Document 01

Contains deletions under FOI

Gregory Parkhurst

From: Media
Sent: Thursday, 23 November 2017 12:01 PM
To: Fiona Sawyers; Erica s 47F ; Phuong s
Cc: Media; Michael Manthorpe; Jaala Hinchcliffe
Subject: FW: Urgent media enquiry: AFP access of journalist metadata [SEC=UNCLASSIFIED]

Importance: High

Good afternoon

Please see below a media enquiry from Christopher Knaus from The Guardian.

Could you please prepare a response to his query. Please note Chris' deadline of **COB today**. For your background, the Communication Team was in a meeting this morning and we have just seen this email.

I will go back to the journalist to ask whether there is any flexibility in his deadline.

Thanks

Candice s 47F
Communication Manager
COMMONWEALTH OMBUDSMAN
Ph: s 47E
Web: **ombudsman.gov.au**
Influencing systemic improvement in public administration

From: Christopher Knaus [mailto:christopher.knaus@guardian.co.uk]
Sent: Thursday, 23 November 2017 10:24 AM
To: Media <Media@ombudsman.gov.au>
Subject: Ombudsman audit: AFP access of journalist metadata

Hi there,

Just hoping you can help me with something. I'm following up on an incident from April, which involved the unlawful accessing of a journalist's metadata by the AFP. At the time, the AFP said the ombudsman was auditing the breach to ensure the agency's safeguards were strong enough to prevent a repeat.

I'm just wondering the following:
- has such an audit been conducted? What is its status?
- if it has been finalised, what were the audit's findings?
- what concerns, if any, does the ombudsman hold about this incident?
- what has been the response of the AFP? Has it strengthened its systems/safeguards in a way sufficient to prevent a repeat?

I was hoping for a response by COB today, if possible.

Many thanks,

Christopher Knaus

Journalist
The Guardian | Australia

+61 2 8076 8536
+61 422 283 681
christopher.knaus@guardian.co.uk

theguardian.com/au

Document 02

Contains deletions under FOI

Gregory Parkhurst

s 22 [redacted]

From: Dermot Walsh s 47E [redacted]
Sent: Wednesday, 26 June 2019 1:48 PM
To: Jaala Hinchcliffe s 47E [redacted]
Cc: Media <Media@ombudsman.gov.au>
Subject: RE: Media query: private health insurers and PEC rejections [SEC=UNCLASSIFIED]

Hi Jaala

As discussed, draft response below for your consideration.

I am going to head back to Lean training, If you would like to discuss/clarify I will be monitoring email and you can reach me on the mobile.

Thanks

Dermot

Dear Mr Knaus

Thank you for your enquiry to the Office of the Commonwealth Ombudsman.

Please be aware that the Office investigates in private, therefore does not provide comment on individual complaints and investigations.

The Private Health Insurance Ombudsman was merged into the Commonwealth Ombudsman in 2015. In this role, our function is to protect the interests of private health consumers. This includes investigating complaints from consumers about pre-existing condition (PEC) decisions and ensuring the PEC rules have been correctly applied. The Office acts as an independent third party when dealing with complaints about PEC waiting periods. When the Office receives a complaint from a member about the application of PEC waiting periods, our process is to request a copy of the health insurer's medical report and a copy of the certificates completed by the member's treating doctor and specialist. This information is only requested once the member has provided written consent for the Office to seek this information from the insurer. The Office reviews the information provided by the insurer and then decides whether to provide an explanation to the consumer, investigate the matter further or negotiate a resolution with the insurer.

In making determinations about complaints about the PEC waiting period, the Office ensures the waiting period has been applied correctly and that the fund and hospital have complied with the Pre-Existing Condition Best Practice Guidelines. In circumstances where individual complaints highlight systemic issues with the application of the private health insurance regulatory framework, the Ombudsman may initiate an own investigation or refer the matter to the regulator, XX.

For more about the Ombudsman's role in PEC cases, please see:
http://www.ombudsman.gov.au/publications/brochures-and-fact-sheets/factsheets/all-fact-sheets/phio/the-pre-existing-conditions-rule

Regards

Media Team

---

s 22

[redacted]

From: Christopher Knaus <christopher.knaus@theguardian.com>
Sent: Tuesday, 25 June 2019 2:57 PM
To: Media <Media@ombudsman.gov.au>
Subject: Media query: private health insurers and PEC rejections

Hi team,

Apologies in advance for the lengthy email, it's a rather complex inquiry.

I have a series of questions about the Commonwealth Ombudsman's dealings with three private health insurers. The dealings date back to 2014, and involve Bupa, NIB, and HCF, and relate to their rejection of claims due to pre-existing conditions (PEC). The Private Health Insurance Act requires insurers to obtain

the "opinion of a medical adviser appointed by the health insurer" on whether symptoms existed within six months of taking out the policy, before they reject a claim on PEC grounds.

In 2016, Bupa publicly acknowledged it had repeatedly failed to obtain these medical opinions for 7740 claimants between 2011 and 2016.

I have evidence showing the following:

- the Ombudsman had evidence to suggest Bupa was illegally rejecting claims by failing to appoint a medical practitioner as early as 2014. It did not act until 2016, when Bupa notified it that there were 7740 claimants affected.
- In 2016, the Cwth Ombudsman believed Bupa had falsified documents that hid the nature and scale of the breach from the Ombudsman. The insurer had claimed the error was just an "oversight" in its processes.
- in 2016, the Cwth Ombudsman had cause to question HCF about whether it had obtained medical reviews in PEC cases. HCF said that it had, but failed to provide any evidence to back up its claims. No further action was taken.
- in 2018, the Cwth Ombudsman again had cause to question HCF and request evidence of medical reviews in a PEC case. No such evidence was provided. Instead, the Ombudsman employee investigating the matter was sidelined and directed not to consider any more PEC cases. This lasted four months, until the employee was restored to normal duties.
- in 2018, the Cwth Ombudsman had cause to investigate NIB for its failure to appoint a medical practitioner to review PEC case. NIB admitted to the Ombudsman that it had not been appointing medical practitioners in some PEC cases over a period of seven years.
- the NIB case has not been made public in any way. NIB has been allowed to deal with it internally. The matter was also referred to the department of health, but it has made no public statement about the case. This has left those with NIB health insurance - including affected claimants - in the dark.

My questions are:
- why did the Cwth Ombudsman not act on the Bupa case in 2014, when it was first identified?
- what action did the Cwth Ombudsman take over Bupa's alleged falsification of records. What records were falsified? in what way were they falsified?
- why did the Ombudsman not demand that HCF produce evidence that it had appointed medical practitioners?
- why did it sideline an investigator who was considering the HCF matter?
- why has the Ombudsman made no public statement about the NIB case? why has the public not been informed that a major insurer has illegally rejected claims over a period of seven years?

I was hoping for a response by 4pm tomorrow.

Many thanks,

Christopher Knaus
Reporter
The Guardian | Australia

+61 (0) 422 283 681
christopher.knaus@guardian.co.uk
---
twitter: @knausc

The Guardian
Level 3, 19 Foster St
Surry Hills NSW 2010
theguardian.com/au

Document 03

Contains deletions under FOI

Gregory Parkhurst

s 22 [redacted]

From: Dermot Walsh s 47E [redacted]
Sent: Monday, 1 July 2019 11:49 AM
To: Jaala Hinchcliffe s 47E [redacted] ; Rodney Walsh s 47E [redacted]
Cc: Media <Media@ombudsman.gov.au>
Subject: FW: Media query: private health insurers and PEC rejections [SEC=UNCLASSIFIED]
Importance: High

Jaala/Rodney

Updated draft media response below as discussed this morning.

I am currently trawling through public documents on the new PHIO powers – it does not appear there were any specific comments about an insurer(s) withholding complaint information from PHIO.

Our Bupa press release is here: https://www.ombudsman.gov.au/media-releases/media-release-documents/commonwealth-ombudsman/2016/12-sep-2016

Thanks

Dermot

Dear Mr Knaus

Thank you for your enquiry to the Office of the Commonwealth Ombudsman concerning pre-existing condition (PEC) cases in relation to three private health insurers. While the Office investigates in private and therefore does not provide comment on individual complaints and investigations, we have considered the matters that you have referred to in your email and are satisfied that we dealt with the matters that were referred to us in accordance with our processes for PEC cases, which we have set out for you below. We note that two of the matters were appropriately referred to the regulator. The third matter was not referred to the regulator because we did not consider that it was necessary to do so.

Background to PHIO role

The Private Health Insurance Ombudsman (PHIO) was merged into the Commonwealth Ombudsman in 2015. In this role, our function is to protect the interests of private health consumers. This includes investigating complaints from consumers about pre-existing condition (PEC) decisions and ensuring the PEC rules have been correctly applied by the insurer. The Office acts as an independent third party when dealing with complaints about PEC waiting periods.

PHIO process for PEC complaints

When the Office receives a complaint from a member about the application of PEC waiting periods, our process is to request copies of relevant documentation including:

- Medical certificate from the member's GP.
- Medical certificate from the member's specialist.
- The assessment and decision from the insurer's medical advisor.
- The outcome letter/email from the insurer to the member.
- Any further information that the medical advisor has used to reach their decision – e.g. hospital admission notes, specialist referral letters, medical records.
- In some cases, some of this information may not be available – e.g. in emergency cases there may be no GP or specialist notes and the insurer may rely on hospital admission notes instead.

The Office's PHIO case officer will assess the information provided by the insurer and will either:

- Finalise the complaint assessment and advise the complainant and insurer of the outcome.
- Seek guidance on the complaint through discussion at a PHIO case meeting.
- Escalate the complaint and seek guidance from PHIO management on how best to progress the complaint, including whether the insurer has made the decision in accordance with the Act.

Steps taken by the Office to finalise PEC complaints:

- If our assessment concludes that the PEC rules were correctly applied by the insurer, the case officer will write to the complainant and the insurer notifying of our decision and advising that the complaint will be finalised.
- If our assessment suggests the PEC rules were not correctly applied or the case is complex/ambiguous, the Office will seek the complainant's permission to send the case to an Independent Medical Advisor (IMA) for review:
    - If IMA agrees that the insurer has correctly applied the PEC rules, the case will finalised.
    - If IMA does not agree that the insurer has correctly applied the PEC rules, our case officer will write back to the insurer requesting their medical practitioner reconsider the case.

In making determinations about complaints about the PEC waiting period, the Office ensures the waiting period has been applied correctly and that the fund and hospital have complied with the Pre-Existing Condition Best Practice Guidelines. In circumstances where individual complaints highlight systemic issues with the application of the private health insurance regulatory framework, the Office may provide feedback to the insurer in our complaint

finalisation correspondence, or the Ombudsman may initiate an own investigation or refer the matter to the regulator, for PEC matters this would be the Department of Health.

For more about the Ombudsman's role in PEC cases, please see:
http://www.ombudsman.gov.au/publications/brochures-and-fact-sheets/factsheets/all-fact-sheets/phio/the-pre-existing-conditions-rule

We would be happy to meet with you to discuss our role in PEC cases if that would be of assistance.

Regards

Media Team

---

s 22

From: Christopher Knaus <christopher.knaus@theguardian.com>
Sent: Tuesday, 25 June 2019 2:57 PM
To: Media <Media@ombudsman.gov.au>
Subject: Media query: private health insurers and PEC rejections

Hi team,

Apologies in advance for the lengthy email, it's a rather complex inquiry.

I have a series of questions about the Commonwealth Ombudsman's dealings with three private health insurers. The dealings date back to 2014, and involve Bupa, NIB, and HCF, and relate to their rejection of claims due to pre-existing conditions (PEC). The Private Health Insurance Act requires insurers to obtain the "opinion of a medical adviser appointed by the health insurer" on whether symptoms existed within six months of taking out the policy, before they reject a claim on PEC grounds.

In 2016, Bupa publicly acknowledged it had repeatedly failed to obtain these medical opinions for 7740 claimants between 2011 and 2016.

I have evidence showing the following:

- the Ombudsman had evidence to suggest Bupa was illegally rejecting claims by failing to appoint a medical practitioner as early as 2014. It did not act until 2016, when Bupa notified it that there were 7740 claimants affected.
- In 2016, the Cwth Ombudsman believed Bupa had falsified documents that hid the nature and scale of the breach from the Ombudsman. The insurer had claimed the error was just an "oversight" in its processes.

- in 2016, the Cwth Ombudsman had cause to question HCF about whether it had obtained medical reviews in PEC cases. HCF said that it had, but failed to provide any evidence to back up its claims. No further action was taken.
- in 2018, the Cwth Ombudsman again had cause to question HCF and request evidence of medical reviews in a PEC case. No such evidence was provided. Instead, the Ombudsman employee investigating the matter was sidelined and directed not to consider any more PEC cases. This lasted four months, until the employee was restored to normal duties.
- in 2018, the Cwth Ombudsman had cause to investigate NIB for its failure to appoint a medical practitioner to review PEC case. NIB admitted to the Ombudsman that it had not been appointing medical practitioners in some PEC cases over a period of seven years.
- the NIB case has not been made public in any way. NIB has been allowed to deal with it internally. The matter was also referred to the department of health, but it has made no public statement about the case. This has left those with NIB health insurance - including affected claimants - in the dark.

My questions are:
- why did the Cwth Ombudsman not act on the Bupa case in 2014, when it was first identified?
- what action did the Cwth Ombudsman take over Bupa's alleged falsification of records. What records were falsified? in what way were they falsified?
- why did the Ombudsman not demand that HCF produce evidence that it had appointed medical practitioners?
- why did it sideline an investigator who was considering the HCF matter?
- why has the Ombudsman made no public statement about the NIB case? why has the public not been informed that a major insurer has illegally rejected claims over a period of seven years?

I was hoping for a response by 4pm tomorrow.

Many thanks,

Christopher Knaus
Reporter
The Guardian | Australia

+61 (0) 422 283 681
christopher.knaus@guardian.co.uk
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twitter: @knausc

The Guardian

Level 3, 19 Foster St
Surry Hills NSW 2010
theguardian.com/au

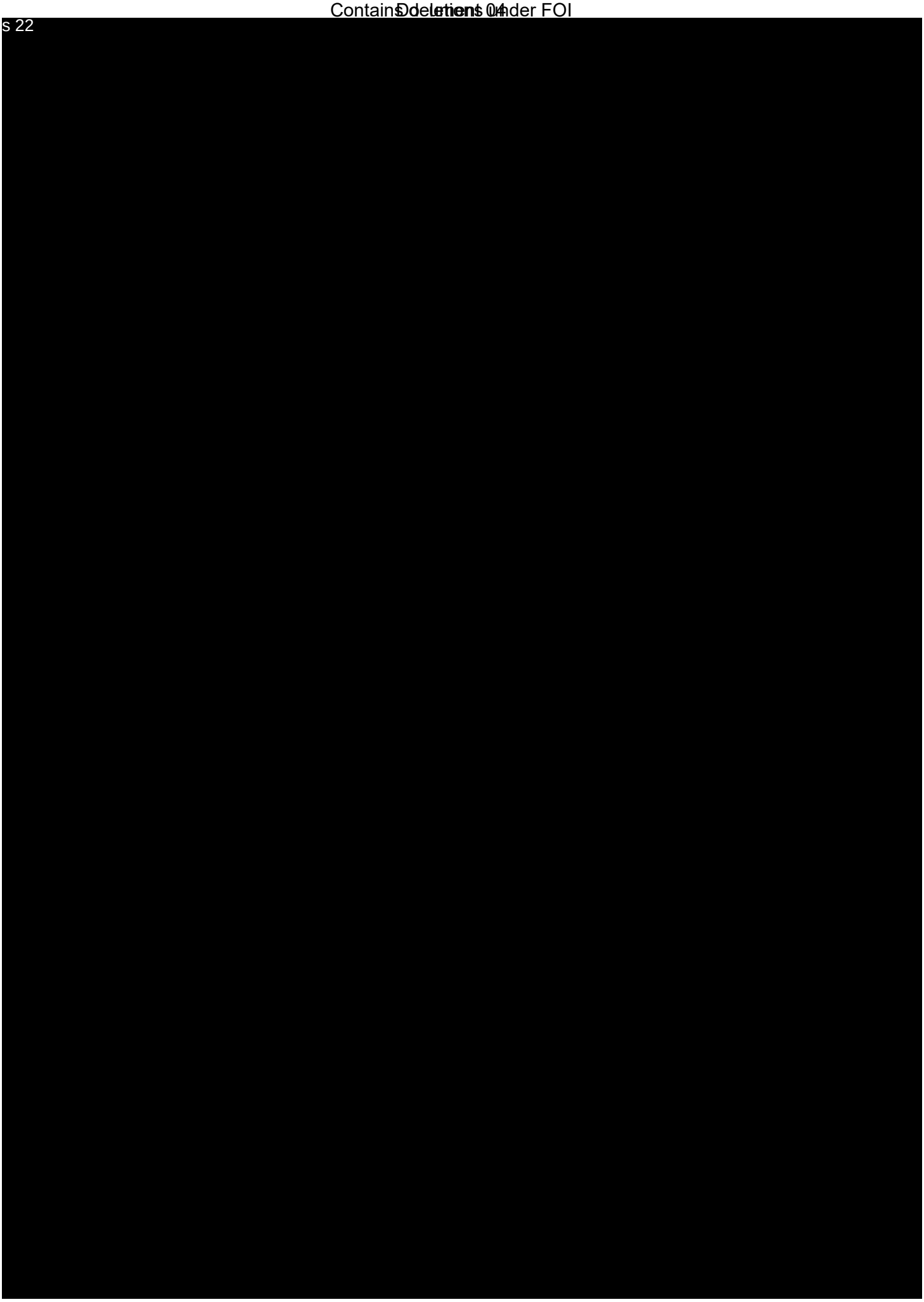
Document 04

Contains deletions under FOI

Gregory Parkhurst

s 22

[redacted]



s 22 [redacted]

From: Rodney Walsh s 47E [redacted]
Sent: Friday, 5 July 2019 11:14 AM
To: Jaala Hinchcliffe s 47E [redacted] Tim s 47F [redacted]
s 47E [redacted]
Cc: Media <Media@ombudsman.gov.au>
Subject: RE: Media query: private health insurers and PEC rejections [SEC=UNCLASSIFIED]

No, no – I'm the same, especially in the context that Mr Knaus has noted his familiarity with the Act.

Does anyone mind if I quickly speak with David?

s 22 [redacted]

s 22 [redacted]

s 22 [redacted]

From: Rodney Walsh s 47E [redacted]
Sent: Friday, 5 July 2019 9:19 AM
To: Tim s 47F [redacted] s 47E [redacted]
Cc: Media <Media@ombudsman.gov.au>; Jaala Hinchcliffe s 47E [redacted]
Subject: FW: Media query: private health insurers and PEC rejections [SEC=UNCLASSIFIED]

Hi Tim - for advice please, as discussed.

I have also confirmed with media team that I will respond to Mr Knaus along the lines "I am seeking some information from the relevant area and will respond as soon as possible".

If it assists you, Alison Leung undertook the research for the primary questions obo PHIO in this matter.

R

From: Christopher Knaus <christopher.knaus@theguardian.com>
Sent: Thursday, 4 July 2019 3:09 PM
To: Rodney Walsh s 47E
Cc: Media <Media@ombudsman.gov.au>
Subject: Re: Media query: private health insurers and PEC rejections [SEC=UNCLASSIFIED]

Thanks again for this Rodney. We will include the response and details of the Commonwealth Ombudsman's role in the piece.

The only other thing I wanted to check on background, not for quoting. In a general sense, does the ombudsman consider rejecting a claim PEC grounds without a doctor's advice to be illegal/unlawful? It seems clear to me from the private health insurance act that it is, but I'm really just wanting to be careful with the language.

Christopher Knaus
Reporter
The Guardian | Australia

+61 (0) 422 283 681
christopher.knaus@guardian.co.uk
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twitter: @knausc

The Guardian

Level 3, 19 Foster St
Surry Hills NSW 2010
theguardian.com/au

On Mon, 1 Jul 2019 at 15:10, Rodney Walsh s 47E wrote:

> Dear Mr Knaus
>
> Thank you for your enquiry to the Office of the Commonwealth Ombudsman concerning pre-existing condition (PEC) cases in relation to three private health insurers. While the Office investigates in private and therefore does not provide comment on individual complaints and investigations, we have considered the matters that you have referred to in your email and are satisfied that we dealt with the matters that were referred to us in accordance with our processes for PEC cases, which we have set out for you below. Given the information that was before us at the relevant times, we are satisfied that we took appropriate actions. We note that two of the insurers subject to your inquiries were appropriately referred to the regulator. The third insurer was not referred to the regulator because we did not consider that it was necessary to do so.

Background to PHIO role

The Private Health Insurance Ombudsman (PHIO) was merged into the Commonwealth Ombudsman in 2015. In this role, our function is to protect the interests of private health consumers. This includes investigating complaints from consumers about pre-existing condition (PEC) decisions and ensuring the PEC rules have been correctly applied by the insurer. The Office acts as an independent third party when dealing with complaints about PEC waiting periods.

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- Any further information that the medical advisor has used to reach their decision – e.g. hospital admission notes, specialist referral letters, medical records.
- In some cases, some of this information may not be available – e.g. in emergency cases there may be no GP or specialist notes and the insurer may rely on hospital admission notes instead.

The Office's PHIO case officer will assess the information provided by the insurer and will either:

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- Seek guidance on the complaint through discussion at a PHIO case meeting.
- Escalate the complaint and seek guidance from PHIO management on how best to progress the complaint, including whether the insurer has made the decision in accordance with the Act.

Steps taken by the Office to finalise PEC complaints:

- If our assessment concludes that the PEC rules were correctly applied by the insurer, the case officer will write to the complainant and the insurer notifying of our decision and advising that the complaint will be finalised.
- If our assessment suggests the PEC rules were not correctly applied or the case is complex/ambiguous, the Office will seek the complainant's permission to send the case to an Independent Medical Advisor (IMA) for review:

- If the IMA agrees that the insurer has correctly applied the PEC rules, the case will finalised.

- If the IMA does not agree that the insurer has correctly applied the PEC rules, our case officer will write back to the insurer requesting their medical practitioner reconsider the case.

In making determinations about complaints about the PEC waiting period, the Office ensures the waiting period has been applied correctly and that the fund and hospital have complied with the Pre-Existing Condition Best Practice Guidelines. In circumstances where individual complaints highlight systemic issues with the application of the private health insurance regulatory framework, the Office may provide feedback to the insurer in our complaint finalisation correspondence, or the Ombudsman may initiate an own investigation or refer the matter to the regulator, for PEC matters this would be the Department of Health.

For more about the Ombudsman's role in PEC cases, please see:

http://www.ombudsman.gov.au/publications/brochures-and-fact-sheets/factsheets/all-fact-sheets/phio/the-pre-existing-conditions-rule

We would be happy to meet with you to discuss our role in PEC cases if that would be of assistance.

Regards

Rodney Lee Walsh | Chief Operating Officer

Media Team

From: Christopher Knaus <christopher.knaus@theguardian.com>
Sent: Tuesday, 25 June 2019 2:57 PM
To: Media <Media@ombudsman.gov.au>
Subject: Media query: private health insurers and PEC rejections

Hi team,

Apologies in advance for the lengthy email, it's a rather complex inquiry.

I have a series of questions about the Commonwealth Ombudsman's dealings with three private health insurers. The dealings date back to 2014, and involve Bupa, NIB, and HCF, and relate to their rejection of claims due to pre-existing conditions (PEC). The Private Health Insurance Act requires insurers to obtain the "opinion of a medical adviser appointed by the health insurer" on whether symptoms existed within six months of taking out the policy, before they reject a claim on PEC grounds.

In 2016, Bupa publicly acknowledged it had repeatedly failed to obtain these medical opinions for 7740 claimants between 2011 and 2016.

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- In 2016, the Cwth Ombudsman believed Bupa had falsified documents that hid the nature and scale of the breach from the Ombudsman. The insurer had claimed the error was just an "oversight" in its processes.

- in 2016, the Cwth Ombudsman had cause to question HCF about whether it had obtained medical reviews in PEC cases. HCF said that it had, but failed to provide any evidence to back up its claims. No further action was taken.

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- in 2018, the Cwth Ombudsman had cause to investigate NIB for its failure to appoint a medical practitioner to review PEC case. NIB admitted to the Ombudsman that it had not been appointing medical practitioners in some PEC cases over a period of seven years.

- the NIB case has not been made public in any way. NIB has been allowed to deal with it internally. The matter was also referred to the department of health, but it has made no public statement about the case. This has left those with NIB health insurance - including affected claimants - in the dark.

My questions are:

- why did the Cwth Ombudsman not act on the Bupa case in 2014, when it was first identified?

- what action did the Cwth Ombudsman take over Bupa's alleged falsification of records. What records were falsified? in what way were they falsified?

- why did the Ombudsman not demand that HCF produce evidence that it had appointed medical practitioners?

- why did it sideline an investigator who was considering the HCF matter?

- why has the Ombudsman made no public statement about the NIB case? why has the public not been informed that a major insurer has illegally rejected claims over a period of seven years?

I was hoping for a response by 4pm tomorrow.

Many thanks,

Christopher Knaus

Reporter

The Guardian | Australia

+61 (0) 422 283 681

christopher.knaus@guardian.co.uk

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twitter: @knausc

The Guardian

Level 3, 19 Foster St

Surry Hills NSW 2010

theguardian.com/au

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any computer viruses or other material transmitted with or as part of this e-mail. You should employ virus checking software.

The Office of the Commonwealth Ombudsman acknowledges the traditional owners of country throughout Australia and their continuing connection to land, culture and community. We pay our respects to elders past and present.

Document 05
Contains deletions under FOI

Gregory Parkhurst

s 22 [redacted]

From: Media <Media@ombudsman.gov.au>
Sent: Tuesday, 9 July 2019 10:26 AM
To: Michael Manthorpe s 47E [redacted] Rodney Walsh s 47E [redacted] Dermot Walsh s 47E [redacted]; Tim s 47E [redacted] s 47E [redacted]
Cc: Jaala Hinchcliffe s 47E [redacted]; David s 47F [redacted] s 47E [redacted]; Media <Media@ombudsman.gov.au>
Subject: RE: ABC RN Drive Interview Request [SEC=UNCLASSIFIED]

Hi all,

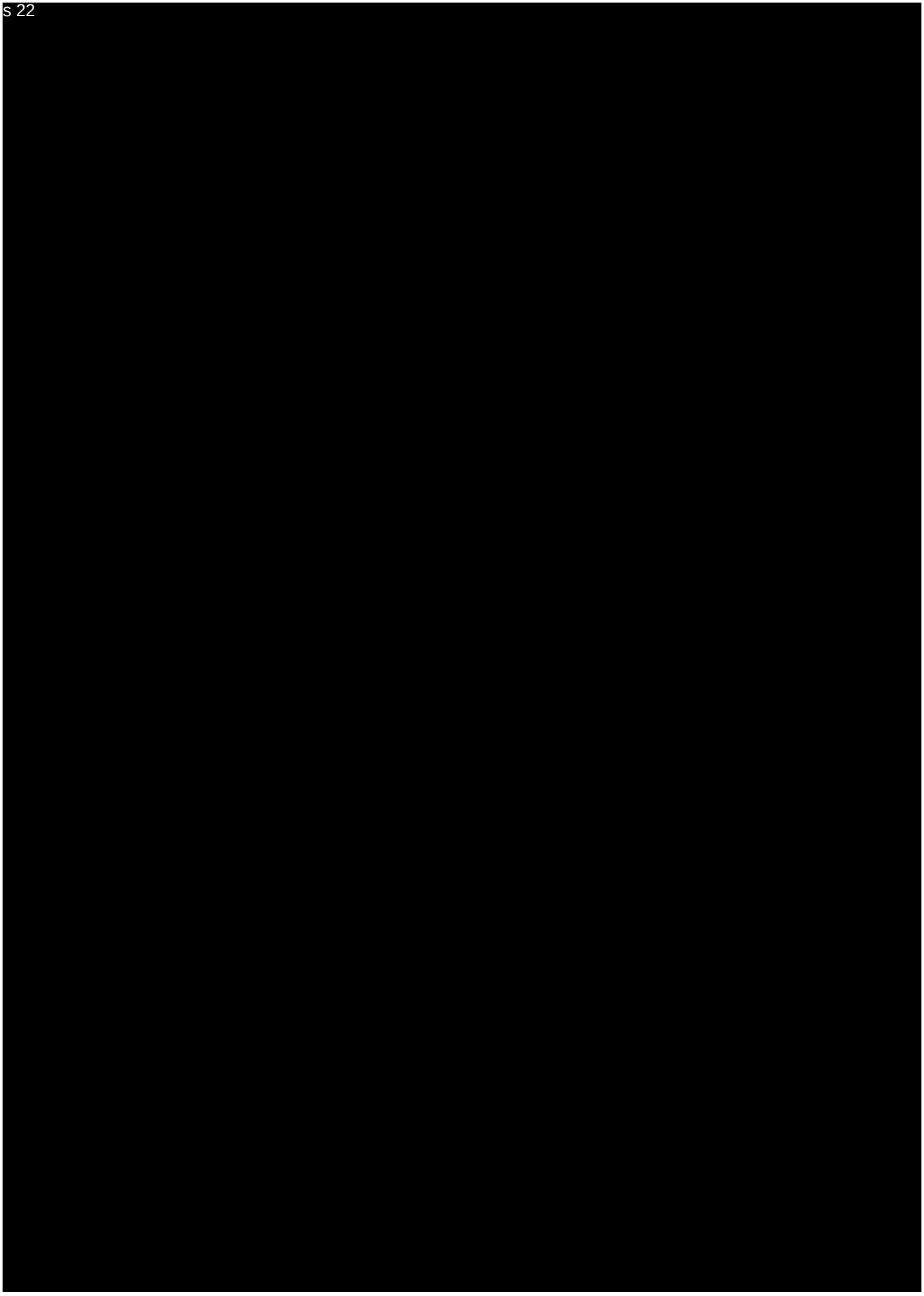
Another article has come out form Christopher Knaus which references our Office and the 'whistleblower' who worked at our Office:
https://www.theguardian.com/australia-news/2019/jul/09/government-urged-to-investigate-allegations-health-insurers-unlawfully-rejected-claims?utm_term=Autofeed&CMP=soc_568&utm_medium=Social&utm_source=Twitter#Echobox=1562609652

