

Appendix 3

Correspondence



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MC18-006136

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Mr Ian Goodenough MP
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Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

A handwritten signature in blue ink that reads 'Dan' with a large, sweeping flourish above it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- b) paragraph 26(1)(a) of the Incident Management Rules – the referral of matters to other regulatory bodies including the police or child protection authorities would not involve a determination of rights and would be subject to the protections afforded to personal information under the Act and the *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018*.
- c) paragraph 26(1)(f) of the Incident Management Rules – this may include a decision to refer the matter to an authorised officer for the purposes of determining whether to conduct an investigation under the Act or to take other compliance or enforcement action under the Act in respect of which rights of review are available (Part 6 of the Act).
- d) subsections 16(3) and (5) of the Complaints Management Rules – in the event that the resolution of a complaint included making adverse findings against a person, the process would be subject to that outlined in the attached Procedural Fairness Guidelines. Any compliance or enforcement action taken by the Commission would be subject to the review rights outlined in Part 6 of the Act.
- e) in respect of any inquiries conducted by the Commissioner under the Complaints or Incident rules, the Commissioner must comply with procedural fairness and the protections and limitations on the use of personal information outlined in the Act and the *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018*. The Commissioner’s inquiry power is not intended to determine the rights or interests of parties to a complaint or incident. The Commissioner has other investigation powers under the Act that could be used for that purpose.

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

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

Thank you again for bringing your concerns to my attention.

Yours sincerely,

DAN TEHAN

Encl.



National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018

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

Dated

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

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Introduction

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

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

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

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

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

Part 1 – Preliminary

1 Name

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

2 Commencement

This instrument commences on the day after it is registered.

3 Authority

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

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

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

4 Definitions

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

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

In this instrument:

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

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

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

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

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

5 Interpretation

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

Part 2 – Procedural fairness and NDIS complaint handling

6 Application of this instrument

- (1) This instrument applies to the Commission's complaints functions under section 181G of the Act in determining whether an NDIS provider or worker has contravened the Act or National Disability Insurance Scheme rules.
- (2) This instrument also applies to complaint handling by a registered NDIS provider under the Complaint Rules. Registered NDIS providers are required to have a complaints management and resolution system that both:
 - (a) supports people with disability to understand how to make a complaint to the provider and to the Commission; and
 - (b) requires that people are afforded procedural fairness when a complaint is dealt with by the provider.
- (3) Effective complaint management and resolution by registered NDIS providers and the Commission is important to a range of people and organisations, including complainants and NDIS providers and workers against whom complaints are made. They all have a direct interest in the complaint process being conducted properly and fairly.
- (4) Procedural fairness compliance by the Commission and NDIS providers is integral to building confidence in NDIS complaint processes.

7 An outline of procedural fairness

- (1) As part of the handling of a complaint under the Complaint Rules, procedural fairness must be afforded to a person if their rights or interests may be adversely or detrimentally affected in a direct and specific way. In those circumstances -
 - (a) the person must be given notice of each prejudicial matter that may be considered against them;
 - (b) the person must be given a reasonable opportunity to be heard on those matters before adverse action is taken, and to put forward information and submissions in support of an outcome that is favourable to their interests;
 - (c) the decision to take adverse action should be soundly based on the facts and issues that were raised during that process, and this should be apparent in the record of the decision, and
 - (d) the decision maker should be unbiased and maintain an unbiased appearance.
- (2) The precise requirements of procedural fairness can vary from one situation to another. The required steps can vary according to:
 - (a) the nature of the matter being dealt with;

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- (b) the options for resolving it;
 - (c) the time-frame for resolution;
 - (d) whether facts in issue are in dispute;
 - (e) the gravity of possible findings that may be reached; and
 - (f) the sanctions that could be imposed based on those findings.
- (3) Sometimes a quick, informal and consultative procedure will be sufficient – but on other occasions procedural fairness may require a more formal, structured or arms-length procedure. A more formal procedure may be required if a complaint involves direct criticism of or an allegation against a worker, or consideration is being given to imposing a harsh sanction on an NDIS provider or worker. Even in those situations, procedural fairness does not preclude the adoption initially of an informal and consultative process that can become more formal at the request of a party or if circumstances require. A transparent procedure should be adopted that ensures a person whose interests may be directly and adversely affected by a complaint process is given the opportunity to have their views heard and considered in a fair and impartial manner.
- (4) The obligation to provide procedural fairness must be balanced against the need to ensure that neither a complainant (including a person with disability) nor a person with disability affected by an issue raised in a complaint is disadvantaged as a result of the complaint being made and resolved. The steps adopted to ensure procedural fairness in any situation must be tailored to ensure that disadvantage is not suffered by the complainant or person with disability.
- (5) Procedures developed by a registered NDIS provider as part of its complaints management and resolutions system must take into account the elements of, and approach to, procedural fairness described in this instrument.

