

Chapter 1¹

New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 6 and 9 October 2020;² and
 - legislative instruments registered on the Federal Register of Legislation between 12 August and 20 September 2020.³

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 12 of 2020*; [2020] AUPJCHR 142.

2 The committee has also deferred consideration of three bills for this reporting period, see Appendix 1 for further details.

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, 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>.

Response required

1.2 The committee seeks a response from the relevant minister with respect to the following instruments.

Age Discrimination Regulations 2020 [F2020L01138]¹

Purpose	This instrument prescribes particular regulations and provisions of regulations as exemptions from the <i>Age Discrimination Act 2004</i> .
Portfolio	Attorney-General
Authorising legislation	<i>Age Discrimination Act 2004</i>
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 6 October 2020. Notice of motion to disallow must be given by 30 November 2020 in the House of Representatives and the first sitting day of 2021 in the Senate ²
Rights	Equality and non-discrimination; right to work
Status	Seeking additional information

Exemptions from the *Age Discrimination Act 2004*

1.3 The *Age Discrimination Act 2004* (the Age Discrimination Act) makes it unlawful to discriminate against someone on the ground of age in respect of a number of areas (including employment and the provision of goods and services).³ The Age Discrimination Act sets out that an act will not be unlawful if it is done in compliance with certain listed legislation.⁴ This includes 'prescribed regulations made under the *Airports Act 1996*' and 'prescribed provisions' of 'Regulations made under the *Defence Act 1903*'.⁵ This instrument prescribes these exemptions.⁶ In particular,

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- 1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Age Discrimination Regulations 2020 [F2020L01138], *Report 12 of 2020*; [2020] AUPJCHR 143.
 - 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 *Age Discrimination Act 2004*, Part 4.
 - 4 *Age Discrimination Act 2004*, section 39.
 - 5 *Age Discrimination Act 2004*, Schedule 1, item 8 and Schedule 2, item 3AA.
 - 6 Section 5.

it prescribes the entirety of the *Airports (Control of On-Airport Activities) Regulations 1997*, which deals with control of liquor, commercial trading, vehicles, gambling, smoking and infringement notices at airports. It also prescribes section 23 of the *Defence Regulation 2016*, which specifies a compulsory retirement age for certain members, and section 88, which provided that those covered under the previous regulations are also subject to the compulsory retirement age.⁷ This instrument ensures that anything done by a person in direct compliance with these prescribed regulations will not constitute unlawful age discrimination.

Preliminary international human rights legal advice

Right to equality and non-discrimination and right to work

1.4 Insofar as the instrument prescribes exemptions from the Age Discrimination Act, it engages and appears to limit the right to equality and non-discrimination, on the basis of age, as well as the right to work. By prescribing exemptions, the instrument has the effect of permitting discrimination on the grounds of age in certain circumstances, such as depriving certain members of the defence force the right to work when they reach their retirement age (listed as 60 years of age for most members of the Permanent Forces).⁸ The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.⁹ The right to equality 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 The right to work must be made available in a non-discriminatory way and includes a right not to be unfairly deprived of work.¹¹ While age is not specifically listed as a prohibited ground of discrimination under article 26 of the International Covenant on Civil and Political Rights, the United Nations Human Rights Committee has stated that 'distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the

7 *Defence Regulation 2016*, sections 23 and 88.

8 Subsection 5(2); *Defence Regulation 2016*, sections 23.

9 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

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

11 International Covenant on Economic, Social and Cultural Rights, articles 2(1), 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

ground of "other status" under [article 26]...or to a denial of the equal protection of the law within the meaning of the first sentence of article 26'.¹²

1.5 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination 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. Mandatory retirement ages do not necessarily constitute age discrimination if justified on reasonable and objective grounds, in pursuit of a legitimate objective.¹³

1.6 The statement of compatibility neither acknowledges that the instrument engages the right to equality and non-discrimination and the right to work, nor explains the purpose and necessity of the prescribed exemptions. It notes that the regulations alter the text of the law but are not intended to alter the interpretation of the law. This is because the prescribed regulations equate to those originally covered by the reference in the *Age Discrimination Act 2004* prior to amendment by the *Statute Update (Regulation References) Act 2020*. It is therefore unclear whether the exemptions from the discrimination provisions in the Age Discrimination Act pursue a legitimate objective and are proportionate to that objective.

1.7 In order to assess the compatibility of this instrument with the right to equality and non-discrimination and the right to work, further information is required as to:

- (a) what is the objective and effect of prescribing the entirety of the *Airports (Control of On-Airport Activities) Regulations 1997* as exempt from the Age Discrimination Act;
- (b) what is the objective of prescribing sections 23 and 88 of the *Defence Regulation 2016* as exempt from the Age Discrimination Act, and the objective behind the compulsory retirement age; and
- (c) whether providing such exemptions is a proportionate limit on the rights to equality and non-discrimination and work, and in particular, are there any less rights restrictive ways to achieve the stated objective, and are there any safeguards in place to protect these rights.

