

Chapter 2¹

Other legislation

2.1 This chapter provides an assessment of the human rights compatibility of legislation which was not made in response to the COVID-19 pandemic, in particular:

- bills introduced into the Parliament between 10 and 18 June;
- legislative instruments registered on the Federal Register of Legislation between 6 and 24 June 2020; and
- two legislative instruments previously reported on.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Other legislation, *Report 8 of 2020*; [2020] AUPJCHR 108.

Response required

2.2 The committee seeks a response from the relevant minister with respect to the following bills.

Education Legislation Amendment (2020 Measures No. 1) Bill 2020¹

Purpose	<p>This bill seeks to amend various Acts in relation to higher education and vocational education and training to:</p> <ul style="list-style-type: none"> • extend the unique student identifier (USI) regime to all higher education students by requiring students commencing from 1 January 2021, and all students from 1 January 2023, to have a USI in order to be eligible for Commonwealth assistance; • clarify that a student's HELP balance is taken to be reduced immediately after the census date for HECS-HELP assistance, FEE-HELP assistance and VET FEE-HELP assistance, and immediately after the census day for VET student loans; • provide undergraduate students seeking FEE-HELP loans with an exemption from the requirement to pay the 25 per cent loan fee for units of study with census dates from 1 April to 30 September 2020; and • make minor technical amendments
Portfolio	Education
Introduced	House of Representatives, 11 June 2020 <i>Passed both Houses on 18 June 2020</i>
Rights	Education
Status	Seeking additional information

Unique student identifier

2.3 Schedule 1 of the bill would amend the *Higher Education Support Act 2003* to provide that, all new higher education students commencing study from 1 January

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Education Legislation Amendment (2020 Measures No. 1) Bill 2020, *Report 8 of 2020*; [2020] AUPJCHR 109.

2021, and all students (including existing students) from 1 January 2023, to have a unique student identifier (USI) in order to be eligible for Commonwealth assistance.² The bill would also amend the *VET Student Loans Act 2016* to provide that all applications for VET student loans made on or after 1 January 2021 must include a student's USI.³

Preliminary international human rights legal advice

Right to education

2.4 As noted, the bill would require that higher education students and VET student loan students must obtain a USI, an identifying indicator which is designed to remain with a person for life, in order to qualify for a Commonwealth supported education place. The bill does not provide for any exemption to be made for students who do not wish to obtain a USI, for example due to privacy concerns.⁴ Given that the lack of a USI would appear to bar a student from obtaining Commonwealth financial assistance in order to undertake further education, this appear to engage and may limit the right to education, as recognised in the statement of compatibility.⁵

2.5 The right to education is guaranteed by article 13 of the International Covenant on Economic, Social and Cultural Rights, which provides that higher education shall be made equally accessible to all, in particular by the progressive introduction of free education.⁶ States have a duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of the right to education.⁷ The measures in this bill, which would, in future, deny Commonwealth financial assistance to undertake further education to students without a USI, may constitute a retrogressive measure with respect to the obligation to progressively

2 Schedule 1, items 1-4. Commonwealth assistance includes FEE-HELP, OS-HELP, and SA-HELP. FEE-HELP is a loan available to Commonwealth supported students to pay for all or part of the tuition fees associated with higher education studies. OS-HELP is a loan to assist students enrolled in a Commonwealth supported place who study some of their course overseas. SA-HELP is a loan to pay for all or part of the student services and amenities fee charged by a higher education provider.

3 Schedule 1, items 6-7.

4 Applying for a USI requires the provision of personal information to the USI Registry System. This engages the right to privacy, as guaranteed under article 17 of the International Covenant on Civil and Political Rights. This is not identified in the statement of compatibility. This entry does not discuss the engagement of this right, noting the privacy protections set out in the *Student Identifiers Act 2014*, *Student Identifiers Regulation 2014*, and the *Privacy Act 1988*.

5 Statement of compatibility, pp. 7-8.

6 See, article 13(2)(c).

7 See, UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999).

introduce free education. Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.⁸

2.6 With respect to the objective of the proposed measure, the statement of compatibility explains that the requirement that all higher education students have a USI will enable the government to de-commission the Commonwealth Higher Education Student Support Number (CHESSN), a government-issued identifier for Commonwealth-supported students.⁹ It also states that these amendments will promote the right to education because having a USI which can track a student's entire tertiary education journey will strengthen the integrity and richness of data available in order to inform policy development and program delivery.¹⁰ However, it is not clear that these would constitute legitimate objectives for the purposes of human rights law. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. The statement of compatibility explains that this measure will facilitate the de-commissioning of the CHESSN. However, administrative convenience, in and of itself, is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights law. Further, while the statement of compatibility explains that a USI regime will enable the government to better inform policy development and program delivery by tracking a student's progress through all their tertiary studies, it is not clear that this is not already possible through the use of data associated with a CHESSN, which is designed to remain with students for the duration of their studies, or by other means.

