
# Parliamentary Joint Committee on Human Rights

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Human rights scrutiny report

Report 10 of 2021

25 August 2021

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

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This report can be cited as: Parliamentary Joint Committee on Human Rights, *Report 10 of 2021*; [2021] AUPJCHR 89.

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

# Membership of the committee

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|---|---|
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# Committee information

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

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

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

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

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

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

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

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

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

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

# Chapter 1[1]

## New and continuing matters

1.1 In this chapter the committee has examined the following bills and legislative instruments for compatibility with human rights:

- bills introduced into the Parliament between 3 to 12 August 2021;
- legislative instruments registered on the Federal Register of Legislation between 25 June to 4 August 2021;[2] and
- one bill previously deferred.[3]

1.2 Bills and legislative instruments from this period that the committee has determined not to comment on are set out at the end of the chapter.

1.3 The committee comments on the following bills and legislative instruments, and in some instances, seeks a response from the relevant minister.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 10 of 2021*; [2021] AUPJCHR 90.

2 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: https://www.legislation.gov.au/AdvancedSearch.

3 Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021, which were previously deferred in *Report 9 of 2021* (4 August 2021).

# Bills

## Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021[1]

| | |
|---|---|
| **Purpose** | The bill seeks to extend for a further three years the declared areas provisions in sections 119.2 and 119.3 of the *Criminal Code Act 1995*, scheduled to sunset on 7 September 2021.<br>It also seeks to extend by a further 15 months the following Australian Federal Police powers that are also scheduled to sunset on 7 September 2021:<br>• the control order regime in Division 104 of the Criminal Code;<br>• the preventative detention order regime in Division 105 of the Criminal Code; and<br>• the stop, search and seizure powers in Division 3A of Part IAA of the *Crimes Act 1914*.<br>The bill also seeks to amend the *Intelligence Services Act 2001* to provide for the Parliamentary Joint Committee on Intelligence and Security to review the declared areas provisions prior to the new sunset date |
| **Portfolio** | Attorney-General |
| **Introduced** | Senate, 4 August 2021<br>*Passed both Houses on 23 August 2021* |
| **Rights** | Liberty; freedom of movement; fair trial and fair hearing; privacy; freedom of expression; freedom of association; equality and non-discrimination; to be treated with humanity and dignity; protection of the family; work; social security; an adequate standard of living; and rights of children |

### Extension of counter-terrorism powers

1.4 This bill, which has now passed both Houses, extends the operation of a number of counter-terrorism related provisions which are due to sunset on 7 September 2021.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021, *Report 10 of 2021*; [2021] AUPJCHR 91.

1.5 In particular, it extends by a further three years (to 7 September 2024) the operation of the declared area provisions. Under these provisions, it is an offence, punishable by up to 10 years' imprisonment, to enter or remain in an area declared by the Minister for Foreign Affairs, unless the accused can raise evidence to demonstrate it is for one of a limited set of purposes as set out in the Criminal Code.[2]

1.6 It also extends by a further 15 months (until 7 December 2022) the operation of the following provisions:

- the control order regime in Division 104 of the Criminal Code, which allows a court to impose on a person a number of obligations, prohibitions and restrictions;
- the preventative detention order regime in Division 105 of the Criminal Code, which allows a person to be taken into custody and detained if it is suspected, on reasonable grounds, that they are preparing to engage in a terrorist act; and
- the stop, search and seizure powers in Division 3A of Part IAA of the *Crimes Act 1914*, which provide a range of powers for the Australian Federal Police and state and territory police officers to exercise in a Commonwealth place (such as an airport) relating to counter-terrorism.

## International human rights legal advice

### *Multiple rights*

1.7 The powers extended by this measure are intended to protect Australia's national security interests and protect against the possibility of terrorist acts in Australia.[3] As such, if these powers were capable of assisting in achieving these objectives, it would appear that extending these powers would promote the rights to life and security of the person. The right to life[4] includes an obligation on the state to protect people from being killed by others or identified risks.[5] The right to security of

2 *Criminal Code Act 1995*, section 119.2. Subsection 119.2(3) sets out that the offence will not apply if the person enters, or remains in, the area solely for one or more of the following purposes: providing aid of a humanitarian nature; appearing before a court; performing an official duty; acting as a journalist; making a bona fide visit to a family member; or any other purpose prescribed by the regulations. Subsection 119.2(4) provides it also will not apply if the person was there as part of the person's service with the armed forces of a foreign country (unless it is a prescribed organisation).

3 See statement of compatibility, pp. 6, 9, 16 and 20.

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

5 UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [3]: the right should not be interpreted narrowly and it 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

the person requires the state to take steps to protect people against interference with personal integrity by others.[6]

1.8 However, the extended powers also engage and limit numerous human rights, including the:

- right to liberty;
- right to freedom of movement;
- right to a fair trial and fair hearing;
- right to privacy;
- right to freedom of expression;
- right to freedom of association;
- right to equality and non-discrimination;
- right to be treated with humanity and dignity;
- right to the protection of the family;
- right to work;
- rights to social security and an adequate standard of living; and
- rights of children.[7]

1.9 The committee has previously considered the human rights compatibility of all of the provisions that are extended by this measure. After detailed consideration of these provisions, the committee has previously found that while all of the measures likely sought to achieve a legitimate objective (namely, that of seeking to prevent terrorist acts), there were questions whether the measures would be effective to achieve this and were necessary, and, in particular, the measures did not appear to be

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

7 See International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and the Convention of the Rights of the Child.

proportionate. As a result, the committee previously found the measures were likely to be incompatible with a range of human rights.[8]

1.10 The same human rights concerns as were raised previously apply in relation to the further extension of these coercive powers. In addition, there are questions as to whether all of these powers remain necessary. In relation to the declared area provisions, there has never been a prosecution for breach of these provisions,[9] no areas are currently declared by the minister,[10] and since these provisions were enacted in 2014, new legislation has conferred further powers to investigate terrorism related offences.[11] The Parliamentary Joint Committee on Intelligence and Security (PJCIS) recommended that the declared area provisions be extended for a further three years. It did so, despite noting the limited use of the offence and that there are no currently declared areas, on the basis that it would not be 'prudent' to repeal the provisions during a period of uncertainty as caused by COVID-19 and at a time when international borders may be reopening.[12] However, no evidence was presented as to how the implications of the pandemic relate to the need for this specific offence. The statement of compatibility accompanying the bill states generally that the current terrorism threat level to Australia is 'probable', but no specific information is provided as to why these provisions remain necessary. As this is the only information presented as to why these powers are required to be extended, it has not been established that the extension for three years of the declared area provisions is necessary and seeks to address a current pressing and substantial need.

8 In relation to the declared area provisions, see Parliamentary Joint Committee on Human Rights, Fourteenth Report of the 44th Parliament (October 2014) pp. 34-44; *Nineteenth Report of the 44th Parliament* (3 March 2015) pp. 75-82; and most recently, *Report 6 of 2018*, (26 June 2018), pp. 17-21. In relation to control orders, preventative detention orders, and stop, search and seizure powers, see most recently *Report 10 of 2018* (18 September 2018) p. 25-53. Note in relation to the stop, search and seizure powers the committee concluded that in circumstances where a police officer believes on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act, these powers might be a proportionate limit on human rights, however, the scope of the other powers are likely to be incompatible with human rights, see *Report 10 of 2018* (18 September 2018) p. 45-53.

9 See Parliamentary Joint Committee on Intelligence and Security, *Review of 'declared areas' provisions: Sections 119.2 and 119.3 of the Criminal Code* (February 2021) p. 14.

10 See statement of compatibility, p. 6.

11 Such as temporary exclusion orders; citizenship cessation; surveillance powers; the grounds for control orders; and a compulsory industry assistance scheme. For further details see Law Council of Australia, *Submission 2*, p. 14, to the Parliamentary Joint Committee on Intelligence and Security, Review of 'declared areas' provisions of the *Criminal Code Act 1995* (Cth), 25 August 2020.

12 See Parliamentary Joint Committee on Intelligence and Security, *Review of 'declared areas' provisions: Sections 119.2 and 119.3 of the Criminal Code* (February 2021) p. 18.

