Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 8 of 2020

1 July 2020

ISSN 2204-6356 (Print)
ISSN 2204-6364 (Online)

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This report can be cited as: Parliamentary Joint Committee on Human Rights, *Report 8 of 2020*; [2020] AUPJCHR 103.

This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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Committee information

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

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[1] A description of the rights most commonly arising in legislation examined by the committee is available on the committee's website.[2]

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be permissible under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is permissible. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationally connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A statement of compatibility for a measure limiting a right must provide a detailed and evidence-based assessment of the measure against the limitation criteria.

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1 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

2 See the committee's *Short Guide to Human Rights* and *Guide to Human Rights*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or draw the matter to the attention of the proponent and the Parliament on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in *Guidance Note 1*, a copy of which is available on the committee's website.[3]

3 See *Guidance Note 1 – Drafting Statements of Compatibility*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

Chapter 1[1]

COVID-19 legislation

1.1 This chapter provides an assessment of the human rights compatibility of legislation made in response to the COVID-19 pandemic, specifically:

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

1.2 Appendix 1 lists all new legislation considered in this chapter, including legislation on which the committee makes no comment, on the basis that the legislation does not engage, or only marginally engages, human rights; promotes human rights; and/or permissibly limits human rights.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, COVID-19 legislation, *Report 8 of 2020*; [2020] AUPJCHR 104.

Concluded matters

1.3 The committee has concluded its examination of these matters on the basis of the responses received.

1.4 Correspondence relating to these matters is available on the committee's website.[1]

Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 [F2020L00419][2]

Purpose	This instrument establishes the operation of the JobKeeper payment
Portfolio	Treasury
Authorising legislation	*Coronavirus Economic Response Package (Payments and Benefits) Act 2020*
Disallowance	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 12 May 2020). Notice of motion to disallow must be given by 12 August 2020 in the House of Representatives and the Senate[3]
Rights	Adequate standard of living; work; equality and non-discrimination
Status	Concluded examination

1.5 The committee requested a response from the Treasurer in relation to the instrument in *Report 5 of 2020*.[4]

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 [F2020L00419], *Report 8 of 2020*; [2020] AUPJCHR 105.

3 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

4 Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020), pp. 32-34.

JobKeeper subsidy for certain workers

1.6 This instrument establishes the operation of the JobKeeper payment. This is a subsidy of $1,500 per eligible employee per fortnight, which is administered by the Australian Taxation Office and provided directly to registered eligible businesses. Those businesses (or entities) are then required to pass on this subsidy to those eligible employees. An individual is defined as an 'eligible employee' if, on 1 March 2020, they were: aged 16 years or older; an employee (other than a casual employee) of the entity or a long term casual employee of the entity;[5] and were an Australian resident (which broadly captures Australian citizens and permanent residents)[6] or a New Zealand citizen living in Australia on a special category of visa.

Summary of initial assessment

Preliminary international human rights legal advice

Rights to an adequate standard of living, work, and equality and non-discrimination

1.7 By providing for the payment of a subsidy to certain registered businesses for eligible employees, this instrument appears to engage a number of human rights. The JobKeeper payment is a short-term emergency measure, which is intended to subsidise the wages of persons employed by businesses that have experienced a downturn in their business during the COVID-19 pandemic, and during circumstances in which people may otherwise be at risk of losing their job. As such, it would appear that this measure promotes the right to an adequate standard of living and the right to work with respect to eligible workers.[7]

1.8 However, the JobKeeper subsidy is broadly limited to employees who are employed by business which are eligible for the subsidy,[8] where those employees are either Australian citizens, permanent Australian residents, or specified New Zealand citizens living in Australia. As such, it appears that this measure engages and limits

5 A long term casual employee is defined in subsection 9(5) of the instrument as a casual employee who had been employed by the entity on a regular and systematic basis during the period of 12 months before 1 March 2020.

6 Paragraph 9(2)(c) of the instrument defines Australian resident as within the meaning of section 7 of the *Social Security Act 1991*, which defines it as a person who resides in Australia and is an Australian citizen, the holder of a permanent visa or holds a visa relating to whether the person had been in Australia before 26 February 2001.

7 International Covenant on Economic, Social and Cultural Rights, articles 11(1) and 6 and 7.

8 Coronavirus Economic Response Package (Payments and Benefits) Rules 2020, subsection 9(c). See also statement of compatibility. Relevantly, businesses with an aggregated turnover of $1 billion or less may be eligible for the Jobkeeper payment where the business has experienced a 30 per cent fall in turnover.

the right to equality and non-discrimination.[9] This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights).[10] This measure may have a disproportionate impact on those employees working in Australia who are foreign nationals (other than New Zealanders on a special category of visa).

1.9 The initial analysis considered that further information was required as to the compatibility of this measure with the right to equality and non-discrimination, including what is the legitimate objective for the differential treatment of eligible employees based on their nationality, and whether the measure is otherwise reasonable and proportionate.

1.10 The full initial legal analysis is set out in *Report 5 of 2020.*

Committee's initial view

1.11 The committee considered that this measure is likely to promote the rights to an adequate standard of living and work, as it is intended to replace a person's wage during the COVID-19 pandemic and during circumstances in which a person may otherwise be at risk of losing their job. The committee noted that the measure may also limit the right to equality and non-discrimination. This right may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate. The committee sought the Treasurer's advice as to the compatibility of this measure with the right to equality and non-discrimination.[11]

Treasurer's response[12]

1.12 The Treasurer advised:

> To the extent that the Rules result in differential treatment for particular groups of people, this treatment is based on reasonable and objective

9 Articles 2 and 26 of the International Covenant on Civil and Political Rights. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

10 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

11 The committee's consideration of the compatibility of a measure which limits rights is assisted if the response addresses the limitation criteria set out in the committee's Guidance Note 1, pp. 2-3.

12 The Treasurer's response to the committee's inquiries was received on 29 May 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

criteria. To access the JobKeeper scheme as an eligible employee or an individual who is self-employed (for example, a sole trader), you must be an Australian citizen, permanent residence visa holder, or New Zealand citizen on a Special Category (Subclass 444) visa at 1 March 2020.

To the extent that differentiation of treatment on the basis of national origin is applied to this cohort, it is reasonable and proportionate as it reaffirms the important role of the bilateral relationship between Australia and New Zealand.

Other temporary visa holders are unable to receive the JobKeeper payment. To the extent that differentiation of treatment on the basis of national origin is applied to this cohort, it is reasonable and proportionate as it reflects the temporary nature of their connection to Australia. The legitimate objective of the temporary JobKeeper scheme is to support employers to maintain their connection to their employees. Given the substantial cost of the scheme, focusing the payment to those who have a permanent connection to Australia is important to ensure the Government's fiscal strategy can include the broader economic response and any support that is required in the future for Australia's economic recovery.

