



Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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Committee information

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

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

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

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

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

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

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

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

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

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

Chapter 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].

- 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 there are any other less 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/RealizingHRThroughGovernmentBudgets.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.

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

Appendix 1

Deferred legislation¹

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Native Title Amendment (Infrastructure and Public Facilities) Bill 2020;
- Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020; and
- Territories Legislation Amendment Bill 2020.

1 This appendix can be cited as: Parliamentary Joint Committee on Human Rights, Deferred legislation, *Report 12 of 2020*; [2020] AUPJCHR 150.