2.7 It is also unclear whether this measure would constitute a proportionate limit on the right to education. The statement of compatibility notes that these measures may limit the right to education by requiring all students to have a USI before they can access Commonwealth assistance. However it states that any barriers are limited, as the process for applying for a USI is simple and free.¹¹ It also highlights that existing higher education students will have until 1 January 2023 to obtain a USI, giving them ample time to do so.¹² These are relevant considerations;

8 See, for example, UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999) [44]-[45].

9 Statement of compatibility, p. 7. The CHESSN is a unique personal identification number allocated to Commonwealth supported students as part of their first application or enrolment process. It is intended that students should have one CHESSN for the duration of their studies. The identifier is used to help monitor and manage Commonwealth assistance.

10 Statement of compatibility, pp. 7-8.

11 Statement of compatibility, p. 7.

12 Statement of compatibility, p. 7.

however in assessing proportionality it is necessary to consider whether a proposed measure seeks to impose a blanket rule, or whether it provides flexibility to treat different cases differently. While the explanatory materials appear to anticipate that an exemption from the requirement to obtain a USI may apply,¹³ the bill itself does not provide any avenue for students to request an exemption. By way of comparison, students completing a VET course are currently able to request an exemption from the requirement to possess a USI where they provide the details of a genuine personal objection to being assigned a student identifier.¹⁴ It may be that such an exemption with respect to the measures in this bill will be contained in a legislative instrument, however no such information has been provided.

2.8 Further information is required in order to assess the compatibility of the measure with the right to education, and in particular:

- (a) whether the requirement that higher education students obtain a USI in order to be eligible for Commonwealth assistance, pursues a legitimate objective that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right to education; and
- (b) whether any exemption from the requirement that higher education or VET students must possess a USI before they may receive Commonwealth financial assistance will apply, and if so, the details of any such exemption.

Committee view

2.9 The committee notes that this bill requires that new higher education and VET students commencing studies from 1 January 2021, and all higher education students from 1 January 2023, must obtain a unique student identifier (USI) in order to be eligible for Commonwealth financial assistance.

2.10 The committee notes that the extension of the USI regime may engage and limit the right to education but considers that, based on the information provided in the statement of compatibility, the measure appears to provide a proper administrative basis for the USI.

2.11 In order to assess the compatibility of this measure with the right to education, the committee seeks the minister's advice as to the matters set out at paragraph [2.8].

13 See, statement of compatibility, p. 6; and explanatory memorandum, p. 11.

14 Student Identifiers (Exemptions) Instrument 2018, section 8.

National Disability Insurance Scheme Amendment (Strengthening Banning Orders) Bill 2020¹

Purpose	This bill seeks to amend the <i>National Disability Insurance Scheme Act 2013</i> to broaden the circumstances in which the National Disability Insurance Scheme (NDIS) Commissioner may make a banning order against an NDIS provider or other person
Portfolio	National Disability Insurance Scheme
Introduced	House of Representatives, 12 June 2020
Rights	Persons with disability; privacy
Status	Seeking additional information

Publication of personal information on NDIS Provider Register

2.12 The *National Disability Insurance Scheme Act 2013* (NDIS Act) currently provides that the National Disability Insurance Scheme Quality and Safeguards Commissioner (Commissioner) can make a banning order prohibiting or restricting specified activities by National Disability Insurance Scheme (NDIS) providers and persons currently employed or engaged by a NDIS provider.

2.13 This bill seeks to broaden the circumstances in which the Commissioner may make a banning order, so as to allow an order to be made:

- in relation to a person no longer employed or engaged by an NDIS provider,² and to provide that the banning order will remain in force despite a person ceasing to deliver NDIS services;³ and
- proactively by the Commissioner where the person has not previously been employed or otherwise engaged by an NDIS provider, or not been an NDIS provider themselves, and the Commissioner reasonably believes that the person is not suitable to be so involved.⁴

2.14 In addition, the NDIS Act currently provides that the NDIS Provider Register (Register) must include the name of persons who are, or were, NDIS providers and

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme Amendment (Strengthening Banning Orders) Bill 2020, *Report 8 of 2020*; [2020] AUPJCHR 110.

