



# Parliamentary Joint Committee on Human Rights

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Human rights scrutiny report

Report 6 of 2020

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# Membership of the committee

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|  |                                |
|--|--------------------------------|
| Senator the Hon Sarah Henderson, Chair | Victoria, LP                   |
| Mr Graham Perrett MP, Deputy Chair     | Moreton, Queensland, ALP       |
| Senator Patrick Dodson                 | Western Australia, ALP         |
| Mr Steve Georganas MP                  | Adelaide, South Australia, ALP |
| Mr Ian Goodenough MP                   | Moore, Western Australia, LP   |
| Senator Nita Green                     | Queensland, ALP                |
| Ms Celia Hammond MP                    | Curtin, Western Australia, LP  |
| Senator Nick McKim                     | Tasmania, AG                   |
| Senator Andrew McLachlan CSC           | South Australia, LP            |
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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.<sup>1</sup> A description of the rights most commonly arising in legislation examined by the committee is available on the committee's website.<sup>2</sup>

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.

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

2 See the committee's *Short Guide to Human Rights* and *Guide to Human Rights*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](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.<sup>3</sup>

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3 See *Guidance Note 1 – Drafting Statements of Compatibility*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)



## Chapter 1<sup>1</sup>

### COVID-19 legislation

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

- bills introduced into the Parliament between 12 to 14 May 2020; and
- legislative instruments registered on the Federal Register of Legislation between 22 April 2020 and 12 May 2020.

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

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, COVID-19 legislation, *Report 6 of 2020*; [2020] AUPJCHR 79.

## Response required

1.3 The committee seeks a response from the relevant ministers with respect to the following bill and legislative instruments.

### **Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment Determination (No. 2) 2020 [F2020L00466]<sup>1</sup>**

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | This instrument amends the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 to prevent or control the entry or spread of COVID-19 in Queensland, Western Australia, South Australia and the Northern Territory. The instrument commenced on 24 April 2020 |
| <b>Portfolio</b>               | Health  |
| <b>Authorising legislation</b> | <i>Biosecurity Act 2015</i>   |
| <b>Disallowance</b>            | This instrument is exempt from disallowance (see subsection 477(2) of the <i>Biosecurity Act 2015</i> )   |
| <b>Rights</b>                  | Life; health; freedom of movement; equality and non-discrimination  |
| <b>Status</b>                  | Seeking additional information  |

### **Controlling entry to certain remote communities**

1.4 This instrument amends the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020,<sup>2</sup> which establishes that persons cannot enter designated areas except in specified circumstances, to prevent or control the entry

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 Remote Communities) Amendment Determination (No. 2) 2020 [F2020L00466], *Report 6 of 2020*; [2020] AUPJCHR 80.

2 The Parliamentary Joint Committee on Human Rights considered this in *Report 5 of 2020* (29 April 2020), pp. 6-9.

or spread of COVID-19 in Queensland, Western Australia, South Australia and the Northern Territory.

1.5 The key changes are: to require a person entering a designated area to have not been in a foreign country, rather than outside Australian territory, in the 14 days immediately prior to entry; to add a new designated area in Queensland; to remove two designated areas in South Australia; and to exclude certain areas in the Northern Territory as designated areas.

1.6 This instrument is made under section 477(1) of the *Biosecurity Act 2015*, which provides that during a human biosecurity emergency period, the Health Minister may determine emergency requirements, or give directions, that they are satisfied are necessary to prevent or control the entry, emergence, establishment or spread of the disease in Australian territory. A person who fails to comply with a requirement or direction may commit a criminal offence (imprisonment for maximum 5 years, or 300 penalty units).<sup>3</sup>

### **Preliminary international human rights legal advice**

#### ***Life, health, freedom of movement, and equality and non-discrimination***

1.7 The explanatory statement notes that the purpose of these amendments is to manage the human biosecurity risk posed by COVID-19 and to improve the operational effectiveness of the current Determination.<sup>4</sup> As the measure is intended to prevent and manage the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that the measure may promote the rights to life and health.<sup>5</sup> However, by restricting entry to these locations, and adding a new location as a designated area, the instrument may also limit the right to freedom of movement. Furthermore, the restrictions of entry would appear to apply to anyone who lives in the designated area, and would mean that they would need to be granted permission to re-enter their community subject to the requirements stipulated by the instruments, thereby potentially limiting their freedom of movement. It appears that these remote geographical areas may have a high proportion of Indigenous people living there, although this has not been specifically addressed in the explanatory materials. As such, the restrictions may have a disproportionate impact on Indigenous persons. Consequently, the measure may also engage the right to equality and non-discrimination,<sup>6</sup> which provides that

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3 *Biosecurity Act 2015*, section 479.

4 Explanatory statement, p. 1.

5 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.

6 International Covenant on Civil and Political Rights, articles 2 and 26. See also International Convention on the Elimination of All Forms of Racial Discrimination.

everyone is entitled to enjoy their rights without distinction based on a personal attribute (for example, race).<sup>7</sup>

1.8 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.9 As there is no statement of compatibility accompanying the explanatory statement to this instrument (noting that this is not required),<sup>8</sup> no assessment of the compatibility of this measure with any human rights has been provided. Further information is required as to the compatibility of these measures with human rights, particularly the rights to freedom of movement, and equality and non-discrimination.

### Committee view

**1.10 The committee notes that this instrument amends requirements designed to prevent or control the entry or spread of COVID-19 in designated remote communities in Australia, including establishing requirements for entry to these areas, for the duration of the period of emergency under the *Biosecurity Act 2015*.**

**1.11 The committee considers that the measure, which is designed to prevent the spread of COVID-19, is likely to promote and protect the rights to life and health, noting that the right to life requires Australia to take positive measures to protect life and the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee notes that the measure may also limit the rights to freedom of movement and equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.**

**1.12 As no statement of compatibility has been provided, which we note is not required, the committee seeks the minister's advice as to the compatibility of this measure with human rights, particularly the rights to freedom of movement and equality and non-discrimination.<sup>9</sup>**

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

8 Noting that this instrument is not subject to disallowance, and as such section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* does not apply, as it only requires rule-makers to prepare a statement of compatibility in relation to a legislative instrument that is subject to disallowance under section 42 of the *Legislation Act 2003*,

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

## Privacy Amendment (Public Health Contact Information) Bill 2020<sup>11</sup>

|                  |  |
|------------------|--|
| <b>Purpose</b>   | The bill seeks to provide stronger privacy protections for users of the Commonwealth's COVIDSafe app and data collected through the COVIDSafe app than that which would otherwise apply in the <i>Privacy Act 1988</i> |
| <b>Portfolio</b> | Health   |
| <b>Rights</b>    | Health, privacy  |
| <b>Status</b>    | Seeking additional information   |

### COVIDSafe application

1.13 The COVIDSafe application (COVIDSafe app), which can be voluntarily downloaded and operated on Android and iOS personal devices, has been developed by the Commonwealth Government in response to the COVID-19 pandemic. The COVIDSafe app is designed to help find close contacts of persons who have tested positive for COVID-19.<sup>12</sup>

1.14 Legislation to protect privacy and impose requirements on data collected through the COVIDSafe app, and the use or disclosure of such data, was first made on 25 April 2020 via the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020 (the determination). This determination was made under section 477 of the *Biosecurity Act 2015* (Biosecurity Act) and set out a number of requirements in relation to the collection, use and disclosure of COVIDSafe app data, failure to comply with which could result in a criminal sanction imposed under the Biosecurity Act.<sup>13</sup>

1.15 The Privacy Amendment (Public Health Contact Information) Bill 2020 (the bill), which received Royal Assent on 15 May 2020, amends the *Privacy Act 1988*

<sup>11</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, Privacy Amendment (Public Health Contact Information) Bill 2020, *Report 6 of 2020*; [2020] AUPJCHR 81. Note that this entry also considers the human rights compatibility of the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020 [F2020L00480].

<sup>12</sup> Explanatory memorandum, p. 2.

<sup>13</sup> *Biosecurity Act 2015*, section 479. Such an offence is punishable by imprisonment for a maximum of 5 years, or 300 penalty units (currently \$63,000, see *Crimes Act 1914*, section 4AA), or both.

(Privacy Act) to establish a series of offences for misuse of data from the COVIDSafe app, or coercion relating to the use of the COVIDSafe app; sets out specific requirements regarding COVIDSafe app data and COVIDSafe; and includes the application of general privacy measures. Many of the measures set out in the bill are substantially similar to those contained in the determination. All offences are punishable by imprisonment for 5 years, or 300 penalty units, or both. Extended geographical jurisdiction applies to all offences,<sup>14</sup> which has the effect that persons may be prosecuted for an offence even where the relevant conduct took place outside Australia.<sup>15</sup>

1.16 As the bill replaces the determination,<sup>16</sup> this report focuses on the provisions of the bill in assessing the compatibility of this legislation with human rights.

## **Preliminary international human rights legal advice**

### ***Rights to health and privacy***

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

1.18 As the legislation is designed to regulate the use, collection and disclosure of data generated through the COVIDSafe app, it appears to engage a number of human rights. The object of the bill is stated to be:

to assist in preventing and controlling the entry, emergence, establishment or spread of the coronavirus known as COVID-19 into Australia or any part of Australia by providing stronger privacy protections for COVID app data and COVIDSafe users in order to:

- (a) encourage public acceptance and uptake of COVIDSafe; and
- (b) enable faster and more effective contact tracing.<sup>17</sup>

1.19 As such, as this is a measure designed to help prevent the establishment and spread of COVID-19, which has the ability to cause high levels of morbidity and

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<sup>14</sup> Privacy Amendment (Public Health Contact Information) Bill 2020, section 94J.

<sup>15</sup> *Criminal Code Act 1995*, section 15.1.

<sup>16</sup> See Schedule 2, item 1 which repeals the determination, which section 2 states applies the day after the Act receives Royal Assent.