1.11 In addition, it is noted that the PJCIS, in recommending the provisions be extended by three years, also recommended changes that may have assisted with the proportionality of the measure, namely that the *Criminal Code Act 1995* be amended to allow Australian citizens to request an exemption to travel to a declared area for reasons not listed in the Criminal Code, but which are not otherwise illegitimate under Australian law.[13] While the government adopted the recommendation to extend the provisions by three years, it did not adopt this exemption recommendation.[14]

1.12 Noting this committee's previous conclusion that the declared area provisions did not contain sufficient safeguards or flexibility to constitute a proportionate limit on rights, and noting the government has not demonstrated the continued necessity of these powers, it has not been established that the extension of these provisions for a further three years is compatible with human rights.

1.13 In addition, the extension of the remaining powers by a further 15 months is stated as being in order to ensure the powers do not sunset and provide time for the government to consider any recommendations of the PJCIS's most recent review into these powers.[15] It is noted that the PJCIS was required, under the *Intelligence Services Act 2001*, to review the operation, effectiveness and implications of these powers and report by 7 January 2021. However, as at the time of tabling, it does not appear that the PJCIS has reported on this inquiry.[16] As such, it appears the lack of reporting under the statutory timeframe is the reason why these coercive powers are being extended by a further 15 months. It is noted that while the statement of compatibility refers to reports from 3-4 years ago as to the continued need for these powers, no recent evidence has been presented that establishes the necessity of continuing these powers. For example, no preventative detention orders have ever been issued in the 16 years since those powers commenced,[17] and no recent evidence demonstrates the continuing need for these powers, including in light of the additional legislative powers that have been enacted since this regime originally commenced. As such, noting the committee's previous conclusion that these provisions do not contain sufficient safeguards to constitute a proportionate limit on rights, and noting the government has not demonstrated the continued necessity of these powers, it has not been demonstrated that the extension of the control order, preventative detention order

13 See Parliamentary Joint Committee on Intelligence and Security, *Review of 'declared areas' provisions: Sections 119.2 and 119.3 of the Criminal Code* (February 2021) p. 21.

14 See Australian Government response to the Parliamentary Joint Committee on Intelligence and Security, *Review of 'declared areas' provisions: Sections 119.2 and 119.3 of the Criminal Code* (July 2021) pp. 2-3.

15 See *Intelligence Services Act 2001*, paragraph 29(1)(bb).

16 See Parliamentary Joint Committee on Intelligence and Security, Review of AFP powers, listed under 'current inquiries' on the PJCIS's webpage.

17 Statement of compatibility, p. 16.

and stop, search and seizure provisions for a further 15 months is compatible with human rights.

## Committee view

**1.14 The committee notes this bill, now Act, extends the operation of a number of counter-terrorism related measures which are otherwise due to sunset on 7 September 2021. The extended measures are the declared area provisions (which make it an offence for a person to travel to any area which the Minister for Foreign Affairs declares to be a declared area); the control order regime; the preventative detention order regime; and certain police stop, search and seizure powers.**

**1.15 The committee notes it has previously considered the human rights compatibility of the provisions being extended. The committee has previously found that while all of the measures likely sought to achieve a legitimate objective (namely, that of seeking to prevent terrorist acts), there were questions whether the measures would be effective to achieve this and were necessary, and, in particular, the measures did not appear to be proportionate, and therefore were likely to be incompatible with a range of human rights.**

**1.16 The committee notes that limited evidence has been presented as to the necessity for continuing these coercive powers beyond their sunset date. In particular, it notes that many of these powers are being extended because no report on their continued effectiveness has been presented to Parliament in the requisite timeframe.**

**1.17 As such, noting the committee's previous conclusion that these provisions do not contain sufficient safeguards to constitute a proportionate limit on rights, and noting the government has not demonstrated the continued necessity of these powers, the committee considers it has not been demonstrated that the extension of these provisions is compatible with human rights.**

**1.18 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.**

# Defence Legislation Amendment (Discipline Reform) Bill 2021[1]

| | |
|---|---|
| **Purpose** | This bill seeks to amend the *Defence Force Discipline Act 1982* to:<br>• expand the operation of the disciplinary infringement scheme in dealing with minor breaches of military discipline;<br>• remove the subordinate summary authority, to reduce the number of summary authority levels; and<br>• introduce several new service offences relating to failure to perform duty or carry out activity, cyber-bullying, and failure to notify change in circumstances concerning the receipt of a benefit or allowance |
| **Portfolio** | Defence |
| **Introduced** | House of Representatives, 12 August 2021 |
| **Rights** | Freedom of expression |

## Service offence to use social media and electronic services to offend

1.19 The bill proposes to make a number of new service offences that would apply to Australian Defence Force (ADF) personnel. This includes making it an offence for a defence member to use a social media service or relevant electronic service (such as email, text or chat messages), 'in a way that a reasonable person would regard as offensive or as threatening, intimidating, harassing or humiliating another person'. The maximum punishment would be imprisonment for two years.[2]

1.20 In addition, if a defence member is convicted of this offence a service tribunal can make an order that the member take reasonable action to remove, retract, recover, delete or destroy the material.[3] A failure to comply with such an order would also be an offence punishable by up to two years imprisonment.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Defence Legislation Amendment (Discipline Reform) Bill 2021, *Report 10 of 2021*; [2021] AUPJCHR 92.

2 Schedule 3, item 2, proposed section 48A.

3 Schedule 3, item 5, proposed section 84A.

4 Schedule 3, item 2, proposed section 48B.

## Preliminary international human rights legal advice

### *Right to freedom of expression*

1.21 Making it a service offence for an ADF member to use social media, or send text messages or emails, that might offend a reasonable person, engages and limits the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.[5] The right to freedom of expression protects all forms of expression and the means of their dissemination, including spoken, written and sign language and non-verbal expression, such as images and objects of art.[6] This right embraces expression that may be regarded as deeply offensive.[7] This right 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.

1.22 The statement of compatibility recognises that freedom of expression is engaged and limited, but says the proposed offence 'is necessary, reasonable and proportionate for the maintenance or enforcement of service discipline of Australian Defence Force personnel'.[8] The explanatory memorandum provides further detail regarding the need for this offence. It states that cyber-bullying 'is conduct that is corrosive to good order and discipline; it is contrary to the Defence Value of respect towards others and has a negative impact on the morale, operational effectiveness, and reputation of the ADF'. It goes on to explain that commanders in the ADF are responsible for ensuring the discipline of ADF members and for the safety, health and well-being of people under their command '24 hours a day, seven days a week'. As such, instances of cyber-bullying within the ADF 'need to be dealt with quickly by commanders to minimise the impact not only on individuals, but also to the morale and operational effectiveness of the ADF more generally'.[9]

5 International Covenant on Civil and Political Rights, article 19(2).

6 UN Human Rights Committee*, General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [12].

7 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [11]. This is subject to the provisions of article 19(3) and article 20 of the International Covenant on Civil and Political Rights. Article 19(3) states that the right to freedom of expression carries with it special duties and responsibilities, and may be subject to restrictions but only such that are provided by law and are necessary for respecting the rights or reputations of others, or to protect national security, public order, public health or morals. Article 20 provides any propaganda for war, and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited.

8 Statement of compatibility, [40].

9 Explanatory memorandum, in the discussion regarding Schedule 3, item 2, proposed section 48A.

1.23 Maintaining or enforcing military service discipline would be likely to constitute a legitimate objective for the purposes of international human rights law, and having an enforceable service cyber-bullying offence may be rationally connected to that objective. A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective. In this respect the explanatory materials accompanying the bill are silent.

1.24 It is noted that the proposed service offence applies broadly to where a defence member uses a social media service or relevant electronic service in a way that a reasonable person would regard 'as offensive or as threatening, intimidating, harassing or humiliating another person'. While threatening, intimidating, harassing or humiliating another person would appear to be limited to serious online abuse, the proposed service offence of using a service in a way that is 'offensive' to a reasonable person may be employed in relation to conduct with effects that range from slight to severe, and could capture a large range of uses that may not constitute cyber-bullying.

