

Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is available on the committee's website.¹

Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 5) 2020 [F2020L00884]²

Purpose	This instrument provides that after 20 July 2020, approved providers of child care services are transitioned out of the JobKeeper scheme for certain employees or for a business participant.
Portfolio	Treasury
Authorising legislation	<i>Coronavirus Economic Response Package (Payments and Benefits) Act 2020</i>
Last day to disallow	15 sitting days after tabling (tabled in the Senate and House of Representatives on 24 August 2020). Notice of motion to disallow must be given in the House of Representative by 27 October 2020 and in the Senate by 1 December 2020 ³
Rights	Adequate standard of living; work; and equality and non-discrimination
Status	Concluded examination

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) Amendment Rules (No. 5) 2020 [F2020L00884], *Report 12 of 2020*; [2020] AUPJCHR 148.

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

2.3 The committee requested a response from the minister in relation to the instrument in [Report 10 of 2020](#).⁴

Exemption of child care workers from the JobKeeper wage subsidy

2.4 This instrument provides that from 20 July 2020, approved providers of child care services are no longer eligible for the JobKeeper wage subsidy with respect to either business participants where the entity is an approved provider of child care services, or with respect to individual workers whose ordinary duties relate principally to the operation of the child care service.⁵

Summary of initial assessment

Preliminary international human rights legal advice

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

2.5 By removing eligibility for the JobKeeper wage subsidy for certain registered businesses and certain employees who were previously eligible for the subsidy, this instrument appears to engage a number of human rights. The JobKeeper payment is intended to subsidise (and in some cases, replace) a person's wages during the COVID-19 pandemic and during circumstances in which people may otherwise be at risk of losing their job. Since the measure removes this support, it would appear that this measure engages and may limit the right to an adequate standard of living. The right to an adequate standard of living requires that the State party take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.⁶

2.6 In addition, as the JobKeeper scheme was designed to support businesses to retain staff during economic downturn,⁷ removing businesses from eligibility, and therefore their workers, may engage and limit the right to work.⁸ The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work. The right to work also requires that states provide a system of protection guaranteeing access to employment. This right must be made available in a non-discriminatory way.⁹

2.7 Australia has obligations to progressively realise the rights to an adequate standard of living and work using the maximum of resources available. It also has a

4 Parliamentary Joint Committee on Human Rights, *Report 10 of 2020* (26 August 2020), pp. 2-6.

5 Schedule 1, items 2 and 3, subsections 9(4)(d) and 11(1)(ba).

6 International Covenant on Economic, Social and Cultural Rights, article 11.

7 See explanatory statement to the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020, p. 1.

8 International Covenant on Economic, Social and Cultural Rights, article 6.

9 International Covenant on Economic, Social and Cultural Rights, articles 6 and 2(1).

corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.¹⁰ Any retrogressive step with respect to the realisation of these rights must be directed towards a legitimate objective, be rationally connected (that is, effective to achieve) that objective, and be proportionate. It is noted that the effect of this change on childcare workers is not clear, noting that certain non-citizens and some casual workers in the childcare sector were not eligible for the JobKeeper subsidy.¹¹ In this respect those ineligible workers may benefit from the funding now available to the childcare sector.

2.8 In addition, it is not clear as to whether removing eligibility for the JobKeeper subsidy for employees in the child care sector, has a disproportionate impact on women, noting that the child care workforce is overwhelmingly staffed by women.¹² As such, this measure may engage and limit the right to equality and non-discrimination. 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).¹³ Differential treatment, if this arises, 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.¹⁴

2.9 The initial analysis stated that further information was required in order to assess the compatibility of the measure with the rights to an adequate standard of living, work and equality and non-discrimination, and in particular:

- (a) how the reintroduction of the Child Care Subsidy and Transition Payment compares to JobKeeper in terms of the likely effect on childcare workers;
- (b) what is the proportion of child care workers who were not previously eligible for JobKeeper;

10 International Covenant on Economic, Social and Cultural Rights, article 2.

11 See Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 [F2020L00419].

12 For example, in a 2017 report prepared for the Department of Education and Training, the Australian National University Social Research Centre noted that 96 per cent of workers in long-day care were female. See, Australian National University Social Research Centre, *2016 Early Childhood Education and Care National Workforce Census* (September 2017) p. 16.

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

14 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].

- (c) whether a child care provider which breaches its obligations under the Transition Payment by terminating the employment of a worker who was in receipt of JobKeeper, will be required to reinstate the worker and/or provide some other form of compensation to that worker;
- (d) whether a child care provider would be considered to breach its obligations under the Transition Payment were it to significantly reduce the rostered hours of a worker who was previously in receipt of JobKeeper;
- (e) whether and how the measure is based on reasonable and objective criteria such that it serves a legitimate objective; and
- (f) whether the measure is a proportionate means of achieving that objective.