<sup>17</sup> Schedule 1, item 2, section 94B.

mortality, it would appear that it may promote the right to health.<sup>18</sup> The right to health is the right to enjoy the highest attainable standard of physical and mental health.<sup>19</sup> Article 12(2) of the International Covenant on Economic, Social and Cultural Rights requires that State parties shall take steps to prevent, treat and control epidemic diseases.<sup>20</sup> The United Nations Committee on Economic, Social and Cultural Rights has stated that the control of diseases refers to efforts to:

make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.<sup>21</sup>

1.20 Prohibiting unauthorised collection, use and disclosure of COVIDSafe app data is also likely to promote the right to privacy. As noted in the statement of compatibility, the bill provides stronger provisions than existing protections for personal information collected by the COVIDSafe app, thereby promoting the right to privacy.<sup>22</sup> However, regulating the collection, use and disclosure of such data is also likely to limit the right to privacy, as such data contains personal information about the user of the COVIDSafe app. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.<sup>23</sup> It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.21 Any limitation on a right must be shown to be aimed at achieving a legitimate objective, which 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. As noted above, the object of the bill is to encourage more people to download the COVIDSafe app in order to enable faster and more effective contact tracing of anyone who may have been exposed to COVID-19. The statement of compatibility states the bill is intended to provide privacy safeguards that build confidence in the COVIDSafe app and is intended to bolster the uptake and effectiveness of the COVIDSafe app as a tool to help Australia respond to the serious health risks posed

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<sup>18</sup> International Covenant on Economic, Social and Cultural Rights, article 12.

<sup>19</sup> International Covenant on Economic, Social and Cultural Rights, article 12(1).

<sup>20</sup> International Covenant on Economic, Social and Cultural Rights, article 12(2)(c).

<sup>21</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (2000), [16].

<sup>22</sup> Statement of compatibility, p. 5.

<sup>23</sup> International Covenant on Civil and Political Rights, article 17.

by COVID-19.<sup>24</sup> It further states that the bill seeks to achieve the objective of combatting the community spread of COVID-19 by collecting personal information about users who come into contact with each other.<sup>25</sup> These would appear to constitute legitimate objectives for the purposes of international human rights law.

1.22 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective in achieving the objective being sought. In this instance, while not explained in the statement of compatibility, the privacy measures in this bill may be capable of achieving the stated objective of improving the uptake and effectiveness of the COVIDSafe app. Further, the establishment of offences for the unauthorised collection, use or disclosure of COVIDSafe app data, and the significant corresponding penalties, may also be effective to achieve the stated objective of improving confidence in the COVIDSafe app, and bolstering its uptake. However, there are inherent challenges in assessing what impact (if any) the introduction of these legislative privacy measures may have on an individual's decision to install and use the COVIDSafe app.

1.23 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. A relevant consideration in determining the proportionality of the measure is whether there are adequate safeguards in place to protect the right to privacy.

### **Safeguards**

1.24 The bill seeks to amend the Privacy Act to include a new Part VIIIA which contains a number of measures that are designed to provide privacy protections relating to COVIDSafe app data and the COVIDSafe app.<sup>26</sup> A key protection is that the bill establishes<sup>27</sup> that it is an offence to collect, use or disclose COVIDSafe app data, other than for specified permitted purposes. These purposes include the collection, use or disclosure:

- by a person working for a state or territory health authority, or a contracted service provider for a government contract with the 'data store administrator', for the purposes of 'contact tracing';<sup>28</sup>

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<sup>24</sup> Statement of compatibility, p. 5.

<sup>25</sup> Statement of compatibility, p. 6.

<sup>26</sup> See also, statement of compatibility, pp. 5-7.

<sup>27</sup> Schedule 1, item 2, section 94D.

<sup>28</sup> 'Contact tracing' is defined in Schedule 1, item 2, subsection 94D(4) of the bill to mean the process of identifying and notifying persons who have been in contact with a person who has tested positive for COVID-19, and providing information and advice to those persons. See also subsection 6(4) of the determination.



- by the 'data store administrator'<sup>29</sup> to enable contact tracing by the state or territory health authorities or to ensure the proper functioning, integrity or security of the COVIDSafe app or of the 'National COVIDSafe Data Store';<sup>30</sup>
- for the purpose of transferring encrypted data between communications devices through the COVIDSafe app or transferring such data to the National COVIDSafe Data Store;
- for the Information Commissioner to perform various functions, including to investigate any interferences with privacy;
- for investigating or prosecuting persons who may have committed an offence under this Part;
- for producing de-identified statistical information about the total number of registrations through the COVIDSafe app; or
- for confirming that data requested to be deleted by the COVIDSafe user is the correct data.

1.25 The bill also prohibits anyone taking action designed to coerce another to download or have the COVIDSafe app, or to coerce them into consenting to upload COVIDSafe app data.<sup>31</sup> This includes refusing to enter into a contract with that person, taking adverse action against them for the purposes of the *Fair Work Act 2009*, declining to provide or receive goods or services to or from that person (or providing or receiving less monetary consideration for the goods or services), or refusing that person entry to certain premises.<sup>32</sup>

1.26 Further, the bill makes it an offence to:

- cause COVIDSafe app data to be uploaded from a mobile device without the consent of the individual device user;<sup>33</sup>
- retain COVIDSafe app data which has been uploaded to the National COVIDSafe Data Store on a database outside Australia, or disclose such data

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<sup>29</sup> 'Data store administrator' is defined in Schedule 1, item 1, subsection 6(1), to mean the agency specified in a determination made by the Secretary of the Health Department, or otherwise the Health Department. Subsection 94Z(3) states that the Secretary of the Health Department must not determine an enforcement agency, intelligence agency, the Australian Geospatial Intelligence Organisation or the Defence Intelligence Organisation to be the data store administrator.

<sup>30</sup> 'National COVIDSafe Data Store' is defined in Schedule 1, item 1, subsection 6(1), to mean the database administered by or on behalf of the Commonwealth for the purpose of contact tracing.

<sup>31</sup> Schedule 1, item 2, subsection 94H(1). See also section 9 of the determination.

<sup>32</sup> Schedule 1, item 2, subsection 94H(2). See also subsection 9(2) of the determination.

<sup>33</sup> Or, where relevant, a parent, guardian or carer. See Schedule 1, item 2, section 94E. See also subsection 7(1) of the determination.

to a person outside Australia (except by a person working for a state or territory health authority and the disclosure is for undertaking contact tracing);<sup>34</sup> or

- decrypt encrypted COVIDSafe app data that is stored on a telecommunications device.<sup>35</sup>

1.27 In addition, the data store administrator must take reasonable steps to ensure COVIDSafe app data is not retained on a mobile telecommunications device for more than 21 days (or if that is not possible, for no longer than the shortest practicable period).<sup>36</sup> A user can also request the deletion of their registration data, but the data administrator does not have to delete data which has been de-identified, or data which is only uploaded to the National COVIDSafe Store as a result of that user interacting with another device.<sup>37</sup> The 'data store administrator'<sup>38</sup> is further restricted from collecting any COVIDSafe app data from a former app user, who has deleted the app from their telecommunications device.<sup>39</sup> Further, a person who has received COVIDSafe app data in error is required to delete it, and notify the data store administrator that they have received it.<sup>40</sup>

1.28 The bill also requires that once the Minister for Health has determined that use of the COVIDSafe app is no longer required, or likely to be effective, in preventing or controlling the entry, emergence, establishment or spread of COVID-19, the data store administrator must delete all COVIDSafe App data from the National COVIDSafe Store as soon as reasonably practicable, and notify all users of the COVIDSafe app of these measures.<sup>41</sup>

1.29 The bill further provides that a breach of a requirement under this new Part VIIIA is an interference with privacy under the Privacy Act,<sup>42</sup> and a breach of a requirement by the data store administrator constitutes an eligible data breach

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<sup>34</sup> Schedule 1, item 2, section 94F. See also subsections 7(3) – (4) of the determination.

<sup>35</sup> Schedule 1, item 2, section 94G. See also section 8 of the determination.

<sup>36</sup> Schedule 1, item 2, section 94K. See also subsection 7(2) of the determination, which makes this a requirement, non-compliance with which would be an offence under the *Biosecurity Act 2015*.

<sup>37</sup> Schedule 1, item 2, section 94L.

<sup>38</sup> Under section 94Z, the Secretary of the Department of Health may, by notifiable instrument, determine that a particular agency is the data store administrator for the purposes of one or more provisions of Part VIIIA.

<sup>39</sup> Schedule 1, item 2, section 94N.

<sup>40</sup> Schedule 1, item 2, section 94M.

<sup>41</sup> Schedule 1, item 2, section 94P.

<sup>42</sup> Schedule 1, item 2, section 94R.

(which requires that individuals affected by the breach are notified).<sup>43</sup> It also states that the Information Commissioner can assess whether entities or State or territory authorities comply with the requirements of new Part VIIIA,<sup>44</sup> and in the course of an assessment must notify the Commissioner of Police or the Director of Public Prosecutions if they form the view that an offence may have been committed.<sup>45</sup>

1.30 Under the Privacy Act, the Information Commissioner can investigate complaints regarding acts or practices which may have interfered with a person, or a class of persons', privacy.<sup>46</sup> Complaints may be dealt with as 'representative' of a class of persons, in which case it is not necessary to obtain the consent of members of that class, or identify class members by naming them or specifying how many there are.<sup>47</sup> The Information Commissioner may also, on their own initiative, investigate an act or practice that may be an interference with the privacy of an individual.<sup>48</sup>

1.31 In undertaking such investigations, the Information Commissioner may: conciliate complaints;<sup>49</sup> make preliminary inquiries of any person;<sup>50</sup> require a person to give information or documents, or attend a compulsory conference;<sup>51</sup> and transfer matters to an alternative complaints body under certain circumstances.<sup>52</sup> After an investigation, the Information Commissioner may make a non-binding determination requiring that the person or entity must: not repeat or continue the act or practice; take specified steps within a specified period to ensure that the act or practice is not repeated or continued; or perform any reasonable act or course of conduct to redress any loss or damage suffered by one or more of those individuals.<sup>53</sup> The Information Commissioner may also determine that one or more of the complainants are entitled to compensation for any loss or damage suffered by reason of the act or practice (including injury to feelings or humiliation).<sup>54</sup> A Commonwealth agency to which a determination relates must comply with declarations included in a determination which require that it not repeat the relevant conduct, or take steps or

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<sup>43</sup> Schedule 1, item 2, section 94S. See also Part IIIC of the *Privacy Act 1988*.

<sup>44</sup> Privacy Amendment (Public Health Contact Information) Bill 2020, section 94T.

<sup>45</sup> Privacy Amendment (Public Health Contact Information) Bill 2020, section 94U.

<sup>46</sup> *Privacy Act 1988*, sections 36 and 40.

<sup>47</sup> *Privacy Act 1988*, section 38.

<sup>48</sup> *Privacy Act 1988*, subsection 40(2).

<sup>49</sup> *Privacy Act 1988*, section 40A.

<sup>50</sup> *Privacy Act 1988*, section 42.

<sup>51</sup> *Privacy Act 1988*, sections 44 and 46.