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

8 Procedural fairness and other legal requirements

- (1) The NDIS Act and the Complaint Rules outline procedural steps that must be followed by registered NDIS providers and the Commission in complaint handling. The central purpose of those requirements is to ensure fairness for all involved parties. Compliance with those steps will go a long way towards meeting procedural fairness legal requirements.
- (2) It is important that the specific requirements of the Act and the National Disability Insurance Scheme rules are followed, in addition to procedural fairness requirements.
- (3) Other laws such as the *Fair Work Act 2009* (Cth) contain protections for workers in relation to adverse employment action. Consideration may need to be given to the requirements of other laws in addition to procedural fairness requirements.

9 NDIS principles and objectives

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

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

- (a) The objects of the Act include that people with disability have the same rights as other members of Australian society to pursue grievances and to be involved in decision making that affects them. To meet that objective when dealing with a complaint made on behalf of a person with disability, a registered NDIS provider or the Commission should, if necessary, consider taking separate procedural fairness steps in relation to both the person making the complaint and the person with disability.
- (b) The Complaint Rules require the Commission to seek to resolve complaints as quickly and with as little formality as a proper consideration of the complaint allows (paragraph 16(5)(c)).
- (c) The Complaint Rules allow that complaints to registered NDIS providers and the Commission may be made anonymously and that a complainant may request that information be kept confidential (subsections 8(1) and 15(3)). This is relevant in deciding the nature of the information to be disclosed to a provider or worker for the purposes of a procedural fairness hearing. The Complaint Rules equally acknowledge that it may not always be possible to fully honour a request for confidentiality if a complaint is to be properly investigated.
- (d) The NDIS Code of Conduct requires providers (whether registered or not) and workers to act with respect for individuals and to respond to allegations of abuse. It may accordingly be necessary in resolving a complaint to reach a finding that is adverse to an individual worker or that results in a sanction being imposed. A fair process should be followed in reaching that adverse outcome, but procedural fairness does not preclude it.

10 How procedural fairness applies to NDIS complaint handling

- (1) This section contains brief examples and discussion of where the obligation to observe procedural fairness in NDIS complaint handling is likely to arise.
- (2) ***A complaint to a registered NDIS provider about the supports or services being provided to a person with disability:*** A registered NDIS provider must afford procedural fairness to a person making a complaint, as that person has an interest (and possibly an expectation) in how the complaint is managed and the outcome.
- (3) Procedural fairness requires only that the complainant has a reasonable opportunity to present their complaint, that the substance of their complaint is understood and their complaint is not dismissed on a view of the facts that was not raised with or apparent to them. If the complaint is made by a representative on behalf of a person with disability, consideration should be given to separately providing procedural fairness to the person with disability.
- (4) ***A complaint to a registered NDIS provider that alleges inappropriate behaviour by a person who is identified:*** Procedural fairness must be provided to any worker who is the specific subject of a complaint.

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- (5) Not every complaint to a registered NDIS provider will make adverse allegations, directly or implicitly, against an identifiable individual. Many complaints may instead be about the quality or level of supports or services provided by the provider or available to the person with disability. In those circumstances there is no obligation to afford procedural fairness to individual workers, unless a possible outcome of the investigation is that a worker will be identified as being at fault.
 - (6) A registered NDIS provider should ensure that its complaints management and resolution system distinguishes between complaints that are specifically about the conduct of identifiable workers and complaints about the provision of supports and services that incidentally identify workers.
 - (7) ***A complaint to the Commission about an NDIS provider:*** The Complaint Rules provide that a person may complain to the Commission about the provision of supports or services by an NDIS provider (whether or not the provider is registered) (section 15). The Commission is required to take action on each issue raised in a complaint. The actions that can be taken are set out in the Complaint Rules, and include the following options: taking no action on a complaint issue (for example, if it has already been dealt with); deferring action on a complaint issue (for example, where another inquiry process is underway); noting the withdrawal of the complaint; requiring the provider to attempt to resolve the complaint issue; requesting the parties to participate in a resolution process; requiring the provider to take remedial action; and recording an adverse finding against the provider on the complaint.
 - (8) The Complaint Rules specify processes that the Commission may follow in deciding what action to take – for example, consulting with the NDIS provider and the complainant, reviewing documents and visiting the location at which supports or services are provided. In most instances those processes will adequately satisfy procedural fairness requirements.
 - (9) In some instances the Commission may need to take additional procedural fairness steps, particularly if its complaint handling process could result in adverse employment action being recorded or taken against the provider. An example of an additional step is the disclosure of specific information to the provider as part of a formal invitation to make a submission. The core issue is whether there is a matter on which the provider can reasonably expect to be heard before action is taken by the Commission that could be regarded as adverse to the provider.
 - (10) ***A complaint to the Commission that could result in an adverse finding against a worker:*** The Commission is not generally required to undertake a separate procedural fairness process in relation to workers of an NDIS provider in handling complaints about the provider’s supports or services. Even if workers are incidentally identified in the complaint to the Commission, the provider can decide which workers to consult after being notified of the complaint by the Commission.
 - (11) The Commission will need to consider undertaking a separate procedural fairness process in relation to a worker against whom an adverse finding may be made by the Commission. This is recognised in paragraph 16(5)(b) of the Complaint Rules which provide that in dealing with a complaint the Commission must consider whether procedural fairness requires ‘allowing a worker reasonable opportunity to comment on any proposed adverse finding in relation to the person’. The procedural fairness