1.25 The right to freedom of expression, to be meaningful, protects both popular and unpopular expression and ideas, including expression that may be regarded as deeply offensive (so long as it does not constitute hate speech).[10] The term 'offensive' has been the subject of extensive consideration in existing areas of Australian law. The High Court of Australia has noted that, 'offensiveness is a protean concept which is not readily contained unless limited by a clear statutory purpose and other criteria of liability'.[11] It has further stated that the modern approach to interpretation—particularly in the case of general words—requires that the context be considered in the first instance: '[w]hilst the process of construction concerns language, it is not assisted by a focus upon the clarity of expression of a word to the exclusion of its context'.[12]

1.26 In *Monis v R*, the High Court considered the meaning of the term 'offensive' within the context of the alleged offence of using a postal service in a way that reasonable persons would regard as being, in all the circumstances, 'menacing,

10 See UN Human Rights Committee, *General Comment 34: Freedom of opinion and expression* (2011) [11].

11 *Monis v R; Droudis v R* [2013] HCR 4 [47] per French CJ. Gleeson CJ (dissenting) in *Coleman v Power* [2004] HCA 39 further commented that concepts of what is offensive will vary within time and place, and may be affected by the circumstances in which the relevant conduct occurs, at [12].

12 *Monis v R; Droudis v R* [2013] HCR 4 [309] (per Crennan, Kiefel and Bell JJ). See also *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 [315] per Mason J; and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [381].

harassing or offensive'.[13] In that instance, Justices Crennan, Kiefel and Bell guided that the terms 'menacing, harassing or offensive' must be considered together:

> It is true that a communication which has the quality of being menacing or harassing can be seen to be personally directed and deliberately so. An offensive communication may have those qualities; it may not…Importantly, the grouping of the three words and their subjection to the same objective standard of assessment for the purposes of the offences in s 471.12 suggests that what is offensive will have a quality at least as serious in effect upon a person as the other words convey. The words "menacing" and "harassing" imply a serious potential effect upon an addressee, one which causes apprehension, if not a fear, for that person's safety. For consistency, to be "offensive", a communication must be likely to have a serious effect upon the emotional well-being of an addressee.[14]

1.27 Section 18C of the *Racial Discrimination Act 1975* similarly prohibits an act done on the basis of race or colour that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate. In this context, having had regard to the collective phrase 'offend, insult, humiliate or intimidate', Australian courts have considered that this establishes an objective test of whether the act is reasonably likely to have a 'profound and serious effect', in all the circumstances, and is not to be likened to mere slights.[15]

1.28 The *Online Safety Act 2021*, which was recently enacted, also gives powers to take down material from websites where an ordinary reasonable adult would regard the material as being, in all the circumstances, 'menacing, harassing or offensive', and that it is likely that the material was intended to have an effect of causing serious harm.[16]

1.29 In contrast, this proposed offence uses different wording that separates out the term 'offensive' from the terms 'threatening, intimidating, harassing or humiliating'. The explanatory memorandum states that this proposed provision differs from similar civilian criminal legislation in that there is no requirement for the cyber-bullying conduct to be 'serious'. It states this distinction is important as 'the availability of this service offence supports the maintenance and enforcement of discipline through deterrence of such conduct by members, which is distinct from the civilian criminal law provisions dealing with criminal behaviour'.[17] However, while the fact that

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13 Pursuant to section 471.12 of the *Criminal Code Act 1995*.

14 *Monis v R; Droudis v R* [2013] HCR 4 [310].

15 *Creek v Cairns Post* [2001] FCA 1007 [16]. See also, *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 [131]; *Jones v Scully* (2002) 120 FCR 243 [102]; and *Eatock v Bolt* (2011) 197 FCR 261 at [267]-[268].

16 *Online Safety Act 2021*, section 7.

17 Explanatory memorandum, in the discussion regarding Schedule 3, item 2, proposed section 48A.

this service offence does not result in a criminal conviction may operate in some respects to safeguard its proportionality, it still could lead to a penalty of up to two years imprisonment being imposed. In addition, it is noted that charges under the ADF's military discipline law system appear able to be laid even in circumstances where the offending conduct occurs outside of what might ordinarily be considered a military context.[18] As such, making it a service offence for an ADF member to, in potentially even a non-military context, post anything on social media, or via email or text message, that a reasonable person may regard as offensive, would appear to be a significant limit on an ADF member's right to freedom of expression.

1.30 It is also not clear whether there are any safeguards in place to protect an ADF member's right to freedom of expression, to ensure speech is not disproportionately restricted. The explanatory memorandum states that the new service offence will enable less serious disciplinary breaches of cyber-bullying to be dealt with by a summary authority, and for more serious breaches, by court martial or Defence Force magistrate, with referral to civilian authorities remaining an option for matters that may constitute a criminal offence.[19] However, as a matter of law all types of uses may be subject to up to two years imprisonment, with no gradients provided as to the level of seriousness. It is also not clear why the current approach to dealing with cyber-bullying, including relying on existing criminal offences, has not proved effective, and whether there are any less rights restrictive ways to achieve the same objective.

1.31 In order to assess the proportionality of this measure with the right to freedom of expression, further information is required, and in particular:

(a) what type of use is likely to be considered 'offensive' for the purposes of proposed section 48A;

(b) is it intended that the term 'offensive' will be considered together with the terms 'threatening, intimidating, harassing or humiliating', or is it intended to have a stand-alone meaning, and, if so, is it intended that this would capture uses that a reasonable person would merely find offensive, without necessarily any profound and serious effects;

(c) could this service offence apply to ADF members in their personal capacity where the offensive use has no, or little, link to their ADF service;

(d) what safeguards are in place to ensure the proposed service offence does not unduly restrict an ADF member's freedom of expression; and

(e) what other, less rights restrictive approaches would be available to achieve the stated objective. In this respect, further information is

18 See *Private R v Cowen* [2020] HCA 31.

19 Explanatory memorandum, in the discussion regarding Schedule 3, item 2, proposed section 48A.

required as to the approach currently taken to deal with cyber-bullying in the ADF and why this has proved not to be effective to achieve the objective of maintaining military discipline.

## Committee view

**1.32 The committee notes this bill seeks to make it an offence for Australian Defence Force members to use a social media service or relevant electronic service (such as email, text or chat messages), 'in a way that a reasonable person would regard as offensive or as threatening, intimidating, harassing or humiliating another person'. The maximum punishment would be imprisonment for two years.**

**1.33 The committee considers that this measure engages and limits the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, including expression that may be regarded as offensive. This right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.**

**1.34 The committee considers that the measure seeks to achieve the legitimate objective of maintaining or enforcing military service discipline, and the proposed offence may be effective to achieve this. However, questions remain as to whether the measure is proportionate.**

**1.35 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this measure, and as such seeks the minister's advice as to the matters set out at paragraph [1.31].**

# Electoral Legislation Amendment (Party Registration Integrity) Bill 2021[1]

| | |
|---|---|
| **Purpose** | This bill seeks to amend the registration eligibility requirements for a federal non-Parliamentary party by increasing the minimum membership from 500 to 1500 unique members |
| **Portfolio** | Finance |
| **Introduced** | House of Representatives, 12 August 2021 |
| **Rights** | Freedom of association; political participation |

## Increasing unique party membership for non-parliamentary parties

1.36 This bill would amend the *Commonwealth Electoral Act 1918* to increase, from 500 to 1500, the minimum number of unique members required by a political party in order for it to be federally registered.[2] Further, the bill would provide that a person may not qualify as a unique member of multiple political parties which are not represented in the federal parliament. Rather, within at least 30 days of being notified by the Australian Electoral Commission, they would be required to nominate one party in order to count towards its unique membership.[3] If they failed to nominate a party within at least 30 days, no party would be permitted to rely on their membership as contributing to their unique membership.