Committee's initial view

2.10 The committee noted the legal advice that this measure may engage the rights to an adequate standard of living, work and equality and non-discrimination. The committee noted that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee also recognised that providing child care workers with the benefit of a Transitional Payment will impact positively on those workers who are currently employed in a child care centre but are not eligible for the JobKeeper payment.

2.11 The committee sought the Treasurer's advice as to the matters set out at paragraph [2.9].

Treasurer's response¹⁵

2.12 The Treasurer advised:

How the reintroduction of the CCS and Transition Payment compares to JobKeeper in terms of the likely effect on childcare worker?

The CCS and Transition Payment apply universally across all approved CCS providers, whereas JobKeeper Payments are restricted to those eligible - excluding any workers in the sector who were ineligible (for example, temporary migrant workers, and those casual employees who had been in their role for less than 12 months).

15 The minister's response to the committee's inquiries was received on 17 September 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.

What is the proportion of child care workers who were not previously eligible for JobKeeper?

There is no comprehensive data available on the number of childcare workers whose employers were ineligible for JobKeeper Payment in respect of those workers as this does not have to be reported by employers. However, as per the testimony at the Senate Select Committee on COVID-19 on 9 June 2020, around 120,000 employees in the child care sector may have been receiving salary or wages that were supported in whole or in part by JobKeeper Payments, which is estimated to be around two thirds of the workforce. Across the sector there was significant variability of JobKeeper eligibility, including some providers having most or all of their educators ineligible, such as local government, those more reliant on casual workers like Outside School Hours Care, and those with employees on skilled visas.

As part of the Early Childhood Education Care Relief Package, Exceptional Circumstance Supplementary Payments were paid to certain providers not eligible for JobKeeper, including services that had more than 30 per cent of full-time equivalent staff ineligible for JobKeeper. As of 12 July 2020, 773 services were approved to receive this supplementary payment.

Whether a child care provider which breaches its obligations under the Transition Payment by terminating the employment of a worker who was in receipt of JobKeeper, will be required to reinstate the worker and/or provide some other form of compensation to that worker?

Providers which do not fulfil the conditions of the terms of the Transition Payment will be investigated. A provider may lose access to payments and be subject to sanctions under the Family Assistance Law. The Commonwealth may recover grant funds if there is a breach of the grant agreement or if providers or their services are found to have been ineligible.

Whether a child care provider would be considered to breach its obligations under the Transition Payment were it to significantly reduce the rostered hours of a worker who was previously in receipt of JobKeeper?

The Employment Guarantee requires providers to maintain employment of existing employees over the Transition Payment period. It also requires providers to offer employees more than one shift during the transition period. Providers which do not fulfil the conditions of the terms of the Transition Payment will be investigated. They may lose access to payments and be subject to sanctions under the Family Assistance Law. The Commonwealth may recover grant funds if there is a breach of the grant agreement or if providers or their services are found to have been ineligible.

Whether and how the measure is based on reasonable and objective criteria such that it serves a legitimate objective?

The objective of the Transition Package was to keep services open for children of essential workers, children experiencing vulnerability and disadvantage, and those children already enrolled. The criteria for support through these packages was being an approved CCS provider. That is, all approved services were eligible for support. This measure has been successful, in that as at 9 September 2020, 99.3 per cent of services have remained open.

Whether the measure is a proportionate means of achieving that objective?

The transition strategy sought to ensure the Early Childhood Education and Care sector was well-placed to be providing the care that families required to be able to return to work and study. While it represented a substantial investment by Government, it has been a successful measure. Based on the most recent and stable administrative data available (up to the week ending 9 August 2020), noting services have up to 28 days to submit and vary session data, charged hours of care exceeded pre-COVID hours (week ending 1 March 2020) across all jurisdictions, excluding Victoria, and were approximately 94.3 per cent of pre-COVID charged hours even in Victoria.

Concluding comments***International human rights legal advice******Rights to an adequate standard of living, work and equality and non-discrimination***

2.13 The Treasurer has advised that, unlike JobKeeper (which those on certain visas and casual employees of less than 12 months are ineligible to receive), the Child Care subsidy and Transition Payment would apply universally to all approved child care service providers. The Treasurer stated that it is estimated that approximately two-thirds of the childcare workforce in June 2020 may have been receiving wages which were supported in whole or in part by the JobKeeper payment, however no comprehensive data is available. The Treasurer further noted that Exceptional Circumstance Supplementary Payments were made to certain providers not eligible for JobKeeper.¹⁶

2.14 As to the potential impact of this new measure on child care workers, the Treasurer advised that child care providers who do not fulfil the conditions of the Transition Payment Employment Guarantee (including by standing down permanent staff without pay) will be investigated and may lose access to payments and be

16 These payments ceased on 20 June 2020. See, <https://www.dese.gov.au/covid-19/childcare/childcare-faq#section-the-end-of-the-early-childhood-education-and-care-relief-package> [Accessed 22 September 2020].

subject to sanctions under the Family Assistance Law.¹⁷ The Treasurer has also advised the Commonwealth may recover grant funds if there is a breach of the grant agreement or if providers or their services are found to have been ineligible. It would appear, however, that this would not require an employer to reinstate a worker or provide them with some other form of compensation, where the termination of their employment was the source of the breach. In addition, the Treasurer advised that the Employment Guarantee requires that providers maintain the employment of existing employees, including by offering more than one shift during the transition period.¹⁸ It would appear, therefore, that an employer who reduced the work hours of an existing employee, but nevertheless offered them at least two shifts during the transition period, may not be in breach of their obligations to continue to be in receipt of a Transition Payment.