The treatment of temporary visa holders is consistent with the general operation of the social security system, under which most temporary visa holders do not have access to income support. Further, the eligibility criteria for the JobKeeper Payment also reflect the general expectation that to obtain a temporary visa these individuals are able to demonstrate that they can support themselves financially while in Australia.

Other measures intended to respond to the economic hardship caused by the Coronavirus may be available to visa holders. For example, temporary visa holders may, where eligible, seek early access to up to $10,000 of their superannuation in the 2019-20 financial year. In addition, emergency relief is also available to people, including temporary visa holders, experiencing financial hardship. The Government has announced an additional $200 million as part of a new Community Support Package. This includes more than $37 million for existing Commonwealth funded Emergency Relief providers and $7 million for the Australian Red Cross to deliver Emergency Relief and some counselling support to temporary visa holders facing significant vulnerabilities.

For these reasons, the Rules do not restrict the rights of equality and non-discrimination based on national origin beyond what is permissible on the basis of being reasonable, necessary and proportionate to achieve a legitimate objective.

Concluding comments

International human rights legal advice

1.13 As noted in the initial analysis, the JobKeeper subsidy appears to promote the right to an adequate standard of living and the right to work with respect to

eligible workers.[13] However, again as noted in the initial analysis, as the JobKeeper subsidy is broadly limited to employees of eligible businesses who are either Australian citizens, permanent Australian residents, or specified New Zealand citizens living in Australia, it appears that this measure also engages and limits the right to equality and non-discrimination.[14] This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights, including where measures have a disproportionate impact on particular groups).[15] In this case, this measure may have a disproportionate impact on those employees working in Australia who are foreign nationals: of all the employees working for eligible businesses who otherwise meet the eligibility criteria for JobKeeper, only those who are foreign nationals may be rendered ineligible for JobKeeper.[16] Of course, non-Australians may be eligible for the wage subsidy where they have permanent residency or are New Zealand citizens on certain visas. However, only persons who are not Australian nationals will be ineligible for the wage subsidy where they otherwise meet all the eligibility criteria. As such this would appear to have a disproportionate impact on non-nationals, and therefore constitute differential treatment which may limit the right to equality and non-discrimination. Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination, however, if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[17]

1.14 Before applying this test to the current measure in light of the Treasurer's response, it is important to note a number of points about the circumstances in which this measure was introduced and takes effect. The first is that this is a temporary measure that was introduced in an unprecedented time of crisis, to help alleviate the economic impact of the COVID-19 pandemic. International human rights

13 International Covenant on Economic, Social and Cultural Rights, articles 11(1) and 6 and 7.

14 Articles 2 and 26 of the International Covenant on Civil and Political Rights. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

15 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

16 Under Coronavirus Economic Response Package (Payments and Benefits) Rules 2020, subsection 9(2)(c).

17 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

law acknowledges that some human rights may need to be derogated from in times of emergency. Certain treaties allow a State to suspend or restrict the exercise of certain rights in 'time of public emergency which threatens the life of the nation'.[18] However, such restrictions can only be to the extent 'strictly required by the exigencies of the situation' and only when a state of emergency is officially proclaimed and intention to derogate from human rights notified to relevant international bodies, including the Secretary General of the United Nations. Australia has not officially proclaimed an intention to derogate from its human rights obligations during this pandemic. As a result, in undertaking an analysis of legislation during this time, as a matter of international human rights law, the usual limitation criteria set out above continues to apply.

1.15 Secondly, it is not clear how many foreign nationals will be affected by being ineligible for Jobkeeper on the basis of not being Australian citizens or permanent residents or specified New Zealand citizens. Some temporary visa holders may still be employed. Others may be ineligible for JobKeeper on other bases, for example, because they do not work for an eligible business. And some Australians may be ineligible for JobKeeper, for example because they are short term casual employees, or do not work for an eligible business. Nonetheless, it remains the case that if an eligible business has two employees, both of whom meet all other eligibility criteria, but one is an Australian citizen and the other is a temporary visa holder from a country other than New Zealand, the Australian citizen will be eligible for JobKeeper and the temporary visa holder will not. As such, the legislation provides a basis for differential treatment and must therefore be scrutinised according to the limitation criteria set out above.

1.16 The Treasurer's response acknowledges that the rules may result in differential treatment for particular groups of people, but notes that the objective of the temporary JobKeeper scheme is to support employers to maintain their connection to their employees. The Treasurer has advised that to the extent that there is any differentiation of treatment on the basis of national origin, it is reasonable and proportionate as it reflects the temporary nature of the connection to Australia of people without permanent residency or citizenship.[19] As such, the payment is focused on those who have a permanent connection to Australia. Seeking to support employers to maintain their connection with their employees during the COVID-19 pandemic, which is the purpose of the JobKeeper scheme itself, is likely to constitute a legitimate objective for the purposes of international human rights law. It appears that the differential treatment of employees, to focus on those with a permanent connection to Australia, may also be based on reasonable and objective criteria.

18 See article 4 of the International Covenant on Civil and Political Rights.

19 Or New Zealand citizens on a Special Category (Subclass 444) visa.

1.17 However, it is not clear that excluding all temporary visa holders from the JobKeeper scheme (except certain New Zealand citizens), would, in all instances, be effective to achieve the objective of focusing on those with a permanent connection to Australia, and supporting employers to maintain their connection with employees. Some temporary visa holders will have a long-term connection to Australia and intend to seek permanent residence in the country. While it is not clear how many of those worked for an eligible business and may have lost their job due to the pandemic, and how many had a more permanent connection with their employer, it appears there would be some persons who fit within that category. Were that business to terminate such a person's employment due to COVID-19, but wished to retain a connection to them, they would be unable to retain that connection under the JobKeeper scheme. Consequently, excluding such people from eligibility for the scheme may not be rationally connected to the stated objective.

1.18 In assessing proportionality it is necessary to consider whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case. The measure may be more likely to be proportionate if it allowed the employers of temporary visa holders, or the visa holders themselves, to apply for exceptions to the eligibility requirements where they could demonstrate an ongoing connection to the employer (for example, if they were awaiting the outcome of an application for permanent residency). As the measure currently applies, it is not clear that the eligibility requirement for the JobKeeper scheme, which excludes most non-citizens on temporary visas, is consistent with the right to equality and non-discrimination.

Committee view

1.19 The committee thanks the Treasurer for this response. The committee notes that this instrument establishes the eligibility requirements for the JobKeeper payment. The committee notes that the payment is broadly restricted to employees of eligible businesses who are Australian citizens, permanent Australian residents or New Zealand citizens[20] working in Australia.

1.20 The committee considers that the JobKeeper scheme, which was developed with great urgency and immediacy in order to protect the livelihoods of Australians during the economic crisis caused by the coronavirus pandemic, constitutes an extraordinary amount of government support designed to protect jobs and businesses and which promotes the rights to an adequate standard of living and work.