12 *Love v Australia*, United Nations Human Rights Committee Communication No. 983/2001 (2003) [8.2].

13 *Love v Australia*, United Nations Human Rights Committee Communication No. 983/2001 (2003). The Committee on Economic, Social and Cultural Rights has stated that while mandatory retirement ages may still be tolerated under international human rights law, 'there is a clear trend towards the elimination of such barriers' and 'States parties should seek to expedite this trend to the greatest extent possible': see United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 6: The economic, social and cultural rights of older persons* (1995) [12].

Committee view

1.8 The committee notes that this instrument prescribes particular regulations under the *Airport Act 2006* and the *Defence Act 2003* as exempt from the requirements in the *Age Discrimination Act 2004*.

1.9 The committee notes that this instrument engages and may limit the right to equality and non-discrimination, specifically on the ground of age, and the right to work. Differential treatment on the basis of age may not be unlawful discrimination if it is shown to be justified on reasonable and objective grounds, in pursuit of a legitimate objective.

1.10 It is unclear whether the exemptions from the discrimination provisions in the *Age Discrimination Act* pursue a legitimate objective and are proportionate to that objective.

1.11 In order to form a concluded view of the human rights implications of this instrument, the committee seeks the minister's advice as to the matters set out at paragraph [1.7].

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020 [F2020L01114]

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 [F2020L01129]¹

Purpose	The first instrument amends existing prohibitions on cruise ships entering Australian territory or ports unless an exemption applies, to remain in effect for the duration of the human biosecurity emergency period. The second instrument extends the human biosecurity emergency period for a further three months until 17 December 2020.
Portfolio	Health
Authorising legislation	<i>Biosecurity Act 2015</i>
Disallowance	These instruments are exempt from disallowance (see subsections 475(2) and 477(2) of the <i>Biosecurity Act 2015</i>)
Rights	Life; health; freedom of movement, equality and non-discrimination, privacy
Status	Seeking additional information

Extension of the human biosecurity emergency period

1.12 On 18 March 2020 the Governor-General declared that a human biosecurity emergency exists regarding the listed human disease 'human coronavirus with

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020 [F2020L01114] and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 [F2020L01129], *Report 12 of 2020*; [2020] AUPJCHR 144.

pandemic potential', namely COVID-19.² Sections 475 and 476 of the *Biosecurity Act 2015* allow the Governor-General to make, and extend, the human biosecurity emergency period for a period of up to three months if the Minister for Health is satisfied of certain criteria. During a human biosecurity emergency period, sections 477 and 478 of the *Biosecurity Act 2015* allow the Minister for Health to determine emergency requirements, or give directions, that he or she is satisfied are necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australian territory or part of Australian territory. A person who fails to comply with an emergency requirement or direction may commit a criminal offence, punishable by imprisonment for a maximum of five years, or 300 penalty units, or both. The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 extends the human biosecurity emergency period for a further three months until 17 December 2020, unless further extended by the Governor-General.

1.13 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020 amends an earlier determination³ which prevents a cruise ship from entering Australian territory or Australian ports, unless an exemption applies to the ship.⁴ The amendments mean that the existing prohibitions are in effect for the duration of the human biosecurity emergency period (unless revoked earlier).

1.14 The explanatory statement notes that the Minister for Health has made the following determinations that will be extended by three months until 17 December 2020 as a result of this instrument:

- restrictions on cruise ships entering Australian territory or ports;⁵
- a ban on Australian citizens or permanent residents from leaving Australia unless otherwise exempted;⁶

2 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 [F2020L00266] was made pursuant to section 475 of the *Biosecurity Act 2015*.

3 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Determination 2020.

4 Explanatory statement, p. 1.

5 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Determination 2020 [F2020C00809].

6 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2020C00870].

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020 [F2020L01114] and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 [F2020L01129]

- prohibition on price gouging in relation to essential goods, namely personal protective equipment and disinfectant products;⁷ and
- restrictions on the trade of retail outlets at international airports.⁸

Preliminary international human rights legal advice

Rights to life, health and freedom of movement

1.15 The extension of the human biosecurity emergency period, and the consequent extension of the restrictions on cruise ships, overseas travel ban, prohibition on price gouging in relation to essential goods, and restrictions on the trade of retail outlets at international airports, for a further three months, engages a number of human rights. As the measures are intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that the instruments may promote the rights to life and health.⁹ The right to life requires States parties to take positive measures to protect life.¹⁰ The United Nations Human Rights Committee has stated that the duty to protect life implies that States parties should take appropriate measures to address the conditions in society that may give rise to direct threats to life, including life threatening diseases.¹¹ The right to health requires that States parties shall take steps to prevent, treat and control epidemic diseases.¹² With respect to the COVID-19 pandemic specifically, the United Nations Human Rights Committee has expressed the view that 'States parties must take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction'.¹³

1.16 However, extending the biosecurity emergency period, and thereby continuing to enliven the various powers under the *Biosecurity Act 2015*, is likely to

7 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020 [F2020L00355].