<sup>52</sup> *Privacy Act 1988*, section 50.

<sup>53</sup> *Privacy Act 1988*, section 52. Subsection 52(1B) provides that a determination under section 52 is not binding or conclusive between relevant parties.

<sup>54</sup> *Privacy Act 1988*, subsection 52(1AB).

perform an act set out under the determination.<sup>55</sup> Where an agency fails to comply, an application may be made to the Federal Circuit Court or the Federal Court for an order directing the agency to comply.<sup>56</sup> Where a determination states that a complainant is entitled to compensation, that sum is recoverable as a debt due by the agency or the Commonwealth.<sup>57</sup>

1.32 The bill also provides that the Health Minister must, every six months, cause a report to be prepared on the operation and effectiveness of COVIDSafe and the National COVIDSafe Data Store during that six month period.<sup>58</sup> The Information Commissioner must, likewise, cause a report to be prepared on the performance of the Commissioner's functions, and the exercise of the Commissioner's powers, under or in relation to this new Part VIIIA within the same timeframe.<sup>59</sup>

### ***Initial privacy assessment***

1.33 As set out above, in considering the proportionality of any limitation on the right to privacy, it is important to consider any relevant safeguards. In this instance, the bill sets out a range of privacy safeguards. It is significant that data on a personal telecommunications device is encrypted and must not be retained for more than 21 days, and that it is an offence to collect, use or disclose such data other than in specified circumstances. It is also relevant that use of the COVIDSafe app itself is voluntary, data can only be uploaded to the National COVIDSafe Data Store after the COVIDSafe app user has consented to the upload, that there are offences for requiring the use of the COVIDSafe app, and that users can delete the COVIDSafe app at any time and request the deletion of their registration data. It is also significant that the bill provides that any COVIDSafe app data which has been uploaded onto the National COVIDSafe Data Store must be held within Australia, and cannot be disclosed to a person outside Australia other than in limited circumstances. Further, it is relevant that the bill provides that any breach of a requirement under this new Part VIIIA constitutes an 'eligible data breach' under the Privacy Act, and enlivens the oversight and investigatory powers of the Information Commissioner. These are all important privacy safeguards that assist in assessing the proportionality of any limitation on the right to privacy.

1.34 However, some questions remain as to the manner in which personal information will be collected, used and disclosed in practice. Foremost, the scope of the information being collected by the COVIDSafe app is unclear, as this is not set out in the bill (and could therefore change over time without legislative oversight). The bill defines 'COVIDSafe app data' as 'data which has been collected or

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<sup>55</sup> *Privacy Act 1988*, section 58.

<sup>56</sup> *Privacy Act 1988*, section 62.

<sup>57</sup> *Privacy Act 1988*, section 60.

<sup>58</sup> Schedule 1, item 2, section 94ZA.

<sup>59</sup> Schedule 1, item 2, section 94ZB.

generated...through the operation of COVIDSafe' and is either registration data, or is stored, or has been stored (including before the commencement of this new Part VIIIA), on a communications device.<sup>60</sup> However, it does not explain the nature and type of data that is actually collected or generated through the operation of the COVIDSafe app, nor does it define 'registration data'. The explanatory memorandum states that 'COVIDSafe does not collect geolocation data',<sup>61</sup> however, there is nothing in the bill to this effect.

1.35 Further, the bill provides that the COVIDSafe app will facilitate 'contact tracing',<sup>62</sup> meaning identifying persons who have been 'in contact' with a person who has tested positive for COVID-19. 'In contact' is in turn defined to mean where the operation of the COVIDSafe app indicates that the person may have been 'in the proximity of' another person.<sup>63</sup> However, the term 'proximity' is not defined in the bill. The explanatory memorandum states that a person will only have been considered to be 'in contact' with another person where they are both COVIDSafe app users, have the COVIDSafe app operating and it subsequently detects the presence of the other person 'within the detectable proximity' of the COVIDSafe app.<sup>64</sup> This does not explain how close each telecommunications device must be in order to be considered 'in contact', nor if there is any particular duration required before a COVIDSafe app user is registered as being 'in contact' with another user's COVIDSafe app. Such information is significant for the purposes of privacy because it provides an indication of the scope of potential data that an individual with the COVIDSafe app installed collects when they carry their mobile device, and in turn shares with other users, and may potentially be uploaded onto the National COVIDSafe Data Store. The Privacy Impact Assessment undertaken in relation to the COVIDSafe app stated that where the COVIDSafe app detects another device with the COVIDSafe app installed within its bluetooth signal range, it will create an encrypted file, or 'digital handshake', every minute.<sup>65</sup> The Privacy Impact Assessment also stated that if a user consents, all digital handshakes will be uploaded to the National COVIDSafe Data Store.<sup>66</sup> The Department of Health's response to this is that data on the Data Store can only be accessed by state and territory health authorities if it meets the 'risk parameters'.<sup>67</sup> This would appear to suggest that data uploaded

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<sup>60</sup> Schedule 1, item 2, subsection 94D(5).

<sup>61</sup> Explanatory memorandum, p. 18.

<sup>62</sup> Schedule 1, item 2, subsection 94D(6).

<sup>63</sup> Schedule 1, item 1, subsection 6(1).

<sup>64</sup> Explanatory memorandum, p. 10.

<sup>65</sup> Maddocks, *The COVIDSafe Application, Privacy Impact Assessment*, 24 April 2020, pp. 19-20.

<sup>66</sup> Maddocks, *The COVIDSafe Application, Privacy Impact Assessment*, 24 April 2020, p. 21.

<sup>67</sup> Department of Health, *The COVIDSafe Application, Privacy Impact Assessment, Agency Response*, p. 17.

onto the National COVIDSafe Data Store will include *all* digital handshakes, including those that were for a minute or less, so long as the other user was in bluetooth range, but policies may be put in place so that not all of this data is shared with state and territory health authorities. Further information is required to assess why it is necessary to include all such data in the Data Store if it may not be necessary for the purposes of contact tracing, noting that in assessing the proportionality of any restriction on the right to privacy it is necessary to consider whether a measure is sufficiently circumscribed.

1.36 Further, as it is unclear what 'COVIDSafe app data' includes, it is also unclear how such data is de-identified, and whether such de-identification processes would sufficiently protect the privacy of personal information. For example, it is unclear whether data which has been de-identified could subsequently be reverse engineered, such that it could indicate personal information about COVIDSafe app users.

1.37 In addition, while the bill prescribes that data held on a telecommunications device is not to be retained for more than 21 days,<sup>68</sup> it would appear that once data is uploaded onto the National COVIDSafe Data Store it is retained until a determination is made by the Health Minister that the use of the COVIDSafe app is no longer required or is no longer likely to be effective.<sup>69</sup> It is not clear why it is necessary to retain the data for this length of time, noting that once the data is transferred to the state and territory health authorities for contact tracing, it would not appear necessary to continue to retain the data on the National COVIDSafe Data Store. It is also not clear how long state and territory health authorities are empowered to retain the data transferred to them by the data store administrator.<sup>70</sup>

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

- (a) what is the nature and type of data that is collected or generated through the operation of the COVIDSafe app, what information falls under the definition of 'COVIDSafe app data', and why does the bill not specify such matters;
- (b) whether the COVIDSafe app data uploaded to the National COVIDSafe Data Store will include all 'digital handshakes' between two users, regardless of the length of time the users are in proximity and what

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<sup>68</sup> Schedule 1, item 2, section 94K.

<sup>69</sup> Schedule 1, item 2, sections 94F and 94Y.

<sup>70</sup> Schedule 1, item 2, section 94X provides that the Privacy Act relevantly applies to a state or territory health authority. Australian Privacy Principle 11 provides that where personal information is not needed 'for any purpose for which the information may be used or disclosed under the APPs', reasonable steps must be taken to destroy the information or ensure that it is de-identified. However, this does not apply to 'Commonwealth records'.

'proximity' means in this context; and if so, why is it necessary to include all such data in the National COVIDSafe Data Store;

- (c) whether the de-identification process will sufficiently protect the privacy of personal information;
- (d) why is it necessary to retain data uploaded to the National COVIDSafe Data Store for the duration of the COVIDSafe data period, rather than requiring data to be deleted once it has been transferred to state and territory health authorities for the purposes of contact tracing; and
- (e) how long will state and territory health authorities be empowered to retain the data transferred to them by the data store administrator.

### **Committee view**

**1.39** The committee notes that this bill sets out stronger privacy protections for data collected through the COVIDSafe contact tracing application than would otherwise apply in the *Privacy Act 1988*.

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

**1.41** However, regulating the collection, use and disclosure of such data is also likely to engage the right to privacy, as such data contains personal information about the user of the COVIDSafe app. The right to privacy may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate. The committee thanks those organisations and individuals who have written to it in relation to its assessment of the human rights compatibility of COVID-19 related legislation.<sup>71</sup>

**1.42** In order to fully assess the compatibility of these measures with right to privacy, the committee seeks the minister's advice as to the matters set out at paragraph [1.38].

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<sup>71</sup> In relation to scrutiny of this bill, see in particular correspondence to the committee from UNSW Sydney, Australian Human Rights Institute and The Allens Hub dated 7 May 2020, available on the committee's [website](#).

## Concluded matters

1.43 The committee has concluded its examination of this matter on the basis of the response received.

1.44 Correspondence relating to this matter is available on the committee's website.<sup>1</sup>

### Public Service (Terms and Conditions of Employment) (General wage increase deferrals during the COVID-19 pandemic) Determination 2020 [F2020L00418]<sup>2</sup>

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | This instrument provides a six month delay to Australian Public Service wage increases occurring during a twelve month period |
| <b>Portfolio</b>               | Prime Minister and Cabinet  |
| <b>Authorising legislation</b> | <i>Public Service Act 1999</i>  |
| <b>Disallowance</b>            | This instrument is exempt from disallowance (see subsection 24(3) of the <i>Public Service Act 1999</i> )                     |
| <b>Right</b>                   | Just and favourable conditions of work  |
| <b>Status</b>                  | Concluded   |

1.45 The committee requested a response from the minister in relation to the determination in [Report 5 of 2020](#).<sup>3</sup>

### Altering terms and conditions of employment

1.46 This determination alters the terms and conditions of public service employment for non-SES (Senior Executive Service) Australian Public Service workers by delaying wage increases for six months. This relates to salary and salary-related allowances. It does not apply to increases in salary which take effect because of a

1 See [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](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, Public Service (Terms and Conditions of Employment) (General wage increase deferrals during the COVID-19 pandemic) Determination 2020 [F2020L00418], *Report 6 of 2020*; [2020] AUPJCHR 82.