1.21 The committee notes that as a matter of international human rights law, the obligation of equality and non-discrimination continues to apply during this time of emergency, and the eligibility requirements which restrict some visa-holders from accessing the payment may also engage the right to equality and non-

20 On a Special Category (Subclass 444) visa.

discrimination. The committee considers that seeking to support employers to maintain their connection with their employees during the COVID-19 pandemic is an important and legitimate objective, and the differential treatment of employees, to focus on those with a permanent connection to Australia, is based on reasonable and objective criteria, particularly noting the temporary nature of this measure.

1.22 The committee accepts there is some difference in treatment as to who is eligible for the payment, but notes that this difference does not affect all temporary visa holders (as many would not have lost their jobs or would not work for businesses which are eligible for the subsidy) and this is a short-term emergency measure, rather than a permanent subsidy.

1.23 The committee thanks the minister and has now concluded its examination of this legislative instrument.

Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 [F2020L00432][1]

Purpose	This instrument temporarily reduces the period of time during which employees must have access to a copy of a proposed variation of an enterprise agreement, and before which employees must be notified of the details of the vote on the variation, from seven calendar days to one calendar day. The instrument commenced on 17 April 2020 and is repealed at the end of six months (unless a later time is prescribed)
Portfolio	Industrial Relations
Authorising legislation	*Fair Work Act 2009*
Disallowance	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 12 May 2020). Notice of motion to disallow must be given by 12 August 2020 in the House of Representatives and the Senate[2]
Right	Work, freedom of association
Status	Concluded examination

1.24 The committee requested a response from the minister in relation to the instrument in *Report 5 of 2020*.[3]

Reduction in access period for variation of an enterprise agreement

1.25 This instrument reduces the period of time during which employees must have access to a copy of a proposed variation of an enterprise agreement, and before which employees must be notified of the details of the vote on the variation, from seven calendar days to one calendar day before the vote. This amendment will be effective for six months after commencement (or for a later time if otherwise prescribed).

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 [F2020L00432], *Report 8 of 2020*; [2020] AUPJCHR 106.

2 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

3 Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020), pp. 38-41.

Summary of initial assessment

Preliminary international human rights legal advice

Rights to just and favourable conditions of work and freedom of association

1.26 By reducing the period of time during which employees must have access to, and be notified of a vote on, a proposed variation to an enterprise agreement, this instrument engages and may limit the right to freedom of association and just and favourable conditions of work.

1.27 The right to freedom of association includes the right to collectively bargain without unreasonable and disproportionate interference from the state. The right to just and favourable conditions of work includes the right to adequate and fair remuneration, reasonable working hours, leave, safe working conditions, and the right to join trade unions. These rights are protected by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[4]

1.28 As recognised in the statement of compatibility, the interpretation of these rights is informed by International Labour Organization (ILO) treaties, including the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) and the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment.[5] The *Human Rights (Parliamentary Scrutiny) Act 2011* does not include the International Labour Organization (ILO) Constitution or ILO conventions on freedom of association and the right to bargain collectively in the list of treaties against which the human rights compatibility of legislation is to be assessed. Nonetheless, these ILO standards and jurisprudence are relevant to the mandate of the committee as they are the practice of the international organisation with recognised and long-established expertise in the interpretation and implementation of these rights. It is a specialised body of law which can inform the general guarantees set out in the human rights treaties. In the current case, ILO Convention No. 87 is directly relevant, in that both article 22(3) of the ICCPR and article 8(3) of the ICESCR expressly state that measures which are inconsistent with the guarantees provided for in ILO Convention No. 87 will not be consistent with the right to freedom of association. The UN Committee on Economic, Social and Cultural

4 International Covenant on Civil and Political Rights, article 22; International Covenant on Economic, Social and Cultural Rights, articles 7 and 8.

5 The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in article 22(3) of the International Covenant on Civil and Political Rights and article 8(3) of the International Covenant on Economic, Social and Cultural Rights.

Rights has also considered ILO Conventions No.87 and 89 when assessing Australia's compliance with Article 8 of the ICESCR.[6]

1.29 The initial analysis considered that further information was required to assess the compatibility of this measure with the rights to freedom of association and just and favourable conditions of work.

Committee's initial view

1.30 The committee noted that this measure engages and may limit the right to freedom of association and just and favourable conditions of work. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.31 The committee sought the minister's advice as to the compatibility of this measure with the right to freedom of association and just and favourable conditions of work.

Minister's response[7]

1.32 The minister advised:

> In response to the Committee's concerns, I note that there are a range of safeguards in the *Fair Work Act 2009.* The Fair Work Commission must be satisfied when approving a variation that the employees have genuinely agreed to the variation and that other important safeguards have been observed, including that the employer has taken all reasonable steps to explain the terms of the variation and their effect to employees. This explanation must be provided in an appropriate manner taking into account the employees' particular circumstances and needs. These requirements operate alongside a number of other existing protections, including that a variation passes the Better Off Overall Test and does not contravene the National Employment Standards.
>
> When the economic effects of the pandemic became clear, urgent industry wide award changes were made by the Fair Work Commission within days of applications for variations being made. I considered it important that those covered by enterprise agreements should also not be subject to unnecessary delays.
>
> The Regulations recognise that the seven day access period before employees may vote on a proposed variation could present a barrier to employers and employees agreeing to implement changes quickly in

6 See, UN Committee on Economic Social and Cultural Rights (UNCESCR), *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (2017), [29]-[30].

7 The minister's response to the committee's inquiries was received on 10 June 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

response to the impacts of the COVID-19 pandemic, with a view to preserving business viability and jobs.

The Regulations recognise that in the very challenging circumstances arising because of the pandemic, a lesser access period can suffice. I note in this regard that employees can continue to seek and receive advice from their union (or other representative) during the period which must include a minimum of one clear calendar day, disregarding the day of the notification and the vote. If notice is given on one day, the earliest a vote could be taken is the day following the next day, if only the minimum period is used.

I note also that agreement variations commonly arise out of prior discussions between employers and employees before commencement of the formal statutory process. Of course, employers must make the case for change, and employees must still vote to agree. In many instances periods of notice can, and have continued to, be given beyond one day, and voting has occurred over a period of days.

The reduced access period set by the Regulations operates as a *minimum* (so more than one day's notice can be provided), and this is a temporary, time-limited measure. To the extent that the Regulations may limit the right to right to freedom of association, or the right to just and favourable conditions of work, they are reasonable, necessary and proportionate to provide employers and employees with the flexibility to implement agreed workplace changes quickly for the purpose of the legitimate objective of keeping businesses operating and saving jobs in the context of the pandemic.

Arising from discussions with various stakeholders and the Senate cross bench I have indicated that changes to the regulation are appropriate, especially in relation to the length of time variations approved after a reduced access period can extend. I am also reviewing the operation of the regulation generally as I indicated I would when the regulation was made.

