

# Chapter 1

## New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 20 and 23 August 2018 (consideration of 1 bill from this period has been deferred);<sup>1</sup>
  - legislative instruments registered on the Federal Register of Legislation between 21 June and 25 July 2018;<sup>2</sup> and
  - bills and legislative instruments previously deferred.

### Instruments not raising human rights concerns

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

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

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

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

## Response required

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

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

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

### **Background**

1.5 The committee has previously considered the human rights implications of increases to court fees on several occasions.<sup>1</sup>

#### **Increase to High Court fees**

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

- filing fees;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 SOC, p. 19.

12 SOC, p. 19.

13 SOC, p. 19.

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

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

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

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

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

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

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

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

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

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

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

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

20 High Court Fees Regulation, section 13.

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

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

### **Committee comment**

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

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

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

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

## Further response required

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

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

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

#### Background

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

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

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

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

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

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

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

- (b) chemical restraint, which is the use of medication or chemical substance for the primary purpose of influencing a person's behaviour. It does not include the use of medication prescribed by a medical practitioner for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition;
- (c) mechanical restraint, which is the use of a device to prevent, restrict, or subdue a person's movement for the primary purpose of influencing a person's behaviour but does not include the use of devices for therapeutic or non-behavioural purposes;
- (d) physical restraint, which is the use or action of physical force to prevent, restrict or subdue movement of a person's body, or part of their body, for the primary purpose of influencing their behaviour. Physical restraint does not include the use of a hands-on technique in a reflexive way to guide or redirect a person away from potential harm/injury, consistent with what could reasonably be considered the exercise of care towards a person.
- (e) environmental restraint, which restricts a person's free access to all parts of their environment, including items or activities.<sup>2</sup>

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

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

3 Section 8 of the rules.

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

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



authorisation as soon as reasonably practicable after the use of the regulated restrictive practice.<sup>6</sup>

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

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

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

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6 Section 9 of the rules.

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

8 See sections 18-20.

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

10 Section 21(3) of the rules.

a provider is conditional on the regulated restrictive practice being used in accordance with the behaviour support plan.<sup>11</sup>

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

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

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

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

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11 Section 10 of the rules.

12 Section 11 of the rules.

13 Section 12 of the rules.

14 Section 13 of the rules.

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

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

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

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

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

17 Statement of compatibility (SOC) p. 29.

18 SOC, p. 28.

19 SOC, p. 30.

20 SOC, pp. 30-31.

21 See section 12 of the rules.

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

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

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

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

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

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

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22 Section 9 of the rules.

23 ES, p. 9.

24 ES, p. 9.

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

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

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

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

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

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

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

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25 CRPD, Article 12.

26 CRPD, Article 17.

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

28 CRPD, article 16.

29 CRPD, article 21.

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

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

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

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

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

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

### **Minister's response**

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

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

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

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

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

In addition, a 'single emergency use' of a regulated restrictive practice that has not been authorised in accordance with a State or Territory process in relation to the use of that practice, constitutes a reportable incident for the purposes of the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018* (section 16). This reporting requirement ensures the NDIS Commission has visibility of the 'first use' and 'single emergency use' of a regulated restrictive practice. Such reports will be provided to the NDIS Quality and Safeguards Commission's behaviour support team for consideration and follow up as required.

The Rules aim to achieve the reduction and elimination of restrictive practices in the NDIS, consistent with the Convention on the Rights of Persons with Disabilities (UNCRPD) and Australian Governments' commitments under the National Framework for the Reduction and Elimination of Restrictive Practices (2014).

The Rules and related instruments seek to achieve this by imposing reasonable, necessary and proportionate conditions of registration on NDIS providers, including reporting requirements in relation to emergency use of restrictive practices, which will give the NDIS Commission visibility of progress made in relation to the reduction and elimination of restrictive practices in the NDIS.

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

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

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

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

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



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

### **Committee response**

**1.50 The committee thanks the minister for his response.**

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

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

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

## **Record keeping requirements**

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

### ***Compatibility of the measure with the right to privacy***

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

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

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

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

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

### **Minister's response**

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

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

33 SOC, p. 28.

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

Once the information is provided to the Commission, it becomes protected Commission information and is subject to the protections outlined in Division 2, Part 2, and Chapter 4 of the Act.

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

### **Committee response**

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

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

## Advice only

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

### Plebiscite (Future Migration Level) Bill 2018

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

### Vote in relation to immigration levels and obligations on broadcasters

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

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

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

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

1 See explanatory memorandum (EM) p. 2.

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

3 See proposed section 30.

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

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

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

1.68 The statement of compatibility does not acknowledge that any rights are engaged by the bill.<sup>6</sup>

### **Committee comment**

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

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

6 EM, statement of compatibility, p. 31.

## **Bills not raising human rights concerns**

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

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