b) and (c). See explanatory memorandum, p. 3.

<sup>27</sup> Explanatory memorandum, p. 4.

– most often as a result of a misunderstanding of what is appropriately funded by the NDIS. However, the minister stated that these items are not intended to be funded by the NDIS. The minister elaborated that while standard household appliances and whitegoods are generally not appropriately funded by the NDIS, there may be some situations where a person has a need for a particular appliance as a result of their disability. For example, a person with dysphasia who experienced difficulty swallowing and is recommended a soft food diet may use NDIS funding to purchase a blender. The minister emphasised that the new NDIS definition would provide clarity and certainty regarding available supports but it would not change the types of supports that have always been appropriate to purchase with NDIS funding. The minister clarified that if an item has already been purchased or provided to a participant through the NDIS, the measure would not result in that item being taken away. However, if a participant is using NDIS funds to obtain supports that should not have been provided by the NDIS and would not meet the new definition of NDIS supports, the participant would not be able to continue using NDIS funding to obtain those supports. The minister stated that the measure is not retrogressive as any supports that a person may no longer have access to under the NDIS would be supports that should never have been purchased using NDIS funding.

2.18 As to whether there is sufficient flexibility to take into account a participant's individual support needs in assessing whether a support should be provided, the minister stated that the definition of NDIS support is necessarily individualised, and the test is whether a person has a need for the support as a result of their disability. The minister stated that there will be some items that will never be an NDIS support for any participant, however generally the approach is entirely needs based and therefore specific to each individual participant.

2.19 As noted above, while the first criterion of the definition would have afforded some flexibility to take into account the needs of individual participants, such as whether the support is necessary to support the person to live and be included in the community, it is not clear that the other criteria of the definition would be similarly flexible (that is, that the support is declared to be a support that is or is not appropriately funded by the NDIS). While the minister's response acknowledged that in some situations a participant may need a standard household appliance as a result of their disability and may therefore use NDIS funding to purchase the appliance, if household appliances were declared by the NDIS rules to be supports that are not appropriately funded through the NDIS, it does not appear that an item such as a blender would be funded by the NDIS as it would fail to meet the new definition of NDIS support. In this way, the measure, as originally introduced, does not appear to contain sufficient flexibility to take into account the individual circumstances and support needs of participants.

2.20 Further, this lack of flexibility appears to be inconsistent with the approach recommended by the NDIS Review. As noted in the preliminary analysis, the NDIS Review recommended redefining the concept of reasonable and necessary supports

as ‘the total amount of funding determined to meet the support needs of a participant’. This ‘whole-of-person reasonable and necessary budget should be based primarily on a participant’s supports needs and intensity’ and ‘should be sufficient to cover the amount and type of support needed to enable the participant to participate in an inclusive life’.<sup>28</sup> The NDIS Review recommended that the amount and type of supports be determined through a structured needs assessment, undertaken by a Needs Assessor (who would be a representative of the National Disability Insurance Agency (NDIA)).<sup>29</sup> The total cost of supports recommended by the Needs Assessor would then be translated into a budget that could be used flexibly by the participant to meet their needs.<sup>30</sup> Having regard to the NDIS Review’s emphasis on focusing on the whole person, their circumstances and their support needs, it is not clear how introducing a more prescriptive definition of NDIS supports without sufficient flexibility to take into account a participant’s individual support needs—the result potentially being a reduction in the supports available for people with disability—is consistent with the NDIS Review’s recommendations.

2.21 Another relevant factor in assessing proportionality is whether any less rights restrictive alternatives could achieve the same stated objective. As to the necessity of allowing NDIS rules to further narrow the definition of NDIS support, the minister advised that once the new budget-based planning framework commences, participants will receive a flexible budget and the NDIS rules will help participants understand what supports can and cannot be purchased using funding under their plan. The minister stated that requiring the minister to make NDIS rules specifying what is an NDIS support puts the onus of identifying what can be funded by the NDIS in law, rather than on the participant. Without the NDIS rules clarifying what may be NDIS supports, the onus would be on a participant to identify whether supports are lawfully or appropriately funded by the NDIS. While it is important that the measure does not result in participants shouldering the burden of identifying what supports may be lawfully funded through the NDIS, this justification does not address whether any less rights restrictive alternatives could achieve the same stated objective. For instance, the NDIS Review’s ‘whole-of-person reasonable and necessary budget’ approach may be less likely to disproportionately limit the rights of participants.

#### *Subsequent amendments to the measure*

2.22 On 5 June 2024, government amendments to this measure were agreed to in the House of Representatives. In particular, section 10 of the bill was omitted and

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<sup>28</sup> NDIS Review, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme*, [Final Report](#) (2023) Recommendation 3, action 3.3, p. 92.

<sup>29</sup> NDIS Review, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme*, [Final Report](#) (2023) Recommendation 3, action 3.3, p. 92 and action 3.4, p. 93.

<sup>30</sup> NDIS Review, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme*, [Final Report](#) (2023) Recommendation 3, action 3.4, p. 93.

substituted with a revised definition of NDIS support. This revised definition provides that a support is an NDIS support if it is declared as such by the NDIS rules.<sup>31</sup> Before making these NDIS rules, the minister must be satisfied that the support is appropriately funded or provided through the NDIS.<sup>32</sup> Additionally, the declaration of the support in NDIS rules must implement Australia's obligations under the CRPD or any other international agreement and/or enable the provision of sickness benefits.<sup>33</sup> Further, the revised definition provides that NDIS rules may declare that a support is not an NDIS support and before making such rules, the minister must be satisfied that the support is not appropriately funded or provided through the NDIS.<sup>34</sup> The supplementary explanatory memorandum states that the revised definition responds to concerns about a lack of clarity in the drafting of the original provision, which would have required participants to undertake a complex analysis of whether a support may be considered an NDIS support for them.<sup>35</sup> The supplementary explanatory memorandum states that the revised definition is more accessible.