8 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Retail Outlets at International Airports) Determination 2020 [F2020C00725].

9 Right to life: International Covenant on Civil and Political Rights, article 6. Right to health: International Covenant on Economic, Social and Cultural Rights, article 12.

10 International Covenant on Civil and Political Rights, article 6.

11 See United Nations Human Rights Committee, *General Comment No. 36, Article 6 (Right to Life)* (2019) [26].

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

13 United Nations Human Rights Committee, *Statement on derogations from the Covenant in connection with the COVID-19 pandemic* (2020) [2].

engage and limit a number of rights, including the right to freedom of movement, equality and non-discrimination and the right to a private life. The right to freedom of movement encompasses the right to move freely within a country, including all parts of federal States, and the right to leave any country, including a person's own country.¹⁴ It encompasses both the legal right and practical ability to travel within and leave a country and includes the right to obtain the necessary travel documents to realise this right.¹⁵ The freedom to leave a country may not depend on any specific purpose or the period of time the individual chooses to stay outside the country, meaning that travelling abroad and permanent emigration are both protected.¹⁶ The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, including for example on the grounds of nationality.¹⁷ The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.¹⁸ This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.¹⁹

1.17 By extending the emergency period to continue preventing Australian citizens and permanent residents from travelling outside Australia (unless an exemption applies) and cruise ships from entering Australian territory or Australian ports (unless an exemption applies), the right to freedom of movement appears to be limited. This is because the right to move freely within a country and the right to leave the country, including for travelling abroad, is restricted. The application of the travel ban to Australian citizens and permanent residents may also limit the right to equality and non-discrimination, as the measure treats some people differently from others on the basis of nationality. The right to a private life may also be limited as the measures restricting movement and trade involves interference with a person's private life.

14 International Covenant on Civil and Political Rights, article 12; United Nations Human Rights Committee, *General Comment 27: Article 12 (Freedom of movement)* (1999) [5], [8].

15 United Nations Human Rights Committee, *General Comment 27: Article 12 (Freedom of movement)* (1999) [9].

16 United Nations Human Rights Committee, *General Comment 27: Article 12 (Freedom of movement)* (1999) [8].

17 International Covenant on Civil and Political Rights, articles 2 and 26.

18 United Nations Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]-[4].

19 The United Nations Human Rights Committee further explains that this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons: *General Comment No. 16: Article 17* (1988).

1.18 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and is proportionate to that objective. In the context of the COVID-19 pandemic, the United Nations Human Rights Committee has indicated that implementing emergency and temporary measures may be necessary to protect the rights to life and health. It acknowledged that such 'measures may, in certain circumstances, result in restrictions on the enjoyment of individual rights guaranteed by the Covenant'.²⁰ Where such restrictions are necessary, they should be 'only to the extent strictly required by the exigencies of the public health situation' and pursue the 'predominant objective' of restoring 'a state of normalcy'.²¹ The sanctions imposed in connection with any emergency and temporary measures must also be proportionate in nature.²²

1.19 Regarding the objective underpinning the extension of the human biosecurity emergency period, the explanatory statement states that it is necessary to ensure that the emergency requirements continue to apply after 17 September 2020 given the ongoing nature of the COVID-19 pandemic and the Minister for Health's view that COVID-19 continues to pose a severe and immediate threat to human health on a nationally significant scale.²³ Regarding the objective underpinning the continued cruise ship ban for the duration of the human biosecurity emergency period, the explanatory statement states that it is necessary to protect Australia's health and quarantine capacity from cruise ship operations.²⁴ The prevention of the spread of COVID-19, an infectious disease that has caused and has the ability to continue causing high levels of morbidity and mortality, is likely a legitimate objective for the purposes of international human rights law. Noting that these instruments seek to protect public health and the rights and freedoms of others – in particular, protect the general Australian population from exposure to

20 United Nations Human Rights Committee, *Statement on derogations from the Covenant in connection with the COVID-19 pandemic* (2020) [2].

21 United Nations Human Rights Committee, *Statement on derogations from the Covenant in connection with the COVID-19 pandemic* (2020) [2(b)].

22 United Nations Human Rights Committee, *Statement on derogations from the Covenant in connection with the COVID-19 pandemic* (2020) [2(b)].

23 Explanatory statement, pp. 1–2.

24 Explanatory statement, p. 2.

COVID-19 – they would appear to be rationally connected to that objective.²⁵ However, as the extension of the human biosecurity emergency period has the effect of extending the determinations made pursuant to section 477 of the *Biosecurity Act 2015*, it is also important to identify the specific objective being pursued by each extended determination (for example, what the objective is for banning overseas travel) and assess whether this objective is legitimate and how the determinations are rationally connected to that objective.