Concluding comments

International human rights legal advice

1.33 The minister has advised that the objective of reducing the minimum access period from seven days to one, is to provide employees and employers with the flexibility to implement agreed workplace changes quickly, in order to be able to keep businesses operating and to save jobs in the context of the pandemic. The minister has explained that the seven day access period could present a barrier to employers and employees agreeing to implement changes quickly. Preserving business viability and jobs is likely to constitute a legitimate objective for the purposes of international human rights law, and if the seven day period worked as a barrier to making swift changes that could affect business viability during this time, reducing this time may be rationally connected to that objective.

1.34 In relation to the proportionality of the measure, the minister has advised that this is a temporary change, operating only for six months, and the reduced access period operates only as a minimum, so a workplace can still choose to give more than one day's notice. The minister also notes that during the reduced access period employees can still continue to seek and receive advice from their unions or other representative. In addition, the minister advises that there are a range of safeguards in the *Fair Work Act 2009* (Fair Work Act) which requires that any variations made to an enterprise agreement must be approved by the Fair Work Commission. In approving a variation the Fair Work Commission needs to be satisfied of a number of matters, including that employees have genuinely agreed to the variation, the employer has taken reasonable steps to explain the terms of the variation and their effect to employees, and that the variation passes the Better Off Overall Test and does not contravene the National Employment Standards.

1.35 The existing protections in the Fair Work Act constitute important safeguards and assist in protecting the rights of employees to just and favourable conditions of work. Of particular importance is that the Fair Work Commission cannot generally agree to the variation of an enterprise agreement unless it passes the Better Off Overall Test, which requires that the changes must result in employees being better off than if the changes weren't applied.[8] However, the Fair Work Commission may still approve an agreement that does not pass the Better Off Overall Test if the Commission is satisfied 'that, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest'.[9] The Fair Work Act gives an example of this as being 'where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement'.[10] As such, it would appear that in the context of the COVID-19 pandemic, the Better Off Overall Test may not operate to specifically safeguard employees' rights.

1.36 In addition, while it is correct that the amendments only affect the *minimum* time required for the access period, and in many instances employers may choose to provide a longer period of time, in assessing the regulations for compatibility with human rights it is necessary to consider what they empower, noting that while many employers may choose to give a longer access period, the law now provides it is sufficient for the employer to give one calendar day's notice. It is relevant to proportionality that these changes are time-limited, applying only for six months (from 17 April 2020 to 17 October 2020). However, it would appear that any changes made to an enterprise agreement following these revised processes, would continue for the life of the agreement, which may last a number of years. As such, while these

8 *Fair Work Act 2009*, section 193.

9 *Fair Work Act 2009*, subsection 189(2).

10 *Fair Work Act 2009*, subsection 189(3).

amending regulations are temporary, any changes made as a result of them could have ongoing effects. In this respect, it is significant that the minister has indicated that changes may be made to the length of time variations approved after a reduced access period can extend. Such changes would assist with the proportionality of the measure.

1.37 In assessing proportionality it is also important to consider whether the measures are sufficiently circumscribed. In this respect, it is noted that the changes made by the regulations apply to all workplaces, including those which have not experienced a downturn in business as a result of the pandemic. Noting that the measure is designed to keep businesses operating and saving jobs in the context of the pandemic, it would appear that the measure as it currently applies may not be sufficiently circumscribed.

1.38 Finally, in relation to the impact of the measure on the ability of workers to collectively bargain (and therefore their right to freedom of association), the minister's response only states that during the reduced access period employees can still continue to seek and receive advice from their unions or other representative. However, it remains unclear that the provision of a minimum one calendar day for review and notification of a vote on a proposed variation to an enterprise agreement would constitute a sufficient period of time for employees to exercise their right to bargain collectively. It is noted that one calendar day would include weekends and public holidays, and could result in employees being required to vote on an agreement that affects their working conditions without having had an opportunity to fully understand the proposal, discuss it with other employees or their union, or to negotiate. For example, were an employee to be notified of a proposed variation on a Saturday evening and that a required vote is scheduled for the following Monday morning, it is unclear how they could seek advice from their union or discuss the matter with other employee during the intervening period, particularly if they were not working on the Sunday.

1.39 In conclusion, reducing the access period for employees from seven calendar days to one calendar day engages and limits the right to freedom of association and just and favourable conditions of work. The rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. In the context of the COVID-19 pandemic, the measure seeks to achieve the legitimate objective of keeping businesses operating and saving jobs. Giving employers and employees the flexibility to implement agreed workplace changes quickly may also be rationally connected (that is, effective to achieve) this objective. However, as the regulations are drafted, it is not clear that the measure is proportionate to the stated objective. This is on the basis of the potentially significant limitation on the right of employees to collectively bargain; the fact that the Fair Work Commission is not required to apply the Better Off Overall Test during short-term crises; the fact that any changes made to an enterprise agreement under

a reduced access period could last for longer than the changes made to the access period itself; and the fact that these changes apply in relation to all workplaces and not only those employers experiencing a downturn in their revenue as a result of the pandemic. Therefore, on the basis that the measure does not appear to be sufficiently circumscribed or contain sufficient safeguards, there is a risk that these amending regulations impermissibly limit the rights of employees to freedom of association and just and favourable conditions of work.

Committee view

1.40 The committee thanks the minister for this response. The committee notes that this instrument temporarily reduced the period of time during which employees must have access to a copy of a proposed variation of an enterprise agreement, and before which employees must be notified of the details of the vote on the variation, from seven calendar days to one calendar day.

1.41 The committee considers that this measure seeks to achieve the vitally important and legitimate objective of keeping businesses operating and saving jobs during the COVID-19 pandemic; giving employers and employees the flexibility to quickly implement agreed workplace changes. The committee also considers that important safeguards apply that assist with the proportionality of this measure, including that the measure is temporary and the existing protections in the *Fair Work Act 2009* continue to apply. However, the committee notes that, as drafted, there would be some risk that the measure may not be sufficiently circumscribed or contain sufficient safeguards to adequately protect the right to freedom of association and just and favourable conditions of work.

1.42 However, the committee notes that this temporary measure was repealed on 12 June 2020, with the registration of the Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020 [F2020L00702], meaning that the seven-day variation access period has now been restored. As such, the committee makes no further comment.

Privacy Amendment (Public Health Contact Information) Bill 2020[1]

Purpose	The bill seeks to provide stronger privacy protections for users of the Commonwealth's COVIDSafe app and data collected through the COVIDSafe app than that which would otherwise apply in the *Privacy Act 1988*
Portfolio	Health
Introduced	House of Representatives, 12 May 2020 *Received Royal Assent on 15 May 2020*
Rights	Health, privacy
Status	Concluded examination

1.43 The committee requested a response from the minister in relation to the bill in *Report 6 of 2020*.[2]

COVIDSafe application

1.44 The COVIDSafe application (COVIDSafe app), which can be voluntarily downloaded and operated on Android and iOS personal devices, has been developed by the Commonwealth Government in response to the COVID-19 pandemic. The COVIDSafe app is designed to help find close contacts of persons who have tested positive for COVID-19.[3]

1.45 The Privacy Amendment (Public Health Contact Information) Bill 2020 (the bill), which received Royal Assent on 15 May 2020, amends the *Privacy Act 1988* (Privacy Act) to establish a series of offences for misuse of data from the COVIDSafe app, or coercion relating to the use of the COVIDSafe app; sets out specific requirements regarding COVIDSafe app data and COVIDSafe; and includes the application of general privacy measures. All offences are punishable by imprisonment for 5 years, or 300 penalty units, or both. Extended geographical jurisdiction applies to all offences,[4] which has the effect that persons may be

1 This entry can be cited as: Parliamentary Joint Committee on Human rights, Privacy Amendment (Public Health Contact Information) Bill 2020, *Report 8 of 2020*; [2020] AUPJCHR 107.