2.23 The concerns outlined above with respect to insufficient flexibility remain applicable to the revised definition. This is because the revised definition removes the first criterion of the original definition, which appeared to provide some flexibility to consider the individual circumstances and support needs of participants. The revised definition effectively leaves all the details of what is and what is not an NDIS support to future NDIS rules.<sup>36</sup> It is not clear whether these future NDIS rules would contain exceptions or afford the NDIA the discretion to consider the individual needs and circumstances of participants. For example, if a support is not declared to be an NDIS support or is declared to be a support that is not an NDIS support, it is not clear whether a participant may nevertheless use NDIS funding to obtain that support if it was otherwise demonstrated that they needed that support as a result of their disability. It also remains unclear that this approach is necessarily the least rights restrictive.

2.24 In conclusion, while the measure pursues a legitimate objective and would be rationally connected to that objective, it does not appear to contain sufficient flexibility to ensure that any limitation on rights is proportionate in each case. For those participants who may lose access to supports, the potential interference with

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<sup>31</sup> Government amendment sheet SK113, item (5), substituted subsection 10(1).

<sup>32</sup> Government amendment sheet SK113, item (5), substituted subsection 10(2).

<sup>33</sup> Government amendment sheet SK113, item (5), substituted subsection 10(3).

<sup>34</sup> Government amendment sheet SK113, item (5), substituted subsections 10(4) and (5).

<sup>35</sup> Supplementary explanatory memorandum relating to sheet SK113, p. 3.

<sup>36</sup> It is noted that the Senate Standing Committee on the Scrutiny of Bills regularly raises concerns if significant matters (such as this) are left to delegated legislation, see the committee's Guidelines on scrutiny principle (iv): [Inappropriate delegation of legislative powers](#).

rights may be significant. However, as much will depend on how the NDIS rules are drafted, it is not possible to finally conclude on the permissibility of such limitations.

### **Committee view**

2.25 The committee thanks the minister for this response. The committee considers that to the extent the measure would have the effect of reducing the type of supports that will be funded by the NDIS and thus available for participants, it would engage and limit the rights of persons with disability as well as the rights to an adequate standard of living, health and social security. Additionally, to the extent that the measure applies to children, the rights of the child would be engaged and possibly limited.

2.26 The committee considers that the measure pursues the legitimate objective of providing greater clarity as to what supports are to be funded by the NDIS and notes that the NDIS Review identified this as an area in need of reform. As to proportionality, the committee notes the minister's advice that those participants who have already purchased or been provided with an item through the NDIS will not have that support taken away. The committee considers this would assist with the proportionality of the measure with respect to those participants.

2.27 However, the committee notes that if a participant is using funds to obtain supports that would not be classified as NDIS supports (as per the new definition), they will no longer be able to use NDIS funding to continue to obtain those supports. In such cases, the committee considers the potential interference with rights to be more significant. The committee considers that, depending on how the NDIS rules are drafted, there is a risk that the measure may not be sufficiently flexible to ensure that any limitation on rights is proportionate in each case. This concern applies to both the measure as it was originally introduced and the revised version.

2.28 The committee notes that as part of its usual scrutiny process, it will scrutinise any future NDIS rules and related legislative instruments for their compatibility with human rights.

### **Suggested action**

2.29 The committee considers the proportionality of this measure may be assisted were future NDIS rules made for the purposes of proposed section 10 to contain sufficient flexibility such that where a support is either not declared to be an NDIS support or is declared to not be an NDIS support, the NDIA may nevertheless exercise discretion to approve the provision of that support through the NDIS if the participant has demonstrated a need for the support as a result of their disability.

2.30 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

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



## Requests for information

2.32 The bill seeks to expand the circumstances in which the CEO of the NDIA may request information and reports from a participant, including for the purposes of:

- deciding whether or not to revoke the participant's status as a participant in the NDIS;<sup>37</sup>
- deciding whether or not the participant meets the early intervention requirements or disability requirements;<sup>38</sup>
- undertaking an assessment for a participant;<sup>39</sup>
- preparing a statement of participant supports for a participant,<sup>40</sup> and
- deciding whether to approve a statement of participant supports for a participant.<sup>41</sup>

2.33 Under the current Act, the CEO may only request information and reports for the purposes of preparing a statement of participant supports, or deciding whether to approve a statement of participant supports.<sup>42</sup>

2.34 As to what information may be requested, the CEO may request that the participant, or another person, provide information that is reasonably necessary for the purpose of making the particular decision, such as deciding whether the participant meets the access requirements, or whether their status should be revoked. The CEO may also request that the participant undergo an assessment and/or undergo, whether or not at a particular place, a medical, psychiatric, psychological or other examination conducted by an appropriately qualified person and provide the report of that assessment or examination to the CEO in the approved form.<sup>43</sup> The requested information must be returned to the CEO within 90 days, or a longer period if specified. Once the information is received, the CEO may request more information or make the relevant decision. The consequence for not complying with a request for information will depend on the context in which the information is requested. For example, in the context of a revocation or assessment decision, the CEO may revoke a participant's status without receiving the information unless the CEO is satisfied that it was reasonable for the person to not have complied with the request.<sup>44</sup> If the CEO requests information for the purposes of undertaking an assessment or preparing or

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<sup>37</sup> Schedule 1, item 30 and item 31, new paragraph 30A(1)(c).

<sup>38</sup> Schedule 1, item 31, new section 30A.

<sup>39</sup> Schedule 1, item 52.

<sup>40</sup> Schedule 1, item 52.

<sup>41</sup> Schedule 1, item 52.

<sup>42</sup> NDIS Act, subsection 36(1).

<sup>43</sup> See e.g. Schedule 1, item 20, subsection 30(3).