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

- (12) The NDIS provider would ordinarily be informed that a separate procedural fairness process was being undertaken with a worker, but not told of any provisional adverse finding. This allows the worker to make an effective submission that the provisional adverse finding should not be adopted. The final report by the Commission to the provider may nevertheless discuss the issue or allegation in another way in order to explain how the complaint was resolved.
- (13) ***A decision by the Commission to initiate an inquiry:*** The Commission may initiate an inquiry either independently of any complaint or in relation to issues that arise from complaints against a provider or complaints against more than one provider (section 29 of the Complaint Rules). A Commission decision to conduct an own motion inquiry potentially exposes a provider to reputational disadvantage if the fact of the inquiry becomes publicly known. Accordingly, it is generally prudent to provide advance notice of an inquiry to a provider that may be individually targeted or affected by the inquiry.
- (14) The Commission decides the terms of reference for an inquiry. Procedural fairness does not require that a provider is given a reasonable opportunity to comment on the draft terms of reference – but it can be prudent administrative practice to do so in order to focus the inquiry on relevant and specific matters. This step may be less appropriate if a large number of providers fall within the scope of the inquiry and each is no more specifically affected than other providers.
- (15) During the conduct of the inquiry there will be a need to take procedural fairness steps in relation to any provisional adverse finding against an individual provider, worker or other person. This is particularly important if the Commission may publish a report that sets out the adverse finding (subsection 29(6) of the Complaint Rules).
- (16) ***A referral by the Commission of an issue raised in a complaint to the Minister, the Agency or another person or body:*** A Commission decision to refer a complaint issue to another organisation under section 31 of the Complaint Rules may expose a provider to disadvantage – for example, if the matter referred involves an allegation against the provider, or the referral may lead to a separate inquiry by that other organisation into the actions of the provider.
- (17) It is generally prudent to advise a provider in advance that a referral is being made, to alert it to any possible disadvantage. It is not usually necessary to invite the provider to make a submission before the referral occurs, as the obligation to afford procedural fairness will apply to the other entity if it decides to take action on the referral.

Part 3 – Key elements of procedural fairness

11 Procedural fairness steps – an illustrative summary

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

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

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

- (1) A registered NDIS provider that is intending to investigate or act upon a complaint it has received that expressly or implicitly alleges inappropriate conduct by a worker should have regard to the following procedural fairness steps:
- (a) Identify whether any information that may be taken into account in resolving the complaint was provided on a confidential basis or may be confidential in nature, and if so –
 - i. consider how confidentiality can be maintained consistently with affording procedural fairness to the worker, and
 - ii. if it may be difficult practically to maintain confidentiality in resolving the complaint, consult with the person who provided the information to inform them of this difficulty and ascertain if they wish the complaint to proceed.
 - (b) Identify if the allegation relates to the behaviour of more than worker, and whether the same (or different) procedural fairness steps should apply to each worker.
 - (c) Consider who is an appropriate person within the registered NDIS provider's organisation to manage the complaint, and whether more than one person should discharge the role of examining the complaint, consulting with interested parties, ensuring that procedural fairness is provided to the worker, and making a decision on the complaint. More than one person may manage the complaint for organisational reasons or to avoid conflicts of interest or the appearance of bias.
 - (d) Identify the training, policies, procedures and any other relevant systems of work provided to the worker in the context of the supports or services in which the allegation arose.
 - (e) Determine an appropriate process for managing the complaint, having regard to the matters considered in paragraphs (a), (b) and (c), and aspects of this instrument.
 - (f) Inform the worker of the issue to be investigated, and the allegation(s) made against the worker. There is no formal requirement as to how the notice is to be given or the issues are to be framed – though the prudent course is to give notice in writing if the matters or potential sanctions under consideration are serious in nature.
 - (g) Inform the worker how the matter will be investigated, including who is conducting the investigation, how long it is expected to take, and how the investigation will be reported.
 - (h) Adequate details of any allegation should be given to enable the worker to respond in a constructive manner – for example, tell the worker what they are alleged to have done or omitted to do, when the incident occurred, and of any evidence that tends to confirm the allegation. Draw the worker's attention to any issue that may be critical to the outcome but which may not be apparent to them.