2 Parliamentary Joint Committee on Human Rights, *Report 6 of 2020* (20 May 2020), pp. 5-15.

3 Explanatory memorandum, p. 2.

4 Privacy Amendment (Public Health Contact Information) Bill 2020, section 94J.

prosecuted for an offence even where the relevant conduct took place outside Australia.[5]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to health and privacy

1.46 The initial analysis noted that this legislation does not authorise or require the use of the COVIDSafe app, rather it seeks to protect the privacy interests associated with the voluntary use of the COVIDSafe app. As such, in assessing the bill for compatibility with human rights, this analysis does not focus on any privacy implications that may emanate from the COVIDSafe app itself; the efficacy of such technology in achieving the goal of contact tracing; or the policy merits of the COVIDSafe app. Rather, its focus is on whether the legislation under consideration may promote or limit human rights.

1.47 As this is a measure designed to help prevent the establishment and spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that it may promote the right to health. The right to health is the right to enjoy the highest attainable standard of physical and mental health.[6] Article 12(2) of the International Covenant on Economic, Social and Cultural Rights requires that State parties shall take steps to prevent, treat and control epidemic diseases.[7] The United Nations Committee on Economic, Social and Cultural Rights has stated that the control of diseases refers to efforts to:

> make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.[8]

1.48 Prohibiting unauthorised collection, use and disclosure of COVIDSafe app data is also likely to promote the right to privacy. As noted in the statement of compatibility, the bill provides stronger provisions than existing protections for personal information collected by the COVIDSafe app, thereby promoting the right to privacy.[9] However, regulating the collection, use and disclosure of such data is also likely to limit the right to privacy, as such data contains personal information about the user of the COVIDSafe app. The right to privacy includes respect for informational

5 *Criminal Code Act 1995*, section 15.1.

6 International Covenant on Economic, Social and Cultural Rights, article 12(1).

7 International Covenant on Economic, Social and Cultural Rights, article 12(2)(c).

8 United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (2000), [16].

9 Statement of compatibility, p. 5.

privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[10] It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. Limitations on the right to privacy will be permissible where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.49 The initial analysis considered that in order to fully assess the proportionality of this proposed measure, further information was required as to:

(a) what is the nature and type of data that is collected or generated through the operation of the COVIDSafe app, what information falls under the definition of 'COVIDSafe app data', and why does the bill not specify such matters;

(b) whether the COVIDSafe app data uploaded to the National COVIDSafe Data Store will include all 'digital handshakes' between two users, regardless of the length of time the users are in proximity and what 'proximity' means in this context; and if so, why is it necessary to include all such data in the National COVIDSafe Data Store;

(c) whether the de-identification process will sufficiently protect the privacy of personal information;

(d) why is it necessary to retain data uploaded to the National COVIDSafe Data Store for the duration of the COVIDSafe data period, rather than requiring data to be deleted once it has been transferred to state and territory health authorities for the purposes of contact tracing; and

(e) how long will state and territory health authorities be empowered to retain the data transferred to them by the data store administrator.

1.50 The full initial legal analysis is set out in *Report 6 of 2020*.

Committee's initial view

1.51 The committee considered that the bill, which is designed to encourage more people to download the COVIDSafe app in order to enable faster and more effective contact tracing of anyone who may have been exposed to COVID-19, is likely to promote and protect the right to health, noting that the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee also considers that as the bill provides stronger privacy protections for personal information collected by the COVIDSafe app, it is likely to promote the right to privacy.

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

1.52 However, regulating the collection, use and disclosure of such data is also likely to engage the right to privacy, as such data contains personal information about the user of the COVIDSafe app. The right to privacy may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate. In order to fully assess the compatibility of these measures with the right to privacy, the committee sought the minister's advice as to the matters set out at paragraph [1.49].

Attorney-General's response[11]

1.53 The Attorney-General advised:

> ***(a) What is the nature and type of data that is collected or generated through the operation of the COVIDSafe app, what information falls under the definition of 'COVIDSafe app data', and why does the bill not specify such matters?***
>
> The following data is collected or generated through the operation of the COVIDSafe app:
>
> - **Registration data:** this is data collected from a COVIDSafe user when they register for the app, and includes their mobile phone number, name (which can include a partial name or pseudonym), age range and postcode. Based on this information an encrypted reference code is then generated for the app on that device.
> - **Data generated through use of COVIDSafe:** this is data generated through an individual's use of COVIDSafe when they come into contact with another COVIDSafe user, and includes the other user's encrypted reference code, the date and time of contact, the Bluetooth signal strength of the other COVIDSafe user and the other user's device model. This information is securely encrypted and stored locally on the user's device.
>
> The definition of 'COVID app data' in subsection 94D(5) is intended to capture all of the above data, by referring to data relating to a person that has been collected or generated (including before the commencement of the Act).
>
> Importantly, the effect of paragraph 94D(2)(b) of the Act is that the National COVIDSafe Data Store administrator is only allowed to collect, use or disclose information through the COVIDSafe App to the extent required to enable State and Territory contact tracing, or to maintain COVIDSafe and the National COVIDSafe Data Store.

11 The minister's response to the committee's inquiries was received on 10 June 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

(b) Whether the COVIDSafe app data uploaded to the National COVIDSafe Data Store will include all 'digital handshakes' between two users, regardless of the length of time the users are in proximity and what 'proximity' means in this context; and if so, why is it necessary to include all such data in the National COVIDSafe Data Store.

The COVIDSafe app collects 'digital handshake' data that is exchanged between users of the app at regular intervals. This contact information is stored on the user's phone/device. Contact information older than 21 days on the phone/device is automatically deleted. It is not technologically feasible to ignore other users' Bluetooth signals beyond 1.5 metres or to limit the collection of Bluetooth signals to 15 minutes contact. This is because the nature of Bluetooth technology means signals can be detected within about 10 metres and the COVIDSafe app detects the strength of Bluetooth signals not the distance.

When a user is diagnosed with COVID-19 and consents to their data being uploaded, contact information on the phone is stored in the National COVIDSafe Data Store. This includes the unique identifier of the contact, date/time the contact occurred and the proximity based on what has been detected via Bluetooth. However, the Government has put in place access restrictions to 'digital handshake' data uploaded to the National COVIDSafe Data Store such that, when a state or territory health official accesses the system, they are only presented with the user's close contacts, defined as contact between users for at least 15 minutes at a proximity approximately within 1.5 metres.