<sup>44</sup> Schedule 1, item 30, subsections 30(5) and (6) and item 31, subsection 30A(7).

approving a statement of participant supports and that information is not received within the specified timeframe, the CEO must suspend the preparation of the new framework plan unless the CEO is satisfied that it was reasonable for the person to not have complied with the request, in which case a further request may be made.<sup>45</sup>

## Summary of initial assessment

### *Preliminary international human rights legal advice*

#### *Right to privacy*

2.35 By allowing the CEO to request that a participant undergo an assessment or examination and provide personal information, including sensitive medical information, to the CEO, the measures would engage and may limit the right to privacy.<sup>46</sup> The right to privacy prohibits arbitrary or unlawful interference with a person's privacy.<sup>47</sup> It includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. The right to privacy also includes the right to personal autonomy and physical and psychological integrity.<sup>48</sup> The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

#### *Committee's initial view*

2.36 The committee noted that allowing the CEO to request information and reports from a participant, including sensitive medical information, engages and may limit the right to privacy. The committee sought the advice of the Minister for the National Disability Insurance Scheme of Australia to assess the compatibility of this measure with this right.

2.37 The full initial analysis is set out in [Report 4 of 2024](#)

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<sup>45</sup> Schedule 1, item 54, paragraph 36(3)(b).

<sup>46</sup> If, as a consequence of the request for and provision of information, a participant's status was revoked, this may affect other rights of the participant. As a result, the measure may also indirectly limit the rights of people with disability, the rights to an adequate standard of living, health and social security as well as the rights of the child (if the participant was a child). As this measure does not directly relate to those provisions in the NDIS Act that allow for revocation, this entry does not address these more indirect human rights implications.

<sup>47</sup> International Covenant on Civil and Political Rights, article 17; Convention on the Rights of Persons with Disabilities, article 22; and Convention on the Rights of the Child, article 16.

<sup>48</sup> See generally UN Human Rights Committee, *General Comment No. 16: Article 17 (1988)* [3]–[4], and *MG v Germany*, UN Human Rights Committee Communication No. 1428/06 (2008) [10.1].

## Minister's response<sup>49</sup>

### 2.38 The minister advised:

*(a) what circumstances would trigger the CEO considering whether to revoke a participant's status under section 30 of the Act*

Subsection 30(1) of the Act will not be changed in any way by the Bill. It currently allows the CEO to revoke a participant's status if the CEO is satisfied they do not meet the residence requirements or either the disability requirements or the early intervention requirements.

A decision to revoke a participant's status under existing section 30 is discretionary and can only be used when the CEO has evidence a participant no longer meets the residence requirements and either the disability requirements or the early intervention requirements.

The CEO will consider revoking the participant's status under this provision only if there is evidence before the CEO that reasonably suggests the person no longer meets the eligibility criteria. For example, if a participant provides updated medical evidence as part of a plan reassessment which suggests they no longer meet the disability or early intervention requirements, the CEO may consider further whether this is the case and if so, the participant's status may be revoked.

Similarly, if the CEO receives information suggesting a participant has relocated overseas, the CEO would seek information to determine whether or not that is the case, and therefore whether or not the participant continues to meet the residence requirements.

*(b) what circumstances are likely to be prescribed for the purposes of proposed section 30A*

The intent of proposed section 30A is primarily to operationalise the new early intervention pathway once it is ready to be implemented. NDIS rules made under section 30A are likely to prescribe matters such as the age of a participant, particularly where a child has entered the NDIS due to developmental delay, and the length of time that a participant has been in the Scheme. This will allow for a consideration of whether early intervention supports are working for a participant and identify whether those supports are no longer required, or whether a participant would benefit from receiving different kinds of supports or services under the NDIS and/or other service systems such as universal education.

*(c) how likely or frequently would the CEO make a request for information and reports from a participant and why does the bill not provide any limit on how often the CEO could make such requests of participants*

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<sup>49</sup> The minister's response to the committee's inquiries was received on 30 May 2024. This is an extract of the response. The response is available in full on the committee's [webpage](#).

Requests for information under proposed section 30A can only happen at times prescribed in NDIS rules. The CEO will not be able to make requests under section 30A in any other circumstances. Participants and their families and carers will know and be able to anticipate when the CEO will make a request for information under section 30A because it will be prescribed in NDIS rules.

With respect to section 30, the CEO will request information if there is already reasonable evidence that suggests the participant does not meet one of the relevant criteria. There will not be recurring requests unless a participant fails, without reasonable excuse, to comply with earlier requests for information.

It is critical the CEO has the ability to request information in this circumstance, as it will ensure decisions about ongoing access to the Scheme are based on current information and ensure the participant is able to access the most appropriate support to meet their needs. It also gives the participant an opportunity to respond to any potentially adverse information that may have been provided to the NDIA. The information requested must be reasonably necessary for the purpose of considering whether the participant continues to meet the relevant criteria or not. Once that has been established, there may be no need for the CEO to request further information unless there is sufficient information for the CEO to make a decision that the participant no longer meets the access requirements at the time. It is important to note that this would not preclude a person from making any future access requests. There is no limitation on the number of times a person can apply for access to the NDIS.

*(d) what types of places could the CEO specify in requesting that a participant undergo an examination (under proposed subparagraph 30(3)(b)(ii))*

The type of location is likely to depend on the kind of examination that is being undertaken. For example, a medical examination may be most appropriately undertaken at the premises of a medical practitioner who has appropriate equipment to conduct the examination. Alternatively, if the examination focuses on a person's ability to undertake self-care activities, it may be more appropriate for the examination to occur in the person's home or other place that they spend time in on a day-to-day basis.

Proposed subparagraph 30(3)(b)(ii) is consistent with subparagraph 26(1)(b)(ii), which allows the CEO to request that a prospective participant undergo certain examinations by an appropriately qualified person, whether or not at a particular place.

*(e) if the CEO specified a place, whether a participant could choose an appropriately qualified person to undertake an examination even if that person was not able to perform the examination at the place specified*

If the qualified person was not able to undertake an examination at the place specified, the NDIA would work with the person to enable a suitable alternative location that would allow the examination to occur.