3 Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020), pp. 45-46.



variation in the rate of salary in an award, or an increase which takes effect because of a performance or training-based progression.

## **Summary of initial assessment**

### ***Preliminary international human rights legal advice***

#### *Right to just and favourable conditions of work*

1.47 This determination applies to the majority of non-SES Australian Public Service Employees (with some specific worker and salary type exclusions set out in sections 5 and 7). By delaying wage increases for Australian Public Service workers for six months, this measure may engage the right to just and favourable conditions of work. The right to just and favourable conditions in work protects the right of all persons to fair wages.<sup>4</sup> This is considered to be a minimum requirement in the protection of the right to work.<sup>5</sup> The right to just and favourable conditions of work 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.

1.48 The initial analysis considered further information was required as to the compatibility of this measure with human rights, particularly the right to just and favourable conditions of work.

1.49 The full initial legal analysis is set out in [Report 4 of 2020](#).

### ***Committee's initial view***

1.50 The committee noted the legal advice that this may engage and limit the right to just and favourable conditions of work, and sought the assistant minister's advice as to the compatibility of this measure with human rights, particularly the right to just and favourable conditions of work.<sup>6</sup>

### ***Assistant minister's response***<sup>7</sup>

1.51 The assistant minister advised:

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4 International Covenant on Economic, Social and Cultural Rights, articles 6-7.

5 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 23 (2016) on the right to just and favourable conditions of work, [7].

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

7 The assistant minister's response to the committee's inquiries was received on 12 May 2020. This is an extract of the response. The response is available in full on the committee's website at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports).

The Determination engages but does not limit the right to just and favourable conditions of work. This is because the Determination gives effect to the Government's expectations in respect of public service wage increases in light of the exceptional circumstances and serious economic challenges being faced by many Australians during the COVID-19 pandemic.

The Determination also reflects the Government's view that, while many Australians are facing significant economic hardship and challenges, it is not appropriate for those serving the public to receive wage increases.

The Determination does not limit the fair wages and remuneration of non-Senior Executive Service APS employees for the following reasons:

- 1 non-SES APS employees will continue to receive their current wage;
- 2 the Determination only defers scheduled general wage increases for a temporary period of six months for non-SES APS employees and it does not indefinitely freeze wages;
- 3 the Determination only defers by six months general wage increases scheduled to occur over a time limited period, namely those due in the next 12 months;
- 4 the Determination does not affect any other terms and conditions of non-SES APS employees; and
- 5 the Determination does not affect increases in salary or allowances that result from performing higher duties, annual performance reviews, the completion of training or the obtaining of a qualification.

Paragraph 1.125 of the Report states:

"As no statement of compatibility has been provided, the committee seeks the Prime Minister's advice as to the compatibility of this measure with human rights, particularly the right to just and favourable conditions of work."

Under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, a statement of compatibility is required to accompany a disallowable instrument. The Determination, as made under section 24(3) of the *Public Service Act 1999*, is not a disallowable instrument.

## **Concluding comments**

### ***International human rights legal advice***

1.52 The assistant minister states that the measure does not limit the right to just and favourable conditions of work, as it does not limit the fair wages and remuneration of non-Senior Executive Service (SES) APS employees, as they will continue to receive their current wage, it is only a temporary wage increase freeze and does not affect other terms and conditions or other salary increases.

1.53 Nonetheless, delaying wage increases for six months, which had previously been bargained for and agreed on, would appear to be a backwards step in the realisation of the right to just and favourable conditions of work. Australia has obligations to progressively realise this right and also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps.<sup>8</sup> However, 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.

1.54 As such, it is necessary to consider if this measure is a permissible limitation on the right to just and favourable conditions of work. As the assistant minister's response does not acknowledge that the measure limits human rights, it does not provide a full explanation of the limitation as assessed against the limitation criteria.<sup>9</sup>

1.55 The assistant minister's response suggests that the objective of the measure is to give 'effect to the Government's expectations in respect of public service wage increases in light of the exceptional circumstances and serious economic challenges being faced by many Australians during the COVID-19 pandemic', and that while many Australians are facing significant economic hardship and challenges 'it is not appropriate for those serving the public to receive wage increases'. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. It is not clear that the stated objective meets this criterion. However, it may be stated that the decision not to implement these wage increases also serves the objective of prioritising the distribution of finite resources in light of the economic challenges posed by the COVID-19 pandemic. This is a matter that may be capable of constituting a legitimate objective, and as such, the measure would seem to be rationally connected to this objective.

1.56 In relation to whether the measure is a proportionate means to achieve the stated objective, the minister's response provides that the determination does not limit the fair wages and remuneration of employees as they will continue to receive their current wage. In addition, the assistant minister notes that the determination only defers scheduled general wage increases for a temporary period of six months and not indefinitely; does not affect any other terms and conditions of employment; and does not affect increases in salary or allowances that result from performing higher duties, annual performance reviews, the completion of training or the

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

9 While it is accepted that there is no legal requirement for a non-disallowable legislative instrument to be accompanied by a statement of compatibility, the Parliamentary Joint Committee on Human Rights is nevertheless required to assess such legislation for compatibility with human rights, see *Human Rights (Parliamentary Scrutiny) Act 2011*, see sections 7 and 9.

obtaining of a qualification. These matters are relevant in assessing the proportionality of the measure in achieving its legitimate objective.

1.57 As this is a temporary measure that does not affect other terms and conditions or pay increases, it may be that the temporary six month delay to non-SES Australian Public Service wage increases is a permissible limitation on the right to just and favourable conditions of work.

### **Committee view**

**1.58 The committee thanks the assistant minister for this response. The committee notes that this determination provides a six month delay to non-Senior Executive Service Australian Public Service wage increases occurring during a twelve month period.**

**1.59 The committee considers that the measure engages and limits the right to just and favourable conditions at work. However, as this is a temporary measure that does not affect other terms and conditions or pay increases, the committee consider this temporary delay constitutes a permissible limitation on the right to just and favourable conditions of work.**

## Chapter 2<sup>1</sup>

### Other legislation

2.1 The committee has assessed the human rights compatibility of bills introduced into the Parliament on 28 March, 8 April, and 12 to 14 May 2020 (which were not made in response to the COVID-19 pandemic). The committee makes no comment on the following bills, on the basis that the legislation does not engage, or only marginally engages, human rights; promotes human rights; and/or permissibly limits human rights:<sup>2</sup>

- Aboriginal Land Rights (Northern Territory) Amendment (Jabiru) Bill 2020;
- Appropriation Bill (No. 5) 2019-2020;
- Appropriation Bill (No. 6) 2019-2020;
- Australian Prudential Regulation Authority Amendment (APRA Industry Funding) Bill 2020;
- Authorised Deposit-taking Institutions Supervisory Levy Imposition Amendment Bill 2020;
- Authorised Non-operating Holding Companies Supervisory Levy Imposition Amendment Bill 2020;
- Aviation Legislation Amendment (Liability and Insurance) Bill 2020
- Excise Tariff Amendment Bill 2020;
- Export Control Legislation Amendment (Certification of Narcotic Exports) Bill 2020;
- General Insurance Supervisory Levy Imposition Amendment Bill 2020;
- Life Insurance Supervisory Levy Imposition Amendment Bill 2020;
- National Skills Commissioner Bill 2020;
- Norfolk Island Amendment (Supreme Court) Bill 2020;
- Payment Times Reporting Bill 2020;
- Payment Times Reporting (Consequential Amendments) Bill 2020;

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, Other legislation, *Report 6 of 2020*; [2020] AUPJCHR 83.

2 For the committee's consideration of bills made in response to the COVID-19 pandemic, see Appendix 1 of this report, and the Parliamentary Joint Committee on Human Rights, Human rights scrutiny of COVID-19 legislation: *Report 5 of 2020*, (29 April 2020).

- Primary Industries (Customs) Charges Amendment (Dairy Cattle Export Charge) Bill 2020;
- Product Stewardship (Oil) Amendment Bill 2020;
- Retirement Savings Account Providers Supervisory Levy Imposition Amendment Bill 2020;
- Services Australia Governance Amendment Bill 2020;
- Social Services and Other Legislation Amendment (Omnibus) Bill 2020;
- Superannuation Supervisory Levy Imposition Amendment Bill 2020;
- Supply Bill (No. 1) 2020-2021;
- Supply Bill (No. 2) 2020-2021;
- Supply (Parliamentary Departments) Bill (No. 1) 2020-2021;
- Treasury Laws Amendment (2020 Measures No. 2) Bill 2020;
- Treasury Laws Amendment (More Flexible Superannuation) Bill 2020; and
- Veterans' Affairs Legislation Amendment (Supporting the Wellbeing of Veterans and Their Families) Bill 2020.

2.2 The committee has deferred its consideration of the following bills which were introduced during this period:

- Australian Security Intelligence Organisation Amendment Bill 2020; and
- Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

2.3 The committee has also assessed the human rights compatibility of legislative instruments registered on the Federal Register of Legislation between 5 March 2020 and 12 May 2020.<sup>3</sup> The committee has determined not to comment on the 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.

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

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## Concluded matters

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

2.5 Correspondence relating to these matters is available on the committee's website.<sup>1</sup>

### Census and Statistics Amendment (Statistical Information) Regulations 2020 [F2020L00109]<sup>2</sup>

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | This instrument amends the Census and Statistics Regulation 2016 to update the list of topics in relation to which the Statistician shall collect statistical information |
| <b>Portfolio</b>               | Treasury  |
| <b>Authorising legislation</b> | <i>Census and Statistics Act 1905</i>   |
| <b>Last day to disallow</b>    | 15 sitting days after tabling (tabled in the House of Representatives on 11 February 2020 and in the Senate on 12 February 2020).   |
| <b>Right</b>                   | Privacy   |
| <b>Status</b>                  | Concluded   |

2.6 The committee requested a response from the minister in relation to these regulations in [Report 4 of 2020](#).<sup>3</sup>

### Collection of personal information

2.7 Schedule 1 of the regulations updates the list of statistical information to be collected by the Census in the *Census and Statistics Regulation 2016*, to insert topics relating to 'health conditions as diagnosed by a doctor or a nurse' and service in the Australian Defence Force (ADF). It also removes a topic relating to access to the internet at the dwelling.

1 See [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](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, Census and Statistics Amendment (Statistical Information) Regulations 2020, *Report 6 of 2020*; [2020] AUPJCHR 84.