(c) Whether the de-identification process will sufficiently protect the privacy of personal information.

The Act has been designed to allow only very limited de-identification of COVID app data. Specifically, under paragraph 94D(2)(f), the only de-identified information that can be produced from COVID app data is de-identified statistical information about the total number of COVIDSafe registrations, and this can only be produced by the National COVIDSafe Data Store administrator. This minimises any potential risk of flaws in the de-identification process, or the publication of de-identified information that could be later re-identified.

(d) Why is it necessary to retain data uploaded to the National COVIDSafe Data Store for the duration of the COVIDSafe data period, rather than requiring data to be deleted once it has been transferred to state and territory health authorities for the purposes of contact tracing?

Data uploaded to the National COVIDSafe Data Store will be accessed by State and Territory health officials to support contact tracing activities. This data is retained for the duration of the COVIDSafe data period to provide a record of any data accessed and by whom through use of the system. This includes investigations where authorised under the *Privacy Act 1988* (the Privacy Act).

Retaining data in the National COVIDSafe Data Store for the duration of the COVIDSafe data period will allow the Information Commissioner to effectively perform the oversight role provided for in the Act by enhancing the Commissioner's ability to investigate complaints about breaches of the legislation and undertake assessments of compliance with privacy obligations under the legislation. The retention of COVID app data for this period will also support law enforcement unde1taking investigations into breaches of the legislation.

The National COVIDSafe Data Store administrator will automatically delete all data from the National COVIDSafe Data Store at the conclusion of the COVIDSafe data period. Individuals can also request deletion of their registration data at any time under section 94L of the Act. Once a deletion request is actioned, State and Territory health officials will not be able to contact the user if they are a close contact of another user who is diagnosed with COVID-19.

(e) How long will state and territory health authorities be empowered to retain the data transferred to them by the data store administrator?

One effect of sections 94R and 94X of the Act is that State and Territory health authorities are subject to the Privacy Act when handling COVID app data, and that COVID app data is treated as 'personal information' under the Privacy Act. This in tum means that the existing provisions of the Privacy Act apply to State and Territory health authorities handling COVID app data (except where those existing provisions are overridden by the stricter protections contained in the Act).

Consequently, Australian Privacy Principle (APP) 11 is expected to apply to COVID app data that State and Territory health authorities hold. This would include APP 11.2, which requires entities to destroy personal information that is no longer required for a legally-permissible purpose (i.e. for contact tracing purposes).

Concluding comments

International human rights legal advice

1.54 The Attorney-General has advised that, where a COVIDSafe app user comes into contact with another user, the app will generate data detailing the date and time of contact, as well as the other user's: encrypted reference code; Bluetooth signal strength; and device model. The Attorney-General has stated that the term 'COVIDSafe app data', which is undefined in the bill, is intended to capture all of this data, in addition to the registration data which a user provides on registering for the COVIDSafe app. This is useful information as to the data that will be potentially uploaded onto the National Data Safe Store, however, it remains unclear why the term 'COVIDSafe app data' is not defined in the bill itself, noting that the data to which it relates appears to be clearly identifiable. Leaving this detail to policy means that what constitutes 'COVIDSafe app data' can change over time.

1.55 Further information was also sought as to data detailing 'digital handshakes' between two devices with the COVIDSafe app installed. The Attorney-General has advised that all digital handshakes of any length of time will be uploaded to the National COVIDSafe Data Store. However, the government has put in place restrictions to restrict access by state and territory health authorities to only those handshakes that identify contact between two users for at least 15 minutes and at a proximity within approximately 1.5 metres. The Attorney-General advises that this is because it is not technologically feasible to ignore other users' Bluetooth signals where a device is picking up the signal and registering the contact. The Attorney-General notes that, depending on the strength of a signal, a Bluetooth signal may be detected within a 10 metre range. The restriction on the ability of state and territory health authorities to access all information in the National COVIDSafe Data Store is significant, and assists with the proportionality of the limitation on the users' rights to privacy. However, noting that only digital handshake data which indicates a contact between two users of 15 minutes at a proximity of approximately 1.5 metres is useful for contact tracing purposes, it is not clear why all other data should not be deleted from the National COVIDSafe Data Store once uploaded, as it has no further utility with respect to facilitating contact tracing. It is also not clear why this restriction is not set out in the legislation itself. Where a measure limits a human right, discretionary or administrative safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law.[12] This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time.

1.56 Clarification was also sought as to why it is necessary to retain data uploaded to the National COVIDSafe Data Store for the duration of the COVIDSafe data period, rather than requiring that data be deleted once it has been transferred to state and territory health authorities for the purposes of contact tracing. The Attorney-General advised that retaining such data for the duration of the COVIDSafe data period will provide a record of any data accessed through the use of the system. This will enable the Information Commissioner to effectively perform their oversight functions, and support both the Information Commissioner and law enforcement undertaking investigations into breaches of legislation. This assists with understanding the necessity of retaining this data during this period. However, it is noted that as soon as reasonably practicable after the COVIDSafe data period ends, the data store administrator is required to delete all COVIDSafe app data from the Data Store. If this is the case then it is unclear how the Information Commissioner and law enforcement can effectively perform their role in investigating any breaches that occur close to this end period, if it is necessary to retain this information for that

12 See, for example, Human Rights Committee, *General Comment 27, Freedom of movement (Art.12)* (1999).

purpose. It is relevant to the proportionality of the measure that a COVIDSafe app user can request the deletion of their data from the Data Store at any time.

1.57 Further information was also sought as to how long state and territory health authorities who have received COVIDSafe app data transferred to them by the data store administrator could retain that data. The Attorney-General advised that the *Privacy Act 1988* applies in relation to the data, and it is expected that Australian Privacy Principle 11 will apply to such data, requiring the states and territories to destroy personal information that is no longer required for a legally-permissible purpose (in this instance, for contact tracing purposes). However, it is noted that these obligations would be clearer if the Act specifically specified that states and territories must delete any COVIDSafe app data after any contact tracing has taken place.

1.58 In conclusion, as set out in the initial analysis, the bill contains a number of measures that are designed to provide privacy protections relating to COVIDSafe app data and the COVIDSafe app.[13] The Attorney-General has provided further information with respect to several safeguards which assist in an assessment of the proportionality of these measures with respect to the right to privacy. It is useful that states and territories have restricted access to the data which is uploaded to the National COVIDSafe Data Store, and that the de-identification of data only applies to statistical information regarding the total number of COVIDSafe app registrations. Given the extensive safeguards contained in the bill itself, the measure may constitute a permissible limitation on the right to privacy. However, the proportionality of this measure would be further assisted if the Act:

(a) defined the term 'COVIDSafe app data' as being the data which the minister has outlined in this response;

(b) provided that only data indicating a 'digital handshake' between two devices of at least 15 minutes duration within a proximity of approximately 1.5 metres may be retained on the National COVIDSafe Data Store, noting the advice that only this data is used for contact tracing purposes; and

(c) specifically provided that state and territory health authorities which have received COVIDSafe app data must delete that data as soon as reasonably practicable once the data is no longer required for contact tracing purposes.