2.15 It would appear that in some cases, the introduction of the Transition payment and re-introduction of the Child Care Subsidy may have a positive effect for some child care workers, for example, the estimated one-third of workers who were ineligible for the JobKeeper wage subsidy, and those who could earn the same or more via their wages than they could on JobKeeper, which may promote the rights to work and an adequate standard of living. However, it would also appear that there may be a cohort of workers for whom these changes may have a negative impact, if their shifts have been reduced and the amount they receive on a fortnightly basis is lower than what they would have received had they remained eligible for JobKeeper. As the Treasurer has advised that there is no comprehensive data on the number of childcare workers whose employers were ineligible for JobKeeper, it is not possible to accurately estimate the size of the cohort in respect of which this funding change may have had a negative impact. However, if such a cohort does exist, this measure may therefore constitute a retrogressive measure in relation to the realisation of the rights to an adequate standard of living and work with respect to those workers. In addition, noting that the child care workforce is overwhelmingly staffed by women,¹⁹

17 Family Assistance Law is a broad term that encompasses the following legislation: *A New Tax System (Family Assistance) Act 1999*; *A New Tax System (Family Assistance) (Administration) Act 1999*; *Child Care Subsidy Minister's Rules 2017*; *Child Care Subsidy Secretary's Rules 2017*; any other instruments (including regulations) made under the *A New Tax System (Family Assistance) Act 1999* and the *A New Tax System (Family Assistance) (Administration) Act 1999*; and Schedules 5 and 6 to the *A New Tax System (Family Assistance and Related Measures) Act 2000*.

18 It would appear that this refers to the period 13 July 2020 – 27 September 2020, which is the period of time during which the Transition Payment will be made instead of the JobKeeper payment. See, <https://www.dese.gov.au/transition-payment> [Accessed 22 September 2020].

19 For example, in a 2017 report prepared for the Department of Education and Training, the Australian National University Social Research Centre noted that 96 per cent of workers in long-day care were female. See, Australian National University Social Research Centre, *2016 Early Childhood Education and Care National Workforce Census* (September 2017) p. 16.

removing eligibility for the JobKeeper subsidy for employees previously eligible may have a disproportionate impact on women, and may limit the right to equality and non-discrimination.

2.16 For a retrogressive step to constitute a permissible limitation on rights, it must be directed towards a legitimate objective, be rationally connected (that is, effective to achieve) that objective, and be proportionate. In addition, 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.²⁰

2.17 The Treasurer advised that the measure is intended to support the child care sector to provide care that families require to be able to return to work and study, and to keep child care services open for children, including children of essential workers and those experiencing vulnerability and disadvantage. This is likely to constitute a legitimate objective for the purposes of international human rights, and if this measure is able to assist in keeping childcare centres open, it could promote the rights of women to work. The Convention on the Elimination of Discrimination Against Women provides that in order to prevent discrimination against women on the grounds of maternity and to ensure their effective right to work, States Parties should take measures to enable parents to combine family responsibilities with work responsibilities and participation in public life, in particular through a network of childcare facilities.²¹

2.18 As to whether the measure is rationally connected to (or effective to achieve) that objective, the Treasurer noted that 99.3 per cent of child care services which were eligible for the Transition Payment have remained open as at 9 September 2020. It would appear, therefore, that the provision of this financial support to the sector may have been effective to achieve the objective of keeping child care centres open. However, it is not clear how many such services were unable to remain open when the relevant financial support available was in the form of the JobKeeper wage subsidy for eligible workers. That is, it is unclear that the continued provision of JobKeeper payments with respect to eligible workers (being two-thirds of that workforce), to subsidise all or part of their wages, would not be as effective in

20 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].