3 Parliamentary Joint Committee on Human Rights, *Report 4 of 2020* (9 April 2020), pp. 2-5.

## Summary of initial assessment

### ***Preliminary international human rights legal advice***

#### *Right to privacy*

2.8 Requiring the statistician to collect personal information about respondents' diagnosed health conditions engages the right to privacy.<sup>4</sup> The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly in relation to the storing, use, and sharing of personal information.<sup>5</sup> The right may be subject to permissible limitations which are prescribed by law and are not arbitrary. In order for a limitation not to be arbitrary, it must pursue a legitimate objective, be rationally connected to that objective, and be a proportionate means of achieving that objective.<sup>6</sup>

2.9 The initial analysis considered more information was required in order to assess the compatibility of this measure with the right to privacy, in particular:

- how collecting information as to people's diagnosed medical conditions can assist with government planning for the provision of services (noting that the nature of the medical condition is unknown and could capture a range of conditions, including those that require no provision of services);
- whether the measure is sufficiently circumscribed; in particular why it is appropriate that a person who does not disclose a diagnosed health condition would be subject to a criminal penalty; and
- what other safeguards would protect the privacy of personal information which respondents would be compelled to provide, including whether the information is securely held and how long identifiable information is retained.

2.10 The full initial legal analysis is set out in [Report 4 of 2020](#).

#### *Committee's initial view*

2.11 The committee noted the legal advice that the measures engage and limit the right to privacy. In order to assess the compatibility of this measure with the right

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4 International Covenant on Civil and Political Rights (ICCPR), article 17.

5 See, UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]; and *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

6 See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.



to privacy, the committee sought the Assistant Treasurer's advice as to the matters set out at paragraph [2.4].

### **Assistant Treasurer's response<sup>7</sup>**

#### 2.12 The Assistant Treasurer advised

In preparing the following responses to the Committee's request, input from the Australian Bureau of Statistics (ABS) has been sought. The Australian Statistician has also advised that senior officers at the ABS are available to meet with the Committee to discuss any further issues or questions that the Committee might have.

#### **How collecting information as to people's diagnosed medical conditions can assist with government planning for the provision of services?**

As the Committee notes in its report, the Regulations prescribe a new Census topic for 'health conditions diagnosed by a doctor or nurse'. This authorises the ABS to set questions in the Census that are within scope of the topic. The Australian Bureau of Statistics has advised that they intend to use this topic to present a list of common health conditions on the Census form. The respondent will then be required to select the condition(s) that they have been diagnosed with. As noted in the Statement of Compatibility for the Regulations, respondents will not be required to provide specific details about their medical condition(s) or any treatment(s) that they are receiving.

The conditions proposed to be included in the list are: arthritis, asthma, cancer, dementia, diabetes, heart disease, kidney disease, lung condition, mental health condition and stroke. These conditions are sufficiently prevalent and broadly described to protect the respondent's privacy when answering, while still being useful to identify small geographic areas and/or population groups where there may be a higher rate of a particular health condition. The differential rate in prevalence - especially when considered with other factors such as income, education, employment status and cultural background - can assist policy makers and service providers to more effectively target their programs.

The health conditions proposed to be listed in the Census question have been determined in consultation with key stakeholders based on prevalence in the community and to ensure consistency with other health surveys. Key stakeholders supporting the addition of a health conditions topic were the Department of Health, the Department of the Prime Minister and Cabinet (Indigenous Affairs Group), the Australian Institute of

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7 The Assistant Treasurer's response to the committee's inquiries was received on 30 April 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](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports).

Health and Welfare and the National Institute for Dementia Research. Other interested stakeholders included academics, community and industry group organisations, and State, Territory and local government. These data users expressed a high demand for health conditions data at the local level for health service planning and to monitor change under the *National Health Reform Agreement*, and various other reporting frameworks and initiatives at the local level.

### **Whether the measure is sufficiently circumscribed?**

The ABS has advised that questions about diagnosed health condition in the 2021 Census will be appropriately circumscribed to ensure that it captures only the high-level information that is most relevant to government planning. As noted above, the ABS proposes to frame its questions using broad descriptions of health conditions (arthritis, asthma, cancer, dementia, diabetes, heart disease, lung condition, mental health condition and stroke). No information will be sought about the individual's particular diagnosis, treatment plan or long-time prospects.

The ABS has also advised that their research shows the vast majority of respondents willingly participate in the Census and have done so for more than 100 years. Participation in the Census is compulsory and, while penalties may apply if a person refuses to complete the Census, the ABS's priority is to get informed and willing cooperation to ensure the continued provision of high quality data. Census data is used by people and organisations from all over Australia to decide how to deliver amenities, assistance, benefits, infrastructure, services and opportunities in the future.

The *Census and Statistics Act 1905* enables the Australian Statistician, or an authorised officer, to request a person to fill up and supply a form (section 10) or answer questions (section 11). The Statistician, or an authorised officer may, by written notice, direct a person to fill up and supply a form or answer questions within a set period being not less than 14 days. If a person fails to comply with the written Notice of Direction, a person has committed an offence and may be prosecuted under section 14 of the Act.

The ABS goes to great lengths to ensure that people are counted as part of the Census, with prosecutions that may result in fines and criminal penalties being the last option. The ABS has a range of internal processes and clearances all officers must follow before issuing a Notice of Direction to ensure fair and equitable treatment of respondents. In 2016, the vast majority of Census forms were received voluntarily. Only a relatively small number of households (2,951 out of a total of 9.9 million households) were issued with a Notice of Direction to complete the Census. Of those cases 42 matters were referred to the Commonwealth Director of Public Prosecutions for consideration due to persons failing to comply with the Notice of Direction. Failure to comply with a Notice of Direction is in

breach of the law and could lead to prosecution. The decision to prosecute rests with the Director of Public Prosecutions.

The ABS has advised that it gives consideration to the following factors before it refers a case to the Director of Public Prosecutions:

- the expected impact of prosecution in protecting the quality and integrity of official statistics and the reputation of the ABS now and in the future through general or personal deterrence (noting that reputational damage to the ABS is not a barrier to referring persons for prosecution);
- the seriousness of the offence (e.g. in terms of statistical impact, or actual or threatened harm to an ABS officer);
- any mitigating or aggravating circumstances;
- the age, physical and mental health, and any special vulnerability of the alleged offender, where the alleged offence relates to an individual; and
- the availability and efficacy of any alternatives to prosecution.

In 2016, consistent with previous Australian Censuses, no individual was issued a Notice of Direction for not responding to a particular question on the Census; all cases were for individuals not returning a Census form. The ABS has advised that they understand that not all respondents will necessarily answer all questions, although the vast majority do substantially complete the Census. Reflecting this, the ABS releases the non-response rates for each question in the Census. This is referred to as 'item non-response' and in the 2016 Census the rates ranged from less than 1 per cent to 4 per cent. The reasons relevant questions are not answered may be due to a range of factors, including respondent fatigue, uncertainty, oversight, misunderstanding, or a perception that the particular question is not relevant to that person.

#### **What other safeguards would protect the privacy of personal information?**

Maintaining the privacy of the personal information collected from the Australian community in the Census is of paramount importance, and is a duty that the ABS takes very seriously.

The *Census and Statistics Act 1905* prohibits the ABS from releasing any data that might lead to the identification of an individual. ABS staff who contravene this prohibition are subject to penalties and sanctions, including imprisonment and hefty fines.

The ABS has advised that they have strong security in place for the IT environment, including processes for detecting misuse of information by ABS staff. There are many layers of security including firewalls against external intrusion. The security of the ABS environment is formally

assessed annually to ensure compliance with all Australian Government IT security standards.<sup>8</sup>

To ensure compliance with the prohibitions in the *Census and Statistics Act 1905*, all Census data is de-identified before it is used in publications and data products made available to researchers. The ABS has a customised, layered approach to removing or obscuring data depending on the chosen output, complemented by other privacy and security protection measures such as vetting and monitoring.

Access to analytical data is controlled according to the Five Safes Framework.<sup>9</sup> This Framework takes a multi-dimensional approach to managing disclosure risk. Each 'safe' refers to an independent but related aspect of disclosure risk. The framework poses specific questions to help assess and describe each risk aspect (or safe) in a qualitative way. This allows the ABS to place appropriate controls, not just on the data itself, but on the manner in which the data is accessed. The five elements of the framework are:

- Safe People;
- Safe Projects;
- Safe Settings;
- Safe Data; and
- Safe Outputs.

The ABS has also advised that they have commissioned an independent Privacy Impact Assessment (PIA) on the 2021 Census. This PIA has involved extensive stakeholder consultations, is currently in the final drafting stages and I am advised it will be published before August 2020.

## Concluding comments

### *International human rights legal advice*

2.13 As stated in the initial analysis, requiring the statistician to collect personal information about respondents' diagnosed health conditions engages the right to privacy.<sup>10</sup> This right may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a

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8 Further information about how the ABS keeps respondent information confidential can be accessed through the ABS website:  
<https://www.abs.gov.au/websitedbs/d3310114.nsf/89a5f3ci8684682b6ca256de4002c809b/1be71b5a0eb4e902ca25711a007b923a!OpenDocument>

9 Further information about the Five Safes Framework can be accessed through the ABS website:  
<https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1160.0Main%20Features4Aug%202017?opendocument&tabname=Summary&prodno=1160.0&issue=Aug%202017&num=&view>

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

proportionate means of achieving that objective.<sup>11</sup> The collection of statistical data for the adequate provision of health services is likely to be considered to be a legitimate objective for the purposes of international human rights law. In assessing if a measure is rationally connected to its stated objectives it is necessary to consider whether the relevant measure is likely to be effective in achieving the objectives being sought. The regulations prescribe the topic for the Census broadly ('health conditions as diagnosed by a doctor or a nurse'), which raised questions as to how collecting such broad information would assist with government planning.

2.14 In response, the Assistant Treasurer has advised that the regulations authorise the Australian Bureau of Statistics (ABS) to set questions in the Census that are within scope of the topic and that the ABS intends to present a list of common health conditions on the Census form, which the respondent will then be required to select from. The conditions proposed to be included in the list are: arthritis, asthma, cancer, dementia, diabetes, heart disease, kidney disease, lung condition, mental health condition and stroke. The Assistant Treasurer states that these conditions are sufficiently prevalent and broadly described so as to protect the respondent's privacy while being useful to assist policy makers and service providers to more effectively target their programs. The more precise articulation of the specific health conditions that will be asked of respondents would appear to be rationally connected to the legitimate objective of better health service provision for the purposes of international human rights law.