Committee view

1.59 The committee thanks the Attorney-General for this response. The committee notes that this Act is designed to encourage more people to download the COVIDSafe app in order to enable faster and more effective contact tracing of

13 Parliamentary Joint Committee on Human Rights, *Report 6 of 2020* (20 May 2020), pp. 5-15.

anyone who may have been exposed to COVID-19, and provides stronger privacy protections for data collected through the COVIDSafe contact tracing application than would otherwise apply in the *Privacy Act 1988.* In this respect, the committee considers that the Act is likely to promote the rights to health and privacy.

1.60 The committee also notes that the Attorney-General has outlined several measures which limit access to COVIDSafe app data, and require its deletion where it is no longer required for a legally permissible purpose. The committee considers that given the extensive safeguards contained in the bill itself, the measure constitutes a permissible limitation on the right to privacy.

1.61 The committee considers that the stringent privacy protections in this Act could be further strengthened if the Act:

- **(a) defined the term 'COVIDSafe app data' as being the data which the minister has outlined in this response;**
- **(b) provided that only data indicating a 'digital handshake' between two devices of at least 15 minutes duration within a proximity of approximately 1.5 metres may be retained on the National COVIDSafe Data Store, noting the advice that only this data is used for contact tracing purposes; and**
- **(c) specifically provided that state and territory health authorities which have received COVIDSafe app data must delete that data as soon as reasonably practicable once the data is no longer required for contact tracing purposes.**

Chapter 2[1]

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 2020[1]

Purpose	This bill seeks to amend various Acts in relation to higher education and vocational education and training to: • 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 *Passed both Houses on 18 June 2020*
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 association 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 2020[1]

Purpose	This bill seeks to amend the *National Disability Insurance Scheme Act 2013* 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.

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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 notice[13] 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 comment[1]

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.

Appendix 1[1]

COVID-19 related legislation

6 to 24 June 2020

Bill/ Instrument	Date registered	Description	Comment
Public Governance, Performance and Accountability Amendment (Corporate Plans) Rules 2020 [F2020L00677]	9/06/2020	This instrument prescribes a different publication date for 2020-21 corporate plans for entities and companies impacted by COVID-19.	No comment
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 5) Determination 2020 [F2020L00683]	10/06/2020	This instrument excludes areas in Queensland which were designated for the purposes of 'Emergency Requirements for Remote Communities' for the purpose of the COVID-19 response. This will take effect on and from 12 June 2020.	No comment
Taxation Administration (Coronavirus Economic Response Package—Ancillary Funds) Amendment Guidelines 2020 [F2020L00684]	11/06/2020	This instrument supports giving by public and private ancillary funds in the 2019-20 and 2020-21 financial years in response to the effects of COVID-19. These ancillary trust funds are eligible to be endorsed as deductible gift recipients. The funds provide financial support for other deductible gift recipients to engage in charitable activities.	No comment
Social Security (Coronavirus Economic Response—2020 Measures No. 10) Determination 2020 [F2020L00690]	11/06/2020	This instrument implements measures to prevent detriment to recipients of social security payments resulting from the impacts of COVID-19. These relate to carer payment and carer allowance, former recipients of wife pension, mobility allowance, and pension portability.	No comment
Coronavirus Economic Support and Recovery (No-one Left Behind) Bill 2020	11/06/2020	This private senator's bill seeks to direct the Finance Minister to create a Coronavirus Economic Support and Recovery Fund;	No comment

[1] This appendix can be cited as: Parliamentary Joint Committee on Human Rights, COVID-19 related legislation, *Report 8 of 2020*; [2020] AUPJCHR 112.

Bill/ Instrument	Date registered	Description	Comment
		expand eligibility for the $550 COVID-19 supplement; and require the Minister to, in creating rules for the JobKeeper scheme, extend eligibility to casuals, temporary visa holders, intermittent workers, and not exclude foreign owned entities.	
Education Legislation Amendment (2020 Measures No. 1) Bill 2020	11/06/2020	Schedule 4 of this bill seeks to 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, thereby reducing the financial burden on these students during that period.	No comment on this Schedule
ASIC Corporations (Amendment) Instrument 2020/565 [F2020L00697]	12/06/2020	This instrument specifies that the following temporary relief measures related to COVID-19 will cease to operate six months after they commenced: ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547, ASIC Corporations (Trading Suspensions Relief) Instrument 2020/289 and ASIC Corporations (COVID-19 – Advice-related Relief) Instrument 2020/355.	No comment
Treasury Laws Amendment (2020 Measures No. 3) Bill 2020	12/06/2020	This bill (which passed on 18 June 2020) authorises the minister to enter into an agreement with the International Monetary Fund (IMF) for Australia to provide loans to the IMF, which plays a key role in responding to the coronavirus crisis. The bill would also ensure that the Treasurer can continue to enter into agreements with other countries to provide them with financial assistance in support of a program of the IMF. Further, the bill would provide for instant asset write offs connected with	No comment

Bill/ Instrument	Date registered	Description	Comment
		the economic conditions created by the pandemic, and clarify the application of cash flow boost provisions.	
Great Barrier Reef Marine Park Amendment (Coronavirus Economic Response Package) Regulations 2020 [F2020L00698]	12/06/2020	These regulations waive permission-related fees for the period 1 July 2020 to 30 June 2021 in order to provide urgent temporary relief from the financial pressures currently faced by Great Barrier Reef Marine Park permission holders and permission applicants, including tourism operators, as a result of the coronavirus pandemic.	No comment
Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020 [F2020L00702]	12/06/2020	These regulations amend the Fair Work Regulations 2009 to repeal amendments made by the Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020, which modified the period that employees must have access to a copy of a proposed variation of an enterprise agreement, and before which employees must be notified of the details of the vote on the variation (the 'access period'), from seven days to one day. This measure was intended to be a time-limited change to enable employers and their employees to quickly respond to issues that may arise in response to COVID-19. These new regulations mean the access period will revert to the previous period of seven days.	No comment
Intellectual Property Laws Amendment (Fee Exemptions) Regulations 2020 [F2020L00703]	12/06/2020	These regulations give the Registrar of Plant Breeder's Rights and the Registrar of Trade Marks new powers to exempt specified classes of persons from the payment of the whole or part of a fee prescribed in the principal regulations. This is intended to address financial	No comment