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

- (i) It is not generally necessary to give the worker access to records relating to the complaint – providing them with a summary of the information that may be relied on in reaching a decision is usually sufficient. Depending on the nature of an allegation it may be necessary to allow a person to inspect a document or to listen to or view an audio-visual recording that may be taken into account.
 - (j) The decision maker or person conducting the inquiry or investigation is not required to notify their provisional views or tentative findings. However, it can enhance the fairness of a process to alert a person to a perceived deficiency or inconsistency in their submission.
- (2) Inform the worker of any potential sanction that may be imposed.
- (a) A sanction may be formal in nature (such as dismissal or an investigation into an alleged contravention of the Code of Conduct) or be an adverse consequence of a different kind (for example, work restrictions, or publication of an investigation report that reflects adversely on the worker’s performance).
 - (b) The notice to the worker should identify considerations that may be relevant to deciding on a sanction to be imposed. This is particularly important if a harsh sanction such as dismissal or reduction in salary is a possibility.
 - (c) It may be desirable to conduct a separate hearing or procedure to decide on a sanction, to ensure fairness to the worker and to remove any appearance of bias.
- (3) Give the worker a reasonable opportunity to respond to the issue to be investigated, the allegation(s) against the worker and possible sanctions.
- (a) What will be a ‘reasonable opportunity’ will depend on the circumstances. Many issues can be dealt with quickly – by discussion or allowing the worker a few days to prepare a response. Other issues may require a longer period for the worker to consult others, obtain information or prepare a more extended response. The central requirement is that the worker should have a reasonable opportunity to comment upon or rebut adverse or prejudicial material and to put forward information and submissions in support of a favourable outcome.
 - (b) It is good practice to allow the worker to choose how they will respond – for example, a face-to-face interview or meeting to discuss the issue, a written submission, or a meeting at which the worker is accompanied by a support person that could be a colleague, a family member, or a representative (see paragraph (c) below).
 - (c) A worker may choose to consult a lawyer or union official in preparing a statement, and obtain advice about what they intend to say in making a verbal submission. The person may have the union official or lawyer attend a meeting as their support person or representative respectively.
 - (d) It may be necessary to allow a person to make more than one statement or submission before a final decision is made. For example, it may transpire at a meeting that some disputed matters cannot fairly be resolved without a further statement or evidence. Equally, if a harsh sanction is to be imposed it may be desirable to split the hearing into two stages – an initial finding on the complaint allegation, followed by a decision on the sanction to be imposed.
 - (e) Special measures may be required to ensure that a person has a reasonable opportunity to respond – such as use of an interpreter, conducting an

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

- (4) Inform the worker in writing of the decision that has been made following the investigation.
 - (a) A written record of the decision is important to ensure clarity and certainty, and to enable the worker to decide whether to follow up.
 - (b) The written form can vary according to the circumstances. For example, a formal letter of advice should be used to notify an adverse decision that could be distressing to a worker or impair their career. In other circumstances – including if a decision is favourable to a worker – it may be sufficient to notify the decision by email, or to invite the worker to sign/initial a written record of the decision.
 - (c) If a sanction is imposed on a worker (including an adverse finding recorded on their personnel record) the nature of the sanction should be clearly stated. If the worker has a right to challenge or review the sanction, the procedure for doing so should be outlined.
- (5) Ensure that the investigation of the complaint or allegation is conducted in a fair and unbiased manner.
 - (a) A transparent process should be followed that gives a worker a reasonable opportunity to present their views on all relevant issues.
 - (b) The person conducting the investigation should do so with an open mind and avoid forming a view on whether to sustain a complaint allegation against a worker before the investigation is complete.
 - (c) Consider whether any decision to impose a sanction should be made separately by someone other than the person who conducted the investigation, to avoid any appearance of prejudice or prejudgement at this stage.