1.37 Where a political party is registered, that party name may be printed on the ballot papers for an election adjacent to the name of a candidate who has been endorsed by that party.[4]

## Preliminary international human rights legal advice

### *Right to freedom of association and right to participate in public affairs*

1.38 By increasing the minimum required membership for a non-parliamentary political party to be registered as a political party for the purposes of a federal election, this bill may limit the right to freedom of association. The right to freedom of association protects the right of all persons to group together voluntarily for a

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Electoral Legislation Amendment (Party Registration Integrity) Bill 2021, *Report 10 of 2021*; [2021] AUPJCHR 93.

2 Schedule 1, item 1, subsection 123(1).

3 Schedule 1, item 2, proposed section 123A.

4 *Commonwealth Electoral Act 1918*, subsection 169(1).

common goal and to form and join an association.[5] This right prevents the State from imposing unreasonable and disproportionate restrictions on the right to form an association, including imposing procedures for formal recognition as an association that effectively prevent or discourage people from doing so.[6] Further, this bill may also engage and limit the related right to participate in public affairs, which gives citizens the right to take part in the conduct of public affairs, directly or through freely chosen representatives, and includes guarantees of the right of Australian citizens to stand for public office and to vote in elections.[7] Any conditions which apply to the exercise of the right to participate in public affairs should be based on objective and reasonable criteria.[8]

1.39 These rights may be permissibly limited where the limitation seeks to achieve a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving the objective. The right to freedom of association may only be limited where the measures are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.[9]

1.40 The statement of compatibility does not identify that this measure engages and may limit the right to participate in public affairs, and so no information is provided with respect to its compatibility. The statement of compatibility notes that this measure engages the right to freedom of association. It states that the amendment is intended to ensure that any political party on the federal Register of Political Parties has 'a genuine foundation of national community support', and notes that the reforms would not preclude members of smaller associations from standing as independent candidates for federal elections with organisational endorsement.[10] However, no information is provided as to: how the figure of 1500 unique members was reached; why a membership of 1500 people (as opposed to 500) is indicative of a foundation of national community support; or why a person may only count as a unique member with respect to one non-parliamentary political party. Further, it is

5 International Covenant on Civil and Political Rights, article 22.

6 The European Court on Human Rights has similarly stated that requiring proof of minimum levels of support by political parties must be reasonable and democratically justifiable and not so burdensome as to restrict the political activities of small parties or to discriminate against parties representing minorities. See, *Republican Party of Russia v. Russia*, European Court of Human Rights, Application No. 12976/07 (2011) [110]-[119]. See also, Council of Europe, European Commission for Democracy through Law, *Guidelines on Political Party Regulation* (December 2020) pp. 27-28.

7 International Covenant on Civil and Political Rights, article 25.

8 UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) [4].

9 International Covenant on Civil and Political Rights, article 22(2).

10 Statement of compatibility, p. 4.

not clear whether and how the measure is necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. The statement of compatibility states that the proposed amendment is proportionate given that there are over 16 million people on the Commonwealth Electoral Roll who can be a member of a political party for the purposes of registration, and noting that the revised threshold would still be less restrictive than equivalent thresholds under some state electoral laws.[11] However, given that voting in federal elections occurs based on a person's electorate (in the House of Representatives) and state or territory (in the Senate), it is not clear that the total number of voters at the federal level is directly relevant to the minimum number of registered party members (particularly where a party may be focused on concerns specific to a particular region, or particular cohort in society).[12]

1.41 In order to assess the human rights compatibility of this measure further information is required as to:

(a) whether and how increasing the minimum required unique membership of a non-parliamentary political party from 500 to 1500 members is necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others;

(b) how the figure of 1500 unique members was reached, and why a membership of 1500 members is considered to be indicative of a foundation of national community support (whereas 500 members is not);

(c) how many federally-registered political parties currently have less than 1500 registered members;

(d) whether this amendment may have the effect of discriminating against parties representing minority groups;

(e) why a person would only be permitted to count as a unique member with respect to one non-parliamentary political party; and

(f) whether and how this measure constitutes a proportionate limit on the right to participate in public affairs.

11 Statement of compatibility, p. 4.

12 Excluding those parties represented in the federal parliament, there would appear to be approximately 38 political parties registered at a federal level. See, Australian Electoral Commission, *Current register of political parties,* 11 August 2021, https://www.aec.gov.au/parties_and_representatives/party_registration/Registered_parties/ (accessed 16 August 2021).

## Committee view

**1.42 The committee notes that this bill seeks to amend the registration eligibility requirements for a federal non-parliamentary party by increasing the minimum membership from 500 to 1500 unique members. The committee notes that this engages and may limit the right to freedom of association, and the right to participate in political affairs. The committee notes that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.**

**1.43 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill, and as such seeks the assistant minister's advice as to the matters set out at paragraph [1.41].**

# Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021[1]

| | |
|---|---|
| **Purpose** | This bill seeks to amend a number of Acts in relation to social security, family assistance and paid parental leave to:<br>• increase the existing newly arrived resident's waiting period (NARWP) for carer payment and carer allowance from 104 weeks to 208 weeks;<br>• remove the 104 week qualifying residency requirement for parenting payment as this payment already has a 208 week NARWP;<br>• ensure the existing 208 week NARWP applies to relevant temporary visa holders for the low income health care card and Commonwealth seniors health card;<br>• increase the existing NARWP for family tax benefit Part A from 52 weeks to 208 weeks;<br>• introduce a new NARWP of 208 weeks for family tax benefit Part B; and<br>• increase the existing NARWP for parental leave pay and dad and partner pay, from 104 weeks to 208 weeks |
| **Portfolio** | Social Services |
| **Introduced** | House of Representatives, 24 June 2021 |
| **Rights** | Social security; adequate standard of living; health; maternity leave; equality and non-discrimination |

## Increased waiting period for social security payments

1.44 This bill seeks to standardise the newly arrived resident's waiting period for social security payments by applying a consistent four-year (or 208 weeks) waiting period across all relevant payments and concession cards (including low income health care card and commonwealth seniors health card). Specifically, the bill would introduce a four-year waiting period for family tax benefit Part B (where no waiting period currently exists) and increase the waiting period to four years (from either 52 or 104 weeks depending on the payment) for carer payment and carer allowance; parenting payment; family tax benefit Part A; parental leave pay; and dad and partner

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021, *Report 10 of 2021*; [2021] AUPJCHR 94.

pay.[2] The increased waiting period would apply prospectively to people granted the relevant visa on or after the commencement of these amendments.[3] The bill would not affect the waiting period or social security payments and concession cards for existing visa holders, or amend the existing exemptions in relation to the waiting period.[4]

## Preliminary international human rights legal advice

### *Rights to social security, adequate standard of living, health and maternity leave*

1.45 By extending the waiting period for certain social security payments and concession cards (including health care cards) and so restricting access to social security for newly arrived residents for four years, this measure engages and limits the rights to social security, adequate standard of living, health and maternity leave.

1.46 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living, the right to health and the rights of the child and the family.[5] Social security benefits must be adequate in amount and duration.[6] States must guarantee the equal enjoyment by all of minimum and adequate protection, and the right includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage.[7] The right to social security also includes the right to access benefits to prevent access to health care from being unaffordable.[8] The right to an adequate standard of living requires states to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.[9] Additionally, the right to health includes the right to enjoy the highest attainable standard of physical and mental health, and

2 Schedule 1, items 5, 6, 13–16; Schedule 2, items 3–5; Schedule 3, items 1–6.

3 Schedule 1, item 17; Schedule 2, item 6; Schedule 3, item 7.

4 Statement of compatibility, p. 13.

5 International Covenant on Economic, Social and Cultural Rights, article 9. See also, UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008).

6 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [22].

7 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [4] and [9].