Thank you

Kim

s 22 [redacted]

s 22



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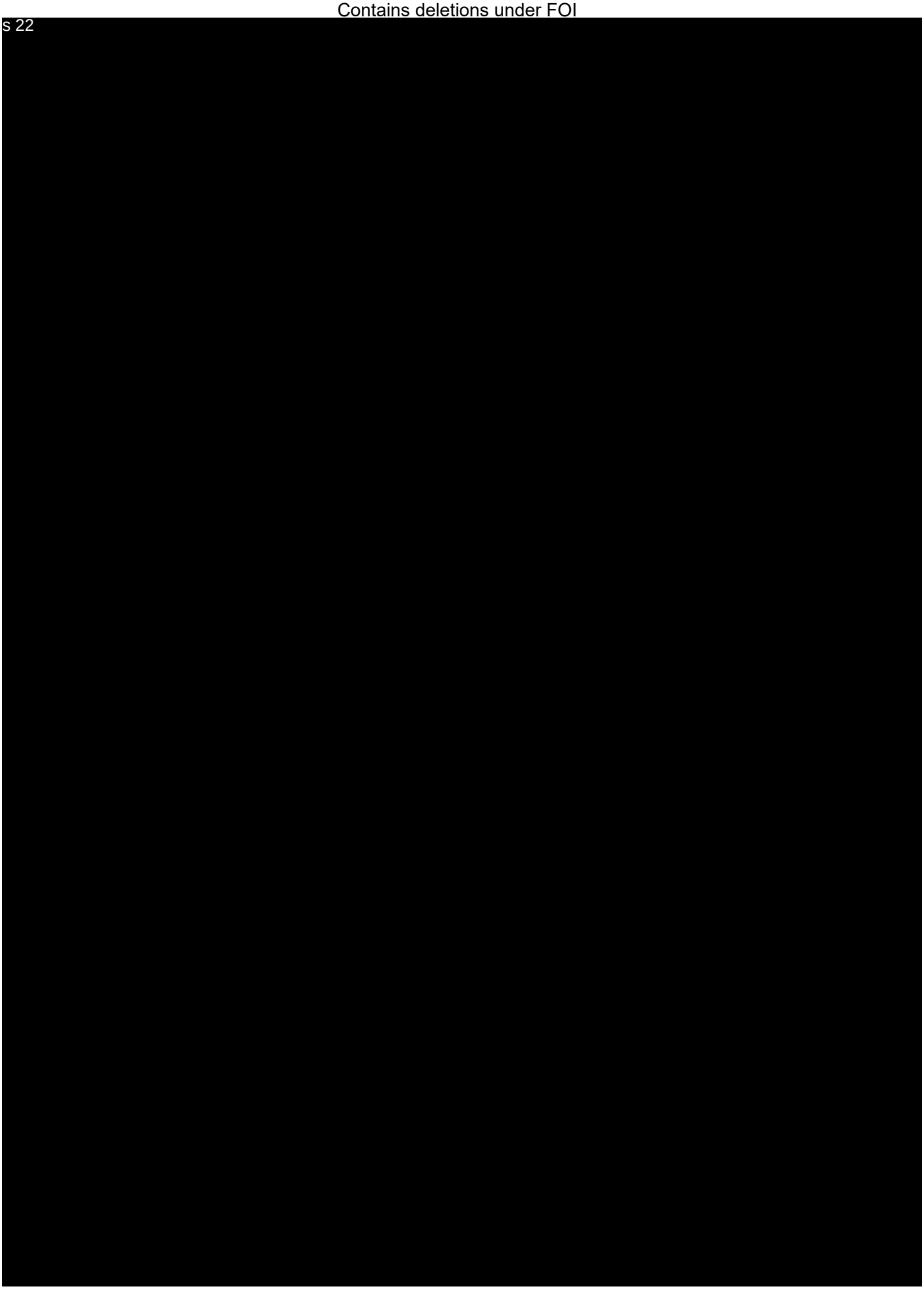

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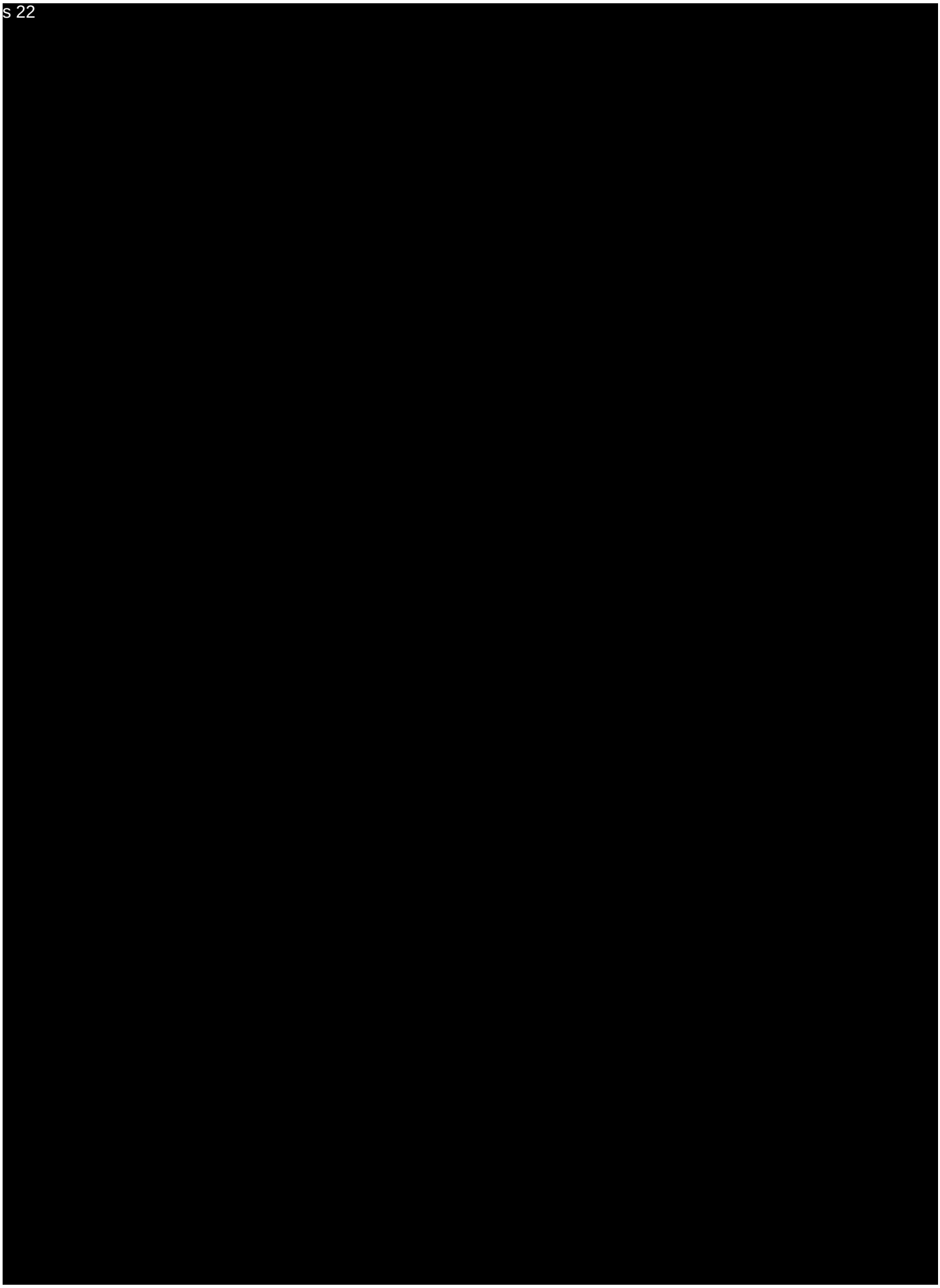
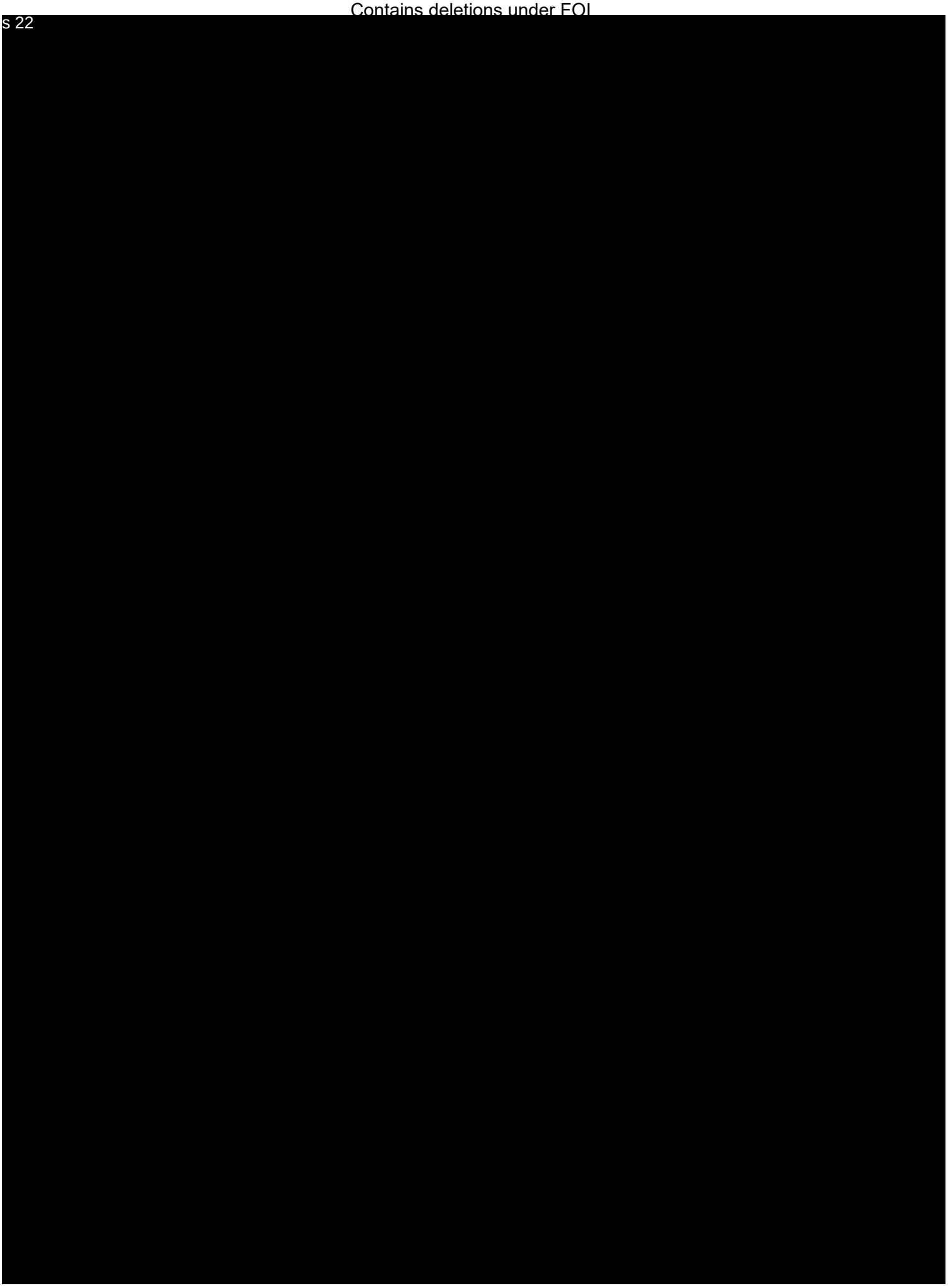


s 22



s 22

Document 06
Contains deletions under FOI

Gregory Parkhurst

From: Media
Sent: Friday, 29 November 2019 1:06 PM
To: Carmen s 47F ; Michael Manthorpe
Cc: Rodney Walsh; Lisa s 47F ; Media; Jaala Hinchcliffe
Subject: FW: Query public interest disclosure [SEC=UNCLASSIFIED]

Categories: Purple Category

Hi all

Please see below media enquiry we have received from Christopher Knaus at the Guardian.

As discussed with Carmen, below is the proposed response for review/approval:

Hi Christopher,

Thank you for your enquiry to the Office of the Commonwealth Ombudsman.

Please see below response to your enquiry:

We are unable to confirm or deny that such a disclosure was received. It is an offence under the PID Act to disclose information which may identify a discloser or which was obtained in the course of performing a function or an investigation under the PID Act (ss 20 and 65).

However, we do note that the conduct of members of parliament is not covered by the PID Act (because they are not public officials as defined in s 69).

Kind regards,

Media team

Kind regards

Kim

From: Christopher Knaus <christopher.knaus@theguardian.com>
Sent: Friday, 29 November 2019 12:08 PM
To: Media <Media@ombudsman.gov.au>
Subject: Query re: public interest disclosure

Hi there,

I'm just inquiring about s 47E nd subsequent statements made about the matter by Peter Dutton, home affairs minister.

My questions are fairly simple on this.
- can the Ombudsman confirm it received a PID on this matter on this date?
- what action is it taking to investigate, if any?

I was hoping for a response by 4pm.

Many thanks,

Christopher Knaus
Reporter
The Guardian | Australia

+61 (0) 422 283 681
christopher.knaus@guardian.co.uk
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twitter: @knausc

The Guardian

Level 3, 19 Foster St
Surry Hills NSW 2010
theguardian.com/au

Document 07

Contains deletions under FOI

Gregory Parkhurst

s 22 [redacted]

From: Christopher Knaus <christopher.knaus@theguardian.com>
Sent: Monday, 17 August 2020 12:27 PM
To: Media <Media@ombudsman.gov.au>
Subject: Media query: home affairs department's identification of whistleblower

Hi there,

I have a query for the ombudsman about the handling of a whistleblower complaint by the department of home affairs.

In June, the department's PID team mistakenly revealed the identity of a whistleblower, a potential criminal offence punishable by six months imprisonment.

The mistake occurred when the department sent correspondence and documents intended for the whistleblower to a second, unrelated person who had made a different PID complaint. In doing so, the department revealed the whistleblower's name and details of the investigation into his/her complaint.

To be clear - the Guardian has no knowledge of the substance of the whistleblower's complaint and has no intention whatsoever to publish his/her identity or any identifying details.

The facts as I understand them are as follows:
- the whistleblower's identity was revealed in an email from the department's public interest disclosure team to a separate whistleblower on Friday, June 12, 2020. That email revealed the name of the first whistleblower and attached a report about his/her complaint.
- disclosing the identity of a whistleblower without consent is a criminal offence, punishable by six months behind bars, as per section 20 of the PID Act 2013
- the person who received the correspondence by mistake complained to the Cwth Ombudsman about the blunder, saying it was a criminal offence

- the Ombudsman refused to investigate and instead passed it back to home affairs, despite concerns of a conflict of interest
- that has resulted in a situation where home affairs is now investigating allegations about its own staff that could amount to criminal conduct.

My questions for the ombudsman are:
- why did it refuse to investigate this matter?
- does it acknowledge there is an unavoidable conflict in having the department of home affairs investigate itself over actions that may amount to criminal conduct?

I am hoping for a response by COB today.

Many thanks,

Christopher Knaus
Reporter
The Guardian | Australia

+61 (0) 422 283 681
christopher.knaus@guardian.co.uk
---
twitter: @knausc

The Guardian

Level 3, 19 Foster St
Surry Hills NSW 2010
theguardian.com/au

Document 08

Contains deletions under FOI

Gregory Parkhurst

From: Claire s 47F
Sent: Monday, 17 August 2020 2:49 PM
To: Michael Manthorpe; Media; Lisa s 47F
Cc: Penny McKay; Julia Taylor
Subject: RE: Media query: home affairs department's identification of whistleblower [SEC=OFFICIAL]

Categories: Purple Category

OFFICIAL

Hi Michael

I suggest the following words to use in response to Mr Knaus:

We are unable to comment noting the public interest disclosures are subject of the secrecy provisions of the PID Act.

If needed, we could also say:

The PID Act encourages the handling of disclosures by the agencies concerned and this office would generally allocate disclosures to the agency concerned unless we assessed the agency cannot handle the matter.

s 47E [redacted]

If you would like more details please let me know.

Regards

Claire

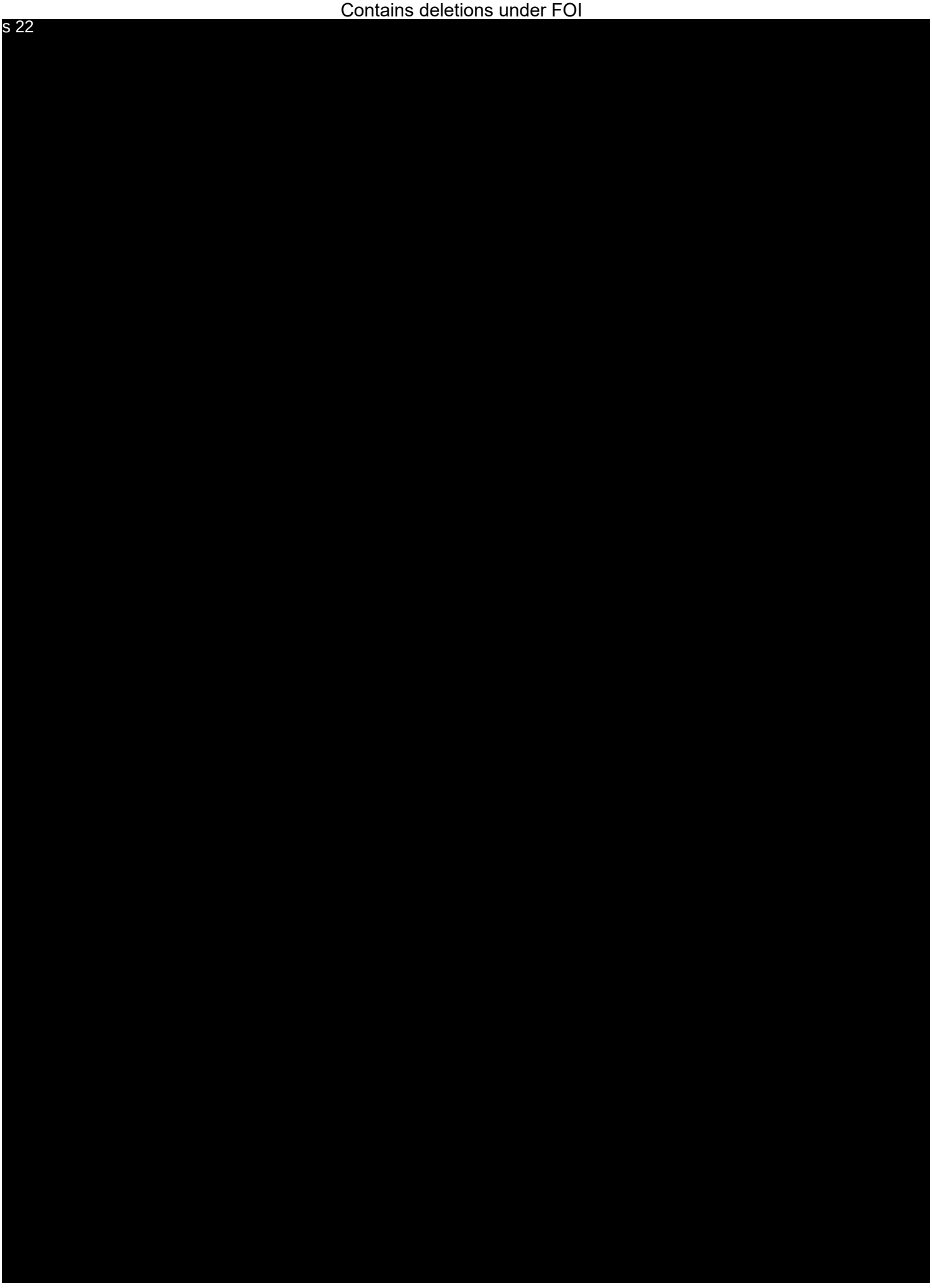
Claire s 47F
Director
Complaints Management and Education Branch
COMMONWEALTH OMBUDSMAN
Phone: s 47E
Email: s 47E
Website: ombudsman.gov.au

[redacted]

Influencing systemic improvement in public administration

s 22 [redacted]

s 22



From: Christopher Knaus <christopher.knaus@theguardian.com>
Sent: Monday, 17 August 2020 12:27 PM
To: Media <Media@ombudsman.gov.au>
Subject: Media query: home affairs department's identification of whistleblower

Hi there,

I have a query for the ombudsman about the handling of a whistleblower complaint by the department of home affairs.

In June, the department's PID team mistakenly revealed the identity of a whistleblower, a potential criminal offence punishable by six months imprisonment.

The mistake occurred when the department sent correspondence and documents intended for the whistleblower to a second, unrelated person who had made a different PID complaint. In doing so, the department revealed the whistleblower's name and details of the investigation into his/her complaint.

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- disclosing the identity of a whistleblower without consent is a criminal offence, punishable by six months behind bars, as per section 20 of the PID Act 2013
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- the Ombudsman refused to investigate and instead passed it back to home affairs, despite concerns of a conflict of interest
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I am hoping for a response by COB today.

Many thanks,

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+61 (0) 422 283 681
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twitter: @knausc

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Surry Hills NSW 2010
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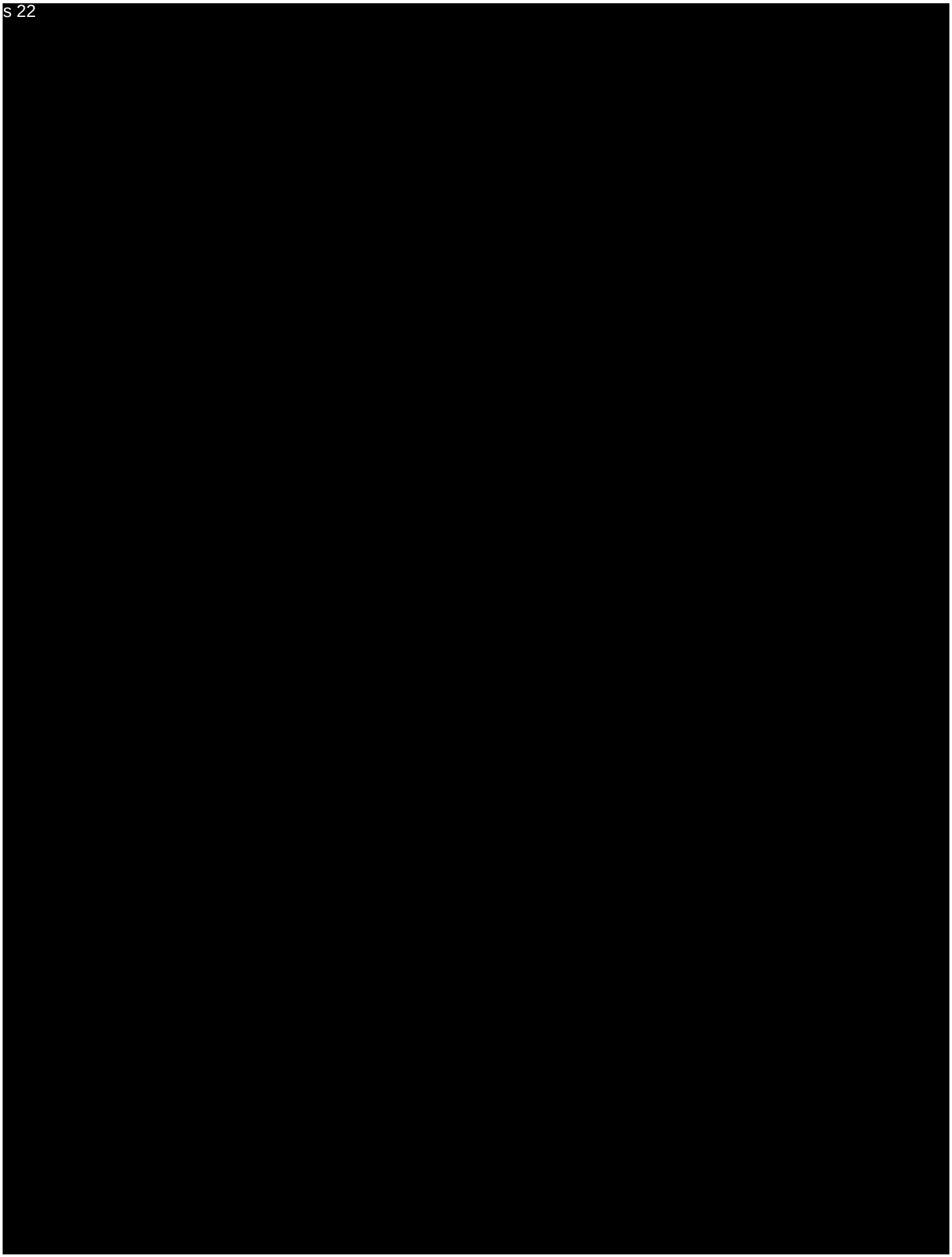
Document 09
Contains deletions under FOI

Gregory Parkhurst

s 22



Document 09

s 22 [redacted]

From: Lisa s 47F s 47E [redacted]
Sent: Wednesday, 11 November 2020 4:07 PM
To: Michael Manthorpe s 47E [redacted] ; Penny McKay s 47E [redacted] ; Julia Taylor s 47E [redacted]
Cc: Kurt s 47F s 47E [redacted] ; Caitlin s 47F s 47E [redacted]
Subject: FYI: Media Releases Isentia
Importance: High

MM/PM

When Isentia publish our media releases we identify media types we would like to receive the release. As per our media release SOP we select:

- All Australian news desks (large, medium and small outlets – this include anywhere from Prime 7 newsroom through to the Ballarat Courier)
- Federal Press Gallery
- State Parliamentary Press Gallery.

These media types will receive the media release as an email with a link to the media release and report (statement) published on our website. This email would go to generic newsroom inboxes – monitored by junior staff.

We will also be able to provide copies of the statement to targeted senior journalists by obtaining their contact details through their newsrooms.

For a more targeted approach, provided below are the details of journalists who have either reached out to our Office on this issue, or who have published material on this topic.

Journalist	Media
Media Enquiry to the Office (attached)	
s 47F [redacted]	Crikey
s 47F [redacted]	The Guardian
Previously reported on the matter	
s 47F [redacted]	ABC
s 47F [redacted]	Crikey
s 47F [redacted]	The Guardian
Christopher Knaus	The Guardian

s 47F	The Financial Review
s 47F	The Sydney Morning Herald

A number of journalist also follow the Office on Twitter – we would recommend a tweet on the statement to cover off this group.

Let me know your preferences.

Regards,
Lisa

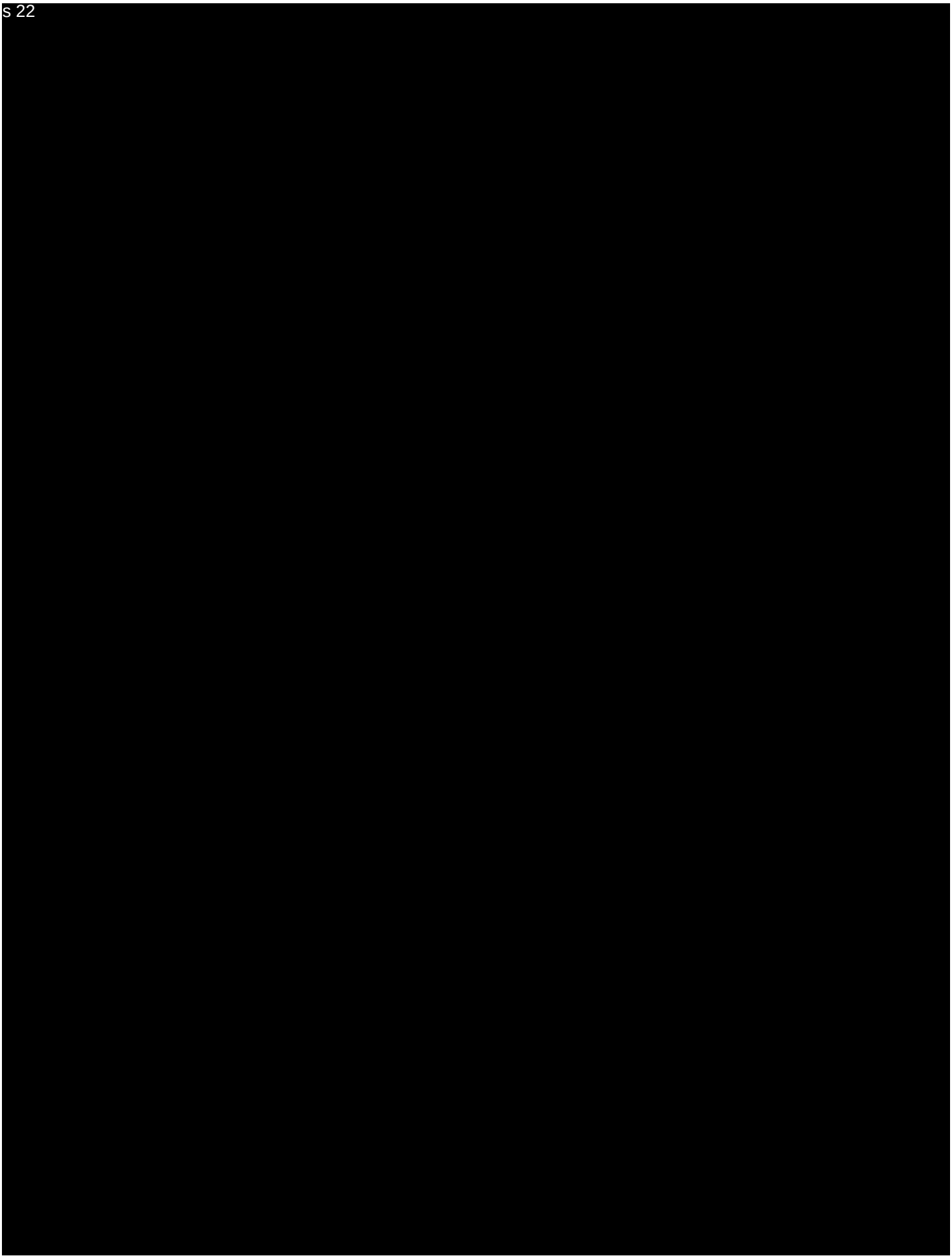
Lisa s 47F **(raised on Wiradjuri land, living on Ngunnawal land)**
A/g Chief Operating Officer
Office of the Commonwealth Ombudsman
Phone: s 47E
Email: s 47E
Influencing systemic improvement in public administration

Document 10

Contains deletions under FOI

Gregory Parkhurst

s 22



s 22 [redacted]

From: Rodney Walsh s 47E [redacted]
Date: Thursday, 27 Jun 2019, 1:59 pm
To: Jaala Hinchcliffe s 47E [redacted] >, Kim s 47F [redacted]
s 47E [redacted] >, Alison s 47F [redacted] s 47E [redacted]
Cc: Michael Manthorpe s 47E [redacted], Dermot Walsh
s 47E [redacted]
Subject: PHIO media enquiry [SEC=UNCLASSIFIED]

All – I have spoken with the Guardian journalist, Christopher Knaus, regarding his deadline for our response.
I have said that a response today, given the range of matters he has raised, was not reasonable.
We have agreed on Monday but with a caveat that I call him if we are in danger of not meeting that.
I suggest we meet tomorrow to discuss where we are at?
Rodney

Gregory Parkhurst

s 22 [redacted]

From: Media
Sent: Friday, 29 November 2019 12:06 PM
To: Carmen s 47F [redacted] ; Michael Manthorpe
Cc: Rodney Walsh ; Lisa s 47F [redacted] ; Media ; Jaala Hinchcliffe
Subject: FW: Query public interest disclosure [SEC=UNCLASSIFIED]

Hi all

Please see below media enquiry we have received from Christopher Knaus at the Guardian.

As discussed with Carmen, below is the proposed response for review/approval:

Hi Christopher,

Thank you for your enquiry to the Office of the Commonwealth Ombudsman.

Please see below response to your enquiry:

We are unable to confirm or deny that such a disclosure was received. It is an offence under the PID Act to disclose information which may identify a discloser or which was obtained in the course of performing a function or an investigation under the PID Act (ss 20 and 65).

However, we do note that the conduct of members of parliament is not covered by the PID Act (because they are not public officials as defined in s 69).

Kind regards,

Media team

Kind regards

Kim

From: Christopher Knaus <christopher.knaus@theguardian.com>
Sent: Friday, 29 November 2019 12:08 PM
To: Media <Media@ombudsman.gov.au>
Subject: Query re: public interest disclosure

Hi there,

I'm just inquiring about s 47E [redacted] and subsequent statements made about the matter by Peter Dutton, home affairs minister.

My questions are fairly simple on this.
- can the Ombudsman confirm it received a PID on this matter on this date?
- what action is it taking to investigate, if any?

I was hoping for a response by 4pm.

Many thanks,

Christopher Knaus
Reporter
The Guardian | Australia

+61 (0) 422 283 681
christopher.knaus@guardian.co.uk
---
twitter: @knausc

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Level 3, 19 Foster St
Surry Hills NSW 2010
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or store, or copy, it in any way. Guardian News & Media Limited is not liable for any computer viruses or other material transmitted with or as part of this e-mail. You should employ virus checking software.