## **Concluding comments**

### ***International human rights legal advice***

2.39 As noted in the preliminary analysis, the measure pursues the legitimate objectives of improving the quality and consistency of NDIA decisions and ensuring decisions are based on current information and appears to be rationally connected to those objectives. The key question is whether the measure is proportionate to achieving those objectives. In this regard further information was sought as to the circumstances in which the CEO would consider whether to revoke or reassess a participant's status (and consequently make a request for information for the purposes of making that decision). The minister advised that the decision to revoke a participant's status is discretionary and can only be made when the CEO has evidence that a participant no longer meets the eligibility criteria. For example, if a participant provides updated medical evidence as part of a plan reassessment that suggests they no longer meet the disability or early intervention requirements, the CEO may consider further whether this is the case and if so, the participant's status may be revoked.

2.40 In relation to reassessment decisions, the circumstances in which the CEO must reassess a participant's status are to be prescribed by NDIS rules. The minister advised that the NDIS rules are likely to prescribe matters such as the age of a participant, particularly where a child has entered the NDIS due to a developmental delay, and the length of time that a participant has been in the NDIS. The minister stated that the reassessment decision will allow for a consideration of whether early intervention supports are working for a participant and identify whether those supports are no longer required, or whether a participant would benefit from receiving different kinds of supports or services under the NDIS and/or other services systems. As to how likely or frequently the CEO would make a request for information, the minister advised that requests with respect to reassessment decisions can only happen at times prescribed in the NDIS rules. With respect to revocation decisions, the minister advised that requests for information will only be made if the CEO already has reasonable evidence that suggests the participant does not meet the eligibility criteria. The minister stated that there would not be recurring requests for information, unless a participant fails, without reasonable excuse, to comply with earlier requests for information. The minister noted that if a participant's status was revoked, they would not be precluded from making another access request as there is no limitation on the number of times a person can apply for access to the NDIS.

2.41 Additionally, subsequent amendments to this measure were agreed to in the House of Representatives that may assist with proportionality. In particular, the amendments provide that the CEO must not request that a participant undergo an

assessment or examination unless they are satisfied that the report of the assessment or examination would provide information that they cannot otherwise reasonably obtain.<sup>50</sup> The supplementary explanatory memorandum states that:

These amendments will impose a further limitation in that the CEO can only make such requests if there is no other reasonable alternative way of obtaining the information. This limitation will require the CEO to have regard to other reasonable alternatives before making the request for an assessment or examination, for example, whether the participant or another person can provide further information.

These limitations together provide a safeguard to ensure that participants will only be asked to undertake assessments and examinations where it is absolutely necessary for the CEO to make a decision about their ongoing access to the NDIS.<sup>51</sup>

2.42 Based on the information provided by the minister, as well as the additional safeguard inserted in the bill by the amendments, it appears that the circumstances in which information may be requested, and thus a participant's right to privacy may be limited, are sufficiently circumscribed. While there is no limit in the bill as to how often the CEO could exercise the power to request information, the requirement that the CEO must only make such requests where they are satisfied that the information cannot be reasonably obtained in an alternative way would appear to go some way to mitigate the risk that a participant would have to repeatedly provide personal information and prove their disability.

2.43 A further consideration with respect to proportionality is the extent to which a participant would be able to exercise control over the assessment process. The minister advised that the types of places that the CEO could specify in relation to an examination would depend on the type of examination. For example, if it was a medical examination, it would be most appropriate for the examination to take place at the premises of a medical practitioner who has appropriate equipment. The minister advised that if the qualified person who the participant chose to undertake the examination was not able to do so at the place specified, the NDIA would work with the person to enable the examination to occur at a suitable alternative location. If this were to occur in practice, this would assist with proportionality and may ensure that a participant's sense of autonomy and control is not lost in the process. However, it is noted that discretionary safeguards are not as stringent as the protection of statutory processes as there is no requirement to follow them.

2.44 These additional safeguards, as well as those provisions that provide some flexibility with respect to the timeframes for compliance with a request for information and safeguard against the CEO making a decision before the participant is able to

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<sup>50</sup> Government amendment sheet PA110, items (2) and (4).

<sup>51</sup> Supplementary explanatory memorandum relating to sheet PA110, pp. 2–3.

comply (if the non-compliance is reasonable),<sup>52</sup> would appear to be sufficient to ensure that the limitation on privacy is likely to be proportionate.

### **Committee view**

2.45 The committee notes that allowing the CEO to request information and reports from a participant, including sensitive medical information, engages and may limit the right to privacy. The committee considers that the measure pursues the legitimate objectives of improving the quality and consistency of NDIA decisions and ensuring decisions are based on current information and appears to be rationally connected to those objectives.

2.46 Based on the information provided by the minister, the committee considers that the circumstances in which the right to privacy is likely to be limited are sufficiently circumscribed. The committee considers that the measure is accompanied by sufficient safeguards to ensure that the limitation on the right to privacy is proportionate.

### **Suggested action**

2.47 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

2.48 The committee considers that its concerns have therefore been addressed, and makes no further comment in relation to this measure.

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## **Working out total funding amounts for NDIS participants**

2.49 By way of background, the bill seeks to introduce new framework plans, which must include a participant's statement of goals and aspirations and a statement of participant supports.<sup>53</sup> The statement of participant supports must, among other things, specify the participant's reasonable and necessary budget.<sup>54</sup> The reasonable and necessary budget would provide for flexible funding (that is, an amount that may be flexibly spent on NDIS supports) and/or funding for a particular stated support or a particular class of stated supports (that is, an amount that must be spent on specific high-cost items such as assistive technology).<sup>55</sup> Whether a participant is entitled to flexible funding and/or funding for stated supports would be based on the needs assessment report for the plan (which would be prepared following an assessment of

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<sup>52</sup> See Schedule 1, item 30, new subsection 30(6) and item 31, new subsection 30A(7) and explanatory memorandum, p. 9.

<sup>53</sup> Schedule 1, item 6 and item 36, new subsection 32A(1) and 32D(1).

<sup>54</sup> Schedule 1, item 9 and item 36, paragraph 32D(2)(a).