21 Convention on the Elimination of Discrimination Against Women, article 11(2)(c).

ensuring that child care providers could remain open, noting that wages are likely to constitute the largest item of expenditure for child care providers.²²

2.19 As to whether this constitutes a proportionate means of achieving that objective, the Treasurer advised that up to 9 August 2020, charged hours of care by child care providers exceeded those pre-COVID in all jurisdictions, excluding Victoria. The Treasurer also advised that charged hours of care were approximately 94.3 per cent of pre-COVID charged hours even in Victoria. However, it is not clear whether the measure contains sufficient safeguards to help protect the rights of those workers who may be financially worse off as a result of the removal of JobKeeper. In relation to the Employment Guarantee condition of the Transition Payment, the Treasurer has advised that providers which do not fulfil these conditions may lose access to payments, be subject to sanctions and grant funds may be recovered. However, these conditions do not appear to include a legal requirement that a child care provider pass on the payment to their workers as wages. Further, while an employer who breaches the Employment Guarantee may lose access to payments and be subject to sanctions, this does not provide a benefit to any affected workers, as there is no requirement that the employer reinstate a worker or provide them with some other form of compensation. Rather, it would appear that a breach of the Employment Guarantee could cause the Transition Payment to be cut off entirely, which in practice may reduce an employer's capacity to pay a worker's wages. In jurisdictions where child care services have largely resumed, this may have no impact on workers who are being provided with shifts and continuing to work as usual. However, in locations subject to COVID-19 related lock-down restrictions this may have a significant impact on workers.

2.20 Consequently, it would appear that the introduction of the Transition Payment and re-introduction of the Child Care Subsidy may constitute a positive measure for some workers, by ensuring that their employer remains viable and can continue to provide them with work, which may promote the rights to work and an adequate standard of living. Further, it may be that some workers who were previously receiving JobKeeper wage subsidies continue to undertake regular shifts and experience little or no change in their income. However, there would also appear to be a cohort of workers for whom this change in funding may have a negative impact. In such cases, there do not appear to be adequate safeguards to protect the rights of workers who are financially worse off as a result of the removal of JobKeeper. Consequently, there is a risk that this is an unjustifiable retrogressive measure in relation to the right to an adequate standard of living and work, and an

22 In 2014, the Productive Commission noted that in the child care sector, labour costs constitute the highest items of expenditure, representing approximately 60 per cent of total costs, as well as constituting a fixed expenditure by virtue of wages being set by regulations. See, Productivity Commission, *Inquiry report No. 73: Childcare and Early Childhood Learning* (31 October 2014), p. 966.

impermissible limitation on the right to equality and non-discrimination for this cohort of workers. However, based on the advice provided by the Treasurer it is not possible to make a conclusion on the effect these changes have had on the childcare workforce as a whole.

Committee view

2.21 The committee thanks the Treasurer for this response. The committee notes that the instrument provides that after 20 July 2020, approved providers of child care services were transitioned out of the JobKeeper scheme for certain employees or for a business participant engaged in the provision of child care services. Child care services were instead eligible for the re-introduced Child Care Subsidy and Transition Payment.

2.22 The committee notes the Treasurer's advice that the Child Care Subsidy and Transition Payment apply universally across all approved child care providers, while JobKeeper was restricted to eligible workers. The committee also notes the advice that as at 9 September 2020, 99.3 per cent of services have remained open, and providers who do not fulfil the conditions of the Transition Payment (including that they not terminate the employment of workers who received JobKeeper) may be required to repay the payment.

2.23 The committee considers that the introduction of the Transition Payment and re-introduction of the Child Care Subsidy may constitute a positive measure for a large cohort of workers, by ensuring that their employer remains viable and can continue to give them work, particularly for those who were ineligible for JobKeeper, which is estimated to be one-third of the workforce. For these workers, the measure would appear to promote the right to work and an adequate standard of living. Further, the committee notes that as the majority of childcare centres now have charged hours of care equal to, or exceeding, pre-COVID hours, it is likely that most workers previously receiving JobKeeper wage subsidies are in the same position as they were prior to the pandemic, and discontinuing JobKeeper payments will mean such workers experience little or no change to their income. In addition, the committee considers that measures designed to ensure that child care services can remain open is likely to promote the rights of women (in particular) to engage in paid employment while they have young children.

2.24 The committee also notes that there may be a cohort of child care workers for whom this revised funding arrangement may have a negative impact, meaning that in some respects this may engage the rights to an adequate standard of living and work and the right to equality and non-discrimination (noting that childcare workers are overwhelmingly female). The committee notes the legal advice but is of the view that the Employment Guarantee provides an important safeguard so as to ensure that workers will not be financially worse off as a result of the removal of JobKeeper. However, the committee also notes the minister's advice as to the absence of comprehensive data available on the number of workers who were not

eligible for JobKeeper payments, meaning that the size of any such cohort is unclear, although it is estimated to be around one-third of the workforce. As such, the committee is unable to provide a concluded view as to the impact of such changes on the realisation of the rights to an adequate standard of living, work and the right to equality and non-discrimination.