Gregory Parkhurst

s 22

[redacted]

s 22

[redacted]

130TH ANNIVERSARY HENRY PARKES ORATION

HENRY PARKES FOUNDATION
TENTERFIELD SCHOOL OF ARTS MUSEUM,
TENTERFIELD, 26 OCTOBER 2019

SAFEGUARDING OUR DEMOCRACY:
WHISTLEBLOWER PROTECTION AFTER THE AUSTRALIAN FEDERAL POLICE RAIDS

A. J. BROWN

Professor of Public Policy & Law, Griffith University;
Board member, Transparency International and
Transparency International Australia

A 7-point plan for restoring public confidence in Commonwealth whistleblower protection

1. Undertake **comprehensive overhaul or replacement of the *Public Interest Disclosure Act 2013* (Cth)** – not as a piecemeal reform, but so as to better support a consistent, coherent and workable national approach to whistleblower protection across Australia's public sector, business and not-for-profit organisations.
2. Reform the **criteria for when whistleblowing outside official channels remains protected** – to be simpler, more workable, reflect presumed public interest in disclosure of wrongdoing, and be consistent for both the public sector (PID Act) and Commonwealth-regulated private sector (Corporations Act or replacement stand-alone legislation).
3. Revise statutory definitions of **'intelligence information'** (PID Act, s. 41) and **'inherently harmful information'** (Criminal Code, ss.121, 122) to ensure whistleblower protection *at all levels* is extended to genuine public interest disclosures i.e. which meet the simplified public interest tests and pose no actual, real, unacceptable risk of harm to national security, defence or law enforcement interests.
4. Strengthen **journalism and other third-party shield laws** to ensure (a) confidentiality of public interest whistleblower sources or clients, and (b) freedom of journalists and other relevant professionals from prosecution for receiving or using public interest disclosures in the fulfilment of their duties or functions (PID Act and Evidence Acts).
5. Ensure it is **viable for public servants to use internal and official channels** for disclosure of wrongdoing, by updating the PID Act to be a true whistleblower protection regime:
    a. Amend anti-detriment protections to match international best practice, by **removing the *de facto* requirement for a deliberate, knowing intention to cause harm** before civil or employment remedies can be accessed (s. 13(1)(b)&(c));
    b. Update the anti-detriment protections to match new national best practice (Corporations Act), by:
        - expanding the definition of **unlawful detriment** beyond employment actions;
        - extending civil liability to **organisational failures to support and protect;**
        - reversing the **onus of proof** for civil or employment remedies;
        - providing for **exemplary damages.**
6. Make protections real by providing **effective support** to public interest whistleblowers:
    a. Update the statutory minimum requirements for **whistleblowing policies and programs** in the public sector, and increase the Commonwealth Ombudsman's monitoring and support roles;
    b. Establish a fully resourced **whistleblower protection authority** to assist all reporters and regulators with advice, support, coordination and enforcement action to prevent, deal with, and gain remedies for detrimental conduct;
    c. Continue to consider a **reward scheme** for public interest whistleblowers.
7. Recognise the wider validity of public interest disclosure of official information, beyond employee disclosures of wrongdoing, by making available **a general public interest defence** for any citizen charged with offences of unauthorised disclosure or receipt of official information (Criminal Code).

SAFEGUARDING OUR DEMOCRACY: WHISTLEBLOWER PROTECTION AFTER THE AUSTRALIAN FEDERAL POLICE RAIDS

INTRODUCTION: PUBLIC INTEGRITY IN AUSTRALIA

For decades, Australian journalists have uncovered truth and aided the quest for good governance around the world – "telling it like it is" with the frankness that makes Australians so well-loved in so many nations. Indeed, for most of the 130 years since Sir Henry Parkes' original Tenterfield Oration, the world has usually looked on Australia as one of the healthiest, most innovative democracies.

No wonder, then, that the world stood shocked when on 4 and 5 June 2019, the Australian Federal Police (AFP) executed search warrants on the home of a News Corporation federal political journalist in Canberra, and the Sydney headquarters of the Australian Broadcasting Corporation, as part of an investigation into possible criminal offences by journalists for receiving and publishing unauthorised disclosures of government information. In fact, the timings were clearly no coincidence. A third AFP raid on News Corporation's Sydney headquarters was also planned for the following days, but quietly abandoned due to the media and public backlash.[1]

These events confirmed, more dramatically than before, that alongside all our trends towards more open and accountable government, we have also experienced powerful counter-trends that undermine those advances, increasingly threatening both the health of our democracy and its long-held reputation. Even before the AFP raids, Australia was slipping on the World Press Freedom Index, largely due to laws eroding journalists' ability to investigate governments and protect their sources.[2] Viewed this way, the raids were a natural product of creeping increases in the criminalisation of public information as a result of national security, intelligence and border protection laws, about which many people have warned us, including at least one previous Henry Parkes Orator, Professor George Williams and my Griffith University colleague, Dr Kieran Hardy.[3] But these trends also have an even larger context. Since 2012, Australia has also been

[1] For a digest of the reaction, see Brown A J et al (2019), *Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government*, Griffith University, August 2019, p.46.

[2] See Reporters Without Borders, World Press Freedom Index (2019), <https://rsf.org/en/ranking>; Alliance for Journalists' Freedom (2019), *Press Freedom in Australia: White Paper*, Sydney, p.3.

[3] Keiran Hardy and George Williams, 'Terrorist, Traitor or Whistleblower? Offences and protections in Australia for Disclosing National Security Information' (2014) 37 *University of New South Wales Law Journal* 784; Keiran Hardy and George Williams, 'Special Intelligence Operations and Freedom of the Press' (2016) 41 *Alternative Law Journal* 160; Keiran Hardy and George Williams, 'Free Speech and Counter-Terrorism in Australia', in Ian Cram

slipping on other indices, including the global Corruption Perceptions Index compiled by my colleagues in Transparency International.[4] Many of the fundamental elements or pillars of our nation's integrity systems remain strong, but as our current assessment of those systems shows, many are not keeping up with our national and international challenges.[5] Fundamentally, the values of honesty and truth in our democracy, and others around the world, have probably not been under such sustained attack for perhaps 80 years.

The weaknesses in our integrity systems are many and varied. In Australia's case, they do actually begin with our ability to acknowledge the constitutional truth that our nation was settled by Europeans, but never ceded by its First Nations, and to deal with all the implications of this. I am delighted this year to be following Professor Megan Davis' 2018 Oration, and her call for support for the Uluru Statement from the Heart, including for constitutional recognition of Indigenous Australians in the form of a Voice to Parliament. We are still speaking here about integrity – our ability to tell and recognise the truth, including the truth that this proposal is perfectly constitutionally acceptable: as former High Court Chief Justice Murray Gleeson has pointed out, a Voice *to* Parliament can enrich our democracy, rather than being a measure that would undermine it.[6] As Megan said last year, unless recognition of Aboriginal and Torres Strait Islander people includes structural and not simply symbolic change to deal with the reality of the situation, constitutional reform is, 'to put it crudely, putting lipstick on a pig'.[7]

My grandfather raised pigs, and I am sure Megan has nothing against pigs. But the same choice between symbolism and substance affects all issues of integrity, justice and accountability in our democracy. Remember that Sir Henry Parkes, the longest-serving Premier of New South Wales and the one who charted the path for Australia's colonies to federate on an American model, had a very progressive, as in dynamic view of how our system of government should evolve, to serve what was then his quite radical idea of a 'great and growing Commonwealth'.[8]

(ed) *Extremism, Free Speech and Counter-Terrorism Law and Policy: International and Comparative Perspectives* (Routledge, 2018).

[4] Transparency International, Corruptions Perception Index 2018 (January 2019), Berlin: www.transparency.org.

[5] See Brown, A J et al (2019). *Governing for integrity: a blueprint for reform.* Draft Report of Australia's Second National Integrity System Assessment. Griffith University & Transparency International Australia. www.transparency.org.au/national-integrity-systems-assessment.

[6] Gleeson, M. (2019). *Recognition in keeping with the Constitution: A worthwhile project*, 18 July 2019. Uphold & Recognise, https://static1.squarespace.com/static/57e8c98bbebafba4113308f7/t/ 5d30695b337e720001822490/ 1563453788941/ Recognition_folio+A5_Jul18.pdf

[7] Megan Davis, 'And remind them that we have robbed them?' 2018 Henry Parkes Oration, Canberra. https://parkesfoundation.org.au/activities/orations/2018-oration/.

[8] Parkes in Tenterfield spoke of America as the "great commonwealth", then concluded his follow-up St Leonard's speech with references to Washington and Franklin, echoing Franklin directly with the idea that an Australian

We should remember he got into trouble in London in 1882, for daring to suggest – accurately – that democracy was becoming more advanced in the Australian colonies than in the Mother Country.[9] And, we should recognise this is no longer a claim that he could honestly make, were he standing today in London, or even in Washington or a range of other capital cities around the world. (I will shortly mention Sir Henry again.)

Taking a long-term view of our direction of travel, we see a strong national integrity system as involving wider issues than simply the freedom for public interest journalism to operate, if it is to meet the challenges of our times. Clearly, press freedom is vital, and no-one should doubt my huge personal sympathy for journalists caught in the cross-fire. My father was a long-serving political journalist in Canberra, and my sister became a very accomplished journalist too. But importantly, in Australia at least, the threat of criminal prosecutions against journalists is still mainly just that: a cross-fire. The primary targets – intended and sometimes unintended – are actually the employees, officials and everyday citizens who might, and do, speak up with concerns about wrongdoing in their organisations. I am talking here about protecting the sources of information on whom not only journalists, but *all* of us rely. This is what the rest of this Oration is about – the whistleblowers at the heart of this struggle.

PROGRESS IN A TIMELESS CHALLENGE

In fact, the importance of whistleblower protection for our democracy – for the health and integrity of all our institutions – begins not with the media, but with the role of whistleblowing as something much more fundamental. Inevitably, for any employee or official to raise concerns about wrongdoing in an organisation, they have to disclose information, and often sensitive or confidential information. And this will always include information that some people want to label that way, specifically because they do not want the information shared or transferred. And the trouble can start even when people blow the whistle purely internally. Just think about your own organisation, or workplace. Or, for a vivid demonstration, look at US President Donald Trump's recent reactions to the intelligence officers worried about the records of his dubious conversations with other world leaders being hidden on even more dubious servers.[10]

commonwealth would also be "great and growing": Parkes, H. (1890). *The Federal Government of Australasia: Speeches*. Turner and Henderson, Sydney, pp.4, 28, 169.

[9] Parkes, Henry. *Fifty Years in the Making of Australian History* (Longman, Green & Co, 1892).

[10] See https://www.theguardian.com/us-news/2019/oct/06/trump-ukraine-scandal-second-whistleblower-comes-forward.

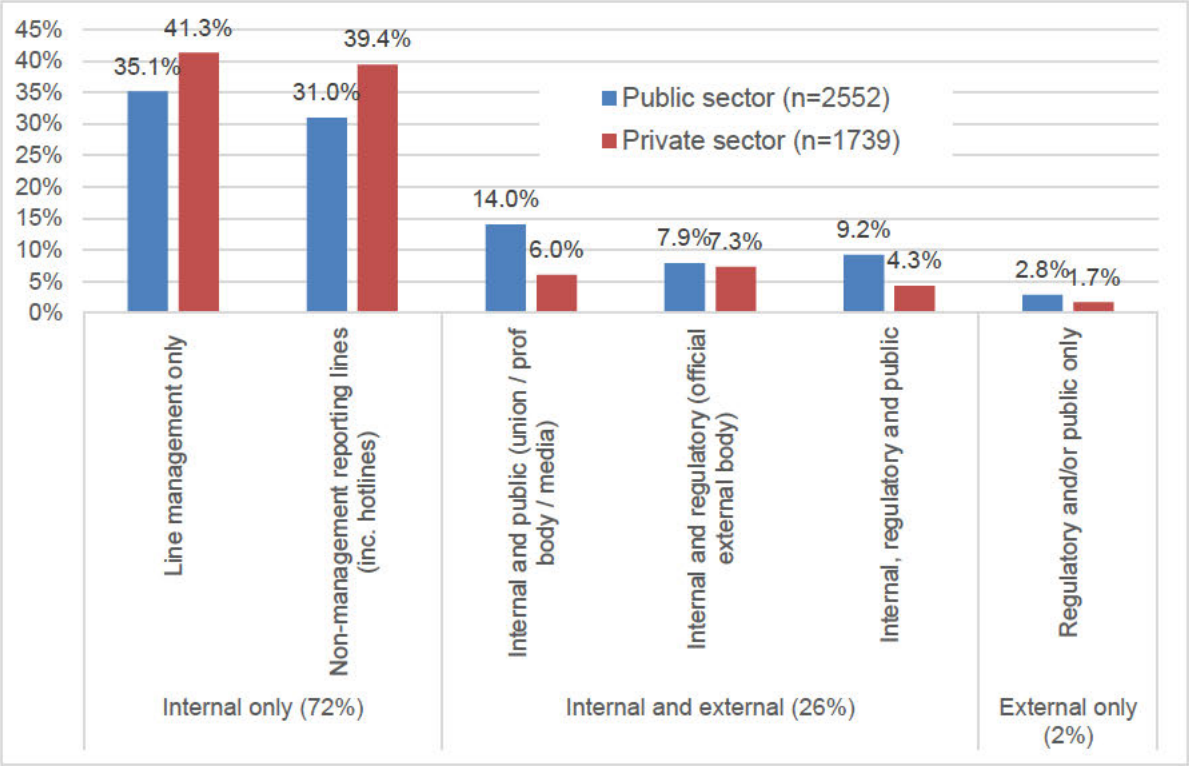
In Australia, if they do end up going outside our more limited official channels, it is whistleblowers who are *actually* being prosecuted, even when, as yet, journalists are hopefully unlikely to be. And whistleblowers play an even more fundamental role in public integrity than the media, because they help ensure honesty, integrity and performance *within* our institutions, every single day. Even if it never reaches the public domain.

We could speak for hours about examples of whistleblowers and whistleblowing, and of the research we now have, internationally, about its dynamics and the role it plays. But I will give you just three vital statistics from our own, recently concluded large-scale study, funded by the Australian Research Council and supported by 23 partner and supporter organisations across Australia and New Zealand, including the Commonwealth Ombudsman and Australian Securities and Investments Commission (ASIC), for whose support we are truly grateful. This is taxpayers' dollars being spent to better understand how other taxpayers (workers and officials) help protect the interests of all taxpayers, by speaking up. Ours is actually the world's largest empirical research project to date focused on organisational responses to whistleblowing, and the first to systematically compare what happens in both public and private bodies at the same time. You can find our *Clean As A Whistle* report on our project website.[11] We surveyed over 17,000 employees and managers across 46 organisations of all shapes and sizes, including just over 5,000 people who had reported wrongdoing concerns, and 3,600 managers and governance professionals who had handled, directly dealt with or observed what happened with reported concerns.

This research gives an overall picture of the role of whistleblowing in organisational integrity, not simply on "public" whistleblowing involving the media. Consistently with previous studies, we found that 72% of those who raised concerns *only ever* reported internally, including many who went no further even though the wrongdoing was not dealt with, or they suffered repercussions. A quarter (26%) reported internally first but also then went outside to regulatory channels, other public channels or both. Only 2% went outside their organisations without ever reporting internally. Even within these figures, however, most 'public' reporting was not actually to the media, or at least not directly. Of the 20% of reporters who ever went public, 19% went to a union, professional association or industry body. Only 1% of reporters ever went directly to a journalist, media organisation or public website (Figure 1).

[11] see Brown A J et al (2019), *Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government*, Griffith University, August 2019.

Figure 1: Reporting paths (current and previous organisation reporters)



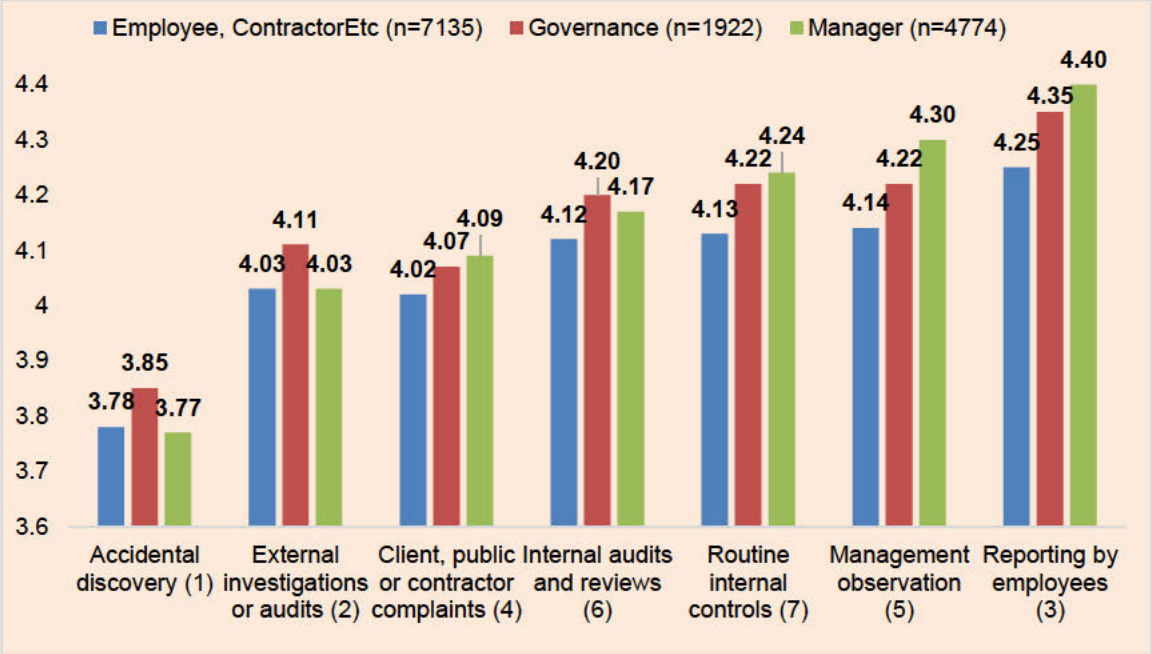
These data indicate there is hardly a crisis of leaking and external disclosure of information in Australian institutions. Indeed, only 16% of reporters ever went to an external regulatory body at any stage – fewer than who went public – even though research indicates that staff often believe external sources are more likely to take the wrongdoing seriously, treat the reporter more fairly or enact change. What may be a "healthy" level of external disclosure cannot be defined, but there is little reason to think that current levels are unhealthy – if anything, the reverse. Quite probably, from a purely utilitarian perspective, there should probably be more external whistleblowing to regulators or if necessary, publicly, than probably now occurs.

This picture also helps make it clear why whistleblowing is so vital to integrity, accountability and the good health, not only of government, but to all our institutions. Our research has established that according to employees at all levels of organisations, right up to managers and leaders, employees who speak up are the single most important way that wrongdoing or other problems come to light in organisations (Figure 2). Even auditors know that employee reporting is more important, even, than their own internal audits or routine controls; while managers, who understand its role best of all, see employee reporting as more important than their own ability to observe what is going on. This picture holds for both public and private sectors. Indeed, 89% of public and 94% of private sector workers agree it is 'in the

best interest of the organisation when an employee reports wrongdoing'. However challenging, whistleblowing is not actually a strange or unfamiliar behaviour that we don't understand. This is why sensible organisations now invest so heavily in speak up programs, even when the law doesn't actually require it.[12]

Figure 2: Importance of employee reporting (all respondents)

'How important do you believe each of the following is for bringing to light wrongdoing…?'
(1=Not important, 2=A little, 3=Somewhat, 4=Important, 5=Very important)



Nevertheless, it is public scandals that, by definition, mostly shape our perception of whistleblowing, and what can happen. And these tend to confirm that whistleblowing can often be the only way that appropriate action is eventually taken on problems, or highlight the people who *didn't* speak up, or the systems that failed. We could speak of nursing manager Toni Hoffman, Australian Local Hero of the Year in 2006, who spoke up about medical negligence in Queensland's Bundaberg Hospital. Or Jeff Morris and the 'ferrets' who revealed criminal misconduct in the Commonwealth Bank's financial planning arm, eventually triggering the Banking Royal Commission. Or James Shelton and Brian Hood, who tried to alert the Australian Federal Police and/or spoke up internally about foreign bribery by Australia's Reserve Bank-owned companies, Securency Ltd and Note-Printing Australia, before James then took that public. More recently, we see the wave of federal prosecutions of whistleblowers for going outside our limited

[12] See Kenny, K., Vandekerckhove, W., & Fotaki, M. (2019). *The whistleblowing guide: Speak-up arrangements, challenges and best practices*. Chichester: Wiley.

official channels, which is so central to our current debate. As is so often the case, irrespective of exactly what may play out in court in terms of clarifying the history and merits of these cases, there is wide acknowledgement that these whistleblowers raised matters which did, or do need addressing. There is the ASIS operative, Witness K in relation to secret overseas bugging operations (although we won't find out much from that prosecution, because the whole prosecution is secret). Military officer and lawyer, David McBride in relation to the war in Afghanistan. Richard Boyle in relation to debt collection practices of the Australian Taxation Office.[13]

In fact, everyday workers and officials have served us as whistleblowers since the dawn of institutions, and have straddled this difficult line between internal and external reporting. A good but little known example is Sir Henry Parkes himself. As a young man in 1845, six years after arriving in the colonies and nine years before he was first elected to parliament, Parkes was working in the NSW Customs department when he raised concerns about rorts involving colleagues stealing alcohol (and worse) on the Sydney wharves. I'm told by at least one descendant[14] that Parkes alerted his superiors without success, and then went further by penning an anonymous letter to the Sydney *Register* (Figure 3). He was merely suspended for three months for this leak, a punishment tending to confirm the merit of what he was saying, as did his final reference from Customs, which commended him as 'a person of great integrity and some talent'. But Parkes' whistleblowing still led to his resignation, feeling his treatment was 'most unreasonable and unjust'.[15] The rest, as they say, is history.

There are no end of tales about the repercussions whistleblowers can experience, especially if dragged or forced into the public domain. The good news, however, is that not all whistleblowers suffer in our institutions, at least today.[16] In our research, when we asked our respondents how well or badly reporters were treated as a result of raising concerns, less than half (42%) of reporters said they felt they were treated badly by their management or colleagues. Managers and governance professionals were slightly more positive, saying reporters were treated badly in 34% of cases (Figure 4). The fact that a majority of reporters said they were treated the same, or even well by the organisation, shows bad outcomes are not inevitable.

[13] For some references to recent cases, see Christoper Knaus, https://www.theguardian.com/australia-news/2019/oct/22/witness-k-lawyer-warns-many-whistleblowers-have-nowhere-to-go.

[14] My great thanks to Ian Thom for alerting me to this episode in Henry Parkes' history.

[15] See Martin, A.W. *Henry Parkes: a Biography* (Melbourne University Press, 1980), p.32 and notes accompanying.

[16] Smith, R. (2014). 'Whistleblowers and Suffering', in A.J. Brown, D. Lewis, R. Moberly and W. Vandekerckhove (eds.), *International handbook on whistleblowing research* (pp. 230-249), Cheltenham: Edward Elgar.

Figure 3. "Government Messengers – The Customs" (Henry Parkes)

Original Correspondence.

GOVERNMENT MESSENGERS. — THE CUSTOMS.

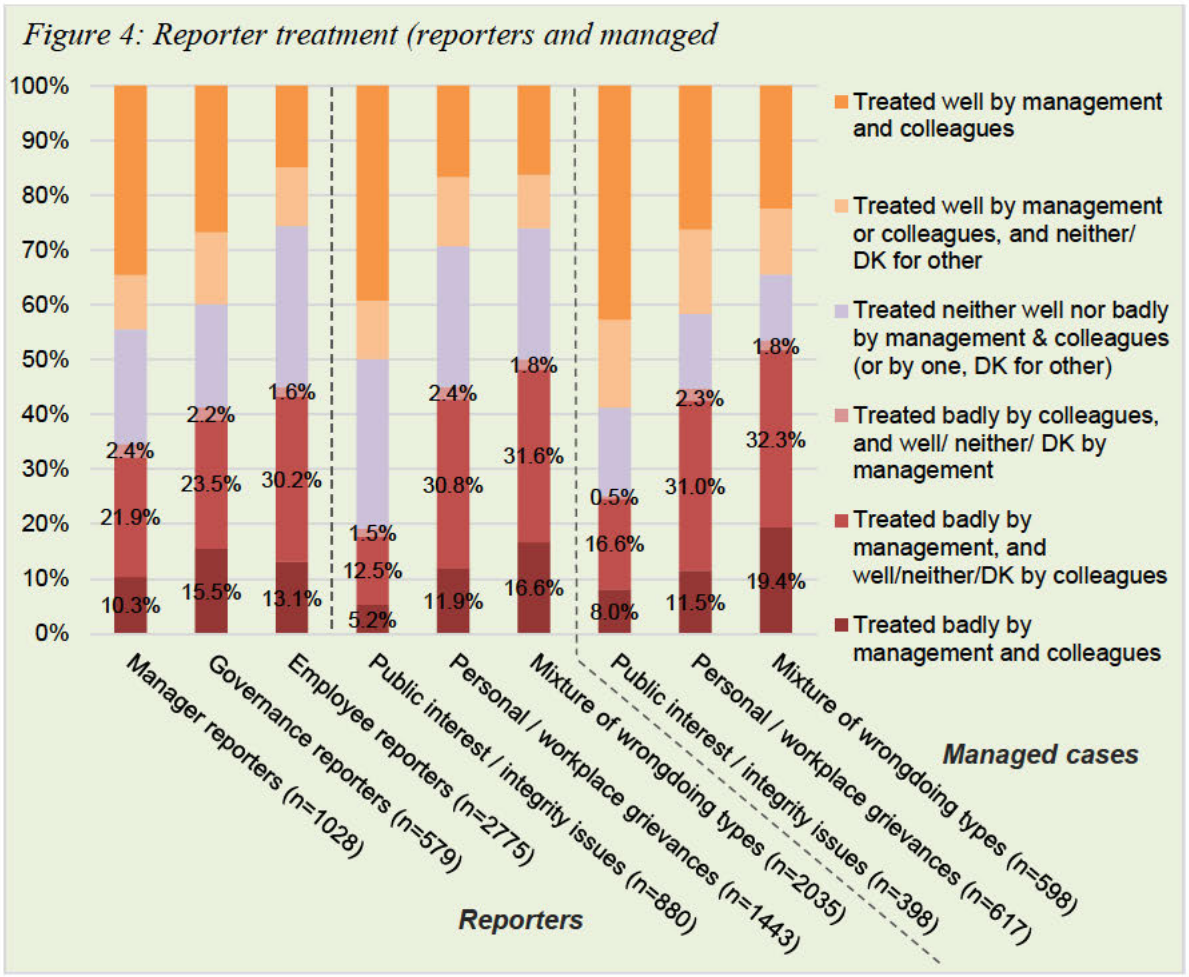
To the Editor of the "Weekly Register."

SIR—It is generally believed that we Sydney people have now outlived the days when prisoners of the crown attained to a corrupt influence in and about the government offices; but the statements I am going to make, however they may surprise your readers, will, I think, go far towards convincing them that this species of corruption is not wholly extinct. My remarks relate to a convict messenger attached to the customs department. I happened to be on one of the public wharves a short time ago, and saw a man, whom I knew to be a prisoner under sentence, busily engaged in taking samples of wine from some casks just landed from a vessel from England, I looked round to see if I could discover any party for whom this man was acting, but saw nobody, except a group of seamen and labourers, who appeared to consider him an extremely agreeable actor, while the wine went freely round among them in tin-pots. On enquiry, I found that this individual was at present a custom-house messenger, under one of the landing-waiters; and that the bottle of wine he took away with him, after regaling his friends, was a sample for that official. Since then, I have been informed that this man is very often employed in responsible situations relating to the public revenue, which, I feel confident, must be unknown to the head of the department, but which ought, at any rate, to be made known to the public. It was given in evidence before the Legislative Council, on the Tariff Bill, that smuggling in this port has been principally carried on from export vessels. Do the public suspect that a convict messenger of the customs is frequently employed in conveying from the bonded stores, with sole charge of shipping, large quantities of spirits on board these vessels? There is, I presume, a book in the custom-house which will prove this to have been the case. Will the public be prepared to learn that a convict is employed by the customs to take account of whole cargoes for the payment of duty? I know that one cargo of New Zealand gum (by the *Thomas Lord*) was lately delivered under the sole superintendence of such a personage. The same individual, I am informed, has been placed in charge of a ship under seizure! The case alluded to was that of the *Duchess of Kent*. I might multiply instances, but I hope I have said enough to call the attention of government to the correction of what I conceive to be a great abuse. I maintain, sir, that the employment of convicts in such cases as above stated, is now-a-days an unwarrantable abuse; and fraught with insecurity to the revenue, and discredit to the community at large, and I am, &c.

A CITIZEN.

[The facts stated in this letter merit publicity, and we are sure the Collector of Customs will inquire into the matter and correct so great an abuse.—ED.]

The Weekly Register of Politics, Facts and General Literature (Sydney, NSW : 1843 - 1845), Saturday 25 October 1845, p.195. https://trove.nla.gov.au/newspaper/article/228135127



And this is exactly the aim of whistleblower protection. Even if it is never likely to be easy, the evidence shows that speaking up is often something that individuals and organisations can learn to encourage and manage quite well. Often it is exactly because it is handled well, that we *don't* hear about it.

But plenty do suffer bad outcomes, and this is the point. Clearly, there is also plenty going wrong. Even when not ascending to the level of criminal investigation and prosecution, the barriers and disincentives for speaking up are always significant, sometimes huge. And yet, people do speak up. Sometimes it is too late. Sometimes it is only after they have left the organisation or the industry with the problem. But very often it is right then and there, and overwhelmingly, at least at first, it is inside the organisation or institution involved, notwithstanding the risks. Fewer need to suffer adverse consequences, than currently do.

Indeed, Henry Parkes' experience resonates with the type of issues we see today, as impacting on our ability to support whistleblowers. Notwithstanding the issues on the wharves, Parkes' own biographer, A W Martin, did not see it as whistleblowing at all, describing the

dispute as a 'trivial' grievance — 'a quarrel at the lower level of the department between Parkes and his immediate superior over the arrogance of a man whom Parkes suspected of being "a convict under sentence" and who made confidential reports' on other workers, such as Parkes himself.[17] Maybe that is true – it probably was. Parkes' letter suggests he was also directly targeting the inappropriateness of putting convict employees in such roles, perhaps linked to his policy disagreement – a view shared with many – that transportation of convicts to New South Wales should not still be happening at all.

But rather than suggesting that here's a whistleblower we should simply abandon, we need to recognise that these questions are always likely to be raised in such situations, or at least, more often than not. And that we don't handle them well (see Figure 4). These disputes reinforce the importance of comprehensive, effective whistleblowing regimes for ensuring that disclosures are properly managed, and when made to third parties (including the media) occur as much as possible in a manner that recognises and supports the wider public interest. And this in turn helps sustain confidence in our systems of public integrity generally.

However, it also shows that unless our laws and regimes for whistleblowing are properly calibrated, they will help have the reverse effect – of feeding public concern that systems for controlling abuses of government power are either missing or ineffective, and that those in government cannot be trusted. And so, especially now, we have a major problem. We have a crisis of confidence in our whistleblowing regimes, made worse because criminal actions against whistleblowers are going too far. When this happens, we have to recognise the consequences. As Law Council president Arthur Moses SC says, it not only has a 'chilling effect' on public disclosures to the media, but all whistleblowing. It makes all workers and officials unsure about whether their superiors really do want them to speak up. It makes them worry about the correct way to do it. And it makes them fear that they – and not the problem or issue – will become the target.