<sup>55</sup> Schedule 1, item 36, new sections 32E–32G.

the participant's needs for supports in respect of the impairments for which they gained access to the NDIS).<sup>56</sup>

2.50 Proposed section 32K would specify how the total funding amount for flexible funding and/or funding for a stated support in a participant's plan must be worked out. In particular, it would require that the total funding amount be worked out by applying the information in the needs assessment report and would allow the minister to determine, by legislative instrument, methods for working out a total funding amount.<sup>57</sup> In making any such determination, the minister must have regard to certain principles, including that people with disability should be supported to receive reasonable and necessary supports, and the need to ensure the financial sustainability of the NDIS.<sup>58</sup> Likewise, the minister must have regard to these same matters in making any determinations with respect to assessments of participants' need for supports, such as the assessment tools that must be used or certain requirements for undertaking assessments.<sup>59</sup> It is noted that the financial sustainability of the NDIS is not currently a specific matter that must be taken into account when assessing a participant's need for supports or approving funding. Rather, the concept must be considered more generally in giving effect to the objects of the Act.<sup>60</sup>

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights of persons with disability; rights to an adequate standard of living, health and social security; and rights of the child*

2.51 By requiring that the minister have regard to the financial sustainability of the NDIS in determining (by way of legislative instrument) matters relating to working out total funding amounts and assessing participants' need for supports, there appears to be a risk that the measures may result in fewer supports being approved and funded for participants. If this were the case, the measures may have an adverse impact on participants' independence and quality of life, and so would engage and may limit the rights of persons with disability, and rights to an adequate standard of living, health and social security. In addition, as the measures would apply to children and it is not clear that the best interests of the child would be a primary consideration in working out the total funding amount or determining matters relating to assessments, the measures would engage and may limit the rights of the child.

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<sup>56</sup> Schedule 1, item 6 defines 'needs assessment report' as 'the report of an assessment undertaken in accordance with section 32L for the purposes of the plan'.

<sup>57</sup> Schedule 1, item 36, new subsections 32K(1) and (2).

<sup>58</sup> Schedule 1, item 36, new subsection 32K(3). The principles referred to are those set out in subsections 4(5) and (11) of the NDIS Act.

<sup>59</sup> Schedule 1, item 36, subsections 32L(8) and (10).

<sup>60</sup> NDIS Act, section 3.



2.52 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. If the measures did have the effect of reducing the total funding amounts and supports available for people with disability, they could be considered retrogressive – a type of limitation.

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

2.53 The committee noted that the measures require the minister to have regard to the financial sustainability of the NDIS in determining matters relating to working out total funding amounts and assessing participants' need for supports. To the extent that this results in fewer supports being approved and funded for participants and has an adverse impact on participants' independence and quality of life, the measures would engage and may limit the rights of persons with disability, the rights to an adequate standard of living, health and social security as well as the rights of the child (if the measures applied to children). The committee sought the advice of the Minister for the National Disability Insurance Scheme of Australia in relation to the compatibility of the measure with these rights.

2.54 The full initial analysis is set out in [Report 4 of 2024](#).

### **Minister's response<sup>61</sup>**

2.55 The minister advised:

The method for working out a total amount for a participant's reasonable and necessary budget is to be worked out in accordance with a method determined by the Minister through a legislative instrument (see proposed new section 32K). In making this determination, the Minister must have regard to the following:

- the principle that people with disability should be supported to receive reasonable and necessary supports, including early intervention supports
- the principle that reasonable and necessary supports for people with disability should:
  - support people with disability to pursue their goals and maximise their independence
  - support people with disability to live independently and to be included in the community as fully participating citizens
  - develop and support the capacity of people with disability to undertake activities that enable them to participate in the community and in employment
- the need to ensure the financial sustainability of the NDIS.

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<sup>61</sup> The minister's response to the committee's inquiries was received on 30 May 2024. This is an extract of the response. The response is available in full on the committee's [webpage](#).

The Committee has asked for further information about the compatibility of the requirement to have regard to the financial sustainability of the NDIS with the above rights. In particular, the Committee has asked for advice on the following:

*(a) what is the objective of the measures and how does this objective address a pressing and substantial social or public concern*

The need to ensure the financial sustainability of the NDIS is fundamental to giving effect to the Objects of the Act (see paragraph 3(3)(b) of the Act). The requirement is also consistent with subsection 209(3) which requires the Minister to have regard to the objects and principles of the Act as well as the need to ensure the financial sustainability of the NDIS when making all NDIS rules, which are the primary form of legislative instrument under the Act.

The NDIS Review supported the proposition that 'a right that cannot be sustained is a right denied' (see page 30 of the NDIS Review Final Report). A critical objective must be that the NDIS is sustainable in the long term so that it can continue to meet the needs of people with disability into the future. There has been substantial social and public concern about the future of the NDIS, including its long-term sustainability and the projected growth of the Scheme. The Bill addresses these concerns by including new measures that will return the NDIS to its original intention and ensure it continues to be available to support Australians with permanent and significant disability for their lifetimes.

It is, therefore, appropriate to have regard to the need to ensure financial sustainability of the NDIS in determining the method for calculating a participant's reasonable and necessary budget under the new planning framework and supporting participants to manage their budget. It is important to note this is only one consideration the Minister is required to make in the context of the determination.

*(b) how much weight is to be given to each matter (namely, the principles set out in section 4 of the Act and the financial sustainability of the NDIS) and whether guidance will be prepared to assist the minister in this regard*

The Bill does not prescribe the weight to be given to each of the matters mentioned in proposed subsection 32K(3). While it is a matter for the Minister to determine what weight should be given to each consideration, generally equal weight should be given to each.

Specific guidance will not be prepared to assist the Minister in determining how much weight is given to each matter prescribed in proposed subsection 32K(3). It will be a matter for the Minister to consider each matter having regard to appropriate advice and information including consultation and co-design with the disability community.

It is important to note that section 17 of the *Legislation Act 2003* requires a rule-maker to undertake appropriate consultation before making legislative instruments. In particular, subsection 17(2) of the *Legislation Act* provides that in undertaking appropriate consultation, a rule-maker may have regard to the extent to which the consultation drew on the knowledge of persons having expertise in relevant fields and the extent to which the consultation ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

This process will provide opportunities for affected parties to provide input to the Minister which may guide the Minister's consideration of each relevant matter. Details of consultation undertaken in the preparation of a legislative instrument must also be included in the explanatory statement.