8 UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008) [13].

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

requires available, accessible, acceptable, and quality health care that is affordable for all.[10]

1.47 Further, the right to maternity leave is protected by article 10(2) of the International Covenant on Economic, Social and Cultural Rights and article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination against Women.[11] The right to maternity leave includes an entitlement for parental leave with pay or comparable social security benefits for a reasonable period before and after childbirth.[12]

1.48 Under international human rights law, Australia has obligations to progressively realise economic, social and cultural rights, including the rights to social security, adequate standard of living, health and maternity leave, using the maximum

10 International Covenant on Economic, Social and Cultural Rights, article 12(1). The United Nations Economic, Social and Cultural Rights Committee has noted that 'health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups': *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [12]. See also Economic, Social and Cultural Rights Committee, *General Comment No. 12: the right to food (article 11)* (1999); *General Comment No. 15: the right to water (articles 11 and 12)* (2002); and *General Comment No. 22: the right to sexual and reproductive health* (2016).

11 The Australian government on ratification of the Convention on the Elimination of All Forms of Discrimination against Women in 1983 made a statement and reservation that: 'The Government of Australia advises that it is not at present in a position to take the measures required by Article 11(2)(b) to introduce maternity leave with pay or with comparable social benefits throughout Australia.' This statement and reservation has not been withdrawn. However, after the Commonwealth introduced the Paid Parental Leave scheme in 2011, the Australian Government committed to establishing a systematic process for the regular review of Australia's reservations to international human rights treaties: See, Attorney-General's Department, Right to Maternity Leave: https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttomaternityleave.aspx. In its concluding observations on Australia in 2018, the CEDAW committee expressed concern at the lack of measures taken to withdraw its reservation to Article 11(2) and recommended that Australia expedite the necessary legislative steps to withdraw its reservation: see Committee on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Australia,* CEDAW/C/AUS/CO/8 (2018) [9]-[10].

12 The UN Committee on Economic, Social and Cultural Rights has further explained that the obligations of state parties to the International Covenant on Economic, Social and Cultural Rights in relation to the right to maternity leave include the obligation to guarantee 'adequate maternity leave for women, paternity leave for men, and parental leave for both men and women'. See UN Committee on Economic, Social and Cultural Rights, *General Comment 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005).

of resources available.[13] Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.[14] Insofar as the measure would further restrict access to social security payments and concession cards (including health care cards), the measure would appear to constitute a retrogressive measure. Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

***Rights of the child***

1.49 Insofar as this measure restricts access to social security payments and concession cards for migrant families once in Australia, including introducing a four-year waiting period for Family Tax Benefit Part B (which is paid per family, with the amount depending on the age of the youngest child), the measure also engages and limits the rights of the child. Under the Convention on the Rights of the Child, children have the right to benefit from social security and to a standard of living adequate for a child's physical, mental, spiritual, moral and social development.[15] The Convention requires States to assist parents or carers of children, through social assistance and support, to realise a child's right to an adequate standard of living.[16] To the extent that the measure restricts newly arrived migrant parents' access to social security, which may limit their ability meet the basic needs of themselves and their children, it may adversely affect the rights of their children to benefit from social security and to an adequate standard of living. The UN Committee on Economic, Social and Cultural Rights has emphasised that the provision of benefits (in the form of cash or services) is crucial for realising the rights of child.[17] Australia is also required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[18] This requires legislative, administrative and judicial bodies

13 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)* (1990) [9]. The obligation to progressively realise the rights recognised in the International Covenant on Economic, Social and Cultural Rights imposes an obligation on States to move 'as expeditiously and effectively as possible' towards the goal of fully realising those rights.

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

15 Convention on the Rights of the Child, articles 26 and 27.

16 See also Convention on the Rights of the Child, article 27(3).

17 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [18].

18 Convention on the Rights of the Child, article 3(1).

and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[19]

***Right to equality and non-discrimination***

1.50 In addition, the measure appears to engage and limit the right to equality and non-discrimination insofar as it treats people differently on the basis of national origin, and would appear to have a disproportionate impact on women, as they are the primary recipients of certain social security payments, including paid parental leave and parenting payment, carer payment and carer allowance. The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[20] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights).[21] Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.[22] The United Nations (UN) Committee on Economic, Social and Cultural Rights has observed that where a legal provision, 'although formulated in a neutral manner, might in fact affect a clearly higher percentage of women than men, it is for the State party to show that such a situation does not constitute indirect discrimination on grounds of gender'.[23]

1.51 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate

19 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013).

20 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights. Articles 1–4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women further describe the content of these obligations, including the specific elements that State parties are required to take into account to ensure the rights to equality for women.

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

22 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. 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'.

23 *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.4].

objective (one which, where an economic, social and cultural right is in question, is solely for the purpose of promoting the general welfare in a democratic society),[24] is rationally connected to that objective and is a proportionate means of achieving that objective.[25] Further, where a person possesses characteristics which make them particularly vulnerable to intersectional discrimination, such as on the grounds of both gender or sex and national origin or ethnicity, the UN Committee on Economic, Social and Cultural Rights has highlighted that 'particularly special or strict scrutiny is required in considering the question of possible discrimination'.[26]

***Right to protection of the family***

1.52 Australia also has obligations to provide the widest possible protection and assistance to the family.[27] To the extent that a four-year waiting period may operate as a deterrent or barrier to newly arrived migrants bringing members of their family to join them in Australia, the measure may engage and limit the right to protection of the family. This is particularly so for families experiencing financial disadvantage as a result of the measure, as without access to social security payments, they may be unable to support family members for the duration of the waiting period. A measure which limits the ability of certain family members to join others in a country is generally a limitation on the right to protection of the family.[28] An important element of protection of the family[29] is to ensure family members are not involuntarily

24 International Covenant on Economic, Social and Cultural Rights, article 4.

25 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13] and UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [13]. See also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

26 *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.2]. See also *Rodriguez v Spain,* UN Committee on Economic, Social and Cultural Rights, Communication No. 1/2013 E/C.12/57/D/1/2013 (20 April 2016) [14.1]; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [17] and *General Comment 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005) [5]; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GS/28 (16 December 2010) [28].

27 Under articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights.

28 See, for example, *Sen v the Netherlands,* European Court of Human Rights Application no. 31465/96 (2001); *Tuquabo-Tekle And Others v The Netherlands,* European Court of Human Rights Application No. 60665/00 (2006) [41]; *Maslov v Austria,* European Court of Human Rights Application No. 1638/03 (2008) [61]-[67].

29 Protected by articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights.

separated from one another. Additionally, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[30] While the state has a right to control immigration, the right to protection of the family does require Australia to create the conditions conducive to family formation and stability, including the interest of family reunification.[31]

*Legitimate objective*

1.53 Any limitation on any of the above rights must pursue a legitimate objective, namely, one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. This general test is further qualified by specific requirements that apply to economic, social and cultural rights, namely that states may limit these rights only insofar as 'this may be compatible with the nature' of those rights, and 'solely for the purpose of promoting the general welfare in a democratic society'.[32] This means that the only legitimate objective in the context of the economic, social and cultural rights is a limitation for the 'promotion of general welfare'. The term 'general welfare' is to be interpreted restrictively and refers primarily to the economic and social well-being of the people and the community as a whole, meaning that a limitation on a right which disproportionately impacts a vulnerable group may not meet the definition of promoting 'general welfare'.[33]

1.54 The statement of compatibility states that the purpose of the measure is to standardise the waiting period across all relevant payments and concession cards, and to reinforce the existing expectations of self-reliance for new permanent migrants.[34] In this way, the statement of compatibility states that the measure will help to target access to payments to those most in need, in line with the fundamental principles underpinning Australia's welfare payment system.[35] The statement of compatibility

30 Convention on the Rights of the Child, article 3(1). See also article 10, which requires States parties to treat applications by minors for family reunification in a positive, humane and expeditious manner.

31 See *Ngambi and Nebol v France,* United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4]–[6.5].

32 See International Covenant on Economic, Social and Cultural Rights, article 4.

33 Limburg Principles on the Implementation of the ICESCR, June 1986 [52]. See also, Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review* vol. 9, no. 4, 2009, p. 573; Erica-Irene A Daes, The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, *Study of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, E/CN.4/Sub.2/432/Rev.2 (1983), pp. 123–4.