1.20 Regarding the proportionality of these instruments, it is necessary to consider whether the proposed limitations are sufficiently circumscribed; accompanied by sufficient safeguards, including the possibility of oversight and the availability of review; and whether any less rights restrictive alternatives could achieve the same stated objective.²⁶ The temporary nature of these measures is an important consideration when assessing the proportionality of the instruments.²⁷ The Governor-General may extend a human biosecurity emergency period more than once, with each extension lasting for a period of three months.²⁸ If the temporary measures were to be extended multiple times, the cumulative time period in which the measures could be in effect could be significant. Although, it is noted that the period can only be extended if the Minister for Health is satisfied that the disease is continuing to pose a severe and immediate threat, or continuing to cause harm to human health on a nationally significant scale and the extension is necessary.²⁹

1.21 As there is no statement of compatibility accompanying the explanatory statement for either instrument, it is difficult to assess the compatibility of these measures with international human rights law, particularly with respect to the

25 See, Parliamentary Joint Committee on Human Rights, *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 2) 2020 [F2020L00594]* and *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020 [F2020L00574]*, *Report 7 of 2020*; [2020] AUPJCHR 92.

26 United Nations Human Rights Committee, *General Comment 27: Article 12 (Freedom of movement)* (1999) [14]-[15].

27 The United Nations Human Rights Committee has acknowledged in the context of the COVID-19 pandemic that 'States parties confronting the threat of widespread contagion may, on a temporary basis, resort to exceptional emergency powers and invoke their right to derogation from the Covenant under article 4 provided that it is required to protect the life of the nation': *Statement on derogations from the Covenant in connection with the COVID-19 pandemic* (2020) [2].

28 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020*, explanatory statement, p. 1.

29 *Biosecurity Act 2015*, section 476.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020 [F2020L01114] and *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 [F2020L01129]*

proportionality of these measures,³⁰ noting it is unclear whether there are other less rights restrictive ways to achieve the objective being pursued.³¹

1.22 In order to assess the compatibility of these instruments with international human rights law, further information is required as to:

- (a) what is the objective, and how are the measures rationally connected to that objective, of each of the measures that are extended for a further three months under the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020, in particular:
 - restrictions on cruise ships entering Australian territory or ports,³² and
 - a ban on Australian citizens or permanent residents from leaving Australia unless otherwise exempted.³³
- (b) whether there are effective safeguards or controls over each of these measures, including the possibility of monitoring and access to review;
- (c) how exemptions from these prohibitions are applied, in particular, how many applications for exemptions have been made and how many have been granted to permit Australian citizens or permanent residents to leave the country under the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020; and

30 The United Nations Human Rights Committee has reiterated that restrictions on the right to freedom of movement cannot merely serve permissible purposes. They must also be necessary to protect them' and 'conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected': *General Comment 27: Article 12 (Freedom of movement)* (1999) [14].

31 The United Nations Human Rights Committee has stated that '[w]here possible, and in view of the need to protect the life and health of others, States parties should replace COVID-19-related measures that prohibit activities relevant to the enjoyment of rights under the Covenant with less restrictive measures that allow such activities to be conducted, while subjecting them as necessary to public health requirements, such as physical distancing': *Statement on derogations from the Covenant in connection with the COVID-19 pandemic* (2020) [2(b)].

32 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Determination 2020 [F2020C00809].

33 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2020C00870].

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020 [F2020L01114] and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 [F2020L01129]

- (d) whether are there any other less rights restrictive ways to achieve the stated objectives.

Committee view

1.23 The committee notes that these instruments extend the human biosecurity emergency period for a further three months until 17 December 2020, which has the effect that the following determinations will continue in operation as a result of this instrument:

- restrictions on cruise ships entering Australian territory or ports;
- a ban on Australian citizens or permanent residents from leaving Australia unless otherwise exempted;
- prohibition on price gouging in relation to essential goods, namely personal protective equipment and disinfectant products; and
- restrictions on the trade of retail outlets at international airports.

1.24 As the committee has previously stated when these determinations were originally introduced, these instruments, which are designed to prevent the spread of COVID-19, promote the rights to life and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires Australia takes steps to prevent, treat and control epidemic diseases.

1.25 The committee notes that these instruments may also limit the right to freedom of movement, equality and non-discrimination and the right to a private life. In light of the unprecedented nature of the COVID-19 pandemic and the necessity for States to confront the threat of widespread contagion with emergency and temporary measures, the committee acknowledges that such measures may, in certain circumstances, restrict human rights. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.26 However, as there has been no statement of compatibility provided with respect to either instrument, which we note are not required in relation to these instruments, questions remain as to whether all of the measures are reasonable, necessary and proportionate. Given the human rights implications of legislative instruments dealing with the COVID-19 pandemic, the committee considers that it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility.