*(c) whether there is flexibility for the minister to have regard to other matters, such as the best interests of the child*

While the Minister is required to have regard to the matters prescribed in subsection 32K(3) when making the determination, there are no limits in relation to any other matters the Minister may choose to have regard to.

As noted above, the Minister will also be required to undertake appropriate consultation before making the instrument, and should have regard to any relevant matters brought up through that process.

*(d) whether the measures could result in a participant 's total funding amount being reduced and consequently having supports taken away from them*

Under the current planning framework, participants do not receive a 'total funding amount'. They receive a plan that identifies reasonable and necessary supports for them. This may be done with reference to an amount of funding, in practical terms, but the central concept in a plan under the current framework is the provision of specific reasonable and necessary supports rather than an overall funding amount.

The new planning framework will rely on a comprehensive assessment of a participant's needs in order to work out a participant's reasonable and necessary budget. This will be established as an amount of funding a participant can use to purchase the range of supports they need to meet their disability needs. This is a different approach to planning that, for the most part, no longer identifies what reasonable and necessary supports are for the participant. The plan that results from this new process is not comparable with a plan developed under the existing framework.

The key area of reform, consistent with the NDIS Review is that the new planning framework will provide more flexibility so participants can identify supports that best meet their disability support needs. This will not take supports away from participants, but rather give them more autonomy and choice and control about how they select their supports.

*(e) what, if any, safeguards accompany the measures to ensure that the NDIS continues to provide sufficient supports to people with disability such that the minimum core obligations with respect to key economic and social rights, including the rights to social security, health and an adequate standard of living, are satisfied*

It is important to note that the NDIS is not, and has never been intended to be, a form of social security. The purpose of social security is to provide a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. The UN Committee on Economic Social and Cultural Rights has stated that social security, through its redistributive character, plays an important role in poverty reduction and alleviation.

The redistributive (and means tested) nature of social security is not consistent with the scope of the NDIS, which provides support to all people with a permanent and substantial disability, or to those who may benefit from early intervention support.

The structure of the Bill ensures that all participants will have access to the supports they require as a result of their disability, in line with Australia's obligations under the CRPD. This is, and always has been, the intention of the NDIS and that will not change under the new framework.

By providing participants with a reasonable and necessary budget that is directly linked to a comprehensive assessment of their needs, the new planning framework will provide participants with sufficient funding for their disability-related needs. This link between funding provided and an assessment of overall needs is an important safeguard for ensuring participants have sufficient funding to access appropriate disability supports.

The Bill also includes a number of safeguards to ensure that participants will have access to supports over a sustained period of time. For example, the Bill introduces the concept of a 'funding period' which essentially releases funding under the participant's plan in set intervals. This ensures that a participant will continue to have access to sufficient funding for disability-related supports throughout their entire plan period.

Additionally, by including requirements to consider the financial sustainability of the Scheme in certain decisions, the Bill safeguards the future of the NDIS ensuring it will be available to provide sufficient supports to people with disability into the future.

*(f) what, if any, safeguards are there to ensure the measures are not retrogressive*

The Bill introduces a new approach to planning which is more participant-focused and flexible, consistent with recommendations of the NDIS review. Providing participants with a reasonable and necessary budget, including a

flexible budget that can be used to purchase a range of supports chosen by the participant, is an important safeguard against retrogression. Many of the measures in the Bill are focused on moving back to the intention of the NDIS and provide participants with choice and control in the context of a fairer and more consistent approach to decision-making around access and planning for the benefit of people who need access to early intervention or disability supports.

Additionally, the new planning framework will rely on a needs assessment which will be the subject of extensive consultation, technical expertise and deep engagement with the disability community. This will ensure needs assessments are fit-for-purpose and support continuous improvement in planning experiences for all participants in the Scheme.

## Concluding comments

### *International human rights legal advice*

2.56 As to the objective being pursued by the measures, the minister advised that ensuring the financial sustainability of the NDIS is fundamental to giving effect to the objectives of the Act. The minister stated that the NDIS must be sustainable in the long term so that it can continue to meet the needs of people with disability into the future. The objective of ensuring the financial sustainability of the NDIS, while important from a policy perspective, may not in itself be sufficient to constitute a legitimate objective for the purposes of international human rights law. There appears to be a risk that the measures could result in the total funding amounts for participants being reduced and consequently fewer supports being provided and, in such cases, would constitute a retrogressive measure. The United Nations (UN) Committee on the Rights of Persons with Disabilities has emphasised that when a State seeks to introduce retrogressive measures, for example in response to an economic or financial crisis, it is 'obliged to demonstrate that such measures are temporary, necessary and non-discriminatory and that they respect its core obligations'.<sup>62</sup> After acknowledging the importance of disability allowances provided by the State as a way of supporting people with disability and facilitating their full inclusion in the community, the UN Committee cautioned:

States parties must not add to the hardship faced by persons with disabilities by reducing their income in times of economic or financial crisis or through austerity measures that are inconsistent with human rights

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<sup>62</sup> UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [43]. See more generally UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999) [45].

standards [namely, the minimum core elements of economic and social rights].<sup>63</sup>

2.57 The minister's response indicates that the measures would not be temporary. As to its necessity, the minister stated that there has been substantial social and public concern about the future of the NDIS, including its long-term sustainability, and the projected growth of the NDIS. The minister stated that the measures in the bill, including these ones, address these concerns by returning the NDIS to its original intention and ensuring it continues to be available to support Australians with permanent and significant disability for their lifetimes. Given the relatively high threshold under international human rights law that must be met in order to justify retrogressive measures, particularly where such measures relate to austerity or ensuring financial sustainability, it is not clear, based on the information provided, that this threshold has been met with respect to these measures. It is therefore not possible to conclude that the measures pursue a legitimate objective for the purposes of international human rights law.