34 Statement of compatibility, pp. 15, 18 and 24.

35 Statement of compatibility, p. 18.

notes that the broader purpose of the welfare payment system is to encourage people to support themselves so that the system remains sustainable into the future.[36]

1.55 In general terms, ensuring the financial sustainability of the welfare system may be capable of constituting a legitimate objective for the purposes of international human rights law, insofar as it may ensure that limited resources are directed towards those most in need.[37] However, the other stated objective of reinforcing expectations of self-reliance for new migrants is unlikely to constitute a legitimate objective for the purposes of international human rights law, noting that a legitimate objective must address a pressing or substantial concern and not simply seek a desirable or convenient outcome, such as meeting community expectations. To the extent that a financially sustainable social security system promotes the economic and social well-being of the people and the community as a whole, the limitation may be for the purpose of promoting general welfare. However, a limitation which disproportionately impacts a vulnerable group may not meet the definition of promoting 'general welfare'.[38] Insofar as this measure would appear to have a disproportionate impact on vulnerable groups, including newly arrived migrants and women experiencing financial disadvantage, questions arise as to whether this measure would, in practice, promote general welfare for the purpose of international human rights law. In addressing these questions, the UN Committee on Economic, Social and Cultural Rights has indicated that the reasonableness and proportionality of the proposed limitation is relevant, including whether the limitation is the only way to achieve the stated purpose and whether there are alternative measures that do not seriously limit rights (see discussion below from paragraph [1.57]).[39]

*Rational connection*

1.56 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to (that is, effective to achieve) the objective sought to be achieved. By introducing a four-year waiting period across all

36 Statement of compatibility, p. 12.

37 Jurisprudence of the UN Committee on Economic, Social and Cultural Rights indicates that the aim of protecting the resources of a social security system can be a valid and legitimate objective: *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [17.1].

38 Limburg Principles on the Implementation of the ICESCR, June 1986 [52]. See also, Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review* vol. 9, no. 4, 2009, p. 573; Erica-Irene A Daes, The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, *Study of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, E/CN.4/Sub.2/432/Rev.2 (1983), pp. 123–4.

39 See *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [17.1], [23(c)].

relevant payments and concession cards and restricting access to social security payments for newly arrived migrants, the measure may be effective to achieve the objective of requiring newly arrived migrants to support themselves and their families, which in turn, may help to achieve the broader objective of ensuring the financial sustainability of the welfare payment system.

*Proportionality*

1.57 In assessing proportionality, it is necessary to consider a number of factors, including whether the proposed limitation is accompanied by sufficient safeguards; whether there is sufficient flexibility to treat different cases differently; and whether any less rights restrictive alternatives could achieve the same stated objective.

1.58 The statement of compatibility states that the existing waiting period exemptions and safeguards will continue to apply as well as be extended to family tax benefit Part B, providing a safety net for individuals who find themselves in need of support.[40] The statement of compatibility notes that some exemptions apply to all relevant payments, while others only apply to specific payments and/or to specific visa holders.[41] For example, permanent humanitarian migrants and their family members will continue to be exempt from the waiting periods for all social security, family assistance and paid parental leave payments, including carer payment, carer allowance, family tax benefit parts A and B, parental leave pay and dad and partner pay.[42] Temporary humanitarian visa holders will also be exempt from the waiting periods for the social security payments that they are eligible for, including special benefit, low income health care card, family tax benefit, parental leave pay and dad and partner pay.[43]

1.59 The statement of compatibility states that migrants who experience a substantial change in circumstances, such as illness, injury, job loss, death of a partner or sponsor, or family or domestic violence, will continue to be exempt from the waiting period for special benefit. The statement of compatibility states that special benefit is a payment of last resort to provide a safety net for people experiencing hardship who are otherwise not eligible for other social security payments. The special benefit payment is equivalent to the jobseeker or youth allowance payment, and may be supplemented with other payments, such as rent assistance. Individuals who are granted special benefit are also entitled to a health care card or pensioner concession card, and depending on their circumstances, may also be eligible for exemptions for

40 Statement of compatibility, pp. 15–16.

41 Statement of compatibility, pp. 16–18. For example, New Zealand citizens on a Special Category Visa will be exempt from the waiting period for family tax benefit, parental leave pay and dad and partner pay, but will be subject to the waiting periods for other social security payments.

42 Statement of compatibility, p. 16.

43 Statement of compatibility, p. 16.

other payments relating to caring responsibilities, including family tax benefit parts A and B and carer allowance.[44] Becoming a lone parent after becoming an Australian resident will also be considered a change in circumstance allowing the individual to access exemptions for the main payments for principal carers of a dependent child.[45] In addition, the statement of compatibility notes that individuals who hold an Orphan Relative or Remaining Relative visa are excluded from the measure, meaning they are not subject to the amendments contained in this bill.[46]

1.60 These exemptions, in combination with access to other government-funded services, including Medicare, the National Disability Insurance Scheme, employment services, schools and tertiary education, will likely operate as important safeguards to ensure that those experiencing financial hardship or whose circumstances have changed can afford to meet their basic needs and maintain an adequate standard of living. In particular, exempting humanitarian visa holders from the waiting periods for all relevant social security payments appears to assist with the proportionality of this measure as these individuals are particularly vulnerable and more likely to require economic and social support. The exemptions process also appears to provide the measure with some flexibility to treat different cases differently, having regard to the individual circumstances of each case. This flexibility would appear to assist with the proportionality of the measure. The strength of the exemptions as a safeguard will likely depend on how the exemption process operates in practice, noting that certain vulnerable individuals may have accessibility issues, for example because of language barriers or the requirement to discuss and provide evidence for potentially sensitive matters, such as domestic violence. In addition, it is not clear whether there is the possibility of oversight and the availability of review in relation to decisions not to grant an exemption for the waiting period.

1.61 Another consideration in assessing proportionality is whether there are less rights restrictive alternatives available to achieve the stated objective.[47] It is not clear that applying a four-year waiting period to access social security payments for all new

44 Statement of compatibility, pp. 16–17.

45 Statement of compatibility, p. 16. The payments include parenting payment, jobseeker payment and youth allowance, and where applicable, family tax benefit parts A and B and carer allowance.

46 Statement of compatibility, p. 17. This means that this cohort of visa holders will continue to be subject to the rules in place prior to 2019, including a two-year waiting period for working age payments and concession cards, and no waiting period for family payments and carer allowance.

47 In *Trujillo Calero v Ecuador*, in assessing the reasonableness and proportionality of the measure, the UN Committee on Economic, Social and Cultural Rights considered whether the limitation was the only way to achieve the stated purpose and whether there were alternative measures that do not seriously limit rights: *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [17.1], [23(c)].

migrants would necessarily be the least rights restrictive way of achieving the broader objective of ensuring a 'sustainable, fair and needs-based welfare payment system'.[48] This is particularly so for new migrants who live in economic precarity but do not qualify for an exemption. For example, in the case of paid parental leave, it would seem that newly arrived migrant women, subject to the waiting period, who earn a low income will not have access to paid parental leave (unless an exemption applies), whereas other women in Australia who earn up to $151,350 will have access to paid parental leave.[49] In this regard, it does not appear that the measure would necessarily target those most in need. Regarding earlier extensions of the waiting period for access to paid parental leave, the committee has raised concerns that restricting access to paid maternity leave may ultimately exacerbate inequalities experienced by women subject to the waiting period and noted that it was not clear that extending the waiting period represented the least rights restrictive approach.[50]

1.62 A further consideration is the extent of any interference with human rights. The greater the interference, the less likely the measure is to be considered proportionate. In this case, the statement of compatibility notes that the waiting period primarily applies to new migrants settling in Australia under the skilled and family streams of Australia's migration program.[51] The statement of compatibility states that these migrants are well placed to support themselves and their families through existing resources, employment or family support.[52] However, the statement of compatibility also acknowledges that the financial impact of this measure on affected individuals will depend on their circumstances and the payments they would otherwise have received. It is noted that extending the waiting period may not substantially limit the rights of some recent migrants, insofar as they may have access to adequate financial support outside of the social security system to meet their basic needs. However, for those migrants who experience economic precarity and do not qualify for a waiting period exemption, there appears to be a risk that the measure would significantly interfere with their rights and their ability to meet their basic needs as well as those of their children.