13 Procedural fairness – practical considerations

- (1) **Fair process:** Procedural fairness requirements aim to ensure that a fair process is followed in decision making that could adversely or detrimentally affect the rights or interests of a person. The underlying assumption is that a fair process will lead to better decision-making – and, in this context, better and fairer complaint handling. However, procedural fairness requirements stop short of assessing whether a particular decision or outcome is fair: they address the process to be followed in reaching a decision, but not the substantive merits of that decision.
- (2) **Fair process overall:** The obligation to afford procedural fairness applies to the overall process of making a decision or resolving a complaint, and not separately to each stage in that process. A person should be given a reasonable and informed opportunity to comment on any adverse finding or sanction before it is finally determined. The precise point in the process at which that opportunity is given can be of secondary importance.
- (3) An illustration of that principle is that there is generally no procedural fairness obligation to notify a person of an adverse allegation or potential finding when a complaint is first recorded or referred to another body. A reasonable opportunity to comment on the allegation or potential finding can be given at a later stage. This enables appropriate analysis of a complaint to determine if it should be managed as a

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- complaint about the level or quality of services or supports that a person with disability is receiving, rather than an allegation of inappropriate conduct by a worker.
- (4) A person who is facing a potential adverse finding or sanction should be reassured as necessary that the overall process will be fair. Equally, a deficiency at an early stage of the process can be corrected at a later stage, provided this is done by a good faith process in which the decision maker approaches the issue with an open mind and gives genuine consideration to any submission made by the person to whom procedural fairness is owed.
 - (5) ***The dual purpose of procedural fairness:*** Procedural fairness is a legal obligation that applies to decisions made under statute that adversely affect the interests of others in a direct and specific manner. A failure to comply with this legal obligation may lead to an adverse decision being set aside by a court or questioned by a review tribunal or body.
 - (6) As importantly, procedural fairness aims to strengthen the fairness and integrity of administrative processes, regardless of whether legal proceedings for a breach are a possibility. Decision-makers should, accordingly, ensure procedural fairness in the pursuit of good administration as an overriding objective.

14 Dealing with confidential information

- (1) Information to be considered in a complaint management and resolution process may have been received on a confidential basis. For example, a complainant, informant, witness or whistleblower may request that their identity remain confidential, or private personal information about a third party may be revealed during an investigation.
- (2) The Complaint Rules (paragraph 8(5)(b)) require that a registered NDIS provider's complaints management and resolution system ensures that information provided in a complaint is kept confidential, and only disclosed if the disclosure is:
 - (a) required by law; or
 - (b) is otherwise appropriate in the circumstances.
- (3) Procedural fairness principles recognise that protection of identity and confidentiality can be important elements of effective complaint handling and dispute resolution. This must nevertheless be balanced against the obligation to provide procedural fairness to a person whose interests may be adversely affected by an administrative action, particularly if a sanction may be imposed on a person as part of the resolution of a complaint or allegation.
- (4) This means that the obligation to provide procedural fairness may override – in whole or in part - the obligation to maintain confidentiality, depending on the circumstances.
- (5) Confidentiality can more easily be safeguarded if a complaint is classified as one about the quality or level of supports provided to a person with disability, rather than a complaint that alleges inappropriate conduct by a worker. Accordingly, a registered NDIS provider should consider at the outset whether any worker who is identified in a complaint is identified only in a manner incidental to describing a complaint issue about the quality or level of supports.

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- (6) Where a complaint involves allegations about the conduct of a worker, it may be practicable to provide the worker with the allegation and the details given in support of it, without disclosing the identity of the source of any prejudicial information. This may not be possible if, for example, the identity of the source of information will be readily apparent from the nature of the allegation. Sometimes, too, fairness may require that a source of information is revealed, so that the worker can better understand how to comment upon or rebut that information. Generally, disclosure is required to a level necessary to avoid any practical injustice to a person to whom procedural fairness is owed.
 - (7) The decision maker or person conducting the inquiry or investigation should look for ways of balancing fairness and confidentiality and effectively safeguarding the interests of all parties. It may be desirable to conduct a separate preliminary discussion with each of the interested parties, so they may offer suggestions or make undertakings that ensure an appropriate balance can be struck.

15 Maintaining an impartial and unbiased appearance

- (1) A decision maker should be impartial and free of actual or apprehended bias. The test for apprehended bias is whether a fair-minded observer might reasonably suspect that the decision maker is not impartial.
 - (2) Apprehended bias can be inferred from a person's conduct, comments, associations or other relevant circumstances. Examples of apprehended bias can include situations in which a decision maker (or person conducting an inquiry) -
 - (a) has a conflict of interest or personal stake in the matter to be resolved, or a relationship with one of the parties that casts doubt on the appearance of fairness
 - (b) displayed hostility or favouritism to one of the parties involved in a matter
 - (c) made comments that suggest the decision maker has prejudged a disputed issue and will not approach the evidence with an open mind
 - (d) was involved at an earlier stage of the process, for example, in making the allegation to be investigated or providing a statement in support of one of the parties.
 - (3) Actual or apprehended bias of a decision maker can undermine both the integrity and legal validity of the decision making process and outcome. The responsibility rests on the decision maker to ensure there is no actual or apprehended bias, and if necessary to withdraw from the process and assign the decision making responsibility to another person. If that is not practical (for example, it is a small organisation) another option is to outsource the inquiry/assessment role to an external professional to prepare a report for the decision maker. A registered NDIS provider has flexibility in deciding how to deal with bias and conflict of interest concerns.
 - (4) It is good practice to clarify bias and conflict of interest concerns before the process commences. It is open to the parties, once informed of a potential issue, to waive any objection and to allow the decision maker to continue. On the other hand, a decision maker should not withdraw merely because one of the parties raises a bias objection: the test of the 'fair-minded observer' should be followed. It is common that decision
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makers will know or work with one or other of the parties, have some familiarity with the issues to be decided, or have expressed a preliminary view on or more of those issues.