So, people with concerns are left with two options. Say nothing – or if it's too serious to let go, leak anonymously, even though in the surveillance age this is increasingly dangerous. Paradoxically, one effect of a strong-handed approach may be simply that suspected wrongdoing is left to get worse, and only later revealed (but not necessarily resolved) either by a scandal that is much worse, or through the more political act of individual public servants making unauthorised "leaks" to the media. The results are obvious. Our society's integrity systems start

[17] A W Martin, op cit.

to break down, at every level. Public confidence is further eroded by a dangerous game of "hide and seek" in which government agencies are tasked, or feel bound, to try to enforce criminal penalties against leakers and reporters, which are not informed by logical public interest principles; and in which public confidence in the media is undermined by it being forced to either (a) resort to new and different forms of subterfuge to receive and handle public interest information, or (b) cease receiving and reporting on such information altogether, no matter how serious and important.

Somehow, this is the path Australia has managed to put itself on. This unhealthy and destructive dynamic is the current situation with respect to the Commonwealth's public sector whistleblowing regime – and it calls for major reform.

FINDING OUR WAY AGAIN: A 7-POINT PLAN

Our present situation is a tragedy, because Australia actually has a record of innovation in whistleblower protection. In principle, we know how to get the balance right. Despite all this, whistleblower protection laws and regimes have been a cornerstone of our integrity systems, at state level, for over two decades. Internationally, we have led the way in a range of aspects. It is perhaps telling that the Commonwealth government came late to the party, only introducing its public sector whistleblowing legislation, the *Public Interest Disclosure Act,* in 2013. Indeed, then Attorney-General Mark Dreyfus' achievement of this Act, in the dying hours of the Gillard government, was something of a miracle, because strong forces of darkness within the Labor Party had tried to undermine it, and help explain that some aspects were always designed not to work. Ultimately, notwithstanding the support of cross-benchers such as Andrew Wilkie and then Shadow Attorney-General, George Brandis, for a strong and effective regime, we ended up with a scheme that works in some respects, but often, not when it really matters.

So how did we end up in a situation of apparent crisis? Reform of the Commonwealth's approach is not a new issue, especially given that the *Public Interest Disclosure Act* had such a difficult birth. Some important reform issues were already identified by a statutory review of the Act by Philip Moss AM (2016)[18], and even more by a Parliamentary Joint Committee on Corporations and Financial Services inquiry on *Whistleblower Protections* (September 2017).[19]

[18] Moss, P. (2016). *Review of the Public Interest Disclosure Act 2013: An independent statutory review,* Department of Prime Minister & Cabinet, Canberra.

[19] Parliamentary Joint Committee on Corporations and Financial Services (2017), *Whistleblower Protections*. Canberra: Parliament of Australia.

Importantly, around half of that inquiry's recommendations were addressed in respect of the *private sector* by reforms to the *Corporations Act 2001* and *Taxation Administration Act 1953,* under the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* – some of them groundbreaking. Instrumental in this was the partnership between Senator Nick Xenophon, and now Centre Alliance Senator Rex Patrick, in securing advances which are in some respects quite historic, but also remain piecemeal. As a member of the Turnbull-Morrison Government's ministerial expert advisory panel on whistleblowing, I was glad to play some role. It was good that it happened, flaws and all, as otherwise, nothing would have happened in the last Parliament.

But this does not change the fact – indeed it reinforces it – that despite the strengths in the new *Corporations Act* protections, overall, our whistleblowing laws currently amount to a well-motivated but largely dysfunctional mess. Many agencies and companies succeed in recognising and protecting whistleblowers, but often despite the relevant laws, not because of them. And they are undermined by the tide of confused, inconsistent secrecy provisions on which government continues to embark, often apparently without realising what it is doing.

Fortunately, there is recognition in government that this all needs to be addressed;[20] just as there are widespread calls in the media, and across society. So, what to do? Sorting this out requires, in my estimation, seven simple but vital steps. "Simple" does not always mean easy, and they require stepping back and seeing the full picture. But they can be done, and if done, we should have some confidence they may work.

1. Undertake **comprehensive overhaul or replacement of the *Public Interest Disclosure Act 2013* (Cth)** – not as a piecemeal reform, but so as to better support a consistent, coherent and workable national approach to whistleblower protection across Australia's public sector, business and not-for-profit organisations.

The first step is recognising that we have to take a comprehensive approach, and ensure that whistleblower protections work simply and consistently across all sectors. This was recommended by the Parliamentary Joint Committee on Corporations in 2017, and others, but is yet to be done. Simply tweaking known technical difficulties in the *Public Interest Disclosures Act* is not going to cut it. That Act needs major reform, if not a total rewrite. Commissioner Moss recommended redrafting using a simpler 'principles-based' approach, in place of the level of prescriptive procedural requirements which currently undermine the pro-disclosure culture which the Act seeks to create.[21] But there are other structural weaknesses – the Act completely leaves

[20] See Merritt, C., & Berkovic, N. (2019). Attorney-General flags plan to protect sources behind public service leaks. *The Australian,* 21 June 2019, pp.1-2.

[21] See Moss Review (2016), pp.6-7.

out disclosures about wrongdoing by politicians or their staff, and limits regulatory reporting channels to just the Ombudsman and Inspector-General of Intelligence and Security – not other obvious points like the AFP itself, Inspector-General of Taxation, Independent Parliamentary Expenses Authority, or the National or Commonwealth Integrity Commission which is to come.

In fact, these problems still also affect the private sector. There is similar unfinished business there, because the Corporations Act protections share common problems, have gaps, and only recognise the role of the financial regulators. For example, there too, they do not even protect disclosures of federal criminal offences to – guess who – the Australian Federal Police. Or breaches to the ACCC. This is why the 2017 Joint Parliamentary Committee recommended a single, comprehensive Act for the private sector, not different schemes in different Acts. This would make it easier to overcome the sheer problems of inconsistency between what remain multiple whistleblowing schemes in different areas, especially affecting government-owned businesses and government contractors. For them, it is not clear if access to remedies for whistleblowers is limited to the courts, as per the Corporations Act, or can also be pursued in Fair Work Australia, as per the PID Act. For unions, the Fair Work (Registered Organisations) whistleblower protection are now inconsistent with everything else, despite having helped show the way as recently as 2016. And who knows how many other laws are still littered with the types of out-of-date protections we have now hunted out of the Corporations Act, such as the entire Division 7 of the *National Disability Insurance Scheme Act* (2013).

2. Reform the **criteria for when whistleblowing outside official channels remains protected** – to be simpler, more workable, reflect presumed public interest in disclosure of wrongdoing, and be consistent for both the public sector (PID Act) and Commonwealth-regulated private sector (Corporations Act or replacement stand-alone legislation).

Obviously, as the backstop, we have to simplify the principles for when whistleblowing outside official channels remains protected. We know that no matter how good our internal systems, such public disclosure will continue to be necessary, from time to time. Our society's regulatory systems rely on public disclosure as a vital and sometimes advantageous means of ensuring action is taken. The law should reflect this reality, and properly extend protection to all three tiers of disclosure.[22] Further, by ensuring that protections are available for justified public disclosures, the law provides the best incentive for regulators and companies to put in place more effective internal processes for dealing with wrongdoing and supporting whistleblowers.

[22] Vandekerckhove, W. (2010). 'European whistleblower protection: Tiers or tears?' in D. Lewis (ed.) *A Global Approach to Public Interest Disclosure* (pp. 15-35), Cheltenham: Edward Elgar Publishing.

These rules, too, can and should be more consistent between the public and private sectors. Presently, apart from being cumbersome, they are almost the reverse of each other, but for no good reason. Part of the good news is that Attorney-General Christian Porter is well qualified to help sort this out, because he personally introduced the very simple equivalent tests to Western Australia's state whistleblowing legislation in 2012 – along with shield laws for journalists. Indeed, there are different precedents in four Australian state or territory laws (NSW 1994, Queensland 2010, Western Australia 2012, ACT 2012), as well as the United Kingdom and Ireland, where the same principles cover both public and private sectors (1998 amended 2013; and 2014). It needs a consistent, fresh look and sensible negotiation. It can be done.

3. Revise statutory definitions of **'intelligence information'** (PID Act, s. 41) and **'inherently harmful information'** (Criminal Code, ss.121, 122) to ensure whistleblower protection *at all levels* is extended to genuine public interest disclosures i.e. which meet the simplified public interest tests and pose no actual, real, unacceptable risk of harm to national security, defence or law enforcement interests.

Third, as part of this process, it is imperative for the federal government to revise its definitions of 'intelligence information' (PID Act, s. 41) and 'inherently harmful information' (Criminal Code, ss.121, 122) to actually make sense. These are the definitions that mean, if this type of information is included in a disclosure, it can never be publicly revealed without criminal sanctions. But currently, they include any information that has ever come within a mile of any intelligence agency or issue, irrespective of the risk it actually poses. Hence it is sadly no surprise that Witness K was forced to plead guilty, irrespective of the merits of his actions. Again, we can do much better. And all sides of politics should support these better solutions, especially the Labor Opposition. After all, even though it was a miracle that then Attorney-General Dreyfus rescued the PID Act in 2013, this problem was in the Act from the start. We know this, because I was one who warned that this would lead to the outcomes we are now seeing. Again, there are sensible international principles than can help us refine these definitions back, to mean what they are meant to say;[23] and provide mechanisms for ensuring that even in the highest sensitivity contexts, whistleblowers have somewhere to go.[24]

4. Strengthen **journalism and other third-party shield laws** to ensure (a) confidentiality of public interest whistleblower sources or clients, and (b) freedom of journalists and other

[23] See Brown, A. J. (2013). Towards 'ideal' whistleblowing legislation? Some lessons from recent Australian experience. *E-Journal of International and Comparative Labour Studies*, 2(3), 153–182.

[24] See Ben Oquist, https://www.theguardian.com/commentisfree/2019/oct/01/someone-blew-the-whistle-on-trump-if-it-happened-in-australia-we-might-never-hear-about-it; Chris Knaus, https://www.theguardian.com/australia-news/2019/oct/22/witness-k-lawyer-warns-many-whistleblowers-have-nowhere-to-go.

relevant professionals from prosecution for receiving or using public interest disclosures in the fulfilment of their duties or functions (PID Act and Evidence Acts).

The fourth step is to strengthen press freedoms and protections for journalists, especially in ways that protect the confidentiality of their sources in cases of public interest. Thanks to the furore created by the current poor state of the law, and the actions of the AFP in trying to enforce it, sensible recommendations from the Alliance for Journalists' Freedom, Right to Know Coalition, Law Council of Australia and every Australian expert now abound.[25] In fact, many of the same principles need to extend beyond journalists, to other relevant professionals who may validly receive and need to deal with wrongdoing disclosures in the fulfilment of their duties or functions. This actually affects everybody.

5. Ensure it is **viable for public servants to use internal and official channels** for disclosure of wrongdoing, by updating the PID Act to be a true whistleblower protection regime.

Fifth, if governments and the public truly want to limit *public* whistleblowing on wrongdoing to when it is really necessary – as I believe we do – then we have to make sure our internal and official systems and protections for disclosure are actually working. Currently, despite all the recent improvements, the legal hoops that a worker has to jump through before they could access remedies for any detrimental conduct against them remain prohibitive. This is especially true for public officials, and simply updating their protections to match the new private sector rules would go a long way. Updating the anti-detriment protections in new public sector legislation to match the new principles in the Corporations Act would include:

- expanding the examples given in the definition of **unlawful detriment** beyond employment actions;
- extending civil liability to **organisational failures to fulfil a duty to support and protect** whistleblowers, which is one of the most important new advances provided by Australian law, on the international stage;
- reversing the **onus of proof** for civil or employment remedies; and
- providing for **exemplary damages.**

But there are actually still also defects – by international standards – in the old PID Act which were copied across to the new Corporations Act provisions, and which therefore continue

[25] See submissions to the Parliamentary Joint Committee on Intelligence & Security, and Senate Environment and Communications References Committee.

to infect both. This is why we must amend the anti-detriment protections in both, to match international best practice, by removing what is a *de facto* requirement for a deliberate, knowing intention to cause harm before civil or employment remedies can be accessed.[26] This may be appropriate for a criminal offence of victimisation, but not for civil or employment remedies for the types of detrimental conduct by organisations – both acts and omissions – which can foreseeability result in damage to whistleblowers. As recommended by the Parliamentary Joint Committee, for protections to be realistic there needs to be a clear separation between this criminal liability, and the different bases on which whistleblowers should be able to obtain civil remedies.[27] We got ourselves into this particular mess by being the first country to systematically criminalise victimisation against whistleblowers, but without realising we were doing it in a way that would narrow the chances of wider remedies being made available. Internationally, best practice frameworks do not make this mistake.[28] Even with other improvements, we cannot expect these legal protections to work until this is addressed.

6. Make protections real by providing **effective support** to public interest whistleblowers:
    - Update the statutory minimum requirements for **whistleblowing policies and programs** in the public sector, and increase the Commonwealth Ombudsman's monitoring and support roles;
    - Establish a fully resourced **whistleblower protection authority** to assist all reporters and regulators with advice, support, coordination and enforcement action to prevent, deal with, and gain remedies for detrimental conduct;
    - Continue to consider a **reward scheme** for public interest whistleblowers.

Sixthly, making the protections real also requires a commitment to providing effective support to public interest whistleblowers in practice, and not just in legal theory. This means practical improvements to what government agencies are required to do, overseen by the Commonwealth Ombudsman. Again, the Corporations Act helps point the way – it provided another world first, by explicitly requiring organisations not only to have their own whistleblowing policies and procedures, but to detail how they were will support and protect whistleblowers from the outset.

[26] See PID Act, s. 13(1)(b)&(c); Corporations Act, s. 1317AD(1)(b)&(c).

[27] Recommendations 10.1 and 10.2.

[28] See OECD, *Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, Paris: OECD, 2011, p.11; Government Accountability Project, *International Best Practices for Whistleblower Policies* (2016); Joint Parliamentary Committee (2017), pp.21-23.

In addition, this means a fully resourced whistleblower protection authority to ensure workers can access their rights, especially the most vulnerable and least powerful. Internationally, the need for effective institutional arrangements is becoming clearer and clearer, and highlights Australia's gaps.[29] Again, the need for and roles of such an authority were laid out in some detail, supported by a bipartisan consensus, by the 2017 Parliamentary Joint Committee. More recently, the *National Integrity Commission Bill* developed and introduced to federal parliament by Independent Cathy McGowan and Centre Alliance's Rebekha Sharkie, in November 2018, shows that the types of roles and powers needed for a whistleblower protection commissioner can be readily translated into legislation.

And as a third element of support, we need to remember the historic recommendation of the 2017 Parliamentary Joint Committee that it is time for Australia to have a reward or incentive scheme, which enables eligible whistleblowers, and their lawyers, to claim a percentage of the financial benefits that their disclosures may bring to regulators or the public.

7. Recognise the wider validity of public interest disclosure of official information, beyond employee disclosures of wrongdoing, by making available **a general public interest defence** for any citizen charged with offences of unauthorised disclosure or receipt of official information (Criminal Code).

Finally, we need to remember it is not only worker disclosures about wrongdoing that might attract penalties under secrecy laws. A general public interest defence needs to be available for any citizen to assert, using the right criteria, if they are charged with offences of unauthorised disclosure or receipt of official information. The common law once provided this kind of relief, before being wiped out by recent decades of secrecy legislation. At one time, a general public interest defence to criminal or civil liability for a breach of confidentiality was likely available to whistleblowers in 'non-emergency' situations.[30] Federal Parliamentary Committees have concluded since at least 1994 that uncertainty over the scope of any common law protection is exactly why statutory protections of these kinds need to be created, and

[29] Loyens, K., & Vandekerckhove, W. (2018). Whistleblowing from an international perspective: A comparative analysis of institutional arrangements, *Administrative Science,* 8(3), 30-46.

[30] In Australian courts it has been said that 'the public interest in the disclosure (to the appropriate authority or perhaps the press) of iniquity will always outweigh the public interest in the preservation of private and confidential information': *Allied Mills Ltd v Trade Practices Commn* (1980) 55 FLR 125 per Sheppard J. For qualifications, see - *G v Hayden (No 2)* (1984) 156 CLR 532, per Gibbs CJ; *Attorney-General (UK) v Heinemann Publishers* (1987) 10 NSWLR 86, per Kirby P at 166-170. The common law principle flowed from the famous English principle that 'there is no confidence as to the disclosure of iniquity': Wood V-C in *Gartside v Outram* (1856) 26 LJ Ch 113 (at 114). See generally, Brown, A. J. (2007). 'Privacy and the Public Interest Disclosure: When Is It Reasonable to Protect 'Whistleblowing' To The Media?' *Privacy Law Bulletin* 4(2): 19-28; Brown, A. J. (2009), 'Returning the Sunshine to the Sunshine State: Priorities for whistleblowing law reform in Queensland' *Griffith Law Review* 18(3): 666-689.

extended to all reasonable circumstances.[31] To return to the starting point of this Oration, the issue also goes beyond employee reporting, and beyond the reporting of clear wrongdoing. The nature of creeping criminalisation of official information means that *anyone* could potentially be caught by the increasing raft of criminal laws – not just whistleblowers, but public servants revealing information in other circumstances, journalists, or businesses and professionals dealing with confidential information as a result of their dealings with government. The Australian Law Reform Commission recommended, in 2010, that a wider approach was needed – not to excuse every public disclosure, but to at least give the courts the flexibility and discretion to *consider* whether the public interest outweighs the merits of secrecy, where this becomes a valid issue in individual cases.[32] Now is the time to re-equip our legal system with this kind of safety valve. Without this, neither these offences nor our legal system are consistent with justice.

CONCLUSION: FOLLOWING PARKES' EXAMPLE

From all these recent events, we can see how confused and inconsistent policy and lawmaking has become in this area. But we can respond, and those seven steps are my suggestions on how. Whatever the approach, we must act to strengthen our national systems of public integrity and accountability if Australia is to remain the world-leading democracy envisioned by our constitutional founders. The new attention on these issues, brought by the AFP's unfortunate attempts to enforce our current mess of laws, can let us turn things around.

These steps are clear, and achievable within this term of Parliament, even if some require a comprehensive view, or a return to basic principles. Our political leaders, especially current and former Attorneys-General with the calibre and skills of Christian Porter and Mark Dreyfus, are capable of doing it. So, however we got into this mess, by taking the right approach, we can get ourselves out. But we have to understand, this is not simply for the sake of press freedom, nor even for the sake of justice for everyday workers and officials. It is vital to safeguarding the future of Australian democracy.

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[31] See e.g. Senate Select Committee on Public Interest Whistleblowing, *In the public interest*, 1994, par 8.27.

[32] Australian Law Reform Commission (2010). *Secrecy Laws and Open Government in Australia*, Report 112.

Gregory Parkhurst

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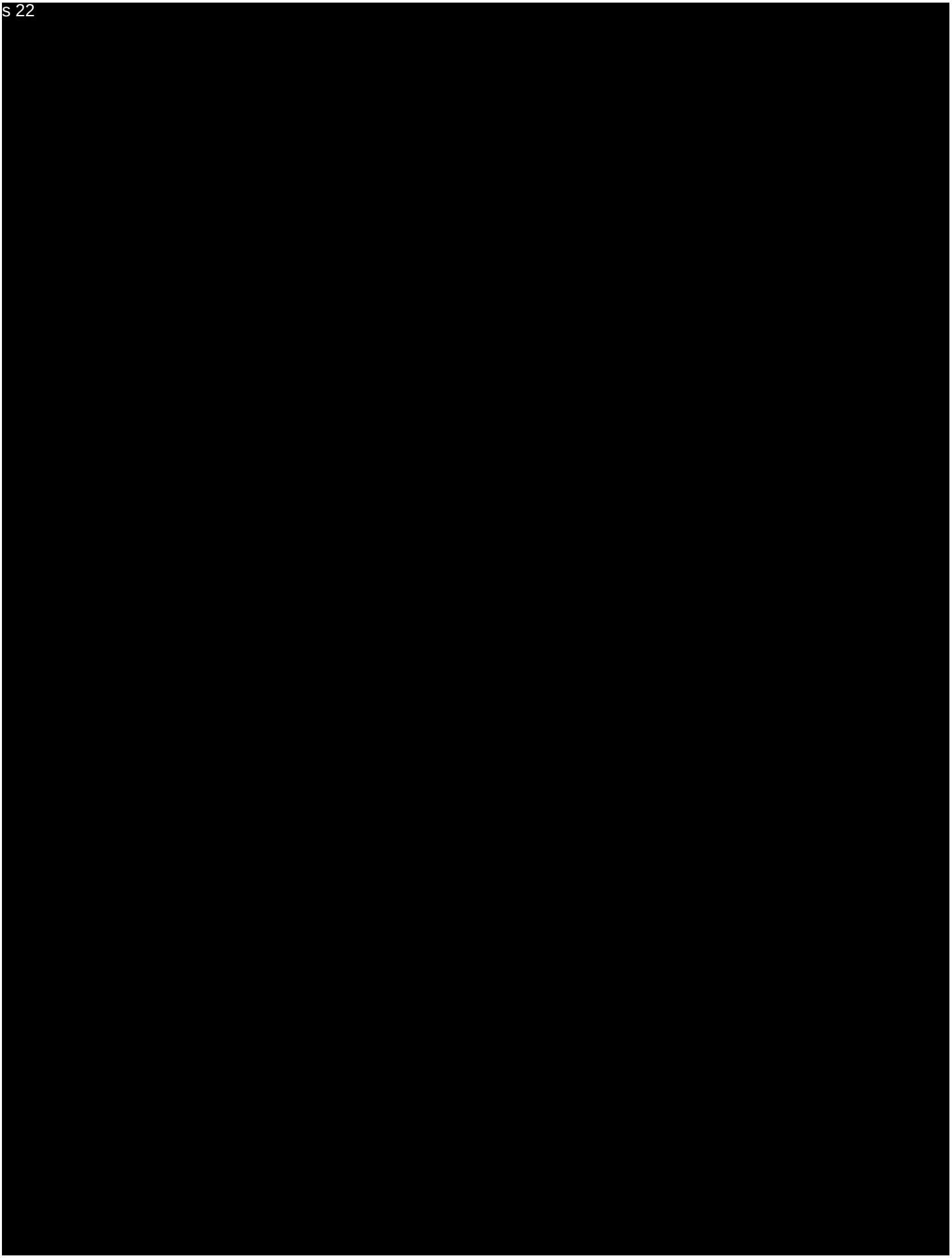

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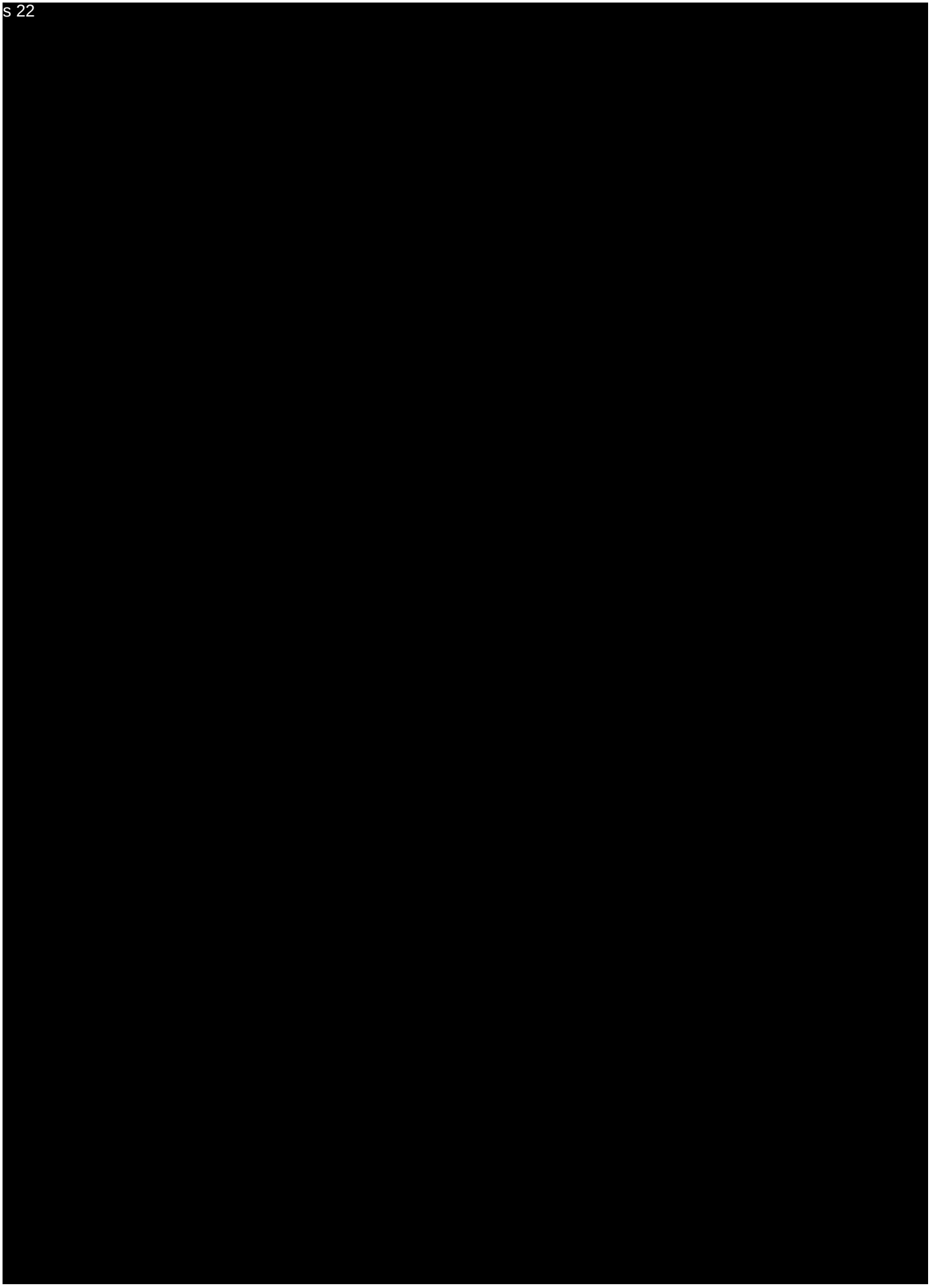

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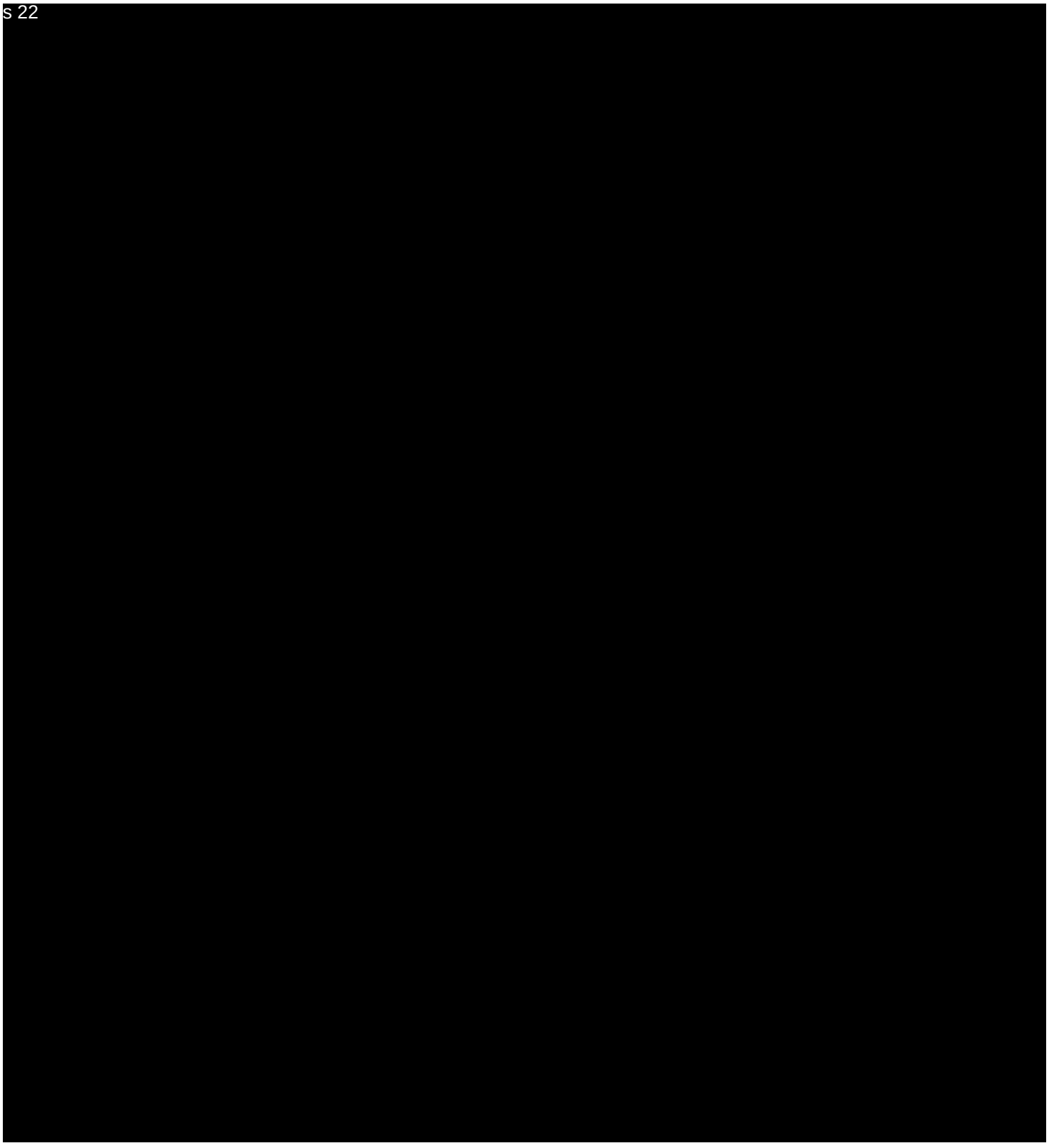


#ausUPR

AUSTRALIA'S HUMAN RIGHTS SCORE CARD

AUSTRALIA'S 3RD UNIVERSAL PERIODIC REVIEW

Joint NGO Submission on behalf of the Australian NGO Coalition

APRIL 2020

This Joint NGO Submission is endorsed, in whole or in part, by 202 NGOs across Australia.

The submission was coordinated by the Human Rights Law Centre, the Kingsford Legal Centre and the Caxton Legal Centre, working with an Advisory Group comprised of 16 NGOs, which provided expert guidance on the content and focus of the submission.

The sections in the submission were developed by 21 expert and recognised NGOs, working with 36 other diverse NGOs. Particular attention was taken to ensure intersectionality across the sections, reflecting the compounding nature of discrimination and disadvantage in Australia, and the direct participation of Aboriginal and Torres Strait Islander Peoples and their organisations.

This submission was finalised in April 2020, at a time when the COVID-19 pandemic was sweeping Australia and the world, resulting in delays in UN Universal Periodic Review processes. This submission was therefore submitted in July 2020 and an annexure included (Annexure C) that addresses COVID-19 and human rights developments in Australia between April and July 2020.