*Concluding remarks*

1.63 Insofar as the measure further restricts access to social security payments for newly arrived migrants and has a disproportionate impact on certain groups, particularly women, it engages and limits the rights to social security, adequate

48 Statement of compatibility, p. 24.

49 For eligibility criteria for paid parental pay see Services Australia, *Meeting the income test*, 1 July 2021, https://www.servicesaustralia.gov.au/individuals/services/centrelink/parental-leave-pay/who-can-get-it/meeting-income-test (accessed 5 August 2021).

50 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) p. 159.

51 Statement of compatibility, p. 15.

52 Statement of compatibility, p. 15.

standard of living, health, maternity leave and equality and non-discrimination as well as the rights of the child. To the extent that an extended waiting period may operate as a deterrent or barrier to newly arrived migrants bringing members of their family to join them in Australia, the measure may also engage and limit the right to protection of the family. These rights may be subject to permissible limitations where the limitation pursues a legitimate objective (one which, where an economic, social and cultural right is in question, is solely for the purpose of promoting the general welfare in a democratic society), is rationally connected to that objective and is a proportionate means of achieving that objective.

1.64 The objectives of ensuring a financially sustainable social security system and targeting those most in need may be capable of constituting legitimate objectives, although some questions remain in this regard, and the measure appears to be rationally connected to the stated objectives. As regards proportionality, the measure contains a broad range of exemptions to the four-year waiting period, which may operate as an important safeguard, providing some flexibility to treat different cases differently. However, the effectiveness of this safeguard will depend on how the exemptions process operates in practice. It is also unclear whether there is access to review of decisions not to grant an exemption and whether the measure represents the least rights restrictive approach.

1.65 In order to assess the compatibility of this measure with international human rights law, further information is required, in particular:

(a) noting the disproportionate impact on certain groups, particularly women, how does the measure promote general welfare for the purpose of constituting a legitimate objective under international human rights law;

(b) since 2018, how many individuals have been subject to the newly arrived resident's waiting period and of those individuals, how many have made applications for exemptions and of those applications, how many have been granted or denied;

(c) what assistance, if any, is provided to migrants subject to the waiting period to help them to understand and navigate the waiting period exemptions process;

(d) what review and oversight mechanisms are available in relation to decisions not to grant an exemption for the waiting period;

(e) how is the measure the least rights restrictive approach to achieving the stated objectives; and

(f) have alternative measures been considered rather than restricting access to social security payments in the context of Australia's use of its maximum available resources, and if so, why are those alternative measures not appropriate.

## Committee view

**1.66 The committee notes that this bill seeks to standardise the newly arrived resident's waiting period for social security payments by applying a consistent four-year waiting period across all relevant payments and concession cards (including low income health care card and commonwealth seniors health card).**

**1.67 The committee notes that insofar as the measure further restricts access to social security payments for newly arrived migrants and has a disproportionate impact on certain groups, particularly women, it engages and limits the rights to social security, adequate standard of living, health, maternity leave and equality and non-discrimination as well as the rights of the child. The committee further notes that to the extent that an extended waiting period may operate as a deterrent or barrier to newly arrived migrants bringing members of their family to join them in Australia, the measure may also engage and limit the right to protection of the family. These rights may be subject to permissible limitations where it is demonstrated it is reasonable, necessary and proportionate.**

**1.68 The committee considers the objectives of ensuring a financially sustainable social security system and targeting those most in need may be capable of constituting legitimate objectives, although some questions remain as to whether this measure would, in practice, promote general welfare for the purpose of international human rights law. Regarding proportionality, the committee notes that while the measure appears to be accompanied by an important safeguard, notably the broad range of exemptions to the waiting period, questions remain as to whether this safeguard is sufficient in practice and whether there are less rights restrictive alternatives.**

**1.69 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill, and as such seeks the minister's advice as to the matters set out at paragraph [1.65].**

# Legislative Instruments

## Australian Immunisation Register Amendment (National Immunisation Program Vaccines) Rules 2021 [F2021L00925][1]

| | |
|---|---|
| **Purpose** | This legislative instrument requires vaccination providers to report the administration of National Immunisation Program vaccines to the Australian Immunisation Register from 1 July 2021. |
| **Portfolio** | Health |
| **Authorising legislation** | *Australian Immunisation Register Act 2015* |
| **Last day to disallow** | 15 sitting days after tabling (tabled in the Senate and the House of Representatives on 3 August 2021). Notice of motion to disallow must be given by 18 October 2021[2] |
| **Rights** | Health; privacy |

### Expansion of requirement to report vaccine information

1.70 This legislative instrument provides that, from 1 July 2021, registered vaccination providers must report all National Immunisation Program vaccines administered in Australia to the Australian Immunisation Register (AIR). Currently, only COVID-19 and influenza vaccinations must be recorded on the register.[3] This instrument has the effect that a higher number of vaccinations—over 30 from childhood to adulthood, depending on individual circumstances—must now be reported to the AIR.[4] Failure to comply with these reporting requirements is subject to a civil penalty of up to 30 penalty units for each failure to report.[5]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Immunisation Register Amendment (National Immunisation Program Vaccines) Rules 2021 [F2021L00925], *Report 10 of 2021*; [2021] AUPJCHR 95.

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

3 Pursuant to the Australian Immunisation Register Amendment (Reporting) Rules 2021 [F2021L00133].

4 Vaccinations set out on the Australian Immunisation Register at 1 July 2021 can be found here: https://www.health.gov.au/sites/default/files/documents/2020/09/national-immunisation-program-schedule-for-all-people.pdf [accessed 5 August 2021].

5 *Australian Immunisation Register Act 2015*, subsections 10A(5) and 10B(3).

1.71 Vaccination providers must report: the person's Medicare number (if applicable), name, contact details, date of birth, and gender; the provider number, name and contact details of the person who administered the vaccines; and the brand name, dose number and batch number, and date of administration.[6]

## International human rights legal advice

### *Rights to health and privacy*

1.72 In increasing the ability for the government to enhance the monitoring of vaccine-preventable diseases, and contributing to enriched monitoring and statistics on health related issues, this measure appears to promote the right to health. The right to health is the right to enjoy the highest attainable standard of physical and mental health.[7] It is a right to have access to adequate health care as well as to live in conditions which promote a healthy life (such as access to safe drinking water, housing, food, and a healthy environment).[8]

1.73 However, in requiring vaccination providers to provide personal information about individuals who receive vaccinations (including both children and adults), the measure also appears to limit the right to privacy. 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.[9] The right to privacy 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 where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.74 In assessing whether the measure seeks to achieve a legitimate objective, the statement of compatibility states that this measure will assist in the objective of protecting the health of individuals and the community by enhanced monitoring of vaccine preventable diseases, and standardise the quality of information in the AIR that records vaccines administered, contributing to enriched monitoring and providing invaluable statistics on health-related issues.[10] This would appear to constitute a

6 Australian Immunisation Register Rule 2015, section 9.

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

8 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [4]. See also, *General Comment No. 12: the right to food (article 11)* (1999); *General Comment No. 15: the right to water (articles 11 and 12)* (2002); and *General Comment No. 22: the right to sexual and reproductive health* (2016).

9 International Covenant on Civil and Political Rights, article 17. International human rights law also recognises the right of children to be free from arbitrary or unlawful interferences with their privacy. See, Convention on the Rights of the Child, article 16.

10 Statement of compatibility, p. 7.

legitimate objective for the purposes of international human rights law and the measure appears rationally connected to that objective.

1.75 When considering whether a limitation on a right is proportionate to achieve the stated objective, it is necessary to consider, among other things, the extent the measure interferes with the right to privacy. The greater the interference, the less likely the measure is to be proportionate. In this regard, this measure significantly expands the information required to be reported to the AIR (from the currently two types of vaccines required to be reported). A person may receive over 30 vaccines from childhood and throughout their adult life (depending on their individual circumstances) under the National Immunisation Program, which will all now be required to be reported to the AIR.