2.15 In relation to whether the measure is a proportionate means to achieve the stated objective, the Assistant Treasurer advises that the questions about the diagnosed health condition will be framed broadly, capturing only high-level information that is most relevant to government planning, and no information will be sought about the individual's particular diagnosis, treatment plan or long-time prospects. In relation to why it is appropriate that a person who does not disclose a diagnosed health condition would be subject to a criminal penalty,<sup>12</sup> the Assistant Treasurer advises that the ABS has a range of internal processes to ensure that prosecutions that may result in fines and criminal penalties is the last option. The Assistant Treasurer advises that in relation to the 2016 Census, out of a total of 9.9 million households, 2,951 were issued with a Notice of Direction to complete the Census, of which 42 cases were referred to the Commonwealth Director of Public Prosecutions, and no individual was issued a Notice of Direction for not responding

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11 See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

12 Subject to one penalty unit, currently \$210 (*Crimes Act 1914*, section 4AA).

to a particular question on the Census; all cases were for individuals not returning a Census form.

2.16 In addition the Assistant Treasurer advised that the ABS is prohibited from releasing any data that might lead to the identification of an individual, with ABS staff who contravene these requirements subject to penalties and sanctions including imprisonment and substantial fines. Further, the response states that all Census data is de-identified by the ABS before it is used in publications and data products made available to researchers. The ABS has advised that they have strong security in place for the IT environment and a framework in place to manage disclosure risks.

2.17 As noted above, the collection of statistical data for the adequate provision of health services is likely to be considered to be a legitimate objective for the purposes of international human rights law, and including more specificity as to the type of conditions means the measure is likely to be effective to achieve the stated objective. In relation to the proportionality of the measure, the prohibition on the ABS disclosing identifiable data is an important safeguard to help protect the right to privacy. It is also relevant that there are internal processes in place to ensure that prosecutions for failing to answer questions on the Census are taken as a last resort, and that no prosecutions, in 2016, were for failing to answer specific questions (relating instead to a failure to return the form in its entirety).

2.18 However, it remains the case that, as a matter of law, it is a criminal offence for a person to fail to answer a Census question.<sup>13</sup> The addition by these regulations of this topic on the Census means that a person who fails to disclose that they have been diagnosed with, for example, a mental health condition or dementia, could be liable to being criminally sanctioned. This is in contrast to, for example, a person who fails to answer a question which relates to their religious beliefs, who would not be subject to criminal sanctions as, under the *Census and Statistics Act 1905* there is a specific defence if the failure to answer a question relates to the person's religious beliefs. While the collection of statistical data for the adequate provision of health services may constitute a legitimate objective, it has not been established that enabling a criminal sanction to be imposed for failing to disclose a potentially sensitive medical condition to a statutory agency would be a proportionate means of achieving this objective. While it is relevant that the powers to prosecute for failing to answer this question may in practice be infrequently used, in assessing the compatibility of the measure it is necessary to consider what may be the effect of the measure as a matter of law. It is also noted that the Assistant Treasurer's response did not provide any information as to how long identifiable data is retained, and what rules exist as to when it will be destroyed. In light of these matters, it has not been established that the inclusion of 'health conditions diagnosed by a doctor or a

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13 See *Census and Statistics Act 1905*, section 14.

nurse' as a Census topic would constitute a permissible limitation on the right to privacy.

### **Committee view**

**2.19** The committee thanks the Assistant Treasurer for this detailed response. The committee notes that these regulations will require all Australians on Census night to disclose if they have a diagnosed health condition, which engages and limits the right to privacy. This right may be permissibly limited if it is shown to be reasonable, necessary and proportionate to do so.

**2.20** The committee considers that the collection of statistical data for the adequate provision of health services seeks to achieve an important and legitimate objective, as it will likely assist with government planning for the provision of services. The committee also considers there are a number of safeguards in place to protect the right to privacy, including internal processes undertaken by the Australian Bureau of Statistics to protect personal data.

**2.21** However, the committee notes that, as a matter of law, this amendment will make it an offence for participants on Census night not to disclose sensitive medical information, including whether they have been diagnosed with a mental health condition or dementia.

**2.22** The committee believes this needs to be balanced with the legitimate objective of ensuring that Australians filling in the Census do so comprehensively and accurately so as to ensure the information provided is accurate and reliable, given the importance of this information in the delivery of health services.

**2.23** The committee draws this matter to the attention of the Assistant Treasurer and the Parliament.

## Defence Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00120]<sup>1</sup>

|                                |  |
|--------------------------------|--|
| <b>Purpose</b>                 | This instrument sets out the circumstances when written notice is not required before a decision is made to terminate an Australian Defence Force member's service |
| <b>Portfolio</b>               | Veterans Affairs   |
| <b>Authorising legislation</b> | Defence Act 1903   |
| <b>Last day to disallow</b>    | 15 sitting days after tabling (tabled in the House of Representatives 13 February 2020 and in the Senate on 24 February 2020).                                     |
| <b>Right</b>                   | Work   |
| <b>Status</b>                  | Concluded  |

2.24 The committee requested a response from the minister in relation to the regulations in [Report 4 of 2020](#).<sup>2</sup>

### Terminating without notice the service of an Australian Defence Force member

2.25 These regulations amend section 24 of the Defence Regulation 2016 to establish two new grounds on which the employment of a member of the Australian Defence Force (ADF) may be terminated without written notice. These grounds are where the member has been imprisoned for an offence; or where they have pleaded guilty to, or been convicted of, an offence and the Chief of the Defence Force is satisfied that it is not in the interests of the defence force for notice to be given to them.<sup>3</sup>

2.26 The regulations also remake what currently exists in section 24, to provide that a member's employment may be terminated without written notice where: the appointment or enlistment is subject to a probationary period; they have failed to

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Defence Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00120], *Report 6 of 2020*; [2020] AUPJCHR 85.

2 Parliamentary Joint Committee on Human Rights, *Report 4 of 2020* (9 April 2020), pp. 6-8.

3 Schedule 1, Item 5, subsection 24(3). The reasons for something being or not being in the interests of the defence force are set out at subsection 6(2) of the regulations, and expanded by this instrument to include a member's failure to meet one or more conditions of the member's enlistment, appointment or promotion. See, Schedule 1, Item 1, subsection 6(2)(c).



meet a condition of their appointment or enlistment; or they have been absent without leave for a continuous period of three months or more.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

#### *Right to work*

2.27 Providing that an ADF member's employment may be terminated without notice to them, for reasons related to their conduct or performance, engages and may limit the right to work. The right to work includes a right not to be unfairly deprived of work.<sup>4</sup> A person's employment must not be terminated for reasons related to their conduct or performance before they are provided an opportunity to defend themselves against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.<sup>5</sup> Any decision to terminate employment should be 'preceded by dialogue and reflection between the parties'.<sup>6</sup>

2.28 The right to work may be limited, provided limitations are prescribed by law, pursue a legitimate objective, are rationally connected to (that is, effective to achieve) that objective, and are a proportionate means of achieving that objective.<sup>7</sup>

2.29 It is unclear whether terminating a member's employment without notice where they have failed to meet a condition of their appointment or enlistment, or where they have been absent without leave for three months or longer is a permissible limitation. In particular, it is noted that the ability to terminate without notice could apply for a failure to meet *any* condition of a member's employment. It is unclear why a member should not be notified of a decision to terminate their employment in such circumstances.

2.30 The initial analysis considered that in order to assess the compatibility of the entirety of the measure with the right to work, further information was required as to:

- whether terminating the employment of an ADF member for failure to meet a condition of their employment or enlistment, or being absent without

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4 See, International Covenant on Economic, Social and Cultural Rights, articles 6-7.

5 International Labour Organization (ILO) Convention 158, article 7 and ILO, *Protection against Unjustified Dismissal*, [146].

6 ILO, *Protection against Unjustified Dismissal*, [148].

7 See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

leave, without notifying them of the decision, is compatible with the right to work; and

- in the absence of notification, what opportunities ADF members would have to respond to allegations related to a failure to meet a condition of their employment or service, or to an absence without leave, prior to their employment being terminated.

2.31 The full initial legal analysis is set out in [Report 4 of 2020](#).

### **Committee's initial view**

2.32 The committee noted the legal advice that the measure engages and may limit the right to work, and in order to assess compatibility with the right to work the committee sought the minister's advice as to the matters set out at paragraph [2.30].

### **Department of Defence's response<sup>8</sup>**

2.33 The Department of Defence advised:

Section 24 of the Regulation, as amended by the Amending Regulations, provides for termination of service in the Australian Defence Force (ADF). Subsection (1) provides three grounds on which a member's service can be terminated: medical unfitness, redundancy and retention not in the interests of the Defence Force. Subsection (2) provides that 14 days written notice must be provided to the member before making a decision to terminate their service. Subsection (3) provides that, in certain circumstances, the notice requirement in subsection (2) does not apply. This includes in the two circumstances of concern to the Committee: where the member has failed to meet a condition of the appointment or enlistment (paragraph 24(3)(b)(i)) and where the member has been absent without leave for a period of three months or more (paragraph 24(3)(b)(iii)).

While subsection (3) exempts certain decisions from the statutory requirement in subsection (2) to provide 14 days written notice, it does not exclude the requirements of procedural fairness more generally. The obligation to provide procedural fairness is a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of a particular case (*Mason J in Kioa v West* (1985) 159 CLR 550, 585). The requirements of procedural fairness are not fixed, and will vary depending

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8 The Department of Defence's response to the committee's inquiries was received on 12 May 2020. This is a departmental response, however, it has been advised that the Minister for Defence, Senator the Hon Linda Reynolds CSC, and the Minister for Veteran's and Defence Personnel, the Hon Darren Chester MP have approved this response. 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](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports).

on the statutory context in which a decision is to be made, and the specific circumstances in which the decision will be made.

For termination decisions that meet the requirements in paragraph 24(3)(b)(i) or (iii), the statutory context means that the requirements of procedural fairness would not include a requirement to provide 14 days written notice. It does not follow, however, that termination decisions of this sort would never require that the member be given notice and an opportunity to respond. This would depend on all of the particular circumstances. Relevant matters in determining fair procedures when making these decisions could include, for example, the nature of the condition on their appointment or enlistment, previous discussions with the member in relation to meeting the condition, or previous correspondence with the member while they were absent without leave. Regardless of the procedures adopted in relation to a particular termination decision, the rule against bias and the obligation to act reasonably remain.