CONTACT

Edwina MacDonald
Human Rights Law Centre
upr@hrlc.org.au
Ph: + 61 2 8599 2184
Level 5, 175 Liverpool Street
Sydney NSW 2122
www.hrlc.org.au

Emma Golledge
Kingsford Legal Centre
e.golledge@unsw.edu.au
Ph: + 61 2 9385 9566
F8-003 UNSW Australia
UNSW Sydney 2052
www.klc.unsw.edu.au

Bridget Burton
Caxton Legal Centre
bridget@caxton.org.au
Ph: + 61 7 3214 6333
1 Manning Street,
South Brisbane QLD 4101
www.caxton.org.au

Human Rights Law Centre

KLC kingsford legal centre

caxton legal centre inc

Submission

This joint submission has been prepared by, and in consultation with, a broad-based coalition of Australian non-government organisations (Annexure A). It has been endorsed, in whole or in part, by 202 NGOs (Annexure B).

Highlighted issues are often relevant to more than one population group, reflecting the intersectionality of inequality and compounding nature of discrimination and disadvantage. In particular, Aboriginal and Torres Strait Islander Peoples are significantly overrepresented across all low social indicators as a result of the continuing impact of colonisation, marginalisation and racism. These unique factors require specific Aboriginal and Torres Strait Islander controlled and targeted strategies that reflect the self-determination of Aboriginal and Torres Strait Islander Peoples.

CONSTITUTIONAL, LEGISLATIVE AND INSTITUTIONAL FRAMEWORK

Australia's Constitution does not support the self-determination, or recognise the rights of Aboriginal and Torres Strait Islander Peoples, and enables Parliament to enact discriminatory, race-based legislation.[1]

Australia must hold a referendum to revise the Constitution to recognise Aboriginal and Torres Strait Islander Peoples' rights, remove racist elements and include an anti-discrimination clause. Australia must establish an Aboriginal and Torres Strait Islander elected representative Voice to Parliament and establish a Makarrata and Truth and Justice Commission to develop a treaty with the First Peoples of Australia.[2]

Australia continues to fail to fully incorporate its international human rights obligations into domestic law. An Australian Charter of Rights would help ensure decisions and actions of our governments meet their obligations and are guided by values like fairness, equality and dignity.

Australia must introduce a comprehensive, judicially enforceable national Charter of Human Rights and Freedoms that protects the whole community. Similar charters must be introduced in states and territories.

Australia must incorporate the UN Declaration on the Rights of Indigenous Peoples into domestic law, establish an independent body to oversee its implementation in consultation with Aboriginal and Torres Strait Islander Peoples, and include UNDRIP in the *Human Rights (Parliamentary Scrutiny) Act*.

Not all Australian jurisdictions have compensation schemes for members of the Stolen Generations.[3]

Australia must urgently compensate all members of the Stolen Generations, as recommended by the Bringing Them Home Report.[4]

Concern persists about Australia's failure to ratify key international human rights instruments, reservations to existing ratifications, and the lack of implementation of previous UPR and UN recommendations.

Within three years, Australia must ratify the Convention on Migrant Workers, ILO 169 on Indigenous and Tribal Peoples, Convention against Enforced Disappearances, OP to ICESCR, Nagoya Protocol and Third OP to the CRC. Within two years, Australia must withdraw all treaty reservations, including to CRC Article 37(c) regarding children in detention.[5] Australia must also immediately task its Joint Parliamentary Committee on Human Rights with monitoring domestic consideration and implementation of UN human rights recommendations.

Australia ratified OPCAT, following its 2016 UPR voluntary commitment. There is a lack of commitment to implementing a National Preventive Mechanism and concern this will result in a NPM lacking the essential powers, resources, independence, and uniformity necessary to fulfil its OPCAT obligations.[6]

Australia must prioritise developing and adequately funding a NPM that covers aged care and children's and disability specific facilities, and establish an advisory relationship with civil society including for designation and implementation stages.

Australia lacks an institutional mechanism for investigating and prosecuting international crimes committed by and against Australians.

Australia must develop an international crime mechanism resourced to provide effective access to justice for victims.

Social and community services suffer deep ongoing funding cuts, funding instability and unjustified funding conditions.[7]

Australia must adequately fund social and community services to underpin the realisation of human rights.[8]

ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

Australia has enacted a series of punitive and paternalistic policies that racially target Aboriginal and Torres Strait Islander communities.[9] In considering the 'Northern Territory Intervention',[10] Special Rapporteur Anaya found the quarantining of welfare payments,[11] compulsory leasing of Aboriginal lands, and removal of governance[12] to 'overtly discriminate against Aboriginal people',[13] infringe their right to self-determination[14] and conflict with the ICERD, ICCPR and the UN Declaration on the Rights of Indigenous Peoples.[15] Continued through the 'Stronger Futures' legislation',[16] funding has been cut to Aboriginal 'Homeland/Outstation' communities.[17]

The Cashless Debit Card racially discriminates with 81% of compulsory recipients being Aboriginal and Torres Strait Islander Peoples.[18] It quarantines 80% of cash welfare,[19] stigmatises, exacerbates financial hardship and entrenches disempowerment,[20] leading to increased violence and crime.[21] A lack of technology and power outages prevent access to funds and food in remote communities.[22] A Parliamentary Committee found it limited human rights and was disproportionate.[23] Despite costing $10,000 per participant, it is being extended.[24]

The Community Development Program racially targets, with 85% of 35,000 participants being Aboriginal and Torres Strait Islander Peoples.[25] It requires remote participants to work for welfare payments, with additional onerous obligations.[26] It has applied financial penalties disproportionately, giving 350,000 penalties over two years,[27] resulting in cuts to payments, causing hunger.[28]

The Intervention/Stronger Futures and welfare reforms that impose cashless debit cards, additional burdens or penalties on Aboriginal and Torres Strait Islander Peoples must be abolished, and Homeland/Outstation communities must be refunded within 12 months.

Australian land management and legislative regimes do not uphold the rights of Aboriginal and Torres Strait Islander Peoples to manifest, practice and teach cultural traditions and customs on traditional lands, territories and waters. Climate change is having a detrimental and inequitable impact on Aboriginal and Torres Strait Islander communities, with unendurable temperatures in central Australia.[29] Aboriginal and Torres Strait Islander Peoples have not been included in water/land regulatory bodies.[30] The commercial sale of water has also left Aboriginal and Torres Strait Islander communities dry, with health impacts from sub-standard water.[31] Traditional Owners are concerned that hydraulic fracking will contaminate and deplete ground water.[32]

Australia must amend all policy and legislative regimes that impact Aboriginal and Torres Strait Islander rights to practice cultural traditions; facilitate Aboriginal and Torres Strait Islander decision making in regulatory water and land management bodies; and provide finances for Aboriginal and Torres Strait Islander communities to develop climate change mitigation strategies.[33]

The *Native Title Act 1993* is fundamentally flawed, favours mining interests, and is inconsistent with the principle of 'equality before the law'.[34]

Australia must: amend the Native Title Act to include free, prior and informed consent; remove power to compulsorily acquire native title lands and extinguish native title rights; and include compensation regardless of date of extinguishment.

The 2017 Uluru Statement called for a Makarrata Commission or Treaty, Truth and Justice Commission.[35] Australia remains the only former British colony without a treaty. A Treaty is crucial for addressing the social-economic disparity and political marginalization of Aboriginal communities by enacting self-determination, in line with the UNDRIP.

Australia must establish a Makarrata Commission to develop a treaty with Aboriginal and Torres Strait Islander Peoples within 3 years.

REFUGEES AND ASYLUM SEEKERS

Australia undermines the institution of asylum by intercepting asylum seekers at sea and implementing rapid returns, with rudimentary screening and without access to legal advice or fair process. Australia has returned people at airports without properly assessing their claims. Asylum seekers who arrived by boat after August 2012 (and not sent to Nauru or Papua New Guinea), are not eligible for permanent protection and have no pathway to citizenship.

Australia must ensure its asylum processes and border management policies fully comply with its international obligations, including the principle of non-refoulement.

Asylum seekers, including children and stateless persons, remain subject to mandatory, indefinite and non-reviewable detention. Some people have been held in immigration detention for over ten years. Since 2015, detention facilities have become more prison-like; use of force has become commonplace.[36]

Australia must repeal mandatory detention and introduce legislative criteria to guide individual decisions to detain. Immigration detention must be subject to maximum timeframes and independent review.

As of July 2020, around 370 refugees and asylum seekers forcibly sent to Nauru and Papua New Guinea in 2013 and 2014 remain there, many without access to durable solutions and some at risk of being arbitrarily detained (including stateless persons).[37] Healthcare remains inadequate and Australian legislation that granted doctors greater power over medical evacuation decision-making was repealed in December 2019.

Offshore processing must end and all those who are yet to access durable solutions must be brought to Australia.

Many asylum seekers, including those in the deficient 'fast-track process', wait years for asylum decisions. Thousands, including children and other vulnerable groups, have lost access to legal advice, healthcare, casework and financial support due to Government decisions. Recognised refugees who arrived by sea many years ago are affected by discriminatory policies that prevent immediate family members from joining them.

Australia must repeal the fast-track process and restore funding for legal assistance, income support and basic healthcare for asylum seekers, and repeal policies preventing family reunion for refugees.

Australia lacks a statelessness determination procedure to identify, monitor and protect the rights of stateless people[38] in accordance with international law.[39]

Australia must introduce a statelessness determination procedure and visa category to protect stateless persons in Australia by 2024.[40]

CULTURALLY AND LINGUISTICALLY DIVERSE PEOPLE AND COMMUNITIES

Positive statements by the Prime Minister condemning racism and the Australian Government's multicultural statement[41] are undermined by policies which threaten social cohesion and prevent CALD people from fully participating in the Australian community.

Australia must ensure that CALD people – particularly in rural and regional areas – have equitable access to services, support and opportunity.

The extension of waiting periods for social support services, limitations on family visa pathways and delays in citizenship processing inflict unnecessary hardship. This hardship disproportionately affects women from CALD backgrounds, particularly those experiencing family violence.

Australia must ensure a fair and non-discriminatory migration and citizenship policy which recognises the importance of family, and promotes full public participation.

Debate about population, national security and crime has seen a sharp rise in anti-immigration sentiment.[42] Muslim Australians continue to experience high levels of racism and bigotry,[43] and Australians of African heritage (particularly Sudanese Australians), have increasingly been the subject of sensationalist political and media attention, which has fuelled racism, profiling and discrimination.[44]

Australia must strengthen measures to combat discrimination and violence on racial, ethnic or religious grounds, particularly through education and dialogue.

OLDER PEOPLE

Australia has not fulfilled its 2016 UPR commitment[45] to use existing human rights mechanisms to report on and protect the rights of older persons, nor to include an older people section in their UN reports. Australia is largely disengaged from the Open-Ended Working Group on Ageing (OEWGA).

Australia must reengage as an active participant of the OEWGA and work towards developing improved international protections for older people.

Australia's Aged Care Royal Commission[46] labelled aged care a "shocking tale of neglect."[47] However, the Royal Commission has so far failed to make conclusions about human rights breaches of older persons in aged care. Over 110,000 older persons have waited between 7-32 months[48] to receive aged care services in their home,[49] and Australia lacks legislative protections against the use of chemical restraints,[50] demonstrating the need for stronger international protections.

Australia must strengthen its aged care system, ensuring it reflects Australia's human rights obligations, including appropriate funding to remove waitlists.

Unlawful age discrimination continues to affect older people, particularly women, in the market and at work.

Australia must fund the recommendations of the 2016 Willing to Work National Enquiry into employment discrimination.[51]

SEXUAL ORIENTATION, GENDER IDENTITY AND EXPRESSION, AND SEX CHARACTERISTICS

Since 2016, Australia has recognised marriages between two people regardless of gender.[52] States have amended laws to make it easier for legal gender to be changed,[53] to allow adoption by couples regardless of gender,[54] and to expunge convictions for historical homosexual offences.[55] Some states may soon prevent so-called 'conversion' practices which seek to eliminate or suppress the affirmation of lesbian, gay, bisexual and transgender identities.[56]

Despite such reforms (and sometimes accompanying them[57]), discrimination, harassment and violence on the grounds of sexual orientation, gender identity and expression, and bodily variations in sex characteristics, remain prevalent.[58]

Within 18 months, Australia must:

- **advance reforms in remaining states which impose unjust hurdles (including requirements for surgery) on people seeking official identity documents reflecting their gender;[59]**
- **implement recommendations on ending harmful practices (including forced and coercive medical interventions) to ensure the bodily integrity of children with intersex variations;[60]**
- **ensure access to redress, independent affirmative peer support and psychosocial support for people with intersex variations and their families;[61]**
- **capture SOGIESC data[62] in its 2021 national census and other significant collections to provide a robust evidence-base for future public policy and government interventions; and**
- **implement effective measures to reduce SOGIESC-based bullying, harassment and violence, particularly targeted at youth.[63]**

PEOPLE WITH DISABILITY

The National Disability Strategy (NDS) is Australia's policy framework to implement the Convention on the Rights of Persons with Disabilities. In 2019, the CRPD Committee raised serious concerns about the lack of implementation, funding and oversight of the NDS.[64]

The new NDS must be properly resourced through a robust National Disability Agreement between all levels of Government. Transparent monitoring and evaluation of outcomes for people with disability must be linked to accountability measures across Governments, ensuring targets are met. People with disability, and their representative organisations, must also be positioned at the centre of the NDS's development, implementation and monitoring.

Legislation regulating legal capacity remains problematic.[65] Australia's Interpretative Declarations to CRPD Articles 12, 17 and 18 prevent reform and allow human rights violations.[66] No progress has been made towards a national Supported Decision-Making Framework.[67] Despite persistent UN recommendations,[68] behaviour management, involuntary treatments and restrictive practices occur across a range of settings.[69]

Australia must withdraw CRPD Interpretative Declarations before 2026[70] and modify, repeal or nullify laws, policies and practices which deny or diminish equal recognition before the law. Australia must eliminate restrictive practices, involuntary treatment, forced sterilisation and medically unnecessary interventions of people with disability.

People with disability, particularly women,[71] experience significant[72] violence and abuse.

The Disability Royal Commission must address the systemic drivers of this violence and establish national mechanisms for redress, complaint and oversight.

CHILDREN

Australia must fully incorporate the CRC into domestic legislation and policy within three years.

The National Framework for Protecting Australia's Children 2009-2020 lacked sufficient focus on preventing violence against children, economic, social and cultural rights, non-discrimination, and participatory rights.

Australia must develop a National Plan for Children which comprehensively protects children's rights, and which is at least consistent with the National Plan to Reduce Violence against Women and Their Children, within 18 months.

Aboriginal and Torres Strait Islander children are over 10 times more likely to be removed from their families than other children and 23 times as likely to be in detention.[73]

Australia must establish a national prevention, early intervention and reunification program to prevent child protection involvement, with significant Aboriginal and Torres Strait Islander community-controlled service provision, within two years. Australia must establish a national commissioner for Aboriginal and Torres Strait Islander children and young people within one year.[74]

To comply with international legal obligations,[75] **Australia must immediately legislate to prohibit detention of asylum-seeking, refugee and migrant children.**

Australia fails to adequately protect children's right to be heard about matters affecting them.[76]

Australia must undertake legal reform to provide mechanisms for children to participate and be heard, and to provide all necessary funding to services that support direct advocacy for children within two years.

Children with disability experience segregation and human rights violations in educational settings.

Australia must develop a national Action Plan for Inclusive Education and urgently end restraint and seclusion of children with disability.[77]

Australia must legislate to mandate consultation between the National Children's Commissioner and children on matters affecting them, while ensuring the Commissioner has adequate resources, within one year.

WOMEN

Many women in Australia experience human rights violations due to an intersection of gender and other aspects of their lived experience.

Discrimination against Aboriginal and Torres Strait Islander women is structurally and institutionally entrenched. Colonisation, intergenerational trauma and a lack of culturally appropriate services fosters a disturbing pattern of violence against Aboriginal and Torres Strait Islander women, who are significantly more likely to die or be hospitalized due to violence than other women[78] and are imprisoned at 21 times the rate of other women.[79]

Funding for women's specialist services is declining and community self-determination is not valued by funders.[80]

Australia must implement gender responsive budgeting which considers the needs and impacts of expenditure on a diverse range of women, underpinned by intersectional data and research.

The family law system does not prioritise safety and risk in its practice and decision-making.[81]

Australia must implement the *Safety First in Family Law Plan.*[82]

The National Plan to Reduce Violence against Women and Their Children is inadequately resourced to meet demand,[83] and is not inclusive of all forms of gender-based violence.[84] UN experts have recommended a National Action Plan for Indigenous Women, but Australia has not implemented this.[85]

Women on temporary visas experiencing violence face barriers to accessing protections, services and justice.[86]

The second National Plan must incorporate adequate funding, specific measures to address violence against women of diverse experiences, and a monitoring and evaluation system for all action plans.

Australia must address economic inequality, including addressing women's unpaid caring work and gendered gaps in wages and retirement savings.[87]

EQUALITY AND NON-DISCRIMINATION

Australia protects against discrimination through multiple inconsistent and overly technical anti-discrimination legislation. Australia's piecemeal approach does not provide remedies for intersectional discrimination, and creates significant exceptions and barriers to individuals bringing complaints.

Australia must enact a comprehensive Equality Act that addresses all prohibited grounds of discrimination, promotes substantive equality and provides effective remedies, including against systemic and intersectional discrimination.

Religious discrimination is not currently addressed by standalone federal discrimination law. In 2019 the federal government released a draft Religious Discrimination Bill. The proposed Bill goes far beyond protecting against religious discrimination and provides people and faith-based institutions with a licence to discriminate on religious grounds, including when delivering healthcare. The Bill privileges religious views over patient health needs, and removes existing anti-discrimination protections, including for women, people with disabilities, SOGIESC, and people from minority faiths.

Australia must not enact the proposed Religious Discrimination Bill.

DEMOCRATIC RIGHTS AND FREEDOMS

Queensland and New South Wales have passed anti-protest legislation that unfairly restricts peaceful assembly, and increases penalties for trespass and using lock-on devices during peaceful protests.[88]

Australia must repeal laws criminalising peaceful protest and recommit to facilitating peaceful protests.

Australian Federal Police have raided the homes and workplaces of journalists following public interest reporting on intelligence and defence agencies.[89] New federal laws have expanded the definition of "espionage" to include public interest reporting by journalists and human rights defenders[90] that could bring the country into disrepute internationally.

Australia must repeal laws criminalising public interest reporting and strengthen journalist warrant obligations.

The Australian Government is prosecuting whistleblowers who disclose public interest matters, most notoriously Witness K and his lawyer, Bernard Collaery.[91]

Australia must strengthen existing protections for whistleblowers and enable public disclosure of serious wrongdoing within intelligence and defence agencies.

The Australian Government has defunded NGO advocacy work and Aboriginal and Torres Strait Islander representative and advocacy bodies.[92] Charities are being investigated and deregistered for advocacy work in elections and for working with protesters.

Australia must recommit funding for and legal protection to the NGO sector and Aboriginal and Torres Strait Islander organisations for advocacy work.[93]

The Australian Government has implemented overbroad foreign interference legislation which exempts politicians, while potentially making NGO reporting to UN bodies a national security offence,[94] and restricts free speech on electoral matters.

Australia must amend the foreign interference laws to exclude NGO advocacy and include politicians.

Government-funded independent broadcasters ABC and SBS have been attacked politically and experienced significant funding cuts.

Australia must restore funding to public broadcasters.

The Australian Government has passed extensive laws requiring telecommunication companies to retain metadata and facilitate access to encrypted messages.[95] It is considering a national database of photographs to enable law enforcement agencies to conduct facial recognition without adequate safeguards.[96]

Australia must repeal the metadata and encryption laws and severely restrict the use of facial recognition technology.

The Australian Government continues to broaden laws stripping Australians of citizenship, without adequate procedural safeguards and sometimes retrospectively, placing them at an unacceptable risk of statelessness, family separation and indefinite detention.[97]

Australia must repeal citizenship deprivation laws.

ACCESS TO JUSTICE AND THE CRIMINAL JUSTICE SYSTEM

Legal assistance funding is inadequate. The separate Indigenous Legal Assistance Program is being wound up despite evaluation recommending retaining it.[98]

Australia must restore dedicated funding for Aboriginal and Torres Strait Islander Legal Services.

The legal assistance sector remains critically underfunded, with insufficient access to legal services to meet demand and provide redress for human rights abuses.

Australia must implement the recommendations of the Productivity Commission to inject $200 million the legal assistance sector.[99]

The criminal justice system is failing young people, Aboriginal and Torres Strait Islander Peoples, women, and people with disabilities. [100]

Australia must reform the criminal justice system to make prison a last resort, and provide greater rehabilitative and diversionary options for overrepresented groups. It must address the over-representation of Aboriginal and Torres Strait Islander Peoples, including by setting justice targets, funding a national Custody Notification Service, and ending mandatory sentences.

Children are too often detained, subject to isolation and force, and not separated from adults.[101]

Australia must mandate separate detention of children from adults, review its juvenile justice systems against the CRC and CRPD,[102] and implement all recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory, within two years.

Australia's age of criminal responsibility is 10, contrasting with UN recommendations,[103] and medical evidence about children's development.[104] This disproportionately harms disadvantaged children.

Australia must raise its minimum age of criminal responsibility to at least 14 within one year.

Little progress[105] has been made towards Australia's 2016 voluntary UPR commitment to improve criminal justice system treatment of people with cognitive disability unfit to plead or found not guilty by reason of mental impairment.[106]

Australia must address the over-representation of people with disability, including eradicating imprisonment of unconvicted people with disability and enforcing safeguards against indefinite forensic detention.

PRISONS

Due to historically entrenched and systematic factors, including racism, Aboriginal and Torres Strait Islander Peoples are the most imprisoned people in the world. Despite making up 2% of the population, they constitute 28% of all imprisoned people.[107] Approximately 50% of imprisoned people in Australia have a disability,[108] and up to 73% and 86% of imprisoned Aboriginal and Torres Strait Islander men and women, respectively, report a psychosocial disability.[109]

At least 437 Aboriginal and Torres Strait Islander Peoples have died in custody since the 1991 Royal Commission into Aboriginal Deaths in Custody.[110]

Australia must fully implement the findings of the Royal Commission into Deaths in Custody and the NT Royal Commission, including closing Don Dale detention centre.

Women are the fastest growing imprisoned group. Aboriginal and Torres Strait Islander women made up a third of all imprisoned women in 2018.[111] Most are imprisoned for low level offending.[112] Domestic violence is both the cause and effect of women's imprisonment.[113]

Australian governments must enter into a formal partnership with Aboriginal and Torres Strait Islander organisations to develop national justice and family violence targets to reduce imprisonment.[114] Additionally, prison must only be a last resort for primary carers.[115]

Investigations of youth detention services, including one Royal Commission, have found repeated breaches of children's human rights.[116] The rights of children in police watch houses in Queensland are being seriously breached.[117] Most jurisdictions have multi-billion dollar prison expansion or construction programs without commensurate investment in preventative or diversionary programs.

Australia must end prison construction and expansion and instead resource preventative and diversionary programs to reduce imprisonment.

POLICE

It is critical that independent bodies[118] are resourced[119] to investigate potential human rights abuses by police.

Australia must ensure that all jurisdictions establish independent investigative bodies that meet international human rights standards.[120]

Racially discriminatory policing remains prevalent, impacting entire communities.[121] In particular, 'intelligence-led' or 'preventive' policing models[122] are having adverse and discriminatory impacts, especially on racially marginalised groups.[123]

Australia must conduct a comprehensive audit into policing law, policy and procedure to identify and eliminate discriminatory impacts, and immediately implement stop & search monitoring and receipting[124] to address racial profiling.

Aboriginal and Torres Strait Islander Peoples continue to die in custody.[125]

Australia must urgently implement all recommendations from the Royal Commission into Aboriginal Deaths in Custody.[126]

Police responses to family violence need urgent reform. Survivors of family violence experience police duty failures, including misidentifying victims as perpetrators, privacy breaches and failing to provide effective protection.[127]

Australia must address police duty failures and improve responses in order to enhance the safety of victims / survivors when requesting police assistance for family violence,[128] and to prevent the criminalisation of survivors[129] as a consequence of police responses.

POVERTY

3.2 million people, including 774,000 children live, below the poverty line in Australia.[130] Australia ranks 16th out of 26 OECD countries, despite high national and household wealth.[131] Poverty is most acute for people who are not in paid work and rely on social security.[132] Poverty among sole parent families is high, at 32% in 2015-16.[133]

Australia must permanently increase allowance payments so that people can afford the basics, and index to wage inflation.

Allowance payment rates and indexation methods are not currently benchmarked to adequacy.

Australia must also establish a Social Security Commission to advise Government on payment rates, including indexation.

Cashless debit and income management schemes have expanded in recent years despite their discriminatory impact on Aboriginal and Torres Strait Islander Peoples and single mothers, their restriction on individual decision making, and weak evidence of effectiveness.[134]

Australia must replace compulsory cashless debit and income management schemes with voluntary models which are non-discriminatory in design and implementation.

Australia's unlawful automated debt collection process – robodebt - has undermined the right to social security and severely impacted the people on whom it has been imposed, especially women.[135]

Australia must end all automated debt collection processes based on flawed debt calculation methods and refund anyone who has repaid a robodebt.

HOUSING AND HOMELESSNESS

Since the last UPR, homelessness has further increased (particularly among Aboriginal and Torres Strait Islander Peoples[136] and older women[137]), housing affordability has not improved,[138] and social housing stock has continued to decline.[139] The previous national homelessness strategy[140] has not been replaced, and there is no national plan to reduce homelessness or housing stress. Funding for the National Rental Affordability Scheme will be discontinued. Government payments assisting renters on low incomes are inadequate, leaving nearly half of renters on low incomes in urban areas in rental stress.[141]

Australia must develop a national homelessness and affordable housing strategy, with goals and targets underpinned by substantial funding in services, stock and support. Australia must also increase investment in new social housing that meets diverse housing needs.

The national inter-governmental funding agreement on remote Aboriginal and Torres Strait Islander housing has expired, and federal funding for remote housing has been withdrawn in many states.

Australia must develop a new inter-governmental Aboriginal and Torres Strait Islander housing strategy, which includes remote homeland communities, and is included in the Closing the Gap[142] Targets.

HEALTH

Australians live approximately 13.2% of their lives in ill health.[143] Poor health outcomes are linked to low incomes,[144] gaps in Australia's healthcare system,[145] and low levels of investment in illness prevention.[146]

Australia must establish an ongoing mechanism for assessing and funding illness prevention.

Climate change and public health are interlinked. Recently, smoke from bushfires has harmed the health of millions of Australians.[147]

Australia must improve systems for implementing accurate, evidence-based and timely public health interventions to mitigate the health impact of climate change.

Aboriginal and Torres Strait Islander Peoples carry a disproportionate health burden related to poverty and poor living conditions,[148] including high rates of gastroenteritis, encephalitis, hepatitis, heart disease, diabetes, kidney failure and trachoma. In 2018, suicide was the leading cause of death for Aboriginal and Torres Strait Islander children and people aged 15-44.[149] Traumatic experiences,[150] intergenerational trauma,[151] discrimination, grief and overcrowding[152] and a sense of disempowerment were attributable factors.[153]

The Australian Government must fund the Aboriginal and Torres Strait Islander controlled health, service and healing sector[154] to meet family, child, youth, health, aged, disability and rehabilitation needs nationally.

Almost a quarter of Australian children are affected by being overweight or obesity.[155]

Within two years, Australia must implement the WHO's *Ending Childhood Obesity Report* recommendations[156] and enact legislation to protect children from unhealthy food marketing.

Transgender and gender-diverse people experience major barriers to accessing culturally safe healthcare in Australia.[157]

Within two years, Australia must ensure free and timely access to culturally safe healthcare, including access to gender affirming multidisciplinary healthcare for children and adolescents.[158]

CLIMATE CHANGE

Australia is failing to prevent human rights harms caused by climate change.[159] Australia's emissions are increasing,[160] its 2030 emissions reduction target is inadequate,[161] and it spends more money supporting fossil fuels than climate action.[162]

Australia must immediately increase its 2030 emissions reduction target to at least 45%, and set a target of net zero emissions before 2050. By 2021, Australia must put a price on carbon and use the revenue to support vulnerable groups; put in place a plan to phase out coal exports; shift to 100% renewable energy before 2035; and end fossil fuel subsidies by 2025.

Australia is failing to implement appropriate measures to ensure all persons have the capacity to adapt to climate change and provide a just transition for workers and communities.

Australia must develop a rights and equity based adaptation plan, establish a just transition authority with sensitivity to multiple and intersecting forms of discrimination,[163] and adequately resource both.[164]

Australia is failing to ensure equity in climate action and ensure meaningful participation in decision making.

Australia must develop mitigation and adaption plans and policies that provide benefits for vulnerable groups and reduce inequality, and legally require consultation with diverse groups (including children, Aboriginal and Torres Strait Islander Peoples, elderly people, people with disabilities, people experiencing poverty, and women) and the publication of their views.[165]

Australia is failing to assist developing countries to mitigate and adapt to climate change.

Australia must increase its climate finance contribution to 2.4% of global flow, additional to existing ODA budget,[166] and ensure it captures the needs and priorities of vulnerable communities.

BUSINESS AND HUMAN RIGHTS

Australian companies continue to have significant adverse human rights impacts within Australia and abroad. Of particular concern are corporate contributions to the climate crisis, attacks on civic space, human rights violations in corporate supply chains, impacts on public health and abuses associated with the extractives, financial and immigration detention sectors.

Despite its 2016 voluntary commitment, Australia has failed to develop a National Action Plan on Business and Human Rights.

Australia must renew its efforts to develop a National Action Plan on Business and Human Rights and provide effective pathways to remedy for corporate human rights violations.

While Australia's new *Modern Slavery Act 2018* – requiring companies to report on their actions to address modern slavery – was a positive step, the legislation relies on voluntary reporting.

Australia must introduce mandatory human rights and environmental due diligence obligations for companies to effectively combat forced labour and other human rights violations in corporate supply chains.

Australia must also require companies emitting greater than 25,000 tCO_2-e per annum to reduce their emissions consistent with the goals of the Paris Agreement, while respecting human rights in a swift, just transition to a net zero economy.

INTERNATIONAL ASSISTANCE

Australia has cut the Official Development Assistance (ODA) budget, diminishing Australia's capacity to support human rights internationally.[167] Low investment has contributed to the failure of the aid program to meet the 80% target of projects effectively addressing gender equality.[168]

Australia must increase its ODA budget to 0.7% of GNI to boost capacity to promote human rights. Australia must also invest in technical expertise and women's rights organisations to meet the aid program's gender target.

As Australia seeks to implement new aid modalities, including blended finance for infrastructure, vigorous safe guards will be needed to mitigate risks to human rights that have previously caused concerns for government-financed projects.[169]

To meet treaty and SDG commitments Australia must put human rights, rather than national interest, at the centre of its ODA program.

Regulations introduced in 2018 require Australian charities with overseas activities to prevent harm, exploitation and abuse of vulnerable persons.[170] These address high-risk activities including volunteering

and residential care. The implementation of monitoring and enforcement is required to assist in meeting CRPD and CRC obligations.[171]

Australia must establish safeguards and monitoring mechanisms to uphold international human rights standards within ODA and blended-finance programs.

TRAFFICKING

Since the last UPR, Australia has strengthened anti-trafficking strategies, including modern slavery legislation, joining UNODC's Blue Heart Campaign, launching ASEAN-Australian Counter Trafficking Initiative, and delinking support for survivors of forced marriage from the criminal justice system for 200 days.

Access to government funded support for other survivors, however, remains contingent on participation in criminal justice processes, creating barriers to support. The National Action Plan to Combat Human Trafficking and Slavery is incomplete. Funding to NGOs has been reduced and there are significant delays in renewing funding. Orphanage trafficking, whilst recognised in modern slavery law, cannot be prosecuted under Australia's trafficking laws.

Australia must promote a human rights-based approach and ensure that the rights of victims, including to redress and economic and social support, are protected. Australia must also bring its trafficking laws into conformity with international obligations.