Bill/ Instrument	Date registered	Description	Comment
		consequences as a result of the COVID-19 pandemic.	
Statement of Principles concerning coronavirus disease 2019 (COVID-19) (Reasonable Hypothesis) (No. 46 of 2020) [F2020L00709]	12/06/2020	This instrument is the Statement of Principles concerning coronavirus disease 2019 (COVID-19) (Reasonable Hypothesis). It is used in the assessment of any COVID-19 related claims by veterans and members of the military for rehabilitation and compensation.	No comment
Statement of Principles concerning coronavirus disease 2019 (COVID-19) (Balance of Probabilities) (No. 47 of 2020) [F2020L00710]	12/06/2020	This instrument is the Statement of Principles concerning coronavirus disease 2019 (COVID-19) (Balance of Probabilities). It is used in the assessment of any COVID-19 related claims by veterans and members of the military for rehabilitation and compensation.	No comment
Fair Work Amendment (One in, All in) Bill 2020	15/06/2020	This private member's bill seeks to extend the Fair Work Commission's jurisdiction to deal with disputes about whether an employee is eligible for the JobKeeper scheme; require it to give effect to the Jobkeeper 'one in, all in' principle; and give it the power to make an order to give effect to this principle, including making an order that an employee is eligible for the Jobkeeper payment.	No comment
Fair Work Amendment (One in, All in) Bill 2020 [No. 2]	15/06/2020	This private senator's bill seeks to extend the Fair Work Commission's jurisdiction to deal with disputes about whether an employee is eligible for the JobKeeper scheme; require it to give effect to the Jobkeeper 'one in, all in' principle; and give it the power to make an order to give effect to this principle, including making an order that an employee is eligible for the Jobkeeper payment.	No comment
Health Insurance (General	15/06/2020	This instrument prescribes a new	No

Bill/ Instrument	Date registered	Description	Comment
Medical Services Table) Regulations (No. 2) 2020 [F2020L00711]		table of general medical services and increases the schedule fee by 1.5 per cent for most of the general medical services. This applies the temporary increase in schedule fees for the bulk-billing incentive items on an ongoing basis. The schedule fee was temporarily increased to encourage medical practitioners to provide bulk-billed services during the COVID-19 pandemic.	comment
Health Insurance (Diagnostic Imaging Services Table) Regulations (No. 2) 2020 [F2020L00713]	15/06/2020	These regulations prescribe a new table of diagnostic imaging services, and increase the schedule fee by 1.5 percent for some diagnostic imaging services from 1 July 2020. This applies the temporary increase in schedule fees for the bulk-billing diagnostic imaging services on an ongoing basis. The fee was temporarily increased to encourage the provision of bulk-billed services during the COVID-19 pandemic.	No comment
Export Market Development Grants (Export Performance Requirements) Amendment (2019-20 Grant Year) Instrument 2020 [F2020L00722]	16/06/2020	This instrument provides that the Export Market Development Grants (Export Performance Requirements) Instrument 2018 will not apply for grant year 2019-20. This means for some applicants, the calculation of 50 per cent of all the applicant's eligible expenses less $2,500 will be applied. This instrument is part of the legislative response to the economic impacts of the COVID-19 response.	No comment
CASA EX90/20 — Helicopter Aircrew Members Amendment Instrument 2020 (No. 1) [F2020L00724]	16/06/2020	This instrument extends the deadline for training requirements from 30 June 2020 to 31 December 2020, noting that travel restrictions imposed due to the COVID-19 pandemic have made it impracticable to conduct the training by 30 June 2020.	No comment
Paid Parental Leave Amendment	16/06/2020	This instrument provides that	No

Bill/ Instrument	Date registered	Description	Comment
(Coronavirus Economic Response) Rules 2020 [F2020L00726]		people who have been in receipt of Jobkeeper may to continue to meet the work test for Paid Parental Leave (PPL), or Dad and Partner Pay (DaPP). It further provides that a person who has returned to work in response to a state, territory or national emergency (which includes the COVID-19 pandemic) can continue to receive their PPL or DaPP entitlement.	comment
Therapeutic Goods (Charges) Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00727]	16/06/2020	These regulations increase the annual charges for most products by 1.95 per cent, for the financial year 2020-21. Further, the regulations provide a 50 per cent decrease in the amount that would otherwise have applied to prostheses under the proposed 1.95 per cent increase, in order to alleviate the impact of reductions in elective surgeries as a result of COVID-19 pandemic.	No comment
Health Insurance (Pathology Services Table) Amendment (Indexation) Regulations 2020 [F2020L00728]	16/06/2020	These regulations increase the fees of two Medicare Benefits Schedule items by 1.5 per cent, to help encourage medical professionals to bulk bill patients during the COVID-19 pandemic. The regulations also clarify that two tests or more under item 69494 for a detection of a virus, microbial antigen or microbial nucleic acid are required.	No comment
National Redress Scheme for Institutional Child Sexual Abuse Amendment (2020 Measures No. 2) Rules 2020 [F2020L00733]	17/06/2020	This instrument provides that the Minister may, until 31 December 2020, declare that an institution, other than a defunct institution, is a participating institution in the scheme. The explanatory materials provide that the extended period of time reflects the time it takes to become a participating institution and takes into account the changed capacity of many institutions due	No comment

Bill/ Instrument	Date registered	Description	Comment
		to the coronavirus (COVID-19) pandemic.	
Public Governance, Performance and Accountability (Section 75 Transfers) Amendment Determination 2019-2020 (No. 7) [F2020L00737]	17/06/2020	This instrument implements machinery of government changes resulting from the Government's communications response to the COVID-19 pandemic. This reflects a transfer of resources from the Department of the Treasury to the Department of Health for COVID‑19 communications campaign activities.	No comment
Health Insurance Legislation Amendment (Indexation) Determination 2020 [F2020L00742]	17/06/2020	This instrument increases the schedule fee by 1.5 per cent for specified the health services. This means that patients will receive a higher Medicare benefit for these services from 1 July 2020. The explanatory materials note that the relevant items are temporary services which enable patients to access many health services during the COVID-19 pandemic.	No comment
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No.6) Determination 2020 [F2020L00752]	18/06/2020	This instrument excludes three designated areas in South Australia from the COVID-19 related emergency entry and exist requirements for remote communities.	No comment
ASIC Market Integrity Rules (Securities Markets) Class Waiver Amendment Instrument 2020/586 [F2020L00764]	19/06/2020	This instrument extends, by 19 months, a class waiver exemption, which applies to the extent that the rules require a Market Participant to provide a confirmation to a wholesale client for a market transaction in a derivatives market contract. The explanatory materials state that this will enable participants to focus on their immediate priorities and the needs of their customers during the COVID-19 pandemic.	No comment
Social Security (Coronavirus	20/06/2020	This instrument temporarily	No

Bill/ Instrument	Date registered	Description	Comment
Economic Response—2020 Measures No. 11) Determination 2020 [F2020L00765]		extends qualification for income support payments and concessions, where a recipient would otherwise cease to qualify due to a change in their or their partner's employment income. It is made in response to circumstances relating to the COVID-19 pandemic.	comment