The decision-maker must adopt fair procedures that are appropriate and adapted to the circumstances of the particular case. This means that, except in extraordinary circumstances, a decision-maker would generally only be able to make a termination decision after providing an ADF member with some sort of opportunity to address the matters of concern. That is, even though section 24(3) excludes the requirement to provide notice in a particular way (14 days written notice), it is compatible with the right to work because the decision-maker must still adopt fair procedures that are appropriate and adapted to the circumstances.

It would be unusual to contemplate termination of an ADF member's service where they have failed to meet a condition of appointment or enlistment, without the member having been made aware of the problem previously and given an opportunity to address it. A common example of a condition on appointment or enlistment is to complete certain training within a specified period. ADF members are made aware of this condition at the time of appointment or enlistment, and, generally, if an ADF member is at risk of not completing required training, they will be made aware of this (including the possible consequences of failing to complete the required training), and given opportunities to improve. If the ADF member fails to complete the required training in time, and termination is contemplated, the procedures adopted in relation to that decision must be reasonable, taking account of previous opportunities the ADF member has had to address the issue.

Similarly, it would be unusual to contemplate termination of an ADF member's service where they have been absent without leave for 3 months or more without having made attempts to locate and talk to the ADF member about the reason for their absence, and the possible consequences of their continued absence.

Applying the 14 day written notice requirement in s 24(2) to these sorts of decisions would result in duplication of process, without making any substantive difference to the fairness of the process followed or decisions made under section 24. The flexible obligation to adopt fair procedures that are appropriate and adapted to the particular circumstances of the case means that ADF members' right to work are protected, notwithstanding the exclusion of the 14 day written notice requirement in subsection 24(3).

The effect of the Amending Regulations is not, therefore, to impermissibly limit the right to work with respect to ADF members.

## **Concluding comments**

### ***International human rights legal advice***

2.34 In response to the question of whether terminating the employment of an ADF member for specified reasons without providing 14 days written notice is compatible with the right to work, the response advises that while these specific decisions are exempt from the statutory requirement to provide written notice, it does not exclude the requirements of procedural fairness more generally, which vary according to the particular statutory context and specific circumstances of each case. The response further explains that although the regulations now provide that there is no specific requirement to provide 14 days written notice, this does not mean that termination decisions of this sort would never require that the member be given notice and an opportunity to respond, which would vary on a case by case basis. The response further states that regardless of the procedures adopted, the rule against bias and the obligation to act reasonably remain.

2.35 With respect to the question as to the opportunities ADF members would have to respond to allegations prior to their employment being terminated, the response states that, except in extraordinary circumstances, a decision-maker would generally only be able to make a termination decision after providing an ADF member with some sort of opportunity to address the matters of concern.

2.36 In light of this response that the ADF will continue to adopt fair procedures that are appropriate and adapted to the particular circumstances of the case, it appears likely that amending the regulations to exclude a specific requirement to provide 14 days written notice before terminating an ADF member's employment in particular circumstances is not an impermissible limitation on the right to work.

### **Committee view**

**2.37 The committee thanks the Department of Defence for this response. The committee notes that the regulations set out the circumstances in which written notice is not required before a decision is made to terminate an Australian Defence Force (ADF) member's service.**

**2.38** In light of the advice that the ADF will continue to adopt fair procedures that are appropriate and adapted to the particular circumstances of the case, the committee considers that it is likely that the measure is not an impermissible limitation on the right to work.

**2.39** The committee considers it may be useful if the statement of compatibility accompanying the regulation were amended to include the information provided by the Department.

**Senator the Hon Sarah Henderson**

**Chair**



# Appendix 1

## COVID-19 related legislation

**April 2020**

**22 – 30 April**

| Instrument   | Date registered | Description  | Comment    |
|--|-----------------|--|------------|
| <a href="#">CASA EX69/20 – EPC Requirements for ATOs Transitioning to the FER (Extensions of Time Due to COVID-19) – Exemption Amendment Instrument 2020 (No. 1) [F2020L00456]</a> | 22/04/2020      | This instrument provides a three months extension for approximately 50 former approved testing officers who had transitioned to the new (equivalent) status of flight examiner rating (FER) holder, to complete a required examiner proficiency check (EPC), due to the social distancing rules required to be observed during the COVID-19 pandemic.  | No comment |
| <a href="#">CASA EX70/20 – Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 2) [F2020L00457]</a>       | 22/04/2020      | This instrument amends CASA EX57/20 in response to the COVID-19 pandemic social distancing rules which require relevant licence holders to avoid, as far as possible, working in close proximity to others during assessment activities. In addition, Airservices Australia has implemented a rostering scheme which aims to mitigate operational and personnel risks associated with COVID-19 and, therefore, the availability of relevant licence holders to conduct assessments and supervision is reduced, and the ability to meet recency requirements is diminished. | No comment |
| <a href="#">Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Rules 2020 [F2020L00461]</a>  | 23/04/2020      | This instrument provides alternative bases for an entity in a class of entities to satisfy the decline in turnover test for the purposes of receiving JobKeeper payments, when the Commissioner is satisfied that there is not a relevant comparison period for the purposes of an entity in a class of entities satisfying the decline in turnover test under the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020.   | No comment |
| <a href="#">Therapeutic Goods (Medical Devices—Specified Articles) Instrument 2020 [F2020L00463]</a>   | 23/04/2020      | This instrument specifies a particular class of non-sterile personal protective equipment and safety apparel to be medical devices.  | No comment |
| <a href="#">Therapeutic Goods Amendment (Excluded Goods) Determination (No.1) 2020 [F2020L00464]</a>   | 23/04/2020      | This instrument excludes from the operation of the <i>Therapeutic Goods Act 1989</i> all non-sterile personal protective equipment and safety apparel other than articles specified in item 1 of Schedule 1 to the Therapeutic Goods (Medical Devices—Specified Articles) Instrument 2020.   | No comment |

|  |            |  |               |
|--|------------|--|---------------|
| <a href="#">Therapeutic Goods Amendment (Declared Goods) Order (No. 1) 2020 [F2020L00465]</a>  | 23/04/2020 | This instrument makes consequential amendments related to the specification of a class of non-sterile personal protective equipment and safety apparel to be medical devices under section 41BD(2B) of the <i>Therapeutic Goods Act 1989</i> .   | No comment    |
| <a href="#">Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 2) Determination 2020 [F2020L00466]</a> | 23/04/2020 | This instrument amends the existing biosecurity emergency measures in remote communities by amending some designated locations, and to require that a person entering a designated area has not been in a 'foreign country' (rather than 'outside Australian territory') in the 14 days immediately prior to entry.  | See Chapter 1 |
| <a href="#">ASIC Corporations (Extended Reporting and Lodgment Deadlines—Unlisted Entities) Instrument 2020/395 [F2020L00469]</a>  | 24/04/2020 | This instrument implements temporary measures aimed at facilitating financial reporting by unlisted entities whose reporting processes take additional time due to current remote work arrangements, travel restrictions and other impacts of COVID-19. The temporary measures are intended to allow unlisted entities up to one additional month to complete financial reports and have those reports audited, in compliance with the financial reporting and audit requirements of the Corporations Act 2001.                  | No comment    |
| <a href="#">ASIC Corporations (Amendment Instrument 2020/396 [F2020L00470]</a>   | 24/04/2020 | This instrument preserves the grandfathered status of certain proprietary companies. Grandfathered proprietary companies must meet certain conditions, including reporting to members within the statutory deadline each year, to be exempt from lodging financial reports with ASIC. The purpose of this is to assist unlisted entities affected by the impacts of COVID-19 by enabling them more time to report and have audits.   | No comment    |
| <a href="#">Fair Work Commission Amendment (Miscellaneous Measures) Rules 2020 [F2020L00471]</a>   | 24/04/2020 | This instrument provides for the practice and procedure that is to be followed by the Fair Work Commission and the conduct of business in relation to matters allowed or required to be dealt with by the Fair Work Commission. This include amendments which replace various requirements under the Rules to lodge statutory declarations, with requirements to lodge signed declarations, ensuring that people are not exposed to health risks during the COVID-19 pandemic in order to have statutory declarations witnessed. | No comment    |
| <a href="#">Social Security (Coronavirus Economic Response—2020 Measures No. 4) Determination 2020</a>   | 24/04/2020 | This instrument modifies the Social Security Act in relation to the partner income reduction rate for jobseeker payment by reducing it from 60 per cent to 25 per cent of  | No comment    |



|   |            |  |               |
|---|------------|--|---------------|
| <a href="#">[F2020L00474]</a>   |            | the person's partner income excess.  |               |
| <a href="#">Social Security (Coronavirus Economic Response—2020 Measures No. 6) Determination 2020 [F2020L00475]</a>  | 24/04/2020 | This determination provides for recipients of widow allowance, partner allowance and special benefit under the social security law to receive the COVID-19 supplement from 27 April 2020.  | No comment    |
| <a href="#">Veterans' Children Education Schemes (COVID-19 Supplement) Amendment Determination 2020 [F2020L00477]</a>   | 24/04/2020 | This instrument temporarily increases payments to certain recipients receiving benefits under the Veterans' Children Education Scheme and the MRCA Education and Training Scheme by providing for receipt of the new and temporary COVID-19 supplement.  | No comment    |
| <a href="#">ASIC Corporations (COVID-19 – Distribution of Debit Cards) Instrument 2020/401 [F2020L00478]</a>  | 24/04/2020 | This instrument provides exemptions and modifications in relation to the hawking and product disclosure requirements in the <i>Corporations Act 2001</i> in relation to issuing basic deposit products, linked non-cash payment facilities and debit cards due to adverse implications on consumers without debit cards due to COVID-19.   | No comment    |
| <a href="#">Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 1) 2020 [F2020L00479]</a>  | 24/04/2020 | This instrument requires the Commissioner of Taxation to verify JobKeeper payment information with authorised deposit-taking institutions.   | No comment    |
| <a href="#">Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020 [F2020L00480]</a> | 25/04/2020 | This instrument provides privacy protections for data collected through a contact tracing app, providing that a person must not collect, use, disclose or otherwise deal with the data unless one of the exemptions listed in the instrument apply.  | See Chapter 1 |
| <a href="#">Child Care Subsidy Amendment (Coronavirus Response Measures No. 3) Minister's Rules 2020 [F2020L00490]</a>  | 28/04/2020 | This instrument provides that Child Care Subsidy and Additional Child Care Subsidy are not payable while child care providers are also in receipt of business continuity payments (BCPs) under the Early Childhood Education and Care Relief Package (the package). It also places a condition on the approval of child care providers to not charge fees while in receipt of BCPs under the package; prescribes the Community Child Care Fund – Special Circumstances program, in order to enable payments under that program to draw on the special appropriation in the family assistance law; and provides that applications for approval not be made for the duration of the BCPs under the package, with | No comment    |