2 Schedule 1, item 2.

3 Schedule 1, item 4, proposed subsection 73ZN(5A)

4 Schedule 1, item 3 proposed subsection 73ZN(2A).

sets out any information about banning orders made against such persons. The bill proposes expanding this to allow the Register to include information in relation to individual employees of NDIS providers who have had banning orders made against them. The information included may include the person's name, their Australian Business Number (if any), information about the banning order and any other matter prescribed by the NDIS Rules.⁵

Preliminary international human rights legal advice

Rights of persons with disabilities and right to privacy

2.15 As this legislation is designed to expand the NDIS Commissioner's powers to allow a banning order to be made against a person who may pose a risk of harm to people with disabilities, to prevent them from entering or re-entering the NDIS sector, it appears to promote the rights of persons with disabilities. The right to be free from all forms of violence, abuse and exploitation is enshrined in article 16 of the Convention on the Rights of Persons with Disabilities, which requires that State parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse.⁶ Further, '[i]n order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.' The statement of compatibility explains that enabling the Commissioner to proactively ban someone from working in the NDIS sector, will mean that a person who has had action taken against them in another field, such as aged care or child care, can be banned from working with people with disability before they commence in the NDIS sector.⁷ As the statement of compatibility notes, this recognises that some NDIS participants are amongst the most vulnerable people in the community, and these changes could promote the rights of such people with disability to live free from abuse, violence, neglect and exploitation.⁸

2.16 However, publishing on a public website the personal details of employees who are subject to a banning order is also likely to limit the right to privacy, as such data contains personal reputational information that may affect an individual's ability to get employment in other, unrelated sectors. The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation. It includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and

5 Schedule 1, item 5, proposed subsection 73ZS(5A).

6 Convention on the Rights of Persons with Disabilities. Article 16(1).

7 Statement of compatibility, p. 4.

8 Statement of compatibility, p. 5.

sharing of such information. It also includes the right to control the dissemination of information about one's private life.⁹

2.17 The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.18 The statement of compatibility recognises that making personal information publicly available about persons who have had a banning order issued against them, engages and limits the right to privacy. However, it argues that the limitation is permissible as it is reasonable 'in relation to preventing exploitation, violence and abuse in the disability sector'.¹⁰ It states:

The register will be generally publically available to allow people with disability and their representatives to search to help ensure that providers they are using are appropriately registered and not subject to any banning order. This is consistent with the objective to ensure that information about whether a person who works, or seeks to work, with people with disability poses a risk to such people, is current, accurate, and available to all States and Territories, and to employers engaging workers in the NDIS.

...

The range of information that will be shared with persons or bodies will be proportionate and necessary for the objective of minimising the risk of banned persons delivering NDIS supports and services to people with disability under the NDIS.

2.19 Minimising the risk of banned individuals from working with people with disability is a legitimate objective for the purposes of international human rights law, and making such information publicly accessible is likely to be effective to achieve (that is, rationally connected to) that objective. However, it is not clear that the inclusion of this personal information on a public website would be a proportionate means of achieving that objective.

2.20 The statement of compatibility states that the range of information to be contained on the Register is limited and it will not contain 'detailed information of the circumstances leading to the banning order, highly sensitive information relied on to support the banning decision, or information about a person's sexual identity or preferences'.¹¹ This is relevant in considering the proportionality of the measure. However, it is noted that the bill provides that the Register may include 'information about the banning order', which does not itself provide for any restriction on what level of detail this may be.

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

10 Statement of compatibility, p. 7.

11 Statement of compatibility, p. 6.

2.21 A relevant consideration in determining the proportionality of the measure is whether there are other less rights restrictive ways to achieve the same aim. The changes proposed by this bill would mean any person who is, or was, employed by a NDIS provider and who is, or has been, subject to a banning order could have their name and information about the banning order publicly listed on the Register. It is not clear why it is necessary to include all of this information on a public website, and whether the aim of ensuring banned persons are not able to work in the NDIS sector could not be achieved in a less rights restrictive way. There may be other methods by which an employer or person with disability could determine whether a person is subject to a banning order, rather than publishing those details on a public website. For example, it would appear that it may be possible for the Register to be available on request by individuals (including people with disabilities and their supports) or potential employers, rather than being publicly available by default. In relation to equivalent sectors such as the aged care or child care sectors, it is noted that it does not appear that there is an equivalent process to search for the names of employees who have been subject to sanctions in those industries.¹²

2.22 Further, in considering the proportionality of any limitation on the right to privacy, it is also important to consider any relevant safeguards with respect to how an individual's name is placed on the Register. It is unclear, for example, how soon the banning order is listed on the Register and whether the banning order is published before any review processes have been exhausted. The NDIS Act provides that a banning order takes effect from the day specified in the notice¹³ and the bill only states that the Register will include the information in relation to a person against whom a banning order 'is made'.¹⁴ A decision to make a banning order is a reviewable decision, with both internal review and review by the Administrative Appeals Tribunal (AAT) available.¹⁵ It would seem that the decision stays in place until and unless another decision is made,¹⁶ and it would appear that once a request for a review is lodged, it may take many months before an internal decision or review by the AAT is finalised, during which time the details of a banning order made against

12 For example, sections 59 and 59A of the *Aged Care Quality and Safety Commission Act 2018* provides that information about an aged care service or a Commonwealth-funded aged care service may be made publicly available (including any action taken to protect the welfare of care recipients), but this does not apply to information relating to action taken against employees of those service providers.