- (5) If a bias issue arises during the course of an inquiry after evidence and submissions have already been collected, these can generally be made available to the new inquirer/decision maker, subject to ensuring procedural fairness. It is good practice to consult the parties about this option before doing so.



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MC18-006138

Mr Ian Goodenough MP
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28 AUG 2018

Dear Mr Goodenough

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

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

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

The Committee notes at paragraph 1.125 that sections 15, 17, 18 and 19 of the *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018* (Information Rules) may permit the disclosure of personal information to bodies that are not constrained by the *Privacy Act 1988* (Privacy Act). While compliance with the Privacy Act is not a complete answer to concerns about the right to privacy, it may provide relevant safeguards that assist in determining whether a limitation on the right to privacy is proportionate. Noting this potential gap in coverage, the relevant sections do not require the Commissioner to be satisfied of how bodies that are not subject to the Privacy Act will collect, store and disclose personal information that is disclosed to them. The potential for information to be disclosed to bodies that are not constrained by the Privacy Act raises a question as to whether there are other, relevant safeguards in place to protect the right to privacy.

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

The Committee notes at paragraph 1.126 that there are a number of exceptions to the safeguards in Division 1, which may restrict the effectiveness of the safeguards. For example, under paragraph 10(3)(b), the Commissioner is not required to de-identify personal information if they are satisfied that to do so would result in an unreasonable delay. A similar exception applies to the consent and consultation requirements in section 11. Neither the Information Rules nor the statement of compatibility explain what constitutes an 'unreasonable delay' or how this is determined. Further information as to how this threshold is determined is provided below to assist the committee to assess whether the limitation on the right to privacy is proportionate to the legitimate objective sought.

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

Finally, the Committee notes in relation to the Information Rules at paragraph 1.27 that the rules do not appear to make decisions made by the Commissioner under Part 3 [The Commissioner's information disclosure powers] reviewable, nor does the Act make decisions under section 67E reviewable. This raises concerns about the sufficiency of the safeguards in place to protect the right to privacy.

Decisions made under Part 3 of the Rules are not reviewable. The rules attempt to strike a balance between, on the one hand, protecting the privacy of individuals and, on the other hand, enabling the Commission to be a responsive regulator and work effectively with other bodies to prevent harm to people with disability arising from unsafe or poor quality NDIS supports or services.

Thank you again for bringing your concerns to my attention.

Yours sincerely

DAN TEHAN



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MC18-006139

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28 AUG 2018

Dear Mr Goodenough

A handwritten signature in blue ink that reads 'Dan'.

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

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

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

The *National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018* (the Rules) do not authorise a registered NDIS provider to use a restrictive practice. The Rules seek to achieve a reduction and elimination of restrictive practices in the NDIS by promoting behaviour support strategies including positive behaviour support and imposing significant conditions around the use of restrictive practices. For example, a restrictive practice can only be used as a last resort in response to risk of harm to the person with disability or others, and after the provider has explored and applied evidence-based, person-centred and proactive strategies and be used for the shortest possible time to ensure the safety of the person with disability or others (section 21). The Rules state that an NDIS provider must not use a restrictive practice that has been prohibited by a State or Territory (section 8). In addition, the Rules require that a restrictive practice be authorised in accordance with any relevant State or Territory process in relation to the use of that practice (section 9).

The Rules, together with the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018* and *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*, engage a variety of regulatory mechanisms to develop a holistic system for the safeguarding of the human rights of people with disability.

The Rules create certain conditions on the registration of providers using regulated restrictive practices and impose a number of limitations when a restrictive practice is being used. For example, when a restrictive practice is being used it must:

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

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

The Rules require that a person with disability, and their family, carers, guardian or other relevant person, be consulted when a behaviour support plan is being developed. Details of any regulated restrictive practice to be included in a behaviour support plan must also be provided in an appropriately accessible format (section 20). As noted above, the Rules create certain conditions on the registration of providers using regulated restrictive practices and impose a number of limitations on the use of regulated restrictive practices with a view to reducing and eliminating restrictive practices in the NDIS.

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

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

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

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

Thank you again for bringing your concerns to my attention.