SEX WORK

Australia's response to sexually transmissible infections has involved effective strategies, including supporting sex worker community organising and peer education. This has supported sex workers to implement safer sex practices, resulting in the virtual elimination of HIV among sex workers.[172]

However, sex workers still experience high levels of discrimination and stigma and are negatively impacted by the criminalisation of sex work, licensing, registration and mandatory testing in some jurisdictions. Additionally, criminal laws remain in relation to sex work and HIV in VIC and QLD, and there is a lack of consistent anti-discrimination protections for sex workers.[173]

Australia must encourage a consistent approach to the decriminalisation of sex work and introduce measures to tackle discrimination against sex workers.

Annexure A: Background to Report Development

PROCESS

This joint NGO report was coordinated by the Human Rights Law Centre, Kingsford Legal Centre, and Caxton Legal Centre working with an NGO Advisory Group, which provided expert guidance based on their on the ground experience on the content and focus of the Report. Report sections were led by expert and recognised NGOs ('lead authors'), consulting with a broad range of other NGOs who provided input to the Report's content ('authors').

Expert NGO Advisory Group members, lead authors and authors were identified through consultation with the NGO human rights sector, by online surveys, the Australian Attorney-General's Department 2019 NGO Forum, and wider NGO networks. These consultations were also used to inform the content of the Report. Particular attention was paid to ensuring diversity within the Group, strong human rights credentials, the direct participation of Aboriginal and Torres Strait Islander Peoples and their organisations, and an intersectional approach to human rights.

This Report is the culmination of the collaborative work of leading human rights organisations and activists within Australia. For more information, see https://www.hrlc.org.au/universal-periodic-review.

The Human Rights Law Centred received $50,000 from the Australian Attorney-General's Department to coordinate this joint NGO report and acted as the Secretariat for the coalition.

NGO COORDINATING COMMITTEE

The Human Rights Law Centre is a national human rights organisation that uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. HRLC has NGO Consultative status with ECOSOC.

The Kingsford Legal Centre is a community legal centre based in UNSW Sydney, which provides free legal services to the community, specialising in discrimination law. Kingsford Legal Centre undertakes law reform and community legal education and teaches law students in a clinical education model.

The Caxton Legal Centre is a community legal centre in Queensland, which represents the interests of people who are disadvantaged or on a low income through strategically advocating to government, providing legal and social work services, publishing legal information and building community awareness.

ADVISORY GROUP COMMITTEE

Amnesty International
Australian Council of Social Service
Caxton Legal Centre
Community Legal Centres Australia
COTA Australia
Equality Rights Alliance
Human Rights Law Centre
Immigration Advice and Rights Centre
Indigenous Peoples Organisation
Kingsford Legal Centre
National Aboriginal and Torres Strait Islander Legal Service
People with Disability Australia
Refugee Council of Australia

Townsville Community Law Inc.
Women with Disabilities Australia
Youth Law Australia

LEAD AUTHORS

Australian Council of Social Service
Caxton Legal Centre
COTA Australia
Equality Australia
Equality Rights Alliance
Gay and Lesbian Counselling Service of NSW
Human Rights Council of Australia
Human Rights Law Centre
Immigration Advice and Rights Centre
Indigenous Peoples Organisation
International Women's Development Agency
Kingsford Legal Centre
National Aboriginal and Torres Strait Islander Legal Service
People with Disability Australia
Project Respect
Public Health Association of Australia
Refugee Council of Australia
Redfern Legal Centre
Save the Children
Scarlet Alliance
Townsville Community Law Inc.
Twenty10

AUTHORS

Advocacy for Inclusion
Aged & Disability Advocacy Australia
Amnesty International
Australian Association of Social Workers
Australian Centre for International Justice
Australian Child Rights Taskforce
Australian Council of Social Service
Australian Lawyers Alliance
Australian Lawyers for Human Rights
Australian Muslim Women's Centre for Human Rights
Australian Older Women's Network
Australian Quaker Peace and Legislation Committee
Better Care Network
Caroline Collaborates
Caxton Legal Centre
Communication Rights Australia
COTA Australia
Disability Discrimination Legal Service
Equality Australia
Equality Rights Alliance
Flemington and Kensington Community Legal Centre
Gay and Lesbian Counselling Service of NSW

Harmony Alliance: Migrant and Refugee Women for Change
Human Rights Council of Australia
Human Rights Law Centre
Immigration Advice and Rights Centre
Indigenous Peoples Organisation
International Women's Development Agency
Kingsford Legal Centre
National Aboriginal and Torres Strait Islander Legal Service
National Older Women's Network
National Social Security Rights Network
New South Wales Aboriginal Land Council
Obesity Policy Coalition
People with Disability Australia
Peter McMullin Centre on Statelessness
Physical Disability Council of NSW
Project Respect
Public Health Association of Australia
Queensland Advocacy Incorporated
Redfern Legal Centre
Refugee Council of Australia
Refugee Legal
Save the Children
Scarlet Alliance
Soroptimist International Australia
Springvale Monash Legal Service
The Secretariat of National Aboriginal and Islander Child Care
Townsville Community Law Inc.
Twenty10
Women with Disabilities Australia
Youth Affairs Network of Queensland
Youth Law Australia
YWCA Australia
YWCA Canberra

Annexure B: List of Endorsing Organisations

This submission is endorsed, either in part or in whole, by the following organisations:

Aboriginal Legal Rights Movement
Aboriginal Legal Service of Western Australia Limited
Aboriginal Rights Coalition
ACCIR
ACON
ACT Council of Social Service
ActionAid Australia
Advocacy for Inclusion
Advocare
Aged & Disability Advocacy Australia
Aleph Melbourne
Alevi Federation of Australia
Alliance for Gambling Reform
Amnesty International Australia
ANTaR
Anti-slavery Australia
Australian Association for Adolescent Health Ltd
Australian Association of Social Workers
Australian Baha'i Community - Office of Equality
Australian Centre for International Justice
Australian Council for International Development
Australian Council for International Development Gender Equity Working Group
Australian Centre for Leadership for Women
Australian Council of Social Service
Australasian Council of Women and Policing
Australian Federation of Medical Women
Australian Graduate Women
Australian Healthcare and Hospital Association
Australian Human Rights Institute, UNSW Sydney
Australian Injecting & Illicit Drug Users League
Australian Lawyers Alliance
Australian Lawyers for Human Rights
Australian Motherhood Initiative for Research and Community Involvement
Australian Muslim Women's Centre for Human Rights
Australian Quaker Peace and Legislation Committee
Australian Women Against Violence Alliance
Australian Women's Health Network
Be Slavery Free
Brigidine Asylum Seekers Project
Business & Human Rights Resource Centre
Canberra Community Law
CARE Australia
Carers Australia
Caxton Legal Centre
Centre for Asylum Seekers, Refugees and Detainees
Centre for Business and Human Rights, RMIT University
Child Rights Taskforce

Children and Young People with Disability Australia
Children by Choice
Civil Liberties Australia
Cohealth
Community Legal Centres Association of WA
Community Legal Centres Australia
Community Legal Centres Australia National Human Rights Network
Commonwealth Human Rights Initiative
Consumer Credit Legal Service (WA)
Consumers Health Forum of Australia
Council on the Ageing Australia
Disability Discrimination Legal Service
Down Syndrome Australia
Eastern Community Legal Centre
Economic Justice Australia
Edmund Rice Centre
End Child Detention Coalition
Environment Centre NT
Equality Australia
Equality Lawyers
Equality Rights Alliance
Federation of Ethnic Communities Councils of Australia
Feminist Legal Clinic
Fitted for Work
Flemington Kensington Community Legal Centre
Forget Me Not Australia Limited
Foundation for Aboriginal and Islander Research Action Aboriginal Corporation
GetUp!
Girl Guides Australia
Good Shepherd Australia New Zealand
Harmony Alliance: Migrant and Refugee Women for Change
Homebirth Australia
Hub Community Legal
Human Rights Council of Australia
Human Rights Law Centre
Immigrant Women's Speakout Association of NSW Inc.
Immigration Advice and Rights Centre
Indigenous Peoples Organisation
International Women's Development Agency
Intersex Human Rights Australia
Intersex Peer Support Australia
JERA International
Jessie Street National Women's Library
Jesuit Refugee Service Australia
Josephite Justice Network
Justice Connect
Kingsford Legal Centre
Legacy
Liberty Victoria
Liberty Victoria's Rights Advocacy Project
Marie Stopes Australia
Maternity Choices Australia
Melbourne Activist Legal Support
Migrant Women's Lobby Group of South Australia

Multicultural Youth Advocacy Network Australia
Music for Refugees
National Aboriginal and Torres Strait Islander Legal Services
National Aboriginal and Torres Strait Islander Women's Alliance
National Association of People with HIV Australia
National Association of Services Against Sexual Violence
National Council of Churches Gender Commission
National Council of Jewish Women of Australia
National Council of Single Mothers and their Children
National Council of Women of Australia
National Foundation for Australian Women
National LGBTI Health Alliance
National Older Women's Network
National Rural Women's Coalition Ltd
National Union of Students Women's Department
New South Wales Aboriginal Land Council
Northern Suburbs Community Legal Centre
NSW Council for Civil Liberties
NSW Council of Social Service
NSW Gay and Lesbian Rights Lobby
NQWLS
Obesity Policy Coalition
Older Persons Advocacy Network
Original Power
People with Disability Australia
Peter McMullin Centre on Statelessness
PFLAG Tasmania
Physical Disability Council of NSW
Plan International Australia
Project Respect
Public Health Association of Australia
Public Health Association of Australia - Women's Health Special Interest Group
Publish What You Pay Australia
Queensland Advocacy Incorporated
Rainbow Families
Redfern Legal Centre
Refugee Advice and Casework Service
Refugee Council of Australia
Reproductive Choice Australia
ReThink Orphanages Australia
Rights in Action Inc.
Rights Information and Advocacy Centre
Rural Australians for Refugees
Safe Motherhood for All
Save the Children Australia
Scales Community Legal Centre
Scarlet Alliance
Secretariat of National Aboriginal and Islander Child Care
Seniors Rights Service
Seniors Rights Victoria
Sisters Inside
Sisters of St Joseph
Soroptimist International Australia
South Australian Rainbow Advocacy Alliance

Springvale Monash Legal Service
St Francis Social Services
TASC National
The Centre for Excellence in Child and Family Welfare
The Youth Affairs Council of Western Australia
Thorne Harbour Health
Traditional Owner Leadership Group
TransFolk of WA
Townsville Community Law Inc.
Twenty10 incorporating the Gay and Lesbian Counselling Service NSW
UN Women National Committee Australia
Union of Australian Women
United Nations Association of Australia Status of Women Network
UQ Pro Bono Centre
Victorian Gay & Lesbian Rights Lobby
Victorian Immigrant and Refugee Women's Coalition
VIEW Clubs of Australia
Violence Prevention Australia
Welfare Rights Centre
Western Australian Council of Social Service
Western NSW Community Legal Centre Inc.
Whittlesea Community Connections
Wollotuka School of Aboriginal Studies, University of Newcastle
Women in Adult and Vocational Education
Women in Engineering Australia
Women on Boards
Women Sport Australia
Women with Disabilities Australia
Women's Electoral Lobby Australia
Women's Equity Think Tank
Women's Housing Ltd
Women's Information Referral Exchange
Women's International League for Peace and Freedom
Women's Legal Centre (ACT & Region) Inc.
Women's Legal Service NSW
Women's Legal Service, Tasmania
Women's Legal Service WA
Women's Legal Services Australia
Women's Property Initiatives
Working Against Sexual Harassment
World Wide Fund for Nature - Australia
Youth Affairs Network of Queensland
Youth Law Australia
Yorta Yorta Nation Aboriginal Corporation
YWCA Australia
YWCA Canberra
Zonta International Districts 22, 23 and 24

Annexure C: Human rights and COVID-19 developments following finalisation of the UPR NGO Coalition Report

The UPR NGO Coalition Report was finalised just as COVID-19 was taking hold in Australia.[174] As a result, it was not possible in the Report to contemplate the impact that COVID-19 would have on the attainment and protection of human rights in Australia. It is still not possible to make this assessment, but this Annexure identifies key areas of human rights concern for monitoring.

The NGO Coalition Report provides an important baseline for measuring and monitoring Australia's human rights response to COVID-19, and should be used to measure the impacts of COVID-19 on groups in Australia that were experiencing human rights violations prior to the pandemic.

By global comparison, Australia has been relatively successful so far in suppressing cases of COVID-19 and limiting deaths directly from the disease, although there has been a higher proportion of deaths among older people. The threat of further waves of the virus remains omnipresent, as highlighted by a recent upswing in cases in the state of Victoria. Australia must continue to effectively respond to the ongoing health threat of the virus.[175]

Preventing deaths is a key human rights outcome, but, we must consider the full range of human rights impacts of COVID-19.[176] These include the impacts of pandemic restrictions on people with pre-existing and emerging health issues[177], as well as other wide-ranging impacts caused by physical lockdown and economic shutdown measures, including the impact on mental health.[178] It is likely that the full impact of the virus will not become apparent for many years. It will be important to monitor the intergenerational impact of the COVID-19 into the future.

MONITORING THE IMPACTS OF AUSTRALIA'S RESPONSE - KEY AREAS OF CONCERN

Monitoring the human rights impacts of COVID-19 restrictions and the measures adopted to mitigate the economic impacts, is complicated by the multi-jurisdictional nature of Australia - measures have varied from state-to-state. A comprehensive human rights-based assessment will be required to consider these geographic and jurisdictional differences.

COVID-19 shutdowns occurred across Australia through new laws and regulations which were developed very rapidly.[179] Most Australian Parliaments did not sit for a number of months, and extraordinary legislative powers have been devolved to individual ministers and officials.[180] Social distancing was implemented and a range of activities and businesses were banned and closed.[181] Police were also given extensive emergency powers, including to issue fines where restrictions are violated.[182] Urgent measures were developed and adopted with little or no consultation with civil society. Civil society concerns about the impact of these extraordinary measures remain, particularly for groups subject to economic and social disadvantage in Australia, as outlined in our NGO Report.

INCURSIONS ON DEMOCRATIC INSTITUTIONS, PROCESSES AND RIGHTS

The speed and lack of consultation on the COVID-19 response measures have led to concerns about democratic decision making. This has been compounded by the temporary closure of Parliaments and creation of new bodies, such as the National COVID-19 Coordination Commission.[183] The Commission has been tasked with the critical role of advising Government on rebuilding jobs, business and livelihoods, however it has no governing legislation, opaque processes and is run by government-picked appointees, many of whom have connections to mining and resources industries. There is a lack of social service, human rights and Aboriginal and Torres Strait Islander representation on the Commission.[184]

Freedom of expression and assembly are being threatened in several jurisdictions by crackdowns on protest and heightened police powers, with over-policed groups, notably Aboriginal and Torres Strait Islander Peoples, most exposed.[185] This has been highlighted by Black Lives Matter and Aboriginal Lives Matter protests, which have occurred across Australia.[186] As the NGO Report highlights, Aboriginal and Torres

Strait Islander Peoples in Australia are the most imprisoned people on earth and die at high rates in police custody.[187] Relatively limited data about the use of police emergency powers has been made public, but what has been released appears to indicate discrimination and significant overstep.[188] The use of COVID-19 powers to prevent protests is a growing area of human rights concern, particularly given community transmission in Australia is relatively low. The proportionality of these measures and the extent to which they curtail democratic freedoms needs to be monitored.

DISPROPORTIONATE IMPACTS OF COVID-19 MEASURES

Physical lockdown measures have had acute human rights implications for certain groups, in particular, people isolated in 'pressure cooker' environments, such as places of detention,[189] nursing homes, and in overcrowded, violent or unsafe homes. For example, people living in institutions are at far higher risk of infection, and at the same time, institutional living arrangements for people with disability and older people have exposed individuals to other forms of harm, including restrictive practices under the guise of public health measures.[190] In addition, Australia has not followed public health advice about releasing people in immigration detention, people imprisoned for low level offending, and people on remand, creating genuine fears for the safety and well-being of detained people.[191]

Of significant concern is that, without regular engagement in school, work and the community, domestic violence and abuse of women, children and older people has been hidden and seeking help has been difficult.[192] The Government must invest in specialist domestic and family violence services to respond to the increased need.[193]

COVID-19 has exacerbated existing inequalities in Australia - as outlined in the NGO Report. Inequalities experienced by Aboriginal and Torres Islander Peoples in areas such as health outcomes, severe and forced housing overcrowding, employment and income and the highest incarceration rate in the world - the result of colonisation and discrimination - significantly increase the threat of death and severe illness from COVID-19 to Aboriginal and Torres Strait Islander Peoples.[194] As recommended throughout the NGO report, these inequalities and injustices must be urgently addressed.

The gendered impact of the COVID-19 health and economic crises is also of significant concern. For example, jobs held by women have decreased by 8.1%, compared to a 6.2% decrease for men.[195]In addition to an expected increase in gender-based violence, physical lockdowns have reinforced and exacerbated the unequal gender distribution of unpaid care and restricted women's access to sexual and reproductive health services and products.[196]

In addition, there is concern that children with disabilities unable to engage in remote learning will be further behind their peers than they were before,[197] and that remote learning has further disadvantaged children from economically and socially disadvantaged households.[198] There is also concern about long term harm to educational, training and employment outcomes for young people.[199]

ECONOMIC IMPACT

There have been a range of positive, but temporary, policy measures including:

- measures to reduce or mitigate tenancy evictions - these have varied across jurisdictions[200];
- measures to provide a wage subsidy to keep people in work;
- measures to increase access to, and the amount of, social security payments, in particular for people on youth, unemployment and parenting payments; and
- measures to make childcare free.[201]

However, many of these economic measures exclude critical groups, such as migrant workers, asylum seekers, refugees and many casual workers, who are already economically vulnerable, and who may be pushed into destitution or unsafe situations, such as highly exploitative work practices.[202]

The impact of these economic measures needs to be closely monitored with most assistance due to end between July and September 2020. The end of assistance, with millions of people still unemployed or under-employed, will present significant human rights challenges for large numbers of people. Monitoring the human rights impact as these measures are withdrawn will be critical. The impact of the end of free childcare will need to be monitored carefully in relation to gender equality.

A HUMAN RIGHTS FRAMEWORK FOR RECOVERY

A human rights decision making framework must shape the Australian Government's legislative and policy approach to recovery from the COVID-19 pandemic.

This must involve creating transparent, accessible, and accountable institutional structures for civil society engagement in government decision making, and moving away from the undemocratic processes, such as the National COVID-19 Coordination Commission. As the immediate health emergency subsides, a key issue will be re-assessing the proportionality of measures that curtail human rights. For example, as governments lift restrictions, they should also be taking steps to facilitate safe and peaceful protests, such as the Black Lives Matter protests.[203] In addition, identifying and addressing pre-existing inequalities, and how COVID-19 has impacted on these, should be central to responses of Australian governments so as to prevent inequality deepening into the future. Further, the swelling of the Black Lives Matter movement in Australia should remind governments that they have a duty to ensure that COVID-19 does not delay urgent action on long-standing human rights issues, such as ending Aboriginal deaths in custody and over-imprisonment.

The NGO Report, particularly the recommendations, offers a human rights roadmap which, if accepted, could align economic stimulus measures with human rights principles. An opportunity exists to turn the calamity of the pandemic into a thoughtful rebuilding which addresses inequality and sets Australia on the road to addressing major human rights concerns. Economic stimulus could be directed in areas such as addressing overcrowding and homelessness through social and affordable housing, addressing gender inequality and strengthening Australia's response to climate change. The changes during the pandemic that have radically improved the lives of some people on social security should also be maintained post the emergency response.[204]

Other successes, such as the pivotal leadership role of Aboriginal and Torres Strait Islander communities and the community controlled health sector in so far preventing the devastation COVID-19 posed to First Nations communities,[205] highlight the critical importance of community-led recovery measures. These need to be built upon to address the critical human rights issues highlighted in the NGO Report.

The swift response to the health emergency by Australian Governments demonstrated an understanding of the sanctity of life and the human right to health. It is with the same commitment that we must address the well-documented human rights concerns in Australia, including those that have been exacerbated by the pandemic. The human rights breaches outlined in the NGO Report represent just as critical a threat to life and health as COVID-19. We must approach these concerns with the same urgency and sense of national responsibility. In these extraordinary times, human rights present us with a values-based roadmap to recovery that centres on human dignity, opportunity and equality. This would be a fitting long term response to the pandemic for future generations.

NGO Co-ordinating Committee

3 July 2020

[1] Sections 25 and 51(xxvi) allow Federal Parliament to make laws by reference to the concept of 'race' – in the case of section 25, State laws; and in the case of section 51(xxvi), Commonwealth laws. See Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (Report, January 2012) 137.
[2] The Voice to Parliament and the Makarrata and Truth and Justice Commission are addressed in Referendum Council, *Final Report of the Referendum Council* (Report, 30 June 2017).
[3] Only three states in Australia have compensation schemes for members of the Stolen Generations: Tasmania (*Stolen Generations of Aboriginal Children Act 2006* (Tas)), South Australia ('Stolen Generations Reparations Scheme', *Government of South Australia: Department of Premier and Cabinet* (Web Page, 2019); and New South Wales ('Stolen Generations Reparations Scheme and Funeral Assistance Fund', *NSW Government: Aboriginal Affairs* (Web Page)).
[4] *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and their Families* (Report, 1997).
[5] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). Art 37(c) protects the right of a child to be separated from adults in prison, unless it is not in the child's best interest to do so, and the right to maintain contact with family.
[6] Concerns include a lack of legislative basis, lack of funding and resources across jurisdictions, inconsistencies with existing inspection bodies, and failure to include aged care and disability-specific facilities. See the Australia Opcat Network, Submission to the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the United Nations Working Group on Arbitrary Detention (WGAD), *The Implementation of Opcat in Australia* (January 2020).
[7] Michel Forst, *Report of the Special Rapporteur on the Situation of Human Rights Defenders on his Mission to Australia*, A/HRC/37/51/Add.3 (28 October 2018) 11 [53]-[55].
[8] Commonwealth funding for community services should be increased by $2 million per annum in order to reverse the cuts seen since the 2014 Budget. See Australian Council of Social Service, *Budget Priority Statement 2020-2021*, (January 2020) 27.
[9] Victoria Tauli-Corpus, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017) 11 [60]-[64].
[10] The NT Intervention sent 600 troops into 73 remote Aboriginal communities in 2007, removed cash welfare payments for Aboriginal and Torres Strait Islander Peoples, removed community governance and instilled the compulsory leasing of Aboriginal and Torres Strait Islander communal lands. It suspended the protections of the *Racial Discrimination Act 1975* (Cth) for Aboriginal and Torres Strait Islander Peoples.
[11] James Anaya, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Situation of Indigenous Peoples in Australia,* UN Doc A/HRC/15/37/Add.4 (1 June 2010) 29.
[12] Ibid 12–13.
[13] The NT Intervention suspended the protections of the *Racial Discrimination Act 1975* (Cth) for Aboriginal and Torres Strait Islander Peoples.
[14] *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People,* UN Doc A/HRC/15/37/Add.4 (n 11) 28.
[15] Ibid 28–30.
[16] *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Visit to Australia*, (n 9) 11 [60]-[64].
[17] Funding to Homeland and Outstation communities was stopped to pressure Aboriginal and Torres Strait Islander Peoples to move to larger hub communities. See *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People,* UN Doc A/HRC/15/37/Add.4 (n 11) 17–18 [68].
[18] Shelley Bielefeld, Submission No 55 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Social Services Legislation Amendment (Cashless Debit Card) Bill 2017* (29 September 2017) 17.
[19] Shelley Bielefeld, *Submission to United Nations Special Rapporteur on Extreme Poverty and Human Rights: Thematic Report to the United Nations General Assembly on Digital Technology, Social Protection and Human Rights* (17 May 2019) 2.
[20] Submission No 55 to Senate Standing Committee on Community Affairs, Parliament of Australia, (n 18) 5, 7, 9.
[21] Christopher Knaus, 'Family Violence Rates Rise in Kimberly Towns with Cashless Welfare', *The Guardian* (online, 12 January 2018); Elise Klein, **'**As Costs Mount, The Government Should Abandon the Cashless Debit Card', *The Conversation* (online, 12 December 2017).
[22] Rangi Hirini, 'Cashless Card Outrage Affects Hundreds across the Nation', *National Indigenous Television* (online, 21 January 2019).
[23] Submission No 55 to Senate Standing Committee on Community Affairs, Parliament of Australia (n 18) 13-14.
[24] Shelley Bielefeld, Submission No 55 to Senate Standing Committee on Community Affairs, Parliament of Australia (n 18) 18; Shelley Bielefeld, Submission No 68 to the Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018* (20 July 2018) 1, 12.
[25] Helen Davidson, 'Remote Work-For-The-Dole Scheme is Racist, ACTU Head Sally McManus Says', The Guardian (online, 6 August 2017).
[26] *Submission to United Nations Special Rapporteur on Extreme Poverty and Human Rights: Thematic Report to the United Nations General Assembly on Digital Technology, Social Protection and Human Rights* (n 19) 5.
[27] Dan Conifer, 'Indigenous Dole Scheme Participants Slapped with 350,000 Fines in Two Years', *Australian Broadcasting Corporation* (online, 6 January 2018).
[28] *Submission to United Nations Special Rapporteur on Extreme Poverty and Human Rights: Thematic Report to the United Nations General Assembly on Digital Technology, Social Protection and Human Rights* (n 19) 5.

[29] Lorena Allam and Nick Evershed, 'Too Hot for Humans? First Nations People Fear Becoming Australia's First Climate Refugees', *The Guardian* (online, 18 December 2019).
[30] Including the National Water Initiative (See Virginia Marshall, *Overturning Aqua Nullius: Securing Aboriginal Water Rights* (AIATSIS, 2017) 120) and the Murray-Darling Basin Royal Commission's findings that Aboriginal and Torres Strait Islander Peoples' interests have been marginalized, and that the Water Act's governance fails to provide for the interests of Aboriginal and Torres Strait Islander Peoples (see South Australia, *Murray-Darling Basin Royal Commission Report* (Report, 29 January 2019) chs 11 and 17).
[31] Michael Gannon, 'Close the clean drinking water gap', *Australian Medical Association* (online, 14 November 2017).
[32] Jane Bardon, 'NT traditional owners' concerns about fracking dominate Origin Energy AGM', *ABC News* (online, 18 October 2018); Grace Dungey and Nick Rodway, 'Fracking threatens Aboriginal land rights in Western Australia', *Mongabay* (online, 21 November 2018); Ben Smee, 'Fracking fears grow for rivers in Queensland's channel country' (online, 10 October 2019); Tom Hatton et al, *Independent Scientific Panel Inquiry into Hydraulic Fracture Stimulation in Western Australia: Final Report to the Western Australian Government* (Report, September 2018) 454-455, 518, 538; Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development, *Hydraulic Fracturing ('Fraccing') Techniques, including Reporting Requirements and Governance Arrangements, Background Review*'(Report, June 2014) 51-52.
[33] National Climate Change Adaptation Research Facility, *National Climate Change Adaptation Research Plan: Indigenous Communities* (Report, 2012); Intergovernmental Panel on Climate Change, *Climate Change and Land: IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems* (Report, 7 August 2019) 381.
[34] The Act denies Aboriginal and Torres Strait Islander Peoples 'free prior and informed consent' in mine approvals affecting native title – without agreement, the tribunal can approve mining without awarding royalties; has a default decision making mechanism in land use agreements that is inconsistent with the right of self-determination; allows for compulsory acquisition of native title land for third party benefit; and provides for extinguishment of Native Title, and extinguishment prior to 1975 without compensation.
[35] Referendum Council, *Final Report of the Referendum Council* (Report, 30 June 2017) I.
[36] In addition, legislative changes in December 2014 resulted in more cancellation or refusal of visas for refugees and asylum seekers on character grounds. Those decisions do not give appropriate weight to non-refoulement obligations, resulting in protracted arbitrary detention for many.
[37] 2017 Senate Estimates indicate that 376 stateless persons were held in offshore detention, comprising 12% of all persons held in offshore detention: Legal and Constitutional Affairs Senate Estimates Committee, Question Taken on Notice, Additional Estimates Hearing (27 February 2017) Immigration and Border Protection Portfolio AE17/170. Neither Papua New Guinea nor Nauru are party to the 1954 *Convention Relating to the Status of Stateless Persons*, or the 1961 *Convention on the Reduction of Statelessness*.
[38] Available Australian Government statistics indicate that the number of stateless persons currently in Australia is, at a minimum, approximately 4,099 (See Australian Government, Department of Home Affairs, Australian Border Force, *Immigration Detention and Community Statistics Summary* (Report, 31 October 2019) 8; Australian Government, Department of Home Affairs, Australian Border Force, *Illegal Maritime Arrivals on Bridging E Visa* (Report, 30 September 2019); Australian Government, Department of Home Affairs, *IMA Legacy Caseload, Report on Processing Status Outcomes* (Report, October 2019); Australian Government, Department of Immigration and Border protection, *Onshore Humanitarian Program 2018-19*; Australian Government, Department of Home Affairs, *Australia's Offshore Humanitarian Program: 2018-19* (Report, 2019); Australian Government, Department of Home Affairs, *Key Statistics as at 31 October 2019* (Factsheet). In contrast to these government statistics, however, until recently the Australian Government was reporting '0' stateless persons within Australian territory, and more recently 138 stateless persons (See: UNHCR, *Global Trends – Forced Displacement in 2018* (Report, 2019)).
[39] Australia also has no method of protecting stateless persons who do not qualify as refugees or for international protection. Statelessness is not a criterion for qualification for a protection visa. Australia's international obligations to protect the rights of stateless people are found in a variety of instruments: *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960); *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975); *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 15(1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 24(3); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 9; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7; *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 18; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) art 1(3), 5; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). State based Stateless Determination Procedures are an implicit requirement of state parties meeting their obligations under the 1954 and 1961 Conventions (United Nations Secretary-General, *Guidance Note of the Secretary-General, The United Nations and Statelessness*, November 2018, 7; UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (2014) 6 [8].
[40] This is in line with the UNHCR #iBelong Campaign to end statelessness by 2024. Action 6 relates to establishing statelessness determination procedures. See United Nations, *Global Action Plan to End Statelessness: 2014-2024* (Report, 2014).
[41] Amy Remeikis, 'Scott Morrison Attacks 'Mindless Tribalism' After Christchurch Massacre', *The Guardian* (online, 18 March 2019); Australian Government, *Multicultural Australia: United, Strong, Successful* (Statement, March 2017).