13 *National Disability Insurance Scheme Act 2013*, subsection 73ZN(5).

14 Schedule 1, item 5, proposed subsection 73ZS(5A).

15 *National Disability Insurance Scheme Act 2013*, sections 99, 100 and 103.

16 A reviewable decision remains in effect while an internal review is being undertaken, and a request for internal review does not affect the operation of, or prevent the NDIS Quality and Safeguards Commission from taking action to implement, the original decision, see *National Disability Insurance Scheme Act 2013*, section 100(7).

an individual may be publicly accessible.¹⁷ This may mean that a person may be listed on a public website as being banned from working within the NDIS on the basis of an administrative decision that is later overturned (noting that once information is included on a public website that information can sometimes remain available indefinitely in some form on the internet).

2.23 As such, further information is required to assess the proportionality of the measure in relation to the right to privacy, in particular:

- why the bill allows the NDIS Provider Register to include any 'information about the banning order', without any restriction on the level of detail that will be included;
- why it is necessary to list the names of current and former employees of NDIS providers who are subject to a banning order on a public website, and whether there are other less rights-restrictive means to achieve the stated objective (for example, allowing the Register to be accessed on request); and
- when is such information included in the Register and what safeguards are in place to ensure that an individual's right to privacy is adequately protected pending any review of a banning order decision.

Committee view

2.24 The committee notes that this bill broadens the circumstances in which the NDIS Quality and Safeguards Commissioner may make a banning order against an NDIS provider or other person, and would allow the names of current and former employees of NDIS providers who are subject to a banning order to be listed on a public website.

2.25 The committee considers that the bill, which is designed to help prevent the violence, abuse, neglect and exploitation of persons with disabilities, promotes and protects the rights of persons with disabilities. However, publishing on a public website the details of employees who have been banned also engages and limits the right to privacy. However, this may be a permissible limitation if it is shown to be reasonable, necessary and proportionate.

2.26 In order to fully assess the compatibility of this measure with right to privacy, the committee seeks the minister's advice as to the matters set out at paragraph [2.23].

17 In terms of request for review of decision, the participant has three months from the date of a decision, within which a request for review can be lodged. Subsection 100(6) of the *National Disability Insurance Scheme Act 2013* states that the reviewer must make a decision in relation to a request for review of a decision 'as soon as reasonably practicable'.

Bills and instruments with no committee comment¹

2.27 The committee has no comment in relation to the following bills (which were not made in response to the COVID-19 pandemic) which were introduced into the Parliament between 10 and 18 June 2020. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:²

- Aged Care Legislation Amendment (Financial Transparency) Bill 2020;
- Biosecurity Amendment (Traveller Declarations and Other Measures) Bill 2020;
- Broadcasting Services Amendment (Regional Commercial Radio and Other Measures) Bill 2020;
- Commonwealth Electoral Amendment (Ensuring Fair Representation of the Northern Territory) Bill 2020;
- Customs Charges and Levies Legislation Amendment (Sheep and Lamb) Bill 2020;
- Electoral Legislation Amendment (Miscellaneous Measures) Bill 2020;
- Excise Levies Legislation Amendment (Sheep and Lamb) Bill 2020;
- Family Law Amendment (A Step Towards a Safer Family Law System) Bill 2020;
- Green New Deal (Quit Coal and Renew Australia) Bill 2020;
- Interactive Gambling Amendment (Banning Social Casinos and Other Measures) Bill 2020;
- Health Insurance Amendment (Continuing the Office of the National Rural Health Commissioner) Bill 2020; and
- Public Governance, Performance and Accountability Amendment (Sustainable Procurement Principles) Bill 2020.

2.28 The committee has also assessed the human rights compatibility of legislative instruments registered on the Federal Register of Legislation between

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 8 of 2020*; [2020] AUPJCHR 111.

2 Inclusion in the list is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

6 to 24 June 2020.³ This includes the Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Continuing Effect Declaration 2020 (No 1) [F2020L00694]. The committee has considered the human rights compatibility of similar instruments on a number of occasions.⁴ As this legislative instrument does not appear to designate or declare any individuals who are currently within Australia's jurisdiction, the committee makes no comment in relation to this specific instrument at this time.

2.29 The committee has determined not to comment on the remaining non-COVID-19 related instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

Senator the Hon Sarah Henderson

Chair

3 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period (including legislation made in response to the COVID-19 pandemic), select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.

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