1.27 In order to form a concluded view of the human rights implications of these instruments, the committee seeks the minister's advice as to the matters set out at paragraph [1.22].

Coronavirus Economic Response Package (Deferral of Sunsetting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020 [F2020L01134]¹

Purpose	This instrument defers the enacted sunset of Division 3 of Part III (Special powers relating to terrorism offences) of the <i>Australian Security Intelligence Organisation Act 1979</i> until 7 March 2021.
Portfolio	Home Affairs
Authorising legislation	<i>Coronavirus Economic Response Package Omnibus Act 2020</i>
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 6 October 2020. Notice of motion to disallow must be given by 30 November 2020 in the House of Representatives and the first sitting day of 2021 in the Senate ²
Rights	Multiple rights
Status	Seeking additional information

Extending the operation of ASIO's compulsory questioning and detention powers

1.28 This instrument defers the enacted sunset of Division 3 of Part III (Special powers relating to terrorism offences) of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) by six months, until 7 March 2021.³ Division 3 of the ASIO Act sets out the Australian Security Intelligence Organisation's (ASIO's) powers with respect to two types of warrants, namely compulsory questioning warrants (without detention), and compulsory questioning warrants which authorise detention for up to seven days. These powers were due to sunset on 7 September 2020.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Coronavirus Economic Response Package (Deferral of Sunsetting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020 [F2020L01134], *Report 12 of 2020*; [2020] AUPJCHR 145.

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 Pursuant to Schedule 16, item 1 of the *Coronavirus Economic Response Package Omnibus Act 2020*.

Preliminary international human rights legal advice

Multiple rights

1.29 ASIO's compulsory questioning and detention warrants regime empowers ASIO to seek a warrant to either compulsorily question, or compulsorily question and detain, a person where a judge is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.⁴

1.30 The explanatory statement notes that this instrument extends the operation of these powers as the passage of the Australian Security Intelligence Organisation Amendment Bill 2020 (ASIO 2020 bill) (which would repeal and replace Part III, Division 3) has been delayed. The extension is therefore necessary to ensure that the current law does not sunset while the Parliament considers the provisions of that bill.⁵ While it is noted that the purpose of the instrument is to give more time for the Parliament to consider the ASIO 2020 bill, in assessing the human rights compatibility of a measure, it is necessary to consider if the extension of these coercive powers is compatible with human rights.

1.31 The extension of both ASIO's compulsory questioning powers and detention powers engages numerous human rights. The statement of compatibility provides that the continued operation of these powers is of vital importance to the counter-terrorism efforts of ASIO.⁶ To the extent that the compulsory questioning powers could have the effect of preventing any likely and imminent terrorist acts, the extension of these powers could operate to protect the right to life.⁷ The right to life imposes an obligation on the state to protect people from being killed by others or identified risks.⁸ However, the extension of these compulsory questioning powers, and the power to detain a person for up to seven days without charge,⁹ also engages and limits numerous other human rights, including the right to liberty, freedom of movement, humane treatment in detention, privacy, fair trial, freedom of expression

4 *Australian Security Intelligence Organisation Act 1979*, sections 34E and 34G.

5 Explanatory statement, pp. 1–2.

6 Statement of compatibility, p. 4.

7 Although it is noted that ASIO has never used the power to issue a questioning and detention warrant and last issued a questioning warrant in 2010. See Attorney-General's Department, submission to the Parliamentary Joint Committee on Intelligence and Security, *Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (March 2018), *Submission 7*, pp. 14 and 55.

8 International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1.

9 *Australian Security Intelligence Organisation Act 1979*, section 34S.

and the rights of persons with disability.¹⁰ In relation to the compulsory questioning powers (without detention), many of the human rights issues raised in relation to Division 3 of Part III of the ASIO Act are the same as those with respect to the ASIO 2020 bill, which sought to continue the compulsory questioning powers. As such, the relevant advice provided in relation to the ASIO 2020 bill in [Report 7 of 2020](#) and [Report 9 of 2020](#) is reiterated in relation to the extension of the compulsory questioning warrant powers by this instrument.¹¹

1.32 Extending the operation of ASIO's compulsory questioning and detention warrants, which could empower ASIO to detain a person for up to seven days,¹² specifically engages and limits the right to liberty. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.¹³ The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the circumstances. The right to liberty 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.