[42] Lowy Institute, 'Immigration and Refugees', Lowy Institute Poll 2019 (Web Page) <https://lowyinstitutepoll.lowyinstitute.org/themes/immigration-and-refugees/#section-attitudes-to-immigration>.
[43] Kevin Dunn et al, *The resilience and ordinariness of Australian Muslims: Attitudes and experiences of Muslims Report*, (Report, November 2015) 27; Derya Iner (ed), *Islamophobia in Australia II (2016-2017)* (Report, 2019).
[44] Diversity Council Australia, 'The Facts on Victorian African Crime' (Position Statement, 3 September 2018); All Together Now, *Social commentary and racism in 2019* (Report, 2019) 19.
[45] See, Attorney-General's Department, *Australia's Universal Periodic Review* (Report, 15 September 2015).
[46] See, 'Terms of Reference', *Royal Commission into Aged Care Quality and Safety* (Web Page, 6 December 2018).
[47] See, Royal Commission into Aged Care Quality and Safety, *Interim Report* (Report, 31 October 2019).
[48] See, Australian Government Productivity Commission, *Report on Government Services 2020* (Report, 23 January 2020).
[49] Older Australians are assessed as having a functional decline in their abilities by the Australian Government prior to being placed on the waitlist. This may trigger incompatibilities with ICRPD articles 25 or 26.
[50] See, Human Rights Watch, *"Fading Away": How Aged Care Facilities in Australia Chemically Restrain Older People with Dementia* (Report, 25 October 2019).
[51] Susan Ryan, 'Commissioner's Foreword' in Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* (Report, 2016). Australia must improve age-discrimination experienced by older workers in the area of recruitment. Almost one in three managers report that they would not employ someone over a certain age, with two thirds saying that age is 50, see, COTA for older Australians, 'MEDIA RELEASE: Survey shows ageism alive and well among Australian employers' (Media Release, 1 November 2018). Discrimination against older workers is also prevalent in insurance. Many insurance products such as workers compensation and workers compensation stop at age 65 despite notional retirement age moving to 67 by 2023.
[52] *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).
[53] Requirements that a person must divorce their spouse prior to updating their legal gender on birth certificates have been removed in all states and territories: Australian Capital Territory ('ACT') (2006), South Australia ('SA') (2016), New South Wales ('NSW') (2018), Queensland ('Qld') (2018), Northern Territory ('NT') (2018), Victoria ('Vic') (2019), Tasmania ('Tas') (2019) and Western Australia ('WA') (2019). Requirements that a person must undergo sexual reassignment surgery or medical intervention prior to updating their legal gender have been removed in ACT (2014), SA (2016), NT (2018), Vic (2019), Tas (2019), and partially, in WA (2011).
[54] Vic (2016), Qld (2016), SA (2017) and NT (2018), which joined WA (2002), ACT (2004), NSW (2010) and Tas (2013).
[55] Tas (2017), Qld (2017), WA (2018) and NT (2018), which joined SA (2013), NSW (2014), Vic (2014) and ACT (2015).
[56] Vic (2016, with further reforms under consideration), ACT (proposed 2020) and Qld (proposed 2020).
[57] There is evidence that discrimination, harassment and violence against lesbian, gay, bisexual, transgender and intersex (LGBTI) Australians was in fact exacerbated by the Australian Government's insistence in 2017 on conducting a non-binding and constitutionally unnecessary national postal survey on same-sex marriage, as a precondition for allowing a vote on legislation in parliament: see, Senate Finance and Public Administration References Committee, Parliament of Australia, *Arrangements for the postal survey* (Report, February 2018) 23–27 [4.3] – [4.15], 33–34[5.8] – [5.12], see also Dissenting Report by Government Senators 48 [1.56]; Stefano Verrelli et al, 'Minority stress, social support, and the mental health of lesbian, gay, and bisexual Australians during the Australian Marriage Law Postal Survey' (2017) 54(4) *Australian Psychologist* 336; Cristen Tilley and Nathan Hoad, 'Keeping Track of the Ugly Side of the Same-Sex Marriage Debate', *ABC News* (online, 26 October 2017).
[58] Ibid; Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights: National Consultation Report* (Report, 2015); William Leonard et al, *Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians* (Report, Australian Research Centre in Sex, Health & Society, La Trobe University, 2012) 45; Intersex Human Rights Australia, Submission to the Australian Human Rights Commission, *Protecting the Human Rights of People Born with Variations in Sex Characteristics in the context of medical interventions* (30 September 2018) ('*IHRA Submission*').
[59] NSW, Qld and WA.
[60] Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Eighth Periodic Report of Australia*, UN Doc CEDAW/C/AUS/CO/8 (25 July 2018); Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019); Office of the High Commissioner for Human Rights, *Background Note on Human Rights Violations against Intersex People* (2019); IHRA Submission (n 58); AIS Support Group Australia, Submission to the Australian Human Rights Commission, Protecting the Human Rights of People Born with Variations in Sex Characteristics (29 September 2018) . In this regard, the 2013 Australian Senate recommendations on ending forced and medical interventions on children with intersex variations remain unimplemented: see Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or coerced sterilisation of intersex people in Australia* (Second Report, 25 October 2013).
[61] Ibid; See also Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) ('*CPRD Concluding Observations on Australia*').
[62] Recognising that the needs, characteristics and human rights situations of populations of diverse sexual orientations, gender identities, gender expressions and sex characteristics are distinct from each other, the data on each population must be collected and managed in a manner consistent with ethical, scientific and human rights standards and made available in a disaggregated form. See *Yogyakarta Principles Plus 10*, Principle 19, (l).
[63] Kerry Robinson et al., 'Growing up Queer: Issues facing Young Australians who are Gender Variant and Sexuality Diverse' (Report, Young and Well Co-operative Research Centre, February 2014).
[64] There are serious concerns with the implementation of the current National Disability Strategy (2010-2020), that were most recently raised by the Committee on the Rights of Persons with Disabilities (CRPD). See *CPRD Concluding Observations on Australia*, UN Doc CRPD/C/AUS/CO/2-3 (n 61). See also Australian Civil Society CPRD Shadow

Report Working Group, 'Disability Rights Now 2019', Australian Civil Society Shadow Report to the United Nations Committee on the Rights of Persons with Disabilities, *UN CRPD Review 2019* (July 2019) ('*Australian Civil Society Shadow Report*').

[65] These include Guardianship, estate management and mental health laws.

[66] See *CPRD Concluding Observations on Australia*, UN Doc CRPD/C/AUS/CO/2-3 (n 61). Australia's interpretation of CPRD Articles 12 and 17 allows for the continuation of guardianship and mental health laws that deprive people of liberty on the basis of disability, and subject them to forced medical interventions. Whilst there have been some reviews and amendments to legislation, there has been no action to end involuntary detention on the basis of disability, or to end forced medical interventions. The Interpretative Declaration on Article 18 also preserves Australia's current legislative and administrative approach to processing visa applications. The *Disability Discrimination Act 1992* (Cth) provides an exception for certain provisions within the *Migration Act 1958* (Cth), which means that Australia's migration arrangements and treatment of disability are unable to satisfy the equal protection obligations under CRPD Article 5.

[67] Despite recommendations from the Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, 24 November 2014); Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, UN Doc A/HRC/31/14 (13 January 2016) 23 and most recently *CPRD Concluding Observations on Australia*, UN Doc CRPD/C/AUS/CO/2-3 (n 61).

[68] See Ibid, and *Australian Civil Society Shadow Report* (n 64) 27, 29.

[69] A high number of people with disability, including children are administered psychotropic medication, physical restraint, and seclusion under the guide of 'behaviour management', including in schools, disability and mental health facilities, hospitals and aged care settings. Surgeries and other medical interventions are performed on infants and children with intersex variations without informed consent or evidence of necessity. See: Australian Cross Disability Alliance (ACDA), Submission No 147 to the Senate Community Affairs References Committee, *Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings* (August 2015).

[70] Australia is required to provide its combined fourth and fifth periodic reports to the UN Committee on the Rights of Persons with Disabilities by 17 August 2026.

[71] Disabled Peoples Organisations Australia and National Women's Alliances, *The Status of Women and Girls with Disability in Australia* (Position Paper, November 2019).

[72] 74% of incidents reported to Australia's Disability Royal Commission have occurred since 2010: *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (First Progress Report, December 2019) 13.

[73] In relation to child protection and out of home care, see SNAICC – National Voice for our Children et al., *The Family Matters Report 2019: Measuring trends to turn the tide on the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care in Australia*, (Report, 2019). In relation to juvenile justice, see Australian Government Productivity Commission, *Report on government services 2020* (Report, 23 January 2020) Section 17, 'Youth justice services', 17.5.

[74] The core components required for the establishment of such a commissioner are outlined in SNAICC – National Voice for our Children and Queensland Aboriginal and Torres Strait Islander Child Protection Peak (QATSICPP) *Position paper: Establishment of a national commissioner for Aboriginal and Torres Strait Islander children and young people* (Position Paper, October 2019).

[75] In relation to obligations under the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) ('*CRMW*'), see UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families ('*CMW*'), *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, UN Doc CMW/C/GC/3-CRC/C/GC/22 (16 November 2017) and CMW, *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, UN Doc CMW/C/GC/4-CRC/C/GC/23 (16 November 2017). Australia has not ratified CRMW.

[76] Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) [22].

[77] The National Action Plan should include a legislative and policy framework that fully complies with Article 24 and General Comment 4; See *CPRD Concluding Observations on Australia*, UN Doc CRPD/C/AUS/CO/2-3 (n 61).

[78] Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2016* (Report, 2016).
See also Djirra, 'High Rates of Violence against Aboriginal and Torres Strait Islander women must be addressed', Oral Statement by Antoinette Braybrook to the Human Rights Council, 41st session, agenda item 3 (27 June 2019).

[79] Human Rights Law Centre and Change the Record, Overrepresented and Overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing imprisonment (Report, May 2017) 10. Djirra, 'High Rates of Violence against Aboriginal and Torres Strait Islander women must be addressed', Oral Statement by Antoinette Braybrook to the Human Rights Council, 41st session, agenda item 3 (27 June 2019)

[80] Dubravka Šimonović, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences on her mission to Australia: note by the Secretariat*, UN Doc A/HRC/38/47/Add.1 (17 April 2018). See, eg Julia Holman, 'Federal Government Axes Funding to Peak Body Representing Indigenous Survivors of Domestic Violence', ABC News (online, 6 December 2019).

[81] Ibid.

[82] 'Safety First in Family Law', *Women's Legal Services Australia* (Web Page, 23 October 2019).

[83] Australian Women Against Violence Alliance, *Analysis of the Fourth Action Plan* (17 September 2019). .

[84] The Plan focuses on sexual assault and domestic and family violence in the context of intimate partner violence. It does not account for structural and institutional forms of gender-based violence related to law, state and culture women with disability experience and are more at risk of – i.e. reproductive rights violations and violence occurring in residential institutions. See, and *Australian Civil Society Shadow Report* (n 64).
[85] *Committee* on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Australia*, *UN Doc CEDAW/C/AUS/CO/8 (*25 July 2018) [52]; *Committee* on the Elimination of Racial Discrimination, *Concluding observations of the eighteenth to twentieth periodic reports of Australia*, Un Doc CERD/C/AUS/CO/18-20 (26 December 2017) [28]; and Dubravka Šimonović, End of Mission statement by United Nations Special Rapporteur on Violence against women, its causes and consequences, on her visit to Australia from 13 to 27 February 2017 (27 February 2017).
[86] National Advocacy Group on Women on Temporary Visas Experiencing Violence, *Blueprint for Reform: Removing Barriers to Safety for Victims/Survivors of Domestic and Family Violence who are on Temporary Visas* (Report, 2019).
[87] Mercy Foundation et al, *Retiring into Poverty: A National Plan For Change: Increasing Housing Security for Older Women* (Report, August 2018).
[88] *Summary Offences and Other Legislation Amendment Bill 2019* (Qld); *Right to Farm Act 2019* (NSW). Tasmania will also likely introduce similar laws: see *Workplaces (Protection from Protesters) Amendment Bill 2019* (TAS).
[89] Lorna Knowles et al., 'ABC Raid: AFP Leave Ultimo Building with Files after Hours-Long Raid over Afghan Files Stories', *ABC News* (online, 6 June 2019).
[90] *Criminal Code Act 1995* (Cth), division 91.
[91] There have been secret prosecutions of former intelligence officer Witness K and his lawyer Bernard Collaery, who revealed that Australia bugged the offices of East Timorese negotiators during oil and gas negotiations. See James Massola, 'PM Dismisses Questions over Prosecution of 'Witness K' and Lawyer' *Sydney Morning Herald* (online, 30 August 2019). The prosecution of Collaery may be in breach of the UN Basic Principles on the Role of Lawyers. In addition, Australia has not applied diplomatic pressure on the UK to prevent the extradition of Julian Assange to the USA, despite the underlying allegations cited in support of the charges include acts of common journalistic practice.
[92] The National Congress of Australia's First Peoples, the national elected Aboriginal and Torres Strait Islander representative body, lost its federal government funding in 2014 and was wound up in 2019 as a result.
[93] Ibid, the Indigenous Peoples Organisation (IPO), which coordinates Indigenous advocacy at the United Nations, lost its annual $100,000 funding to support Indigenous participation at United Nations fora in 2014.
[94] *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth).
[95] *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth); *Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (Cth).
[96] *Identity-matching Services Bill 2019 and Australian Passports Amendment (Identity-matching Services) Bill 2019* (Cth). At local and State level, governments and corporations have already rolled out facial recognition.
[97] See *Australian Citizenship Act 2007* (Cth) ss 32A-36A. The *Australian Citizenship Amendment (Citizenship Cessation) Bill 2019* is also currently before the Australian Parliament, which could render the Act inconsistent with Australia's international obligations and provide inadequate protections in ensuring the reduction and prevention of statelessness. See Peter McMullin Centre on Statelessness, Submission No 19 to the Parliamentary Joint Committee on Intelligence and Security, *Review of the Australian Citizenship Amendment (Citizen Cessation) Bill 2019* (16 October 2019).
[98] Cox Inall Ridgeway, *Review of the Indigenous Legal Assistance Program (ILAP) 2015-2020* (Final Report, February 2019).
[99] Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2, 738–9.
[100] See e.g., *Report of the Royal Commission and Board of Inquiry into the protection and detention of children in the Northern Territory*, 17 November 2017, Canberra; Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) [47]-[48]; Human Rights Watch *I needed help, instead I was punished' Abuse and Neglect of Prisoners with Disabilities in Australia* 2018 https://www.hrw.org/sites/default/files/report_pdf/australia0218_web.pdf; and the Prisons section of this Report.
[101] See, e.g., *Report of the Royal Commission and Board of Inquiry into the protection and detention of children in the Northern Territory*, (Final Report, 17 November 2017); Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) [47]-[48].
[102] See The Office of the Public Guardian, Queensland *Annual Report 2018–19* (Report, 2019) 9; see also *Australian Civil Society Shadow Report* (n 64) and *CPRD Concluding Observations on Australia*, UN Doc CRPD/C/AUS/CO/2-3 (n 61).
[103] The Committee on the Rights of the Child has called on all States Parties to raise their minimum age to at least 14 and has specifically urged Australia to do so: Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) [22]; Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) [48(a)]. Numerous other UN committees and entities have called on Australia to raise its minimum age of criminal responsibility in line with international standards: see, e.g., Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) [26(a)]; Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [44]; *Report of the Special Rapporteur on the Rights of Indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (n 9) [77] and [113(i)].
[104] Manfred Nowak, *Global study on children deprived of liberty*, UN Doc A/74/136 (11 July 2019).
[105] In 2016 Australian Governments tabled the Working Group on the Treatment of People Unfit to Plead or Found Not Guilty by reason of Mental Impairment, *Draft National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty By Reason of Cognitive or Mental Health Impairment* . However, three years later, these Principles are yet to be consulted on, endorsed or implemented. In 2016 the Australian Senate also tabled the Community Affairs References Committee, *Inquiry Report into the Indefinite Detention of People with Cognitive and Psychiatric Impairment*

(Report, November 2016). The Government is yet to respond to the Report. Most recently Australia was highly criticised by the Committee on the Rights of Persons with Disabilities for making no progress in this regard, see *CPRD Concluding Observations on Australia*, UN Doc CRPD/C/AUS/CO/2-3 (n 61) 7.

[106] See 'Australia's 2nd Universal Periodic Review: Voluntary Commitments', Human Rights Law Centre (Web Page). See also: 'Australia's International Human Rights Obligations', Law Council of Australia (Web Page).

[107] Australian Bureau of Statistics, *Prisoners in Australia, 2019* (Catalogue 4517.0, 4 December 2019); Jane AndrewJ et.al. *Prison Privatisation in Australia: The State of the Nation Accountability, Costs, Performance and Efficiency* (Report, University of Sydney Business School, 2016; Hayley Gleeson and Julia Baird, 'Why are our prisons full of domestic violence victims?' ABC News (online, 18 December 2019). In 2017 the Australian Law Reform Commission conducted an Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples: Australian Law Reform Commission, Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (Summary Report No 133, December 2017). Recommendations from the Final Report have yet to be implemented.

[108] Human Rights Watch, *Interview: The Horror of Australia's Prisons. Prisoners with Disabilities Serving Time in Solitary, Face Physical, Sexual Abuse*, (Interview with Kriti Sharma, 6 February 2018).

[109] Human Rights Watch, *"I Needed Help, Instead I Was Punished": Abuse and Neglect of Prisoners with Disabilities in Australia'* (Report, 6 February 2018).

[110] Lorena Allam, Calla Wahlquist, Nick Evershed, 'Aboriginal deaths in custody: Black Lives Matter protests referred to our count of 432 deaths. It's now 437', *The Guardian* (online, 9 June 2020).

[111] Hayley Gleeson and Julia Baird, 'Why are our prisons full of domestic violence victims?' ABC News (online, 18 December 2019).

[112] Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (Report, May 2017).

[113] Mandy Wilson et.al., 'Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia' (2017) 7(1) *SAGE Open* 1; Rowena Lawrie, 'Speak Out Speak Strong: Rising Imprisonment Rates of Aboriginal Women' (2003) 8(2) *Australian Indigenous Law Reporter* 81.

[114] These must also be consistent with the National Plan to Reduce Violence against Women and Their Children.

[115] Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Report into Children of Imprisoned Parents* (Report No 12, July 1997) 6.

[116] *Royal Commission into Child Protection and Youth Detention in the Northern Territory* (Final Report, 17 November 2017), *Queensland Independent Review of Youth Detention Centres* (Confidential Report, December 2016); Commission for Children and Young People, Victoria, *The same four walls: Inquiry into the use of isolation, separation and lockdown at places of youth detention in Victoria* (Report, 2017); Office of the Inspector of Custodial Services, Western Australia, *Behaviour Management Practices at Banksia Hill* (Report, June 2017); Inspector of Custodial Services, New South Wales, *Use of Force Against Detainees in NSW Juvenile Justice Centres* (Report, 2018); Legal and Social Issues Committee, Legislative Council, Parliament of Victoria, *Inquiry into Youth Justice Centres in Victoria* (Final Report, March 2018); Office of the Advocate for Children and Young People, New South Wales, *What children and young people in juvenile justice centres have to say* (Report, 2019); Australian Institute of Health and Welfare, *Youth Justice in Australia* (Report, 10 May 2019); Australian Institute of Health and Welfare, *Young people in child protection and under youth justice supervision: 2013-2014* (Report, Data Linkage Series No 21, 2016); Susan Baidawi and Rosemary Sheehan, *Cross-over kids: Effective responses to children and young people in the youth justice and statutory Child Protection systems* (Report to the Institute of Criminology, December 2019) and Ombudsman SA, *Investigation concerning the use of spit hoods in the Adelaide Youth Training Centre* (Report, September 2019). In Tasmania a police investigation resulted in charges of common assault being laid against a guard from Ashley Youth Detention Centre. In the ACT an incident at Bimberi Youth Justice Centre on 6 May 2016 is, according to the ACT Human Rights Commission: "subject to three separate external enquiries, including an investigation by the AFP."

[117] Mark Willacy, 'The Watch House Files', *ABC News* (online, 13 May 2019).

[118] Garth den Heyer and Alan Beckley, 'Police independent oversight in Australia and New Zealand' (2013) 14(2) *Police Practice & Research* 130, 130, 139.

[119] The New South Wales example showing a 5% cut in budget over a four year period starting in 2018, despite having initiating 1,083 more assessments in the 2018/2019 period than previous oversight body in 2015/2016. Michael McGowan, 'NSW police watchdog fully investigated just 2% of 'firehose' of complaints: Law Enforcement and Conduct Commission says budget cuts mean it is being forced to 'do more with less'' *The Guardian* (online, 3 November 2019); Garth den Heyer and Alan Beckley, (n 118) 138.

[120] Louise Porter and Tim Prenzler, *Police Integrity and Management in Australia: Global Lessons for Combating Police Misconduct* (Routledge, 2012), 4, 233.

[121] Avital Mentovich et al., 'Policing alienated minorities in divided cities' (2018) *Regulation & Governance* 1, 2.

[122] Kristina Murphy, Adrian Cherney and Marcus Teston, 'Promoting Muslims' Willingness to Report Terror Threats to Police: Testing Competing Theories of Procedural Justice' (2018) 36(4) *Justice Quarterly* 594, 594-597; Kent Roach, 'The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond* (Routledge, 2010) 48, 49.

[123] Police notably struggle in the context of violence against minority communities, with training being inconsistent overall. Avital Mentovich et al. (n 121) 2; Toby Miles-Johnsona et al, 'Police Perceptions of Prejudice: how police awareness training influences the capacity of police to assess prejudiced motivated crime' (2016) 28(6) *Policing and Society* 730, 732.

[124] Tamar Hopkins, *Monitoring Racial Profiling - Introducing a scheme to prevent unlawful stops and searches by Victoria Police* (Report, Police Stop Data Working Group, Flemington & Kensington Legal Centre, August 2017).

[125] Two major reviews of the rates of the incarceration of Aboriginal and Torres Strait Islander Peoples have been conducted in the period since the Royal Commission without response from Federal Government. Lorena Allam, Calla Wahlquist and Nick Evershed, 'Indigenous Deaths in Custody worsen in the year of tracking by Deaths inside Project',

The Guardian (online, 23 August 2019); Lorena Allam, Calla Wahlquist, Nick Evershed, 'Aboriginal deaths in custody: Black Lives Matter protests referred to our count of 432 deaths. It's now 437', *The Guardian* (online, 9 June 2020).
[126] Notably, whilst the rate of deaths in custody has declined since the Royal Commission, the rate of incarceration has increased, resulting in increased numbers of deaths in custody, and disharmony between states on the implementation of the 339 recommendations made in 1991: Lorena Allam and Calla Wahlquist, 'Indigenous Deaths in Custody: key recommendations still not fully implemented - Deloitte review of deaths in custody reveals that only two-thirds of landmark royal commission's recommendations have been fully implemented', *The Guardian* (online, 25 October 2018).
[127] Heather Nancarrow, *Unintended Consequences of Domestic Violence: Gendered Aspirations and Racialised Realities* (Palgrave, 2019), 90, 113, 184.
[128] Nafiseh Ghafournia and Patricia Easteal, 'Help-Seeking Experiences of Immigrant Domestic Violence Survivors in Australia: A Snapshot of Muslim Survivors', (2019) July, *Journal of Interpersonal Violence* 1, 2-3.
[129] Heather Nancarrow, *Unintended Consequences of Domestic Violence: Gendered Aspirations and Racialised Realities* (Palgrave, 2019), 90, 113, 184.
[130] Peter Davidson et al., *Poverty in Australia 2020: Part one, Overview. ACOSSUNSW Poverty and Inequality Partnership Report No.3* (Report, 2020).
[131] Ibid.
[132] Ibid. The Newstart Allowance falls $117 a week below the poverty line, and youth payments are $168 a week below the line.
[133] Peter Davidson et al., *Poverty in Australia 2020: Part one, Overview. ACOSSUNSW Poverty and Inequality Partnership Report No.2* (Report, 2020).
[134] See, J. Rob Bray, 'Seven years of evaluating income management - what have we learnt? Placing the findings of the New Income Management in the Northern Territory evaluation in context' (2016) 51(4) *Australian Journal of Social Issues* 449.
[135] See Luke Henriques-Gomes, 'Robo Debt Could Target Pensioners and 'Sensitive' Groups, Leaked Documents Show', *The Guardian* (online, 23 August 2019).
[136] In 2014–15, 29% Aboriginal and Torres Strait Islander people 15 years and over had experienced homelessness: Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey, 2014-15* (Catalogue No 4714.0, 28 April 2016). A review of remote housing in 2017 found overcrowding in 49% of very remote and 27% in remote housing, with more than 20 people per house: Department of Prime Minister and Cabinet, Commonwealth of Australia, *The Remote Housing Review 2008-2018: A Review of the National Partnership Agreement on Remote Housing and the Remote Housing Strategy 2008-2018* (Report, 2018) 20. Overcrowding negatively impacts physical and mental health, children's school attendance and is a key contributing factor and is a key contributing factor for assault and sexual assault**.** Overcrowding also caused additional stresses on water supplies and sewage disposal systems, causing failures and sewage overflow, strained shared amenities resulting in a lack of washing of people, clothes and bedding (see Department of Prime Minister and Cabinet, Commonwealth of Australia, *The Remote Housing Review 2008-2018: A Review of the National Partnership Agreement on Remote Housing and the Remote Housing Strategy 2008-2018* (Report, 2018). This Housing review did not include Aboriginal Homelands, Outstations, or non-remote discrete communities.
[137] Australian Bureau of Statistics, *Census of Population and Housing: Estimating homelessness, 2016* (Catalogue No 2049.0, 14 March 2018).
[138] Australian Bureau of Statistics, *Housing Occupancy and Costs, 2017-18* (Catalogue No 4130.0, 17 July 2019).
[139] At 4.4% in 2017, compared to nearly 20% for the UK: see 'Affordable Housing Database', *Organisation for Economic Co-operation and Development* (Web Page, 2019); Australian Institute of Health and Welfare, *Housing Assistance in Australia 2018* (Web Report, Catalogue no HOU 296, 28 June 2018).
[140] Homelessness Taskforce, Department of Families, Housing, Community Services and Indigenous Affairs, *The Road Home: A National Approach to Reducing Homelessness* (White Paper, 2008).
[141] See Australian Bureau of Statistics, *Housing Occupancy and Costs, 2017-18* (Catalogue No 4030.0, 17 July 2019).
[142] *Closing the Gap* aims to improve the lives of all Aboriginal and Torres Strait Islander Peoples. Australian governments have worked together to deliver better health, education and employment outcomes for Aboriginal and Torres Strait Islander Peoples, and to eliminate the difference between Aboriginal and Torres Strait Islander Peoples and other people across a number of areas like health, education, employment and life expectancy. In December 2018 the Council of Australian Governments (COAG) committed to forming a genuine formal partnership with Aboriginal and Torres Strait Islander Peoples to enable them to decide on the priorities and lead on the progress of Closing the Gap.
The Coalition of Peaks is a representative body comprised of Aboriginal and Torres Strait Islander community controlled peak-body organisations that have come together to partner with all Australian governments on designing, implementing and evaluating the closing the gap strategy, a policy aimed at improving the lives of Aboriginal and Torres Strait Islander Peoples. The Coalition of Peaks entered into a historic formal Partnership Agreement on Closing the Gap with the Council of Australian Governments (COAG) which sets out shared decision making on Closing the Gap. Together, it has been agreed to develop a new National Agreement on Closing the Gap, to be signed by COAG and the Coalition of Peaks, which will set out joint actions over the next ten years to help improve the lives of Aboriginal and Torres Strait Islander Peoples.
[143] This is one of the largest ratios of any OECD nation. See Productivity Commission, *Why a Better Health System Matters*, *Shifting the Dial: 5 year Productivity Review*, *Supporting Paper 4* (Report, 2017) 11.
[144] The 20% of Australians living in the lowest socioeconomic areas in 2014–15 were 1.6 times as likely as the highest 20% to have at least two chronic health conditions, such as heart disease and diabetes. Australians living in the lowest socioeconomic areas lived about 3 years less than those living in the highest areas in 2009–2011: Australian Institute of Health and Welfare, *Australia's health 2016* (Report, 13 September 2016), Chapter 4, 130.
[145] For example, Australia lacks a universal dental scheme. See Stephen Duckett, Matt Cowgill and Hal Swerissen, *Filing the Gap: A Universal Dental Scheme for Australia* (Report, Grattan Institute, March 2019).
[146] Public Health Association Australia, *Commonwealth Budget 2020-2021 Pre-Budget Submission* (31 January 2020) 6.