|   |            |   |            |
|---|------------|---|------------|
|   |            | the exception of applications resulting from the sale of a service.   |            |
| <a href="#">Social Security (Coronavirus Economic Response—2020 Measures No. 5) Determination 2020 [F2020L00509]</a>                          | 28/04/2020 | This instrument facilitates the provision of information (including tax file number information) by the Commissioner of Taxation to the Secretary of the Department of Social Services in matters related to the administration of the JobKeeper payment.   | No comment |
| <a href="#">Biosecurity Repeal (Human Health Response Zone) (Swissotel Sydney) Determination 2020 [F2020L00510]</a>                           | 29/04/2020 | This instrument repeals the Biosecurity (Human Health Response Zone) (Swissotel Sydney) Determination 2020 as the Swissotel is no longer a Human Health Response Zone.  | No comment |
| <a href="#">Health Insurance (Pathologist-determinable Services) Amendment Determination (No. 2) 2020 [F2020L00519]</a>                       | 29/04/2020 | This instrument includes a reference to three pathology items for the detection of Chlamydia trachomatis, two pathology items for viral respiratory pathology tests where the service is referred to a laboratory that did not receive the original request (including COVID-19 related tests), twenty new items for genetic testing of somatic markers for the diagnosis and classification of tumours, and one pathology item for archival tissue retrieval and review. | No comment |
| <a href="#">National Health (Continued Dispensing – Emergency Measures) Amendment Determination 2020 (No.3) (PB 36 of 2020) [F2020L00522]</a> | 30/04/2020 | This instrument adds and deletes drugs and forms to the list of pharmaceutical benefits that can be supplied as a Continued Dispensing supply. This will provide a continued option for consumers to obtain Pharmaceutical Benefits Scheme (PBS) subsidised access to their medicines to assist in managing the demand on the health system during the COVID-19 outbreak. No end date is specified in the instrument, however it is intended to be temporary.             | No comment |

## May 2020

### 1 - 8 May 2020

| Instrument  | Date registered | Description   | Comment    |
|---|-----------------|---|------------|
| <a href="#">Customs By-law No. 2019608 [F2020L00540]</a>  | 1/05/2020       | This by-law prescribes certain medical products and hygiene products imported as part of the response to the COVID-19 pandemic.   | No comment |
| <a href="#">Parliamentary Contributory Superannuation (Early Release Payments) Regulations 2020 [F2020L00542]</a> | 1/05/2020       | The instrument allows early access to superannuation by deferred members in the Parliamentary Contributory Superannuation Scheme (PCSS) due to severe financial hardship and compassionate grounds due to COVID-19. | No comment |
| <a href="#">Therapeutic Goods Amendment</a>   | 1/05/2020       | This instrument introduces an exemption from the operation of Part 3-3 of the   | No comment |

|  |           |   |            |
|--|-----------|---|------------|
| <a href="#">(Radiopharmaceuticals and Radiopharmaceutical Active Ingredients) Regulations 2020 [F2020L00544]</a>                       |           | <i>Therapeutic Goods Act 1989</i> for certain radiopharmaceuticals and radiopharmaceutical active ingredients. This exemption is necessary to facilitate the continued supply of radiopharmaceuticals to patients around Australia which has been negatively impacted by the unforeseen reduction in commercial flights between Australian capital cities caused by the current outbreak of COVID-19. |            |
| <a href="#">Social Security (Coronavirus Economic Response—2020 Measures No. 7) Determination 2020 [F2020L00545]</a>                   | 1/05/2020 | This instrument varies the <i>Social Security Act 1991</i> to remove the liquid assets test waiting period and seasonal work preclusion period for social security claimants who had already served a part of such period prior to 25 March 2020, and for people who claim during certain periods, to expand and expedite access to payments for those financially impacted by COVID-19.              | No comment |
| <a href="#">Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020 [F2020L00546]</a>               | 1/05/2020 | This instrument amends the rules relating to the JobKeeper scheme to adjust some elements of the scheme, and expand access to the scheme in some areas.   | No comment |
| <a href="#">National Vocational Education and Training Regulator (Charges) Amendment (COVID-19) Determination 2020 [F2020L00547]</a>   | 4/05/2020 | This instrument provides for the refunding and waiver of charges imposed on registered training organisations and registered providers by the Australian Skills Quality Authority, to assist the vocational education and training sector during the COVID-19 pandemic.   | No comment |
| <a href="#">Australian Skills Quality Authority Instrument Fixing Fees Amendment (Refund of Fees) Determination 2020 [F2020L00548]</a> | 4/05/2020 | This instrument further provides for the refunding and waiver of fees charged to registered training organisations and registered providers by the Australian Skills Quality Authority to assist the vocational education and training sector during the COVID-19 pandemic.   | No comment |
| <a href="#">Tertiary Education Quality and Standards Agency Determination of Fees No. 1 of 2020 [F2020L00549]</a>                      | 4/05/2020 | This instrument provides the Tertiary Education Quality and Standards Agency (TEQSA) with the capacity to refund certain fees due to special or unusual circumstances that cause the fee to be unreasonable or inequitable, including in circumstances related to the COVID-19 pandemic event.  | No comment |
| <a href="#">Therapeutic Goods Amendment (Excluded Goods—Hand Sanitisers) Determination (No. 2) 2020 [F2020L00551]</a>                  | 5/05/2020 | This instrument clarifies certain matters relating to the specification of hand sanitisers that are excluded goods for the purposes of the <i>Therapeutic Goods Act 1989</i> , and to introduce minor safety measures.  | No comment |
| <a href="#">Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument</a>                                       | 7/05/2020 | This instrument clarifies the rules where reporting entities are seeking to rely on alternative identity proofing processes to establish the identity of their customer in  | No comment |

|  |           |   |            |
|--|-----------|---|------------|
| <a href="#">2020 (No. 2)</a><br><a href="#">[F2020L00559]</a>  |           | circumstances where that customer possesses, but cannot produce or provide, relevant identity documents due to measures designed to prevent the spread of COVID-19.   |            |
| <a href="#">ASIC Corporations (AFCA Regulatory Requirement) Instrument 2020/0433</a><br><a href="#">[F2020L00560]</a>                | 7/05/2020 | This instrument makes some amendments to the manner in which the Australian Financial Complaints Authority operator must comply with conditions of the AFCA Scheme Authorisation 2018, as part of the COVID-19 pandemic response.   | No comment |
| <a href="#">Financial Sector (Collection of Data) (reporting standard) determination No. 5 of 2020</a> <a href="#">[F2020L00561]</a> | 7/05/2020 | This instrument reinstates reporting standards to APRA for Registered Financial Corporations and authorised deposit-taking institutions, which had been revoked in January. These have been reinstated in light of the volatile market movements and unprecedented economic conditions caused by the COVID-19 virus, given the need for a consistent series of reporting to develop the National Accounts to accurately represent the impacts of the COVID-19 virus on Australia's economic activity. | No comment |
| <a href="#">Financial Sector (Collection of Data) (reporting standard) determination No. 6 of 2020</a> <a href="#">[F2020L00562]</a> | 7/05/2020 | This instrument reinstates reporting standards to APRA for Registered Financial Corporations and authorised deposit-taking institutions, which had been revoked in January. These have been reinstated in light of the volatile market movements and unprecedented economic conditions caused by the COVID-19 virus, given the need for a consistent series of reporting to develop the National Accounts to accurately represent the impacts of the COVID-19 virus on Australia's economic activity. | No comment |

### 9 - 14 May 2020 (Bills to 14 May, legislative instruments to 12 May 2020)

| Bill/instrument   | Date introduced/<br>registered | Description  | Comment    |
|---|--------------------------------|--|------------|
| <a href="#">National Greenhouse and Energy Reporting (Safeguard Mechanism) Amendment (Extended Transition) Rule 2020</a><br><a href="#">[F2020L00566]</a> | 11/05/2020                     | This instrument amends the National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015 to delay the requirement to apply for new baselines due to the COVID-19 pandemic.  | No comment |
| <a href="#">VET Student Loans Amendment Rules (No. 1) 2020</a> <a href="#">[F2020L00569]</a>  | 12/05/2020                     | This instrument temporarily exempts students from the requirement to pay loan fees associated with Vocational Education and Training (VET) student loans for six months, to assist students as they deal with the financial consequences of the global outbreak of COVID-19. | No comment |

|  |            |  |               |
|--|------------|--|---------------|
| <a href="#">Fair Work Amendment (COVID-19) Bill 2020</a><br>[Private Senator's bill]                                       | 12/05/2020 |  | No comment    |
| <a href="#">Aged Care Legislation Amendment (Emergency Leave) Bill 2020</a>  | 13/05/2020 | This bill introduces an emergency leave type that will enable approved providers to remain eligible for residential care subsidy in declared emergency situations (such as the current COVID-19 pandemic) and ensure approved providers cannot decide to charge aged care residents a fee during a declared emergency to reserve their place in an aged care service. These emergency situations may include natural disasters, pandemics or other large-scale emergencies that may impact the safe provision of residential aged care and the safety of the resident. | No comment    |
| <a href="#">Privacy Amendment (Public Health Contact Information) Bill 2020</a>  | 13/05/2020 | This bill seeks to provide stronger privacy protections for users of the Commonwealth's COVIDSafe app and data collected through the COVIDSafe app than that which would otherwise apply in the <i>Privacy Act 1988</i> .  | See Chapter 1 |
| <a href="#">Air Navigation (Exemption for Commercial Non-Scheduled Flights) Amendment Determination 2020 [F2020L00571]</a> | 13/05/2020 | This determination removes exemptions for single charter flights carrying passengers where the seating capacity of the aircraft exceeds 80 persons, while the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 remains in force. This would have the effect that operators of such flights must seek permission from the Secretary of the Department of Infrastructure, Transport, Regional Development and Communication for such operations.   | No comment    |
| <a href="#">Great Barrier Reef Marine Park Amendment (Coronavirus Economic Response Package) Bill 2020</a>                 | 14/05/2020 | This bill effectively waives the requirement for Great Barrier Reef Marine Park permission holders to pay the environmental management charge to the Great Barrier Reef Marine Park Authority for the period 1 January 2020 to 31 March 2020. This is intended to provide financial relief to the Great Barrier Reef tourism industry and other relevant permission holders impacted by the COVID-19 pandemic.   | No comment    |