1.33 The statement of compatibility recognises that the right to liberty is engaged and states that the power to detain a person under ASIO's questioning and detention warrant provisions is justified to ensure that ASIO can collect intelligence that is important in relation to a terrorism offence.¹⁴ Although the objective of ensuring that ASIO can collect intelligence relating to a terrorism offence may be capable of constituting a legitimate objective for the purposes of international human rights law, questions remain as to whether the measure address a pressing and substantial concern for the purposes of international human rights law. The Parliamentary Joint Committee on Intelligence and Security reviewed these powers in 2018, and noted that ASIO had made it clear that it was not wedded to the model of detention under

10 International Covenant on Civil and Political Rights, articles 9, 10, 12, 14, 17, 19 and Convention on the Rights of Persons with Disabilities.

11 The preliminary international human rights legal advice provided in relation to this bill is set out in Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020), pp. 32–69. The concluding international human rights legal advice provided in relation to this bill is set out in Parliamentary Joint Committee on Human Rights, *Report 9 of 2020* (18 August 2020), pp. 1–115. The recent international human rights legal advice provided with respect to the Australian Security Intelligence Organisation Bill 2020 did not consider the particular human rights implications of ASIO's compulsory questioning and detention warrant powers, as these powers are proposed to be repealed by that bill.

12 *Australian Security Intelligence Organisation Act 1979*, section 34S.

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

14 Statement of compatibility, p. 6.

the questioning regime. The committee was of the view that the current provisions were no longer the appropriate response to the threat of terrorism, and recommended that the questioning and detention powers be repealed.¹⁵ The government has accepted this recommendation,¹⁶ and the ASIO 2020 bill seeks to repeal the questioning and detention powers entirely.¹⁷ In introducing the ASIO 2020 bill the Minister for Home Affairs stated that in accepting the recommendation to repeal the questioning and detention powers, and in implementing other changes to the questioning powers regime, the bill will ensure these powers 'are fit for purpose in the current security environment'.¹⁸ Further, ASIO has never used the power to issue a questioning and detention warrant.¹⁹ It is therefore unclear what pressing and substantial need there is to retain these questioning and detention powers, noting that they do not appear to have ever been used and the government itself has accepted these should be repealed.

1.34 In addition, the statement of compatibility provides no information as to how the detention powers are likely to be effective to achieve, and proportionate to, the stated objective. In assessing proportionality it is necessary to consider if there are any other less rights restrictive ways to achieve the stated objective. In this regard, the government itself has accepted that it is not necessary to retain the detention powers, but instead has proposed a reformed compulsory questioning framework which does not explicitly give the power for ASIO to detain a person for up to seven days. As such, there would appear to be a less rights restrictive way to achieve the stated objective.

15 Parliamentary Joint Committee on Intelligence and Security, *Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (March 2018), pp. 40–41.

16 See Minister for Home Affairs, the Hon Peter Dutton MP, Second Reading Speech on the Australian Security Intelligence Organisation Amendment Bill 2020, 13 May 2020

17 This amendment is pursuant to a recommendation of the Parliamentary Joint Committee on Intelligence and Security. See, Parliamentary Joint Committee on Intelligence and Security, *Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (March 2018), recommendation 2.

18 See Minister for Home Affairs, the Hon Peter Dutton MP, Second Reading Speech on the Australian Security Intelligence Organisation Amendment Bill 2020, *House Hansard*, p. 3231, 13 May 2020.

19 See, Australian Security Intelligence Organisation Amendment Bill 2020. See also, Attorney-General's Department, submission to the Parliamentary Joint Committee on Intelligence and Security. See, Parliamentary Joint Committee on Intelligence and Security, *Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (March 2018), Submission 7, p. 14.

1.35 In order to form a concluded view regarding the extended operation of ASIO's compulsory questioning and detention warrants powers, further information is required as to:

- (a) what evidence demonstrates a pressing and substantial concern sought to be addressed by maintaining ASIO's questioning and detention warrant power, noting that the government has introduced primary legislation seeking to repeal the detention powers, and that the power itself has never been used;
- (b) how maintaining ASIO's questioning and detention warrant powers is rationally connected with (that is, effective to achieve) any such pressing and substantial concern; and
- (c) whether the extension of ASIO's detention warrant powers is a proportionate means by which to address a pressing and substantial concern; and whether there are any less rights restrictive measures (such as the use of questioning warrants without detention) to achieve the stated objective.

Committee view

1.36 The committee notes that the instrument extends the operation of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*, by six months. The committee notes that this has the effect of extending the operation of ASIO's powers with respect to compulsory questioning warrants and compulsory questioning and detention warrants.

1.37 The committee notes that extending these powers, which engages numerous human rights, is required by reason that the passage of the ASIO 2020 bill (which would repeal and replace Part III, Division 3) has been delayed. Accordingly, the committee recognises that the extension of these measures is intended to put in place only temporary powers with respect to the compulsory questioning and detention framework until such time as the ASIO 2020 bill is presumably passed by the Parliament.