2.25 The committee has concluded its consideration of this instrument.

Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020 [F2020L00870]¹

Purpose	This instrument allows for a new service provider to administer the Norfolk Island Workers' Compensation Scheme, and makes several amendments to the scheme itself, including with respect to mutual obligations.
Portfolio	Infrastructure, Transport, Regional Development and Communications
Authorising legislation	<i>Norfolk Island Act 1979</i>
Last day to disallow	15 sitting days after tabling (tabled in the Senate and House of Representatives on 24 August 2020). Notice of motion to disallow must be given in the House of Representative by 27 October 2020 and in the Senate by 1 December 2020. ²
Rights	Adequate standard of living; social security; persons with disability
Status	Concluded examination

2.26 The committee requested a response from the minister in relation to the instrument in [Report 10 of 2020](#).³

Suspension of workers' compensation payments

2.27 This instrument amends the Norfolk Island Continued Laws Ordinance 2015 with the effect of amending the *Employment Act 1988* (NI) and the *Employment Regulations 1991* (NI). It relevantly provides that an employee's right to compensation is suspended in the following circumstances:

- (a) if the employee fails, without reasonable excuse, to comply with a notice to attend for a permanent incapacity assessment given to the employee, their right to lump sum compensation in relation to a loss or

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020 [F2020L00870], *Report 11 of 2020*; [2020] AUPJCHR 149.

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 10 of 2020 (26 August 2020), pp. 7-10.

impairment of a bodily or mental function is suspended until they comply with a new notice;⁴

- (b) if the employee is required to undertake a rehabilitation program for an injury or condition, and they fail without reasonable excuse to begin, or continue with, the program, their right to compensation is suspended until they begin, or continue with, the program;⁵
- (c) if a claim for compensation is made in relation to an injury or condition of, or the death of, an employee, and the claimant fails, without reasonable excuse, to provide information to the Employment Liaison Officer within the time specified, any right of the claimant to compensation is suspended until they comply with the notice;⁶ and
- (d) if an employee fails, without reasonable excuse, to comply with a notice to attend for an independent medical examination, their right to compensation in relation to an injury or condition is suspended until they comply with a new notice to attend such an examination.⁷

Summary of initial assessment

Preliminary international human rights legal advice

Rights to social security and an adequate standard of living, and rights of persons with disability

2.28 Under international human rights law, the provision of compensation for workplace injuries, including those which lead to a worker's permanent incapacitation, forms part of the provision of social security. Consequently, the power to suspend a worker's entitlement to compensation for failure to do certain specified things, engages and may limit the right to social security, as well as the related right to an adequate standard of living.

2.29 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.⁸ The right to an adequate standard of living requires that the State party take steps to ensure the availability, adequacy and

4 Schedule 1, substituted item 73ZY, new section 32A.

5 Schedule 1, substituted item 74P, substituted section 38.

6 Schedule 1, substituted item 74ZF, substituted section 47.

7 Schedule 1, substituted item 74ZF, new section 47B.

8 International Covenant on Economic, Social and Cultural Rights, article 9.

accessibility of food, clothing, water and housing for all people in its jurisdiction.⁹ Australia has obligations to progressively realise these rights using the maximum of resources available, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to their realisation. Introducing the ability for payments to be suspended, which was not previously available, appears to be a retrogressive measure. Retrogressive measures may be permissible if it can be demonstrated that the measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) such an objective, and is proportionate.

2.30 Suspending a person's entitlement to workers' compensation may also engage the rights of persons with disability, where the eligible worker has suffered an injury leading to a disability. The Convention on the Rights of Persons with Disabilities recognises the right of all persons with disability to enjoy their rights without discrimination on the basis of disability.¹⁰ It requires States to facilitate access to rehabilitation, and provide reasonable accommodation to persons with disabilities in the workplace.¹¹ It is not clear whether and how these measures would accommodate the particular needs of persons with disability, including where they are required to engage in a rehabilitation program.

2.31 The statement of compatibility does not identify the engagement of any rights, other than the right to privacy in relation to the collection of information.¹² Consequently further information was required in order to assess the compatibility of these measures with the rights to social security, an adequate standard of living, and of persons with disability. In particular:

- how long payments may be suspended for;
- whether there is any requirement that new notices to attend medical examinations etc, be promptly provided;
- what is the legitimate objective behind suspending such payments, and how is suspending such payments rationally connected (that is, effective to achieve) that objective; and
- what safeguards are in place to ensure any limitation on rights is proportionate to the objective sought to be achieved.

9 UN Human Rights Committee, *General Comment No. 3: Article 2 (Implementation at a national level)*. The Committee explains that 'implementation [of the ICCPR] does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient'.

10 Convention on the Rights of Persons with Disability, article 4.

11 Convention on the Rights of Persons with Disability, articles 26–27.

12 Statement of compatibility, p. 9.

Committee's initial view

2.32 The committee noted that these measures may engage the rights to social security and an adequate standard of living, and the rights of persons with disability. The committee noted that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.33 The committee sought the assistant minister's advice as to the matters set out at paragraph [2.31].

Assistant Minister's response¹³

2.34 The assistant minister advised:

The Ordinance makes amendments to the *Employment Act 1988* (NI) (the Employment Act) to enable a private, third party workers' compensation scheme administrator (scheme administrator) to deliver the Norfolk Island Workers' Compensation Scheme (the Scheme). It also makes a number of improvements to the Scheme (for example, giving people better access to rehabilitation programs), bringing it closer into line with workers' compensation schemes in the rest of Australia.