2.58 In assessing proportionality, it is relevant to consider how the measures are likely to operate in practice, including the likely weight to be given to each matter identified in the legislation when determining funding. The minister advised the bill does not prescribe the weight to be given to each matter and there will not be specific guidance prepared to assist the minister in this regard. The minister stated that it will be a matter for the minister to determine what weight should be given to each consideration, although generally equal weight should be given to each matter. The minister noted that in making NDIS rules relating to these measures there will be opportunities for consultation with affected parties and this consultation will guide the minister's consideration of each relevant matter. Further, the minister stated that there are no limits in relation to other matters the minister may choose to have regard to, including for example the best interests of the child.

2.59 Without legislative or other guidance to assist the minister in exercising their discretion, there appears to be a risk that greater weight may be given to ensuring the financial sustainability of the NDIS, which could result in fewer supports being assessed as necessary and the total funding amounts being reduced. Where children are involved, while the minister may consider other matters such as the best interests of the child, they are not required to do so by law. As international human rights law requires the best interests of the child to be a *primary* consideration, it follows that the financial sustainability of the NDIS must be a secondary consideration – which is not how the provisions are currently drafted. Indeed, the minister advised that generally equal weight would be given to relevant matters, so even if the minister chose to consider the best interests of the child, it is unlikely that that consideration

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<sup>63</sup> UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [62].

would be given the primacy that it requires under international law. As noted by the UN Committee on the Rights of the Child:

...the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child.<sup>64</sup>

2.60 As to whether there are any safeguards to mitigate the risk that the measures may be retrogressive in practice, the minister advised that providing participants with a reasonable and necessary budget, including a flexible budget that can be used to purchase a range of supports chosen by the participant, is an important safeguard against retrogression. If, however, an existing participant was unable to purchase the equivalent level of supports using their new reasonable and necessary budget, it is not clear how the new planning framework itself would operate as a safeguard against retrogression. As to safeguards accompanying the measures to ensure that the minimum core obligations with respect to economic and social rights are met, the minister advised that the new reasonable and necessary budget, which is directly linked to a comprehensive assessment of a participant's needs, will provide participants with sufficient funding for their disability-related needs. The minister stated that other measures, such as the release of funding under the participant's plan in set intervals over a period of time, as well as the requirement to consider the financial sustainability of the NDIS, will ensure that participants will continue to have access to sufficient funding for disability-related supports throughout their entire plan period and into the future.

2.61 Based on the information provided, while the minimum core obligations are likely to be met, there appears to remain a risk that the measures may be retrogressive, depending on how it operates in practice, and it is not clear that there are sufficient safeguards to ensure that the resulting limitations on rights would be proportionate in each case. Further, as there is no requirement to consider the best interests of the child, the measures are unlikely to be compatible with this right.

### **Committee view**

2.62 The committee thanks the minister for this response. To the extent that the measures result in fewer supports being approved and funded for participants and consequently if this had an adverse impact on participants' independence and quality of life, the committee considers the measures would limit the rights of persons with disability, the rights to an adequate standard of living, health and social security as well as the rights of the child (if the measures applied to children).

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<sup>64</sup> UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013); see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

2.63 While ensuring the financial sustainability of the NDIS is an important policy aim, given the high threshold that must be met to justify retrogressive measures under international human rights law, the committee considers that it is not clear whether this stated objective would, in itself, be considered legitimate for the purposes of international law. The committee considers that there remains a risk that the measures may be retrogressive in practice, as without any legislative or other guidance, there is a risk that the financial sustainability of the NDIS may be given greater weight than other matters, such as the needs of participants, and there do not appear to be sufficient safeguards accompanying the measures to mitigate this risk. The committee therefore considers that it has not been demonstrated that the proposed limitations on rights would be proportionate in all cases.

2.64 Further, the committee notes that the best interests of the child are not required to be considered. Noting the requirement under international human rights law that, where children are involved, the best interests of the child be a primary consideration, which means that it may not be considered on the same level as all other considerations, the committee considers that the measures do not appear to be compatible with this right.

#### **Suggested action**

2.65 The committee considers the proportionality of the measures may be assisted were:

- (d) guidance prepared, in consultation with, and co-designed by, people with disability, to assist the minister in considering and giving appropriate weight to the various matters in proposed subsection 32K(3); and
- (e) the best interests of the child included as a primary matter that the minister must have regard to in making a determination under proposed subsection 32K(2).

2.66 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

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



## Legislative instruments

### Social Security (Remote Engagement Program Payment) Determination 2023<sup>65</sup>

<b>FRL No.</b>	<a href="#">F2023L01003</a>
<b>Purpose</b>	This legislative instrument determines the arrangement that is the remote engagement program; the part of that program that is a remote engagement placement; and the rate of payment of a remote engagement program payment
<b>Portfolio</b>	Employment and Workplace Relations
<b>Authorising legislation</b>	<i>Social Security Act 1991</i>
<b>Disallowance</b>	15 sitting days after tabling (tabled in the House of Representatives and Senate on 31 July 2023)
<b>Rights</b>	Adequate standard of living; equality and non-discrimination; just and favourable conditions of work; social security; work

2.68 The committee initially considered, and requested further information in relation to, this legislative instrument in [Report 10 of 2023](#), and published its concluded advice to Parliament in [Report 12 of 2023](#).<sup>66</sup> The committee did not make a further request for the provision of a response from the minister but did make a series of recommendations to assist with the proportionality of the measure.

#### Remote engagement program

2.69 This instrument determines arrangements between the Commonwealth and Paupiyala Tjarutja Aboriginal Corporation and the Commonwealth and Ngaanyatjarra Council Aboriginal Corporation, respectively, as the remote engagement program. It also determines the part of that program that is the remote engagement placement and the rate of the remote engagement program (REP) payment (that is, \$190 per fortnight). The remote engagement program is intended to replace the Community Development Program.