1.38 To the extent that the compulsory questioning powers could have the effect of preventing any likely and imminent terrorist acts, the extension of these powers could operate to protect the right to life. However, the extension of these powers also engages and limits numerous human rights. The committee recently assessed the human rights compatibility of compulsory questioning warrants in [Report 9 of 2020](#), when it considered the ASIO 2020 bill. As such, the committee refers the minister and parliamentarians to the relevant parts of that report in relation to the assessment of the human rights compatibility of the extension of the questioning warrant powers.

1.39 In relation to the questioning and detention warrant powers, the committee notes the legal advice that the power for ASIO to detain a person for up

to seven days limits the right to liberty. While the committee appreciates that the COVID-19 pandemic has resulted in delays to the parliamentary schedule, this committee's role is to assess all legislation for compatibility for human rights. As such, the extension of the questioning and detention powers needs to be demonstrated to be compatible with the right to liberty. The committee notes that the right to liberty can be permissibly limited if it is shown to be reasonable, necessary and proportionate.

1.40 In order to form a concluded view of the human rights implications of this instrument, the committee seeks the minister's advice as to the matters set out at paragraph [1.35].

Advice only

1.41 The committee draws the following bills to the attention of the relevant minister on an advice only basis. The committee does not require a response to these comments.

Appropriation Bill (No. 1) 2020-2021

Appropriation Bill (No. 2) 2020-2021¹

Purpose	These bills seek to appropriate money from the Consolidated Revenue for services
Portfolio	Finance
Introduced	House of Representatives, 13 February 2020
Rights	Multiple rights: economic, social and cultural; civil and political; equality and non-discrimination
Status	Advice only

Appropriation of money

1.42 These bills seek to appropriate money from the Consolidated Revenue Fund for a range of services. The portfolios, budget outcomes and entities for which these appropriations would be made are set out in the schedules to each bill.

International human rights legal advice

1.43 Proposed government expenditure to give effect to particular policies may engage and limit, or promote, a range of human rights, including civil and political rights and economic, social and cultural rights (such as the right to housing, health, education and social security).²

1.44 Australia has obligations to respect, protect and fulfil human rights, including the specific obligations to progressively realise economic, social and cultural rights using the maximum of resources available; and a corresponding duty to refrain from taking retrogressive measures (or backwards steps), in relation to the realisation of

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Appropriation Bill (No. 1) 2020-2021 and Appropriation Bill (No. 2) 2020-2021, *Report 12 of 2020*; [2020] AUPJCHR 146.

2 Under the International Covenant on Civil and Political Rights and the International covenant on Economic, Social and Cultural Rights.

these rights.³ Economic, social and cultural rights may be particularly affected by appropriation bills, because any reduction in funding for measures which realise them, such as specific health and education services, may be considered to be retrogressive with respect to the attainment of such rights and, accordingly, must be justified for the purposes of international human rights law.

1.45 The statements of compatibility accompanying these bills do not identify that any rights are engaged by the bills, and state that the High Court has emphasised that because appropriation Acts do not ordinarily confer authority to engage in executive action, they do not confer legal authority to spend.⁴ However, because appropriations are the means by which the appropriation of money from the Consolidated Revenue Fund is authorised, they are a significant step in the process of funding public services. The fact that the High Court has stated that appropriations Acts do not create rights or duties as a matter of Australian law, does not address the fact that appropriations may nevertheless engage human rights for the purposes of international law. The appropriation of funds facilitates the taking of actions which may affect both the progressive realisation of, and failure to fulfil, Australia's obligations under international human rights laws. Appropriations may, therefore, engage human rights for the purposes of international law, because reduced appropriations for particular areas may be regarded as retrogressive, or as limiting rights.

1.46 There is international guidance about reporting on the human rights compatibility of public budgeting measures.⁵ For example, the Committee on the Rights of the Child has advised that countries must show how the public budget-related measures they choose to take result in improvements in children's rights,⁶ and has provided detailed guidance as to implementation of the rights of the child, which 'requires close attention to all four stages of the public budget process: planning, enacting, executing and follow-up'.⁷ It has also advised that countries

3 See, International Covenant on Economic, Social and Cultural Rights.

4 Statements of compatibility, p. 4.

5 See, for example, UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017); South African Human Rights Commission, *Budget Analysis for Advancing Socio-Economic Rights* (2016); Ann Blyberg and Helena Hofbauer, *Article 2 and Governments' Budgets* (2014); Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (UNIFEM, 2006); and Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

6 Committee on the Rights of the Child, *General Comment No. 19 (2016) on public budgeting for the realization of children's rights (art. 4)* [24].

7 Committee on the Rights of the Child, *General Comment No. 19 (2016) on public budgeting for the realization of children's rights (art. 4)* [26].

should 'prepare their budget-related statements and proposals in such a way as to enable effective comparisons and monitoring of budgets relating to children'.⁸

1.47 Without an assessment of human rights compatibility of appropriations bills, it is difficult to assess where Australia is promoting human rights, and realising its human rights obligations. For example, a retrogressive measure in an individual bill may not, in fact, be retrogressive when understood within the budgetary context as a whole. Further, where appropriation measures may engage and limit human rights, an assessment of the human rights compatibility of the measure would provide an explanation as to whether that limitation would be permissible under international human rights law.