Yours sincerely

DAN TEHAN



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MC18-004624

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09 JUL 2018

Dear Mr Goodenough

Ian,

Thank you for your email of 20 June 2018 regarding your Committee's consideration of the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 (now Act) (the National Act) and National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018 (now Act). I appreciate the time you have taken to bring this matter to my attention. My response in relation to the human rights compatibility of the legislation is outlined below.

As you may be aware, the National Redress Scheme for people who have experienced institutional child sexual abuse (the Scheme) commenced operation on 1 July 2018. The National Act that established the Scheme passed the Australian Parliament and received Royal Assent on 21 June 2018. The passage of this legislation is significant as it enables jurisdictions and non-government institutions to opt into the Scheme, ensuring those who were sexually abused as children in institutions can apply for redress.

As acknowledged by the Committee, the statement of compatibility to the National Act and the Consequential Amendments Act draws extensively upon the Committee's earlier human rights analysis of the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017, and I thank the Committee for this analysis.

The Australian Government maintains the view that the National Act has the appropriate safeguards in place to be compatible with human rights while achieving the objective of establishing a best practice, supportive redress scheme for those who have experienced institutional child sexual abuse. Throughout its operation, the Scheme will continue to be monitored and reviewed to ensure these safeguards remain appropriate and compatible with human rights.

National Redress Scheme Rules

1.59 The committee requests the minister provide the committee with a copy of the proposed redress scheme rules. Alternatively, the committee requests a detailed overview of the proposed rules, having regard to the matters discussed above.

The National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 (the Rules) are now available on the Federal Register of Legislation.

Information sharing

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

1.70 In relation to the additional disclosure authorisations for employees or officers of government institutions in section 97, the committee seeks the advice of the minister as to the compatibility of this provision with the right to privacy, in particular:

- whether the measure pursues a legitimate objective;
- whether the measure is rationally connected to that objective;
- whether the measure is proportionate to the legitimate objective (including whether the provision is the least rights restrictive approach, and clarification as to the scope of the power to declare new permitted purposes by the rules); and
- whether section 97 could be amended to include a positive requirement that the operator must have regard to the impact the disclosure may have on a person to whom the information relates.

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

Section 97 of the National Act provides limitations on when a person may disclose protected information to a government institution, and when employees or officers of a government institution may disclose protected information. That provision provides that protected information may be disclosed if that disclosure is reasonably necessary for a permitted purpose. The National Act limits disclosure for the permitted purposes of the enforcement of a criminal law, for the safety or wellbeing of children, for investigatory, disciplinary or employment processes related to the safety or wellbeing of children, or for a purpose prescribed in the Rules.

These disclosure arrangements were included after significant consultation with the states and territories and key non-government institutions, who strongly advocated that such disclosure provisions were essential to enable them to comply with existing state or territory mandatory reporting laws or reportable conduct scheme requirements, and necessary to support states to opt in to the Scheme.

Using the Rules to prescribe other permitted purposes rather than incorporating all elements of the Scheme in the National Act provides appropriate flexibility and enables the Scheme to respond to matters as they arise in a timely manner through adapting and modifying the Rules. The Rules do not currently prescribe any additional permitted purposes and any adaptations or modifications to the Rules will be agreed by participating states and territories.

Entitlement to receive redress under the National Redress Scheme: special rules for persons with serious criminal convictions

1.85 The preceding analysis indicates that the special assessment procedure for applicants with serious criminal convictions raises concerns as to the compatibility of the measure with the right to equality and non-discrimination. This is because the measure may disproportionately negatively affect Aboriginal and Torres Strait Islander peoples and so may constitute indirect discrimination on the basis of race. It may also constitute discrimination on the basis of a person's criminal record.

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

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

1.90 The preceding analysis indicates that restrictions on the entitlement to redress for survivors with serious criminal convictions engage the right to an effective remedy. The statement of compatibility does not address the compatibility of the measure with this right.

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

The limitations on applications from people who have committed serious offences have been included in the National Act to ensure integrity of and public confidence in the Scheme, and to prevent further traumatising victims or survivors of serious or harmful crimes. These arrangements were developed in consultation with state and territory Redress Ministers, who agreed that reasonable limitations on such applications are necessary to have public confidence in the Scheme, and a necessary part of the framework for the states and territories to opt in to the Scheme. The participation of the states, territories and non-government institutions is integral to ensuring nationally consistent and equal access to effective remedy for those who have experienced institutional child sexual abuse.

Before being entitled to redress, those with serious criminal convictions will go through a special, case-by-case assessment under section 63 of the National Act. Determining eligibility by way of special assessment (including consideration of the nature of the crime committed, the duration of the sentence, rehabilitation outcomes of the person and broader public interest issue factors), provides assurance that only those who have committed very serious, heinous crimes will be prevented from being entitled to redress.