2.70 To the extent the measure provides opportunities for job seekers to develop employment skills and facilitates the payment of a supplementary social security

<sup>65</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Remote Engagement Program Payment) Determination 2023, *Report 5 of 2024*; [2024] AUPJCHR 36.

<sup>66</sup> Parliamentary Joint Committee on Human Rights, [Report 10 of 2023](#) (13 September 2023), pp. 5–18; Parliamentary Joint Committee on Human Rights, [Report 12 of 2023](#) (15 May 2023), pp. 83–104.

payment, the committee considered that it promotes the rights to work, social security, an adequate standard of living and equality and non-discrimination. However, the committee also considered that these rights may be limited. For example, if work performed as part of the remote engagement program placement was characterised as a form of employment for the purposes of international human rights law, the measure may engage and limit the right to just and favourable conditions of work, noting that the rate of payment is insufficient to amount to fair remuneration. The measure may also engage and limit the rights to social security and an adequate standard of living if the remote engagement program placement is ended and the payment removed on unreasonable grounds.

2.71 The committee considered that the measure pursues a legitimate objective and noted that as the program is still in its trial phase and had not been subject to evaluation, it was not possible to conclude on its likely effectiveness to achieve the stated objective. The committee considered that the measure was accompanied by some important safeguards but remained concerned that a placement may be ended in circumstances that may not always be reasonable. Were this to happen, there would be a risk that the payment may be removed on unreasonable grounds and thus constitute a retrogressive measure that risks impermissibly limiting the rights to social security and an adequate standard of living. The committee also considered, however, that were the supplementary payment to be removed only in circumstances that are reasonable, subject to due process, and provided for in law, the measure would likely be compatible with these rights.

2.72 The committee was also concerned that if the placement were to constitute a form of employment for the purposes of international human rights law, the rate of pay for a minimum 15 hours per week (being \$6.33 per hour) is insufficient to amount to fair and equal remuneration. While the committee noted that the remote engagement program payment is in addition to the participant's other social security entitlements, were the participant to be paid the minimum wage for the hours worked as part of the program, they would receive a higher fortnightly income amount than that offered by the program. As such, if the placement were to constitute a form of employment for the purposes of international human rights law, the committee considered that the measure may not, in all circumstances, constitute a proportionate limitation on the right to just and favourable conditions of work. The committee further considered that if the measure impermissibly limited the above rights, it would also likely constitute unlawful discrimination, particularly with respect to Aboriginal and Torres Strait Islander peoples, as it is not clear that the differential treatment would be based on reasonable and objective criteria.

2.73 The committee considered that the proportionality of the measure may be assisted by:

- amending the *Social Security Act 1991* to remove the maximum rate of pay for the remote engagement program payment, thereby allowing the rate of pay to be greater than \$190 and determined through genuine co-design;
- circumscribing with greater clarity the grounds on which a REP Placement may be ended, including the circumstances in which a REP host may cancel a placement; and
- specifying the duration of the REP Placement in legislation, noting that the longer the placement the more likely it would be considered to be a form of employment.

2.74 The committee finally recommended that the statement of compatibility be updated to reflect the information provided by the minister in *Report 12 of 2023*.

### **Minister's response<sup>67</sup>**

2.75 The minister advised:

I thank the Committee again for their consideration of the Instrument, and for the opportunity to respond in full to the Committee's initial views in October 2023.

I note advice from the Committee Secretariat that the Committee does not require a response to the Report, and that the Instrument is now a concluded matter for the Committee.

As noted in my previous response, the Government has committed to replace the Community Development Program (CDP) with a new program with real jobs, proper wages and decent conditions developed in partnership with First Nations people. The Remote Engagement Program (REP) is a trial that has helped inform the design of the new program.

As at 29 February 2024, there has been very limited uptake of the REP Trial, there are currently no trial participants and no participant has become eligible for a REP payment. The REP Trial and availability of the REP payment will not be extended beyond 30 June 2024.

The Government remains committed to supporting community and real job opportunities for people in remote Australia, including in the Ngaanyatjarra Lands. These employment opportunities will aim to ensure just and favourable conditions of work, in line with the Committee's recommendations.

On 13 February 2024, the Government announced a \$707 million investment in a new Remote Jobs and Economic Development Program that will help close the gap in employment outcomes by creating 3,000 jobs in remote Australia.

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<sup>67</sup> The minister's correspondence was received on 16 May 2024. This is an extract of the response. The response is available in full on the committee's [website](#).

I have asked the National Indigenous Australians Agency to take consideration of the Committee's findings in designing a new Remote Jobs and Economic Development Program and a new employment service for remote Australia, which together will replace the CDP.

### **Committee view**

2.76 The committee thanks the Minister for Indigenous Australians for this response. The committee welcomes the minister's request that the National Indigenous Australians Agency consider the committee's findings when designing a new Remote Jobs and Economic Development Program and a new employment service for remote Australia, which would replace the Community Development Program.

**Mr Josh Burns MP**

**Chair**

## Coalition Members Additional Comments<sup>1</sup>

### Commission of Inquiry into Antisemitism at Australian Universities Bill 2024

2.1 Coalition members consider the *Commission of Inquiry into Anti Semitism at Australian Universities Bill 2024* to be 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.

2.2 The measures in the Bill would positively engage the following human rights:

- The obligation to eliminate racial discrimination in Article 2 of the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD);
- The right to an education protected under Article 5 of the ICERD and Article 13 of the International Covenant on Economic, Social, and Cultural Rights (ICESC);
- The role of education in combatting racial discrimination in Article 7 of the ICERD;

### Defence Amendment (Parliamentary Joint Committee on Defence) Bill 2024

2.3 Coalition members consider the secrecy offences within this Bill to be entirely necessary and proportionate to protect the human rights of all Australians.

**Mr Henry Pike MP**  
Member for Bowman

**Senator Matt O'Sullivan**  
Senator for Western Australia

**Senator Gerard Rennick**  
Senator for Queensland

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<sup>1</sup> This section can be cited as Parliamentary Joint Committee on Human Rights, Additional Comments, *Report 5 of 2024*; [2024] AUPJCHR 37.