In response to the Parliamentary Joint Committee on Human Rights' request for information about an employee's right to compensation being suspended if they fail, without reasonable excuse, to attend an assessment, provide information or engage with a rehabilitation program, I provide the following.

a) How long payments may be suspended for;

Requirement to attend assessment for permanent incapacity (section 32A)

Subsection 32A provides that an employee's right to lump sum compensation in relation to a loss or impairment of a bodily or mental function is suspended until the employee receives a new notice setting out new arrangements for an assessment and the employee attends that assessment.

Requirement to undertake rehabilitation program (section 38)

Subsection 38(3) provides that an employee's right to compensation in relation to an injury or condition would be suspended until the employee begins, or continues with, a rehabilitation program.

13 The assistant minister's response to the committee's inquiries was received on 14 September 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.

Requirement to provide information (section 47)

Subsection 47(3) provides that if a claimant fails, without reasonable excuse, to provide information required by the Employment Liaison Officer (ELO), any right of the claimant to compensation in relation to the injury, condition or death is suspended until the claimant complies with a notice to provide the information.

Requirement to attend independent medical examination (section 47B)

Subsection 47B(2) provides that an employee's right to compensation in relation to an injury is suspended until the employee receives a new notice setting out new arrangements for an independent medical examination and the employee attends that examination.

b) whether there is any requirement that new notices be promptly provided;

Key performance measures and strict timeframes for assessing claims and making compensation payments are included in the Service Level Agreement between the Department of Infrastructure, Transport, Regional Development and Communications and the private third party claims administrator contracted to administer the Scheme.

c) what is the legitimate objective behind suspending such payments and how is suspending such payments rationally connected (that is, effective to achieve) to that objective; and*Requirement to attend assessment for permanent incapacity (section 32A)*

The purpose of an assessment for permanent incapacity is to help determine the amount of compensation an employee is entitled to receive in relation to a loss or impairment of a bodily or mental function. It is therefore in the best interests of the employee to attend the assessment and therefore unlikely that this provision would be required.

In cases where an employee fails to attend an assessment there is no way for the employee's entitlement to compensation to be accurately determined. This may result in the employee receiving more than the amount they are entitled to or, conversely, in them receiving less. The primary objective behind the suspension of an employee's entitlement to compensation is therefore to provide an incentive to employees who may not be acting in their own best interests to attend an assessment, and to facilitate the compensation process.

Additionally, the provision helps ensure the assessment of claims is fair and transparent and that decisions about entitlements to compensation are made using independent evidence from a registered medical practitioner.

Requirement to undertake rehabilitation program (section 38)

Rehabilitation programs aim to provide injured employees a pathway back into the workplace and help people regain control and independence.

Participation in rehabilitation programs can assist with recovery from injury and improve employees' physical and mental health. It is therefore in the best interests of an employee to participate in a rehabilitation program and therefore unlikely that this provision would be required.

In cases where an employee fails to participate in a rehabilitation program, their recovery from injury and return to work is likely to be delayed, which could in turn have significant detrimental impacts on their mental health. The primary objective behind the suspension of an employee's entitlement to compensation is therefore to provide an incentive to employees to participate in a rehabilitation program for the recovery of physical and mental health.

Requirement to provide information (section 47)

In order for an assessor to accurately assess an employee's claim for compensation they must have access to information relevant to the claim. It is therefore in the best interests of the employee to provide all information relevant to the claim and unlikely that this provision would be required in the majority of cases.

In cases where an employee fails to provide the relevant information, there is no way for an employee's entitlement to compensation to be accurately determined. This may result in the employee receiving more than the amount they are entitled to or, conversely, in them receiving less. The primary objective behind the suspension of an employee's entitlement to compensation until the relevant information is received is therefore to provide an incentive to employees who may not be acting in their own best interests.

In addition, the provision helps ensure the assessment of claims is fair and transparent and that decisions about entitlements to compensation are made using appropriate evidence.

Requirement to attend independent medical examination (section 47B)

The purpose of the independent medical examination is to help determine the amount of compensation an employee is entitled to receive. It is therefore in the best interests of the employee to attend an examination and unlikely that this provision would be required.

In cases where an employee fails to attend an independent medical examination there is no way for an employee's entitlement to compensation to be accurately determined. This may result in the employee receiving more than the amount they are entitled to or, conversely, to them receiving less. The primary objective behind the suspension of an employee's entitlement to compensation is therefore to provide an additional incentive to employees who may not be acting in their own best interests to attend an examination.

Additionally, the provision helps ensure the assessment of claims is fair and transparent and decisions about entitlements to compensation are

made using evidence from an independent, registered medical practitioner.

d) what safeguards are in place to ensure any limitation on rights is proportionate to the objective sought to be achieved.

For all requirements

The employee may have a reasonable excuse for not fulfilling the requirements. Where this occurs, the compensation they are entitled to will not be suspended. Examples of a reasonable excuse could include illness, difficulty accessing transport or urgent family business.