These arrangements do not contravene the right to effective remedy, as people with serious criminal convictions will still have the opportunity to apply for redress under the Scheme. The Scheme Operator will determine the person's application on a case-by-case basis and only prevent entitlement to redress where the person would bring disrepute to the Scheme or affect the public's confidence in the Scheme. This balances the need to allow everyone to apply to the Scheme, with the need to give integrity and public confidence to the Scheme by placing some limitations on applications from people who themselves have committed serious and harmful offences.

Access to redress under the National Redress Scheme for persons in gaol

1.98 The preceding analysis indicates that precluding incarcerated persons from applying for redress may engage the right to equality and non-discrimination. This is because the measure may disproportionately negatively affect Aboriginal and Torres Strait Islander peoples and so may constitute indirect discrimination on the basis of race. It may also constitute discrimination on the basis of a person's criminal record.

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

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

1.100 The preceding analysis also raises questions as to the compatibility of the measure with the right to an effective remedy. The committee therefore seeks the advice of the minister as to the compatibility of the measure with the right to an effective remedy.

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

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

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

Entitlement to receive redress under the National Redress Scheme: persons subject to a security notice

1.108 The preceding analysis indicates that the restrictions on entitlement to persons subject to security notices engage the right to an effective remedy.

1.109 The committee therefore seeks the advice of the minister as to the compatibility of the restriction with this right.

1.114 The preceding analysis raises questions as to whether removing a person's entitlement under the scheme while a security notice is in force engages and limits fair trial and fair hearing rights under Article 14 of the ICCPR.

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

The National Act includes provisions that restrict a person's access to redress where it may prejudice the security of Australia or a foreign country. A person's access to redress will only be impacted in circumstances where the receipt of redress is relevant to the assessed security risk posed by the individual and the receipt of redress would adversely impact the requirements of security. It is not intended that every person whose passport or visa has been refused or cancelled would not be entitled to access redress, rather only in cases where it is appropriate or justified on security grounds.

These provisions provide consistent powers for the Australian Government to deal with the threat of terrorism within Australia and that posed by Australians who participate in terrorist activities overseas. These are also standard arrangements that align with Australia's existing counter-terrorism legislative framework by mirroring provisions contained in the *Paid Parental Leave Act 2010* (sections 278A to 278L), *Social Security Act 1991* (sections 38L to 38W) and *A New Tax System (Family Assistance) Act 1999* (sections 57GH to 57GS).

While not entitled to apply for redress, a person subject to a security notice who has suffered sexual abuse may still be able to pursue a civil claim to seek remedy for the abuse suffered. Should that person no longer be subject to a security notice, that person will then be entitled to apply for redress under the Scheme, should they satisfy other entitlement requirements.

A person subject to a security notice seeking to apply for redress will not be able to seek internal review of their entitlement for redress, as they are not entitled by way of a security notice as determined and decided by the Minister for Home Affairs. However, as section 69 of the National Act outlines, the Minister for Home Affairs is required to review the application of a security notice every 12 months, and as outlined in section 70 of the National Act, may revoke a security notice.

The right to judicial review of the determination of a security notice is maintained, and is not limited by the National Act. Judicial review under section 75(v) of the Constitution is maintained and where such a suit is initiated, a person will be entitled to a fair and public hearing by an independent and impartial tribunal. A person subject to a security notice will also maintain existing judicial review rights in the Administrative Appeals Tribunal in relation to the issuing of an adverse security assessment or the decision to cancel a passport.

Entitlement to receive redress under the National Redress Scheme: child applicants

1.122 The preceding analysis indicates that the special process for child applicants, to be prescribed in the rules, raises concerns as to compatibility with the right to an effective remedy and the right to equality and non-discrimination.

1.123 The committee seeks further information as to the proposed process for child applicants, including:

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

Section 15 of the Rules deals with applications by a child. The process contained in this section is consistent with the right to an effective remedy and the right to equality and non-discrimination. The intention of this process is to allow the child, in the months prior to turning 18, to provide further detail about the abuse related to their application and the impact of the abuse, which may not have been realised at the time they submitted their application due to their young age. This process also allows the Scheme Operator to make a more fully informed determination regarding the child's eligibility for redress as soon as practicable after they turn 18.

As stated in the human rights statement of compatibility accompanying the National Act, prior to turning 18 child applicants will be given an indication of their likely redress entitlement. The purpose of this is to provide information to the child to pursue a range of different options, if they so choose. Some may wait until they turn 18 in order to access redress, whilst others (supported by their parent/s or guardian/s) may choose to pursue civil litigation. Once a determination to approve, or not approve, the application has been made, child applicants will be able to seek a review of the determination, consistent with all other determinations, as outlined in Chapter 4, Part 4-1 of the National Act.

Thank you again for raising this matter with me.

Yours sincerely

DAN TEHAN