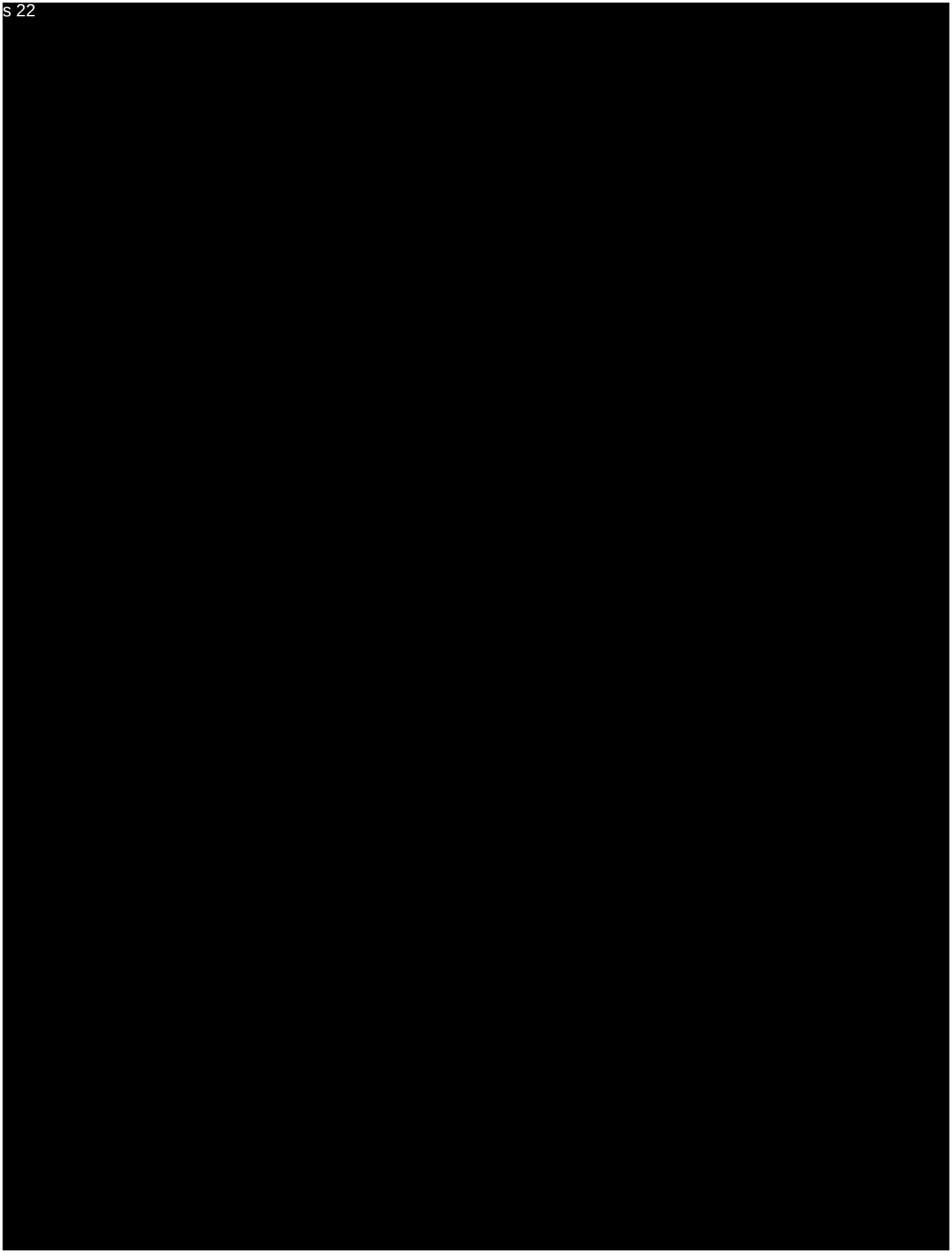
[147] The Australia Institute, *Polling – Bushfire Crisis and Concern about Climate Change* (Report, January 2020) 5.
[148] Poverty and poor living conditions contribute to high rates of cardiovascular disease for Aboriginal and Torres Strait Islander Peoples (18% for remote regions), with 94% of cases of Acute Rheumatic Fever, and 92% of cases of Rhematic Heart Disease involving Aboriginal and Torres Strait Islander Peoples. Kidney disease and renal failure in 2011-2015 for Aboriginal and Torres Strait Islander Peoples was 6.8 times the rate of other people, with 18.6 times the rate in the NT, and 12.7 times the rate in WA. Aboriginal and Torres Strait Islander Peoples also have 3 times the rate of blindness than other people, and trachoma, caused by poor living conditions and over-crowding, was at 4% in identified Aboriginal communities in 2017. Australia is the only developed country with trachoma. Diabetes impacts 13% of Aboriginal and Torres Strait Islander Peoples, with a death rate of 5.2 times that of other people. Cancer accounted for 9% of the disease burden for Aboriginal and Torres Strait Islander Peoples, and chronic respiratory disease is the third leading cause of death among Aboriginal and Torres Strait Islander Peoples, with Aboriginal and Torres Strait Islanders babies 4.5 times more likely to die than other babies. See, Australian Indigenous Health InfoNet, *Summary of Aboriginal and Torres Strait Islander health status 2017* (Report, 2018) 10-21.
[149] In 2016, an inquest was launched following 13 child deaths in the Kimberley in less than four years, including five children aged between ten and 13. The Coroner recommended a greater focus on self-determination, consultation, cultural education, increased and paid Aboriginal employment in service delivery, increased mental health services, recreational facilities and educational engagement, language learning, together with education on preventing, increased support for Foetal Alcohol Syndrome Disorder and the provision of alcohol rehabilitation with an emphasis on self-determination. See, State Coroner, *Record of Investigation into Death: Inquest into the deaths of thirteen children and young persons in the Kimberley Region of West Australia* (Report, 2017).
[150] Ibid 268.
[151] Ibid 334-336.
[152] Ibid 295-297.
[153] Ibid, 372. In a 2019 inquest into five deaths by suicide at Casuarina Prison, in which three of the deceased persons were Aboriginal or Torres Strait Islander Peoples, the Coroner made a series of recommendations on the need to improve mental health support and reduce the risk of suicide in the prison. See, State Coroner, *Record of Investigation into Death: deaths of five persons incarcerated at Casuarina Prison* (Report, 2019) 128–129 [666]. The Coroner also acknowledged that it is important that the cultural needs of Aboriginal and Torres Strait Islander prisoners are recognised, and that Aboriginal and Torres Strait Islander prisoners are supported by networks of Aboriginal and Torres Strait Islander Elders and support workers. See, State Coroner, *Record of Investigation into Death: deaths of five persons incarcerated at Casuarina Prison* (Report, 2019) 65-66 [317]-[322].
[154] State Coroner (n 149) 332.
[155] Australian Bureau of Statistics, *National Health Survey: First Results, 2017-18* (Catalogue No 4364.0.55.001, 12 December 2018).
[156] Commission on Ending Childhood Obesity, World Health Organisation, *Report of the Commission on Ending Childhood Obesity* (Report, 2016). Thank you to Professor Louise Baur for reviewing this section.
[157] See, Human Rights Council of Australia, Oral Statement by Cristyn Davies to United Nations Human Rights Council, 41st session, agenda item 8 (24 June 2019).
[158] Culturally safe healthcare refers to care that 1) respects human rights of self-determination and bodily autonomy 2) ensures health professionals are trained in culturally safe gender affirming care; 3) that therapeutic agents are subsidised and accessible; and 3) that provides a culturally safe informed consent model practiced across community-based services and in general practice. National frameworks and up-to-date guidelines for healthcare must be developed in partnership with community. In addition, Australia must (1) implement the Australian modification and implementation of the ICD-11 (ensuring that all diagnostic coding of 'Gender Incongruence' are within a newly established Sexual Health chapter and that all gender related coding is removed from the existing Mental Illness chapter), and (2) establish a review of the Medicare Benefits Schedule, which allows public funding to be directed towards particular healthcare services, to ensure the health system does not discriminate against people on the grounds of their gender identity and sex characteristics. See, Cristyn Davies et al, 'Australians of diverse sexual orientations and gender identities', (2020) *Culture, Diversity and Health in Australia: Towards Culturally Safe Health Care*; Michelle Telfer et al., *Australian Standards of Care and Treatment Guidelines for Trans and Gender Diverse Children and Adolescents* (Report version 1.1, Melbourne Royal Children's Hospital, 2018); Editorial, 'Gender-affirming care needed for transgender children' (2018) 391 (10140) *The Lancet* 2576; E Coleman et al, 'Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7' (2012) 13(4) *International Journal of Transgenderism* 165-232; Cheung et al 'Position statement on the hormonal management of adult transgender and gender diverse individuals' (2019) 211(3) *Medical Journal of Australia* 127. Thank you to Associate Professor Michelle Telfer and Professor S. Rachel Skinner for reviewing this section.
[159] The Human Rights Commission states "climate change threatens the enjoyment of all human rights, including the rights to health, water, food, housing, self-determination, and life itself. Climate change is man-made. It is a result of policy choices that breach the affirmative obligations of States to respect, protect and fulfil human rights": 'Human Rights and Climate Change', *Office of the High Commissioner, United Nations Human Rights* (Fact Sheet, October 2018), *The Paris Agreement* preamble states "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity."
[160] Quarterly Updates of Australia's National Greenhouse Gas Inventory in 'Publications and Resources', *Department of Agriculture, Water and the Environment* (Web Page, September 2019).
[161] The Climate Action Tracker is an independent scientific analysis that tracks government climate action and measures it against the globally agreed Paris Agreement. Its December 2019 update has rated Australia's 2030 target as "insufficient" and is at the less stringent end of what would be a fair share of the global effort. See, 'Australia', *Climate Action Tracker* (Web Page, 2 December 2019).

[162] According to analysis by NGO Market Forces, national tax-based subsidies that encourage fossil fuel production and consumption add up to $12 billion every year, see 'How your tax dollars subsidise fossil fuels', *Market Forces* (Web Page). According to analysis by the Australian Conservation Foundation (ACF) after the 2019/2020 Federal budget release, the Australian federal Government spends $4.36 subsidising pollution for every dollar it spends on climate action, see, 'Morrison Government's Budget 2019-20: Devaluing Our Environment While Fuelling Global Warming', *Australian Conservation Foundation* (Media Release, 2 April 2019).
[163] Transition planning is an opportunity to ensure job creation, social justice, poverty eradication, and grassroots leadership and empowerment, including for people experience multiple forms of discrimination.
[164] A carbon price and ending fossil fuels subsidies are two ways to fund adaptation and just transition measures.
[165] Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) [40].
[166] Australia has committed $1bn over 5 years 2015-2020 representing 0.3% of global flows. Academics and OFMA have estimated Australia's contribution should be 2.4% of global flows which is equivalent to at least $3.2billion. See, Australian Council for International Development (ACFID), 'Australian Development Cooperation in a Time of Contestation: AFCIF Submission to the 2019-20 Federal Budget' (Report, January 2019), 9. A carbon price and ending fossil fuels subsidies are two ways to fund adaptation and just transition measures.
[167] Australia's ODA reduced by over 30% between 2013 and 2018. See OECD Development Assistance Committee, 'Development Co-operation Peer Reviews: Australia 2018' (Report, 26 March 2018).
[168] Performance has fallen year-on-year against the 80% gender target, from a high of 78% in FY 2015-16 down to 75% in 2017-18. See, Commonwealth of Australia, DFAT, 'Performance of Australian Aid 2017-18' (Report, 2 April 2019).
[169] International Women's Development Agency, 'Making Infrastructure Work for Gender Equality' (Media release, 30 May 30 2019); see, HELP Resources Inc. et al, *Shadow report to the 70th Session of CEDAW: Review of Australia Extraterritorial Obligations* (June 2018).
[170] Australian Charities and Not-For-Profits Commission, 'External Conduct Standard Four: Protection of Vulnerable Individuals'.
[171] See, ACFID Child Rights Community of Practice and ReThink Orphanages Australia, *Working with Children in Residential Care: Implications of the ACNC External Conduct Standards for Australian Charities* (Report, 2019).
[172] Australian Government Department of Health, *Eighth National HIV Strategy 2018-2022* (Report, 2018).
[173] In November 2019, the Northern Territory passed a bill to fully decriminalise sex work in the NT, ensuring that sex workers can access workplace health and safety protections. This places NT as only the third jurisdiction in the world to decriminalise sex work, alongside NSW which was the first.
[174] The first domestic case of COVID-19 in Australia was confirmed on 25 January 2020. See the Hon. Greg Hunt MP, *First Confirmed Case of Novel Coronavirus in Australia* (Media Release, Department of Health, 25 January 2020). After this, cases significantly increased and major lockdown measures occurred in mid-March 2020. See Prime Minister Scott Morrison, *Update on Coronavirus Measures* (Media Statement, 18 March 2020).
[175] As at 3 July 2020, fewer than 9,000 people have fallen ill from COVID-19 and 104 people have died - far fewer than projected. See Australian Government, 'Coronavirus (COVID-19) Current Situation and Case Numbers' (3 July 2020) <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-current-situation-and-case-numbers>.
[176] Michelle Bachelet, UN High Commissioner for Human Rights, *COVID-19 Pandemic - Informal Briefing to the Human Rights Council* (Statement, 9 April 2020).
[177] The Australian Medical Association, Submission No 86 to the Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic* (28 May 2020) 9.
[178] Ibid. The AMA's submission specifically notes the need for the Australian Government to renew and expand its focus on mental health to support the population as it emerges from the health and social effects of the pandemic.
[179] This occurred at both a Commonwealth, State and Territory level, making the response complex and varying across Australia.
[180] Human Rights Law Centre, Submission to the Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic* (3 June 2020) 6; Civil Liberties Australia, Submission No 76 to the Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic* (27 May 2020) 2-3.
[181] Ibid.
[182] Ibid.
[183] The Commission was established to lead the "non-health" aspects of Australia's recovery. See the National COVID-19 Coordination Committee, Terms of Reference <https://www.pmc.gov.au/nccc/terms-reference>.
[184] Human Rights Law Centre, above n 180, 7.
[185] Ibid 14-16.
[186] National Aboriginal and Torres Strait Islander Legal Services, *NATSILS Supports Black Lives Matter Rallies Across Australia* (Media Release, 5 June 2020).
[187] See pages 12-13 of the NGO Report. There have been at least 437 deaths in custody since the 1991 Royal Commission into Deaths in Custody. See Lorena Allam, Calla Wahlquist and Nick Evershed, "Aboriginal deaths in custody: Black Lives Matter protests referred to our count of 432 deaths. It's now 437" *The Guardian* (online, 9 June 2020) <https://www.theguardian.com/australia-news/2020/jun/09/black-lives-matter-protesters-referred-to-our-count-of-432-aboriginal-deaths-in-custody-its-now-437>.
[188] National Aboriginal and Torres Strait Islander Legal Services, Submission No 141 to the Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic* (28 May 2020) 26.
[189] Human Rights Law Centre, Joint Submission No 79 to the Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic* (27 May 2020) 6-7.
[190] Disability and Aged Care OPCAT Working Group, Submission to the Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic* (June 2020).

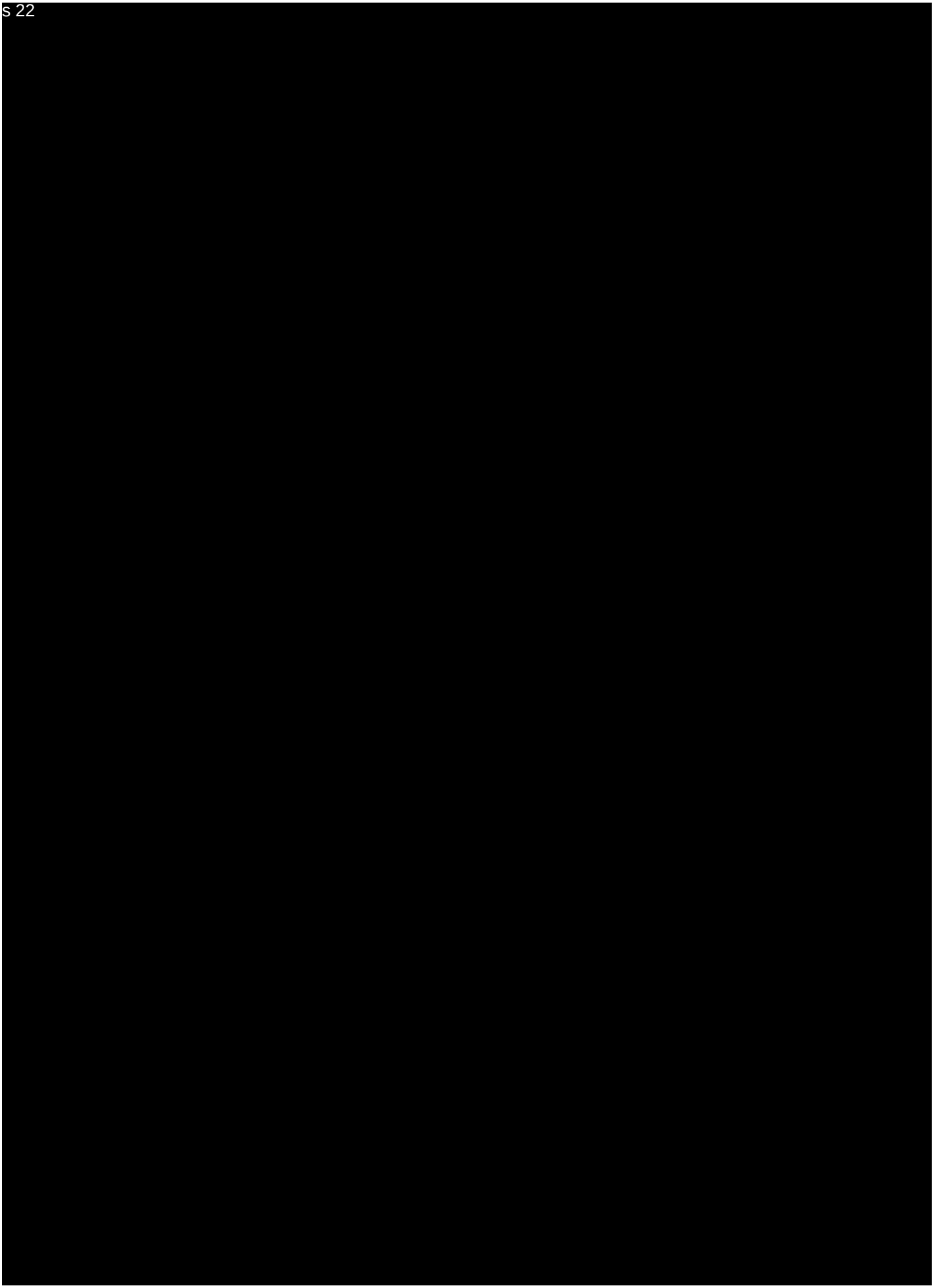
[191] National Aboriginal and Torres Strait Islander Legal Services, above n 186, 35.
[192] Equality Rights Alliance, Submission No 88 to the Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic* (28 May 2020) 4; Community Legal Centres Australia, Submission to the Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic*(12 June 2020) 6.
[193] Equality Rights Alliance, ibid, 6.
[194] National Aboriginal and Torres Strait Islander Legal Services, above n 186, 32; Aboriginal Medical Services Alliance (NT), Submission to the Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic* (1 June 2020) 5-6; National Aboriginal Community Controlled Health Organisation, Submission No 64 to the Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic* (28 May 2020) 7-8, 25. There is also deep concern about the virus being spread to Aboriginal and Torres Strait Islander Peoples in the Northern Territory and other remote regions by US military troops and mining operations, and with the imminent opening of NT borders. See Keira Jenkins, "'Shut it Down': Traditional Owners Call for a Stop to the NT's FIFO Mining Workers" *NTIV* (Online, 26 March 2020) <https://www.sbs.com.au/nitv/article/2020/03/26/shut-it-down-traditional-owners-call-stop-nts-fifo-mining-workers>;
[195] ABS (2020), *6160.0.55.001 - Weekly Payroll Jobs and Wages in Australia*, Week ending 18 April 2020, viewed 7 May 2020 <https://www.abs.gov.au/ausstats/abs@.nsf/mf/6160.0.55.001>.
[196] Equality Rights Alliance, above n 192, 3-4
[197] Children and Young People with Disability Australia, Submission to the Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic* (28 May) 2-3.
[198]Westerly, Submission No 115 to the Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic* (28 May 2020) 4.
[199] Australian Youth Affairs Coalition, Young Australians and our Response to COVID-19 - Member Briefing (May 2020) 1-2.
[200] Claudia Farhart, 'How is Each State Enacting the Moratorium on Rental Evictions?' *SBS News* (Online, 13 April 2020) <https://www.sbs.com.au/news/how-is-each-state-enacting-the-moratorium-on-rental-evictions>.
[201] The Australian Government, *Economic Response to the Coronavirus* <https://treasury.gov.au/coronavirus>.
[202] Human Rights Law Centre, above n 180, 8-9; Refugee Advice and Casework Service, Submission No 68 to the Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic* (28 May 2020) 1-4.
[203] Human Rights Law Centre, Australians' Right to Protest' (Joint Statement, 18 June 2020) <https://www.hrlc.org.au/news/2020/6/18/australians-right-to-protest>.
[204] Australian Council of Social Services, Submission No 130 to the Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic* (26 May 2020) 4.
[205] Aboriginal Peak Organisations Northern Territory, Submission to the Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic* (4 June 2020) 2; National Aboriginal Community Controlled Health Organisation, above n 194, 7-8, 25; Aboriginal Medical Services Alliance (NT), above n 194, 5-6.

Gregory Parkhurst

s 22



s 22



s 22

s 22

[redacted]

From: Christopher Knaus <christopher.knaus@theguardian.com>
Sent: Tuesday, 25 June 2019 2:57 PM
To: Media <Media@ombudsman.gov.au>
Subject: Media query: private health insurers and PEC rejections

Hi team,

Apologies in advance for the lengthy email, it's a rather complex inquiry.

I have a series of questions about the Commonwealth Ombudsman's dealings with three private health insurers. The dealings date back to 2014, and involve Bupa, NIB, and HCF, and relate to their rejection of claims due to pre-existing conditions (PEC). The Private Health Insurance Act requires insurers to obtain the "opinion of a medical adviser appointed by the health insurer" on whether symptoms existed within six months of taking out the policy, before they reject a claim on PEC grounds.

In 2016, Bupa publicly acknowledged it had repeatedly failed to obtain these medical opinions for 7740 claimants between 2011 and 2016.

I have evidence showing the following:

- the Ombudsman had evidence to suggest Bupa was illegally rejecting claims by failing to appoint a medical practitioner as early as 2014. It did not act until 2016, when Bupa notified it that there were 7740 claimants affected.
- In 2016, the Cwth Ombudsman believed Bupa had falsified documents that hid the nature and scale of the breach from the Ombudsman. The insurer had claimed the error was just an "oversight" in its processes.
- in 2016, the Cwth Ombudsman had cause to question HCF about whether it had obtained medical reviews in PEC cases. HCF said that it had, but failed to provide any evidence to back up its claims. No further action was taken.
- in 2018, the Cwth Ombudsman again had cause to question HCF and request evidence of medical reviews in a PEC case. No such evidence was provided. Instead, the Ombudsman employee investigating the matter was sidelined and directed not to consider any more PEC cases. This lasted four months, until the employee was restored to normal duties.
- in 2018, the Cwth Ombudsman had cause to investigate NIB for its failure to appoint a medical practitioner to review PEC case. NIB admitted to the Ombudsman that it had not been appointing medical practitioners in some PEC cases over a period of seven years.

- the NIB case has not been made public in any way. NIB has been allowed to deal with it internally. The matter was also referred to the department of health, but it has made no public statement about the case. This has left those with NIB health insurance - including affected claimants - in the dark.

My questions are:
- why did the Cwth Ombudsman not act on the Bupa case in 2014, when it was first identified?
- what action did the Cwth Ombudsman take over Bupa's alleged falsification of records. What records were falsified? in what way were they falsified?
- why did the Ombudsman not demand that HCF produce evidence that it had appointed medical practitioners?
- why did it sideline an investigator who was considering the HCF matter?
- why has the Ombudsman made no public statement about the NIB case? why has the public not been informed that a major insurer has illegally rejected claims over a period of seven years?

I was hoping for a response by 4pm tomorrow.

Many thanks,

Christopher Knaus
Reporter
The Guardian | Australia

+61 (0) 422 283 681
christopher.knaus@guardian.co.uk
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twitter: @knausc

The Guardian

Level 3, 19 Foster St
Surry Hills NSW 2010
theguardian.com/au

Document 23
Contains deletions under FOI

Gregory Parkhurst

From: Media
Sent: Friday, 29 November 2019 1:06 PM
To: Carmen s 47F ; Michael Manthorpe
Cc: Rodney Walsh; Lisa s 47F ; Media; Jaala Hinchcliffe
Subject: FW: Query public interest disclosure [SEC=UNCLASSIFIED]

Hi all

Please see below media enquiry we have received from Christopher Knaus at the Guardian.

As discussed with Carmen, below is the proposed response for review/approval:

Hi Christopher,

Thank you for your enquiry to the Office of the Commonwealth Ombudsman.

Please see below response to your enquiry:

We are unable to confirm or deny that such a disclosure was received. It is an offence under the PID Act to disclose information which may identify a discloser or which was obtained in the course of performing a function or an investigation under the PID Act (ss 20 and 65).

However, we do note that the conduct of members of parliament is not covered by the PID Act (because they are not public officials as defined in s 69).

Kind regards,

Media team

Kind regards

Kim

From: Christopher Knaus
Sent: Friday, 29 November 2019 12:08 PM
To: Media
Subject: Query re: public interest disclosure

Hi there,

I'm just inquiring about s 47E nd subsequent statements made about the matter by Peter Dutton, home affairs minister.

My questions are fairly simple on this.
- can the Ombudsman confirm it received a PID on this matter on this date?
- what action is it taking to investigate, if any?

I was hoping for a response by 4pm.

Many thanks,

Christopher Knaus
Reporter
The Guardian | Australia

+61 (0) 422 283 681
christopher.knaus@guardian.co.uk
---
twitter: @knausc

Level 3, 19 Foster St
Surry Hills NSW 2010
theguardian.com/au

Document 24
Contains deletions under FOI

Gregory Parkhurst

From: Rodney Walsh
Sent: Thursday, 27 June 2019 2:29 PM
To: Jaala Hinchcliffe; Kim s 47F Alison s 47F
Cc: Michael Manthorpe; Dermot Walsh
Subject: PHIO media enquiry [SEC=UNCLASSIFIED]

All – I have spoken with the Guardian journalist, Christopher Knaus, regarding his deadline for our response.

I have said that a response today, given the range of matters he has raised, was not reasonable.

We have agreed on Monday but with a caveat that I call him if we are in danger of not meeting that.

I suggest we meet tomorrow to discuss where we are at?

Rodney

Document 25
Contains deletions under FOI

Gregory Parkhurst

s 22 [redacted]

From: Kim Armstrong
Sent: Thursday, 5 December 2019 8:44 AM
To: Rodney Walsh ; Jaala Hinchcliffe
Cc: Carmen s 47F ; Lisa s 47F
Subject: Department of Home Affairs - re PID media [SEC=UNCLASSIFIED]
Importance: High

Hi Rodney/Jaala,

I have just taken a call from s 47F who is the Director of Internal investigations, professional standards at the Department of home affairs.

He is wanting to speak to someone regarding the veracity of claims in this media article which was published late yesterday: https://www.theguardian.com/australia-news/2019/dec/04/whistleblower-lodges-complaint-about-peter-dutton-in-case-of-drug-trafficker-spared-deportation

We were contacted by Christopher Knaus at the Guardian late last week, please see attached our formal response back noting Michael also asked Carmen to brief him, if in fact we did receive the complaint.

Can you advise who is the best person to contact s 47F His contact number is s 47E .

Kind regards

Kim s 47F
Communication Manager

COMMONWEALTH OMBUDSMAN
Phone: s 47E
Email: s 47E
Website: ombudsman.gov.au

[redacted]

Influencing systemic improvement in public administration

Gregory Parkhurst

From: Media
Sent: Friday, 29 November 2019 1:25 PM
To: Christopher Knaus
Subject: RE: Query public interest disclosure [SEC=UNCLASSIFIED]

Hi Christopher,

Thank you for your enquiry to the Office of the Commonwealth Ombudsman.

Please see below response to your enquiry:

We are unable to confirm or deny that such a disclosure was received. It is an offence under the PID Act to disclose information which may identify a discloser or which was obtained in the course of performing a function or an investigation under the PID Act (ss 20 and 65).

However, we do note that the conduct of members of parliament is not covered by the PID Act (because they are not public officials as defined in s 69).

Kind regards,

Media team

From: Christopher Knaus
Sent: Friday, 29 November 2019 12:08 PM
To: Media
Subject: Query re: public interest disclosure

Hi there,

I'm just inquiring about s 47E [redacted] nd subsequent statements made about the matter by Peter Dutton, home affairs minister.

My questions are fairly simple on this.
- can the Ombudsman confirm it received a PID on this matter on this date?
- what action is it taking to investigate, if any?

I was hoping for a response by 4pm.

Many thanks,

Christopher Knaus
Reporter
The Guardian | Australia

+61 (0) 422 283 681
christopher.knaus@guardian.co.uk
---
twitter: @knausc

The Guardian

Level 3, 19 Foster St
Surry Hills NSW 2010
theguardian.com/au

Gregory Parkhurst

From: Rodney Walsh
Sent: Monday, 1 July 2019 3:10 PM
To: christopher.knaus@theguardian.com
Cc: Media
Subject: Media query: private health insurers and PEC rejections [SEC=UNCLASSIFIED]

Dear Mr Knaus

Thank you for your enquiry to the Office of the Commonwealth Ombudsman concerning pre-existing condition (PEC) cases in relation to three private health insurers. While the Office investigates in private and therefore does not provide comment on individual complaints and investigations, we have considered the matters that you have referred to in your email and are satisfied that we dealt with the matters that were referred to us in accordance with our processes for PEC cases, which we have set out for you below. Given the information that was before us at the relevant times, we are satisfied that we took appropriate actions. We note that two of the insurers subject to your inquiries were appropriately referred to the regulator. The third insurer was not referred to the regulator because we did not consider that it was necessary to do so.

Background to PHIO role

The Private Health Insurance Ombudsman (PHIO) was merged into the Commonwealth Ombudsman in 2015. In this role, our function is to protect the interests of private health consumers. This includes investigating complaints from consumers about pre-existing condition (PEC) decisions and ensuring the PEC rules have been correctly applied by the insurer. The Office acts as an independent third party when dealing with complaints about PEC waiting periods.

PHIO process for PEC complaints

When the Office receives a complaint from a member about the application of PEC waiting periods, our process is to request copies of relevant documentation including:

- Medical certificate from the member's GP.
- Medical certificate from the member's specialist.
- The assessment and decision from the insurer's medical advisor.
- The outcome letter/email from the insurer to the member.
- Any further information that the medical advisor has used to reach their decision – e.g. hospital admission notes, specialist referral letters, medical records.
- In some cases, some of this information may not be available – e.g. in emergency cases there may be no GP or specialist notes and the insurer may rely on hospital admission notes instead.

The Office's PHIO case officer will assess the information provided by the insurer and will either:

- Finalise the complaint assessment and advise the complainant and insurer of the outcome.
- Seek guidance on the complaint through discussion at a PHIO case meeting.
- Escalate the complaint and seek guidance from PHIO management on how best to progress the complaint, including whether the insurer has made the decision in accordance with the Act.

Steps taken by the Office to finalise PEC complaints:

- If our assessment concludes that the PEC rules were correctly applied by the insurer, the case officer will write to the complainant and the insurer notifying of our decision and advising that the complaint will be finalised.
- If our assessment suggests the PEC rules were not correctly applied or the case is complex/ambiguous, the Office will seek the complainant's permission to send the case to an Independent Medical Advisor (IMA) for review:
    - If the IMA agrees that the insurer has correctly applied the PEC rules, the case will finalised.
    - If the IMA does not agree that the insurer has correctly applied the PEC rules, our case officer will write back to the insurer requesting their medical practitioner reconsider the case.

In making determinations about complaints about the PEC waiting period, the Office ensures the waiting period has been applied correctly and that the fund and hospital have complied with the Pre-Existing Condition Best Practice Guidelines. In circumstances where individual complaints highlight systemic issues with the application of the private health insurance regulatory framework, the Office may provide feedback to the insurer in our complaint finalisation correspondence, or the Ombudsman may initiate an own investigation or refer the matter to the regulator, for PEC matters this would be the Department of Health.

For more about the Ombudsman's role in PEC cases, please see:
http://www.ombudsman.gov.au/publications/brochures-and-fact-sheets/factsheets/all-fact-sheets/phio/the-pre-existing-conditions-rule

We would be happy to meet with you to discuss our role in PEC cases if that would be of assistance.

Regards

Rodney Lee Walsh | Chief Operating Officer
Media Team

From: Christopher Knaus <christopher.knaus@theguardian.com>
Sent: Tuesday, 25 June 2019 2:57 PM
To: Media <Media@ombudsman.gov.au>
Subject: Media query: private health insurers and PEC rejections

Hi team,

Apologies in advance for the lengthy email, it's a rather complex inquiry.

I have a series of questions about the Commonwealth Ombudsman's dealings with three private health insurers. The dealings date back to 2014, and involve Bupa, NIB, and HCF, and relate to their rejection of claims due to pre-existing conditions (PEC). The Private Health Insurance Act requires insurers to obtain the "opinion of a medical adviser appointed by the health insurer" on whether symptoms existed within six months of taking out the policy, before they reject a claim on PEC grounds.

In 2016, Bupa publicly acknowledged it had repeatedly failed to obtain these medical opinions for 7740 claimants between 2011 and 2016.

I have evidence showing the following:

- the Ombudsman had evidence to suggest Bupa was illegally rejecting claims by failing to appoint a medical practitioner as early as 2014. It did not act until 2016, when Bupa notified it that there were 7740 claimants affected.
- In 2016, the Cwth Ombudsman believed Bupa had falsified documents that hid the nature and scale of the breach from the Ombudsman. The insurer had claimed the error was just an "oversight" in its processes.
- in 2016, the Cwth Ombudsman had cause to question HCF about whether it had obtained medical reviews in PEC cases. HCF said that it had, but failed to provide any evidence to back up its claims. No further action was taken.
- in 2018, the Cwth Ombudsman again had cause to question HCF and request evidence of medical reviews in a PEC case. No such evidence was provided. Instead, the Ombudsman employee investigating the matter was sidelined and directed not to consider any more PEC cases. This lasted four months, until the employee was restored to normal duties.
- in 2018, the Cwth Ombudsman had cause to investigate NIB for its failure to appoint a medical practitioner to review PEC case. NIB admitted to the Ombudsman that it had not been appointing medical practitioners in some PEC cases over a period of seven years.

- the NIB case has not been made public in any way. NIB has been allowed to deal with it internally. The matter was also referred to the department of health, but it has made no public statement about the case. This has left those with NIB health insurance - including affected claimants - in the dark.

My questions are:
- why did the Cwth Ombudsman not act on the Bupa case in 2014, when it was first identified?
- what action did the Cwth Ombudsman take over Bupa's alleged falsification of records. What records were falsified? in what way were they falsified?
- why did the Ombudsman not demand that HCF produce evidence that it had appointed medical practitioners?
- why did it sideline an investigator who was considering the HCF matter?
- why has the Ombudsman made no public statement about the NIB case? why has the public not been informed that a major insurer has illegally rejected claims over a period of seven years?

I was hoping for a response by 4pm tomorrow.

Many thanks,

Christopher Knaus
Reporter
The Guardian | Australia

+61 (0) 422 283 681
christopher.knaus@guardian.co.uk
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twitter: @knausc

The Guardian

Level 3, 19 Foster St
Surry Hills NSW 2010
theguardian.com/au