Section 65 of the Employment Act provides for internal review of decisions made in relation to claims for compensation. If an application for review is received, the matter will be reviewed by someone other than the original decision maker and must be completed within 10 business days.

Requirement to attend independent medical examination (section 47B)

Subsection 47A(6) provides for a limitation on the frequency of the independent examinations an employee is required to undergo to be prescribed in rules.

In summary, the key objectives of a workers' compensation scheme are to support injured workers and to assist them to return to the workplace. The measures in the Ordinance engage certain human rights, but they are also consistent with those rights in that they are reasonable, necessary and proportionate to achieving the legitimate objectives as described above.

Concluding comments

International human rights legal advice

Rights to social security and an adequate standard of living, and rights of persons with disability

2.35 A workers' compensation scheme that supports injured workers and assists them to return to the workplace through facilitating access to rehabilitation and other medical services may promote a number of human rights, such as the rights to work, social security and an adequate standard of living as well as the rights of people with disability.¹⁴ However, the introduction of provisions to suspend the right to compensation if an employee or claimant fails, without reasonable excuse, to fulfil certain requirements, engages and limits the rights to social security and an adequate standard of living and may constitute a retrogressive measure. 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.

14 Convention on the Rights of Persons with Disabilities, articles 26 and 27.

2.36 The assistant minister advised that the objective of suspending compensation payments for failing to fulfil various requirements without reasonable excuse, including attending an assessment for permanent incapacity,¹⁵ providing information relevant to the claim to the assessor,¹⁶ and attending an independent medical examination,¹⁷ is to provide an incentive to employees who may not be acting in their own best interests to attend an assessment or examination or provide the relevant information, as well as to facilitate the compensation process. Additionally, the assistant minister noted that the measures would help to ensure that the assessment of claims are fair and transparent and that decisions about entitlements to compensation are made using independent evidence from a registered medical practitioner. Regarding the requirement to undertake a rehabilitation program, the assistant minister advised that the primary objective is to provide an incentive to employees to participate in a rehabilitation program for the recovery of physical and mental health. The assistant minister noted that fulfilment of these mutual obligation requirements is necessary to determine the amount of compensation that an employee is entitled to receive and to assist with an employee's recovery and rehabilitation. The assistant minister suggested that it would be in the employee's best interests to fulfil the requirements and therefore unlikely that the provisions would be required.

2.37 A legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. It is not sufficient, therefore, that a measure simply seeks an outcome regarded as desirable or convenient. It is unclear whether there is a pressing or substantial concern that requires addressing, having regard to the assistant minister's statement that the provisions that allow for the suspension of the right to workers compensation would unlikely be required. The assistant minister further advised that the amendments enable a private, third party workers' compensation scheme administrator to deliver the Norfolk Island Workers' Compensation Scheme. Administrative convenience, in and of itself, is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights law.

2.38 However more broadly, the objective of facilitating the compensation process and ensuring that employees have access to the full amount of compensation payments that they are entitled to receive as well as access to rehabilitation programs to improve their health and ability to re-join the workforce,

15 Schedule 1, substituted item 73ZY, new section 32A.

16 Schedule 1, substituted item 74ZF, substituted section 47.

17 Schedule 1, substituted item 74ZF, new section 47B.

may constitute a legitimate objective for the purposes of international human rights law, and the measure may be rationally connected to that objective.¹⁸

2.39 In assessing the proportionality of the measure, it is necessary to consider the length of time that payments may be suspended. The greater the time period for which payments may be suspended, the greater the interference with rights is likely to be and the less likely the measure may be considered proportionate. The assistant minister advised that regarding the requirements to attend an assessment for permanent incapacity¹⁹ and an independent medical examination,²⁰ the right to compensation is suspended until the Employment Liaison Officer gives the employee a new notice setting out the new arrangements for the assessment or examination, and the employee attends that assessment or examination. Regarding the requirement to undertake a rehabilitation program, the right to compensation is suspended until the employee begins, or continues with, a rehabilitation program.²¹ Regarding the requirement to provide information, any right of the claimant to compensation is suspended until the claimant complies with the notice.²² The promptness at which new notices are provided to employees and claimants is likely to have a practical effect on how long payments may be suspended for. The assistant minister advised that there are strict timeframes for assessing claims and making compensation payments in the Service Level Agreement which the contracted claims administrator is governed by. This agreement may provide some form of oversight to ensure new notices are promptly provided, although it is noted that there is no legislative requirement that the notice be sent within a set timeframe. Without clear timeframes for issuing new notices and maximum periods of time for which payments can be suspended, the length of time that the right to compensation is suspended may depend on the efficiency of the Employment Liaison Officer as well as the availability of an independent capacity assessor, rehabilitation program provider and independent medical practitioner. For example, there is a possibility that a person may have their right to compensation suspended for a significant period of time if there are limited assessment or examination appointments available

18 Although noting that no evidence was provided as to whether suspension of payments would in fact provide an incentive for employee's to comply with the requirements, and benefit sanctions in other areas of social security have not always been demonstrated to be effective, see Economic and Social Research Council, *Final findings report: Welfare Conditionality Project 2013-2018* (June 2018) 23. See also, Del Roy Fletcher and John Flint, 'Welfare conditionality and social marginality: The folly of the tutelary state?' (2018) *Critical Social Policy* 38(4) 771, 772, 775-785.