1.48 Considering that appropriations may engage human rights for the purposes of international law, in order to assess such bills for compatibility with human rights the statements of compatibility accompanying such bills would need to include an assessment of the measures, including an assessment of:

- overall trends in the progressive realisation of economic, social and cultural rights (including any retrogressive trends or measures);⁹
- the impact of budget measures (such as spending or reduction in spending) on vulnerable groups (including women, First Nations Peoples, persons with disabilities and children);¹⁰ and
- key individual measures which engage human rights, including a brief assessment of their human rights compatibility.

1.49 In relation to the impact of spending or reduction in spending on vulnerable groups, relevant considerations may include:

- whether there are any specific budget measures that may disproportionately impact on particular groups (either directly or indirectly); and
- whether there are any budget measures or trends in spending over time that seek to fulfil the right to equality and non-discrimination for particular groups.¹¹

8 Committee on the Rights of the Child, *General Comment No. 19 (2016) on public budgeting for the realization of children's rights (art. 4)* [81].

9 This could include an assessment of any trends indicating the progressive realisation of rights using the maximum of resources available; any increase in funding over time in real times; any trends that increase expenditure in a way which would benefit vulnerable groups; and any trends that result in a reduction in the allocation of funding which may impact on the realisation of human rights and, if so, an analysis of whether this would be permissible under international human rights law.

10 Spending, or reduction of spending, may have disproportionate impacts on such groups and accordingly may engage the right to equality and non-discrimination.

Committee view

1.50 The committee notes that these bills seek to appropriate money from the Consolidated Revenue Fund for services. The committee notes the legal advice that the High Court has emphasised that because appropriation Acts do not ordinarily confer authority to engage in executive action, they do not confer legal authority to spend. However, we also note the legal advice that proposed government expenditure to give effect to particular policies may engage and promote, or limit, a range of human rights.

1.51 The committee acknowledges that appropriations bills may present particular difficulties given their technical and high-level nature, and as they generally include appropriations for a wide range of programs and activities across many portfolios. As such, it may not be appropriate to assess human rights compatibility for each individual measure. However, the committee considers that the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility, namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups.

1.52 The committee draws this matter to the attention of the minister and the Parliament.

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- 11 There are a range of resources to assist in the preparation of human rights assessments of budgets: see, for example, UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017) at: <https://www.ohchr.org/Documents/Publications/RealizingHRTroughGovernmentBudgets.pdf>; South African Human Rights Commission, *Budget Analysis for Advancing Socio-Economic Rights* (2016) at: <http://spii.org.za/wp-content/uploads/2018/05/2016-SPII-SAHRC-Guide-to-Budget-Analysis-for-Socio-Economic-Rights.pdf>; Ann Blyberg and Helena Hofbauer, *Article 2 and Governments' Budgets* (2014) at: <https://www.internationalbudget.org/wp-content/uploads/Article-2-and-Governments-Budgets.pdf>; Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (UNIFEM, 2006) at: <https://www.internationalbudget.org/wp-content/uploads/Budgeting-for-Women%E2%80%99s-Rights-Monitoring-Government-Budgets-for-Compliance-with-CEDAW.pdf>; Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

Bills and instruments with no committee comment¹

1.53 The committee has no comment in relation to the following bills which were introduced into the Parliament between 6 to 9 October 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

- Appropriation (Parliamentary Departments) Bill (No. 1) 2020-2021;
- Bankruptcy (Estate Charges) Amendment (Norfolk Island Bill) 2020;
- Economic Recovery Package (JobMaker Hiring Credit) Amendment Bill 2020;
- Export Market Development Grants Legislation Amendment Bill 2020;
- Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020;
- National Redress Scheme for Institutional Child Sexual Abuse Amendment (Technical Amendments) Bill 2020;
- Royal Commissions Amendment (Confidentiality Protections) Bill 2020;
- Social Security Amendment (COVID-19 Economic Recovery) Bill 2020; and
- Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020.

1.54 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 12 August and 20 September 2020.³ This includes the Autonomous Sanctions Legislation Amendment (Syria and Proliferation of Weapons of Mass Destruction) Instrument 2020 [F2020L01019] and the Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Continuing Effect Declaration 2020 (No 2) [F2020L01089]. The committee has considered the human rights compatibility of similar instruments on a number of

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 12 of 2020*; [2020] AUPJCHR 147.

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.

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, 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>.

occasions.⁴ As these legislative instruments do 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.

1.55 The committee has reported on four legislative instruments from this period earlier in this chapter. The committee has determined not to comment on the remaining 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.

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.