19 Schedule 1, substituted item 73ZY, new subsection 32A(2).

20 Schedule 1, substituted item 74ZF, new subsection 47B(2).

21 Schedule 1, substituted item 74P, substituted subsection 38(3).

22 Schedule 1, substituted item 74ZF, substituted subsection 47(3).

(noting also that there may be more limited medical services available on Norfolk Island).

2.40 It is not clear if there is flexibility to end the suspension prior to compliance with the new notice in circumstances where there is significant delay in issuing a new notice and/or attending the assessment or examination due to circumstances beyond the control of the employee. The assistant minister has advised that if the employees themselves have a reasonable excuse for not fulfilling requirements, the compensation payments would not be suspended. The assistant minister has advised this may include 'illness, difficulty accessing transport or urgent family business'. This may operate as a safeguard insofar as it provides flexibility to treat different cases differently, depending on how it is applied in practice.

2.41 Another relevant factor in assessing whether the measure is proportionate is whether there is the possibility of oversight and the availability of review. The assistant minister advised that employees have access to internal review of decisions, and external review by a tribunal is also available,²³ which may operate as important safeguards.

2.42 However, the assistant minister's response did not clarify whether there are any less rights restrictive alternatives to achieving the objective of incentivising employees to act in their best interests and facilitate the compensation process. It is unclear why, for example, the instrument does not provide for the issuing of warning notices or an opportunity for genuine consultation with those affected prior to the complete suspension of the right to compensation.

2.43 In conclusion, while the objective of encouraging persons to engage in rehabilitation and other requirements necessary to facilitate the compensation process may be legitimate for the purposes of international human rights law, questions remain as to whether suspending the right to compensation for failing to fulfil certain requirements without reasonable excuse would be a proportionate means of achieving that objective, noting that payments may be suspended for what could be a significant period of time due to matters outside the employee's control and that it is not clear whether there are any less rights restrictive ways of achieving the stated objective.

Committee view

2.44 The committee thanks the assistant minister for this response. The committee notes that this measure amends the Norfolk Island Continued Laws Ordinance 2015 with the effect of amending the *Employment Act 1988 (NI)* and the *Employment Regulations 1991 (NI)*, and provides that an employee's right to compensation is suspended in the several circumstances.

23 Schedule 1, substituted item 74ZV, new section 67 and Schedule 1, substituted item 75, substituted section 82.

2.45 The committee notes the assistant minister's advice that the objective of suspending compensation payments for failing to fulfil various requirements without reasonable excuse is to provide an incentive to employees who may not be acting in their own best interests to attend an assessment or examination or provide the relevant information, as well as to facilitate the compensation process. Additionally, the assistant minister noted that the measures would help to ensure that the assessment of claims are fair and transparent, made using independent evidence from a registered medical practitioner, and provides incentives to employees to participate in a rehabilitation program for the recovery of physical and mental health.

2.46 The committee also notes the legal advice that by providing that an employee's right to compensation may be suspended where they have failed to engage with certain requirements without a reasonable excuse, the instrument engages and may limit the rights to social security and an adequate standard of living as well as the rights of persons with disability. The introduction of benefit sanctions may constitute a retrogressive measure with respect to the duty to refrain from taking backwards steps with respect to the realisation of economic, social and cultural rights. Retrogressive measures and limitations on rights may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are proportionate way to achieve that objective.

2.47 The committee notes the assistant minister's response and the legal advice and considers that the measure pursues the legitimate objective of supporting injured workers and assisting them to return to the workplace. The committee notes that the broader objective of the workers' compensation scheme promotes the rights to work, social security and adequate standard of living as well as the rights of people with disability, particularly with respect to facilitating access to rehabilitation services. However, questions remain as to whether the measure is proportionate, noting that payments may be suspended for a potentially significant period of time due to matters outside the employee's control and it is unclear whether there are other less rights restrictive ways to achieve the objective.

2.48 The committee considers that the proportionality of this measure would be assisted if the instrument were amended to provide that:

- (a)** the suspension of an employee's right to compensation does not continue unless the responsible party in relation to the claim gives the employee a new notice within a reasonable time, and the date for attending an assessment falls within a reasonable timeframe; and
- (b)** an employee is first given a warning notice to comply within a set timeframe before the right to compensation is suspended.

2.49 The committee draws these human rights concerns to the attention of the assistant minister and the Parliament.

Senator the Hon Sarah Henderson
Chair