1.76 It is also necessary to consider whether there are sufficient safeguards in place to protect the right to privacy and whether there are other less rights restrictive ways to achieve the stated objective. In this regard, the statement of compatibility notes that vaccination providers have the capacity to decline to report where they consider it would be likely to pose a risk to the health or safety of an individual to do so.[11] This has the capacity to serve as a privacy safeguard, depending on the extent to which it is utilised.

1.77 The statement of compatibility also states that the information required to be provided is subject to the secrecy provisions in the *Australian Immunisation Register Act 2015* (AIR Act), which control the use and disclosure of information stored on the AIR and who can use and disclose this information.[12] It also states that existing privacy provisions in the AIR Act regulate the uploading of personal information or of 'relevant identifying information' for the purposes of including such information in the AIR. Section 23 of the AIR Act provides that it is an offence for a person to record, disclose or use protected information (including personal information) obtained, or derived, under the Act, unless they are authorised to do so. A person is authorised to record, disclose or use protected information if they do so in order to include the information on the Register or to otherwise perform functions under the AIR Act, to disclose the information to a court or coroner, or where authorised to do so under another law.[13] However, the AIR Act also includes a broad power for the minister (or their delegate) to authorise a person to use or disclose protected information for a specified purpose where satisfied 'it is in the public interest' to do so.[14] While making it an offence to record, use or disclose protected information helps to safeguard the right to privacy, it is not clear why it is necessary that the AIR Act includes a broad discretionary power

11 Statement of compatibility, p. 7.

12 Statement of compatibility, p. 7.

13 *Australian Immunisation Register Act 2015*, section 22.

14 *Australian Immunisation Register Act 2015*, subsection 22(3).

enabling the disclosure of the personal vaccination information of Australians to 'any person', for any specified purpose, so long as it is considered to be in the (undefined) 'public interest'. The minister has previously advised that an assessment of whether a disclosure is in the public interest 'generally requires the decision maker to consider a range of relevant factors', which could include the impact of such a disclosure on the privacy of an affected individual.[15]

1.78 As set out in an earlier analysis of related legislation (which provided for the mandatory reporting of COVID-19 and influenza vaccinations to the AIR),[16] empowering the minister to disclose protected information to 'a person' rather than 'a specified class of person', appears to enable disclosure without specifying or limiting the recipients of the information. While the minister has previously advised that it was not his intention (at that time) to use this power to authorise the disclosure of information regarding COVID-19 vaccinations, as a matter of law the minister is empowered to, at any time, disclose personal information regarding a person's vaccination status to any person for any purpose, as the minister considers it to be in the public interest to do so. Expanding the number of vaccinations required to be reported to the AIR means that this power may now be exercised with respect to a much larger volume of information.

1.79 It is difficult to assess the privacy implications of requiring vaccination providers to report information relating to National Immunisation Register vaccinations to the AIR without knowing the extent to which such information may be disclosed or the purposes for which it may be used. However, noting the existing broad ministerial discretion to authorise the disclosure of this information to any person for any purpose if it is considered to be in the public interest to do so, there is a risk that expanding the range of personal information that may be so disclosed may impermissibly limit the right to privacy.

## Committee view

**1.80 The committee notes that this legislative instrument requires vaccination providers to report the administration of all National Immunisation Program vaccines to the Australian Immunisation Register from 1 July 2021. The committee notes that there are currently over 30 vaccines on the National Immunisation**

15 See minister's response, Parliamentary Joint Committee on Human Rights, *Report 4 of 2021* (31 Mary 2021), Australian Immunisation Register Amendment (Reporting) Bill 2020 and Australian Immunisation Register Amendment (Reporting) Rules 2021 [F2021L00133], pp. 10–11.

16 Parliamentary Joint Committee on Human Rights, *Thirty-Second Report of the 44th Parliament* (1 December 2015) p. 53; and *Report 4 of 2021* (31 Mary 2021), Australian Immunisation Register Amendment (Reporting) Bill 2020 and Australian Immunisation Register Amendment (Reporting) Rules 2021 [F2021L00133].

**Program (depending on a person's circumstances), from when a person is a child through to adulthood.**

**1.81 The committee notes this will enable the government to enhance its monitoring of vaccine preventable diseases, and monitor vaccination coverage across Australia. The committee considers that in increasing the ability for the government to enhance the monitoring of vaccine preventable diseases, this measure promotes the right to health.**

**1.82 The committee also notes that requiring vaccination providers to provide personal information about individuals who receive vaccinations also appears to limit the right to privacy. The committee considers that monitoring information about vaccination coverage in order to identify health-related issues constitutes a legitimate objective for the purposes of international human rights law and the measure is rationally connected to that objective. In relation to proportionality, the committee notes that while the legislation provides safeguards regarding collection, use and disclosure of personal information, there is some risk that the existing broad ministerial discretion to disclose personal information to any person and for any purpose if it is considered to be 'in the public interest' to do so, may not sufficiently safeguard the right to privacy.**

### Suggested action

**1.83 As previously recommended,[17] the committee considers the proportionality of this measure may be assisted were subsection 22(3) of the *Australian Immunisation Register Act 2015* amended to provide that:**

- **(a) the minister's power to disclose protected information is to 'a specified class of persons' rather than 'a person';**
- **(b) specific, and limited, purposes for disclosure are set out in the legislation; and**
- **(c) in authorising disclosure the minister must have regard to the extent to which the privacy of any person is likely to be affected by the disclosure.**

**1.84 The committee draws these human rights concerns to the attention of the minister and the Parliament.**

17 Parliamentary Joint Committee on Human Rights, *Report 4 of 2021* (31 Mary 2021), Australian Immunisation Register Amendment (Reporting) Bill 2020 and Australian Immunisation Register Amendment (Reporting) Rules 2021 [F2021L00133], p. 13.

# Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021 [F2021L01068][1]

| | |
|---|---|
| **Purpose** | This legislative instrument removes the automatic exemption for Australian citizens and permanent residents ordinarily resident in a country other than Australia, such that a person will no longer be able to rely on an automatic exemption to travel overseas where they ordinarily reside in a country other than Australia |
| **Portfolio** | Health |
| **Authorising legislation** | *Biosecurity Act 2015* |
| **Last day to disallow** | This instrument is exempt from disallowance (see subsections 475(2) and 477(2) of the *Biosecurity Act 2015*) |
| **Rights** | Life; health; freedom of movement; equality and non-discrimination; privacy |

## Removal of automatic exemption to leave Australia

1.85 An existing Biosecurity determination prohibits Australian citizens or permanent residents from travelling outside Australia unless an exemption is granted to them. A person who fails to comply may commit a criminal offence (punishable by imprisonment for a maximum of 5 years or 300 penalty units).[2] This legislative instrument removes an automatic exemption from this ban for Australian citizens and permanent residents ordinarily resident in a country other than Australia.[3] Persons who would previously have been able to rely on this automatic exemption are now required to apply to the Australian Border Force (ABF) Commissioner or an ABF employee for an exemption, and to demonstrate a compelling reason for needing to leave Australian territory.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021 [F2021L01068], *Report 10 of 2021*; [2021] AUPJCHR 96.

2 *Biosecurity Act 2015*, section 479.

3 Schedule 1, item 2 repeals paragraph 6(1)(a) of the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020.

4 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020, section 7.

## Preliminary international human rights legal advice

### *Rights to life; health; freedom of movement; equality and non-discrimination; and privacy*

1.86 The repeal of the automatic exemption for Australian citizens and permanent residents ordinarily resident in a country other than Australia (which allowed them to return to Australia and then return to their usual country of residence without seeking an exemption from the travel ban) engages a number of human rights. As the measure is intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, the instrument may promote the rights to life and health.[5] The right to life requires States parties to take positive measures to protect life.[6] The United Nations (UN) Human Rights Committee has stated that the duty to protect life implies that States parties should take appropriate measures to address the conditions in society that may give rise to direct threats to life, including life threatening diseases.[7] The right to health requires that States parties shall take steps to prevent, treat and control epidemic diseases.[8] With respect to the COVID-19 pandemic specifically, the UN Human Rights Committee has expressed the view that 'States parties must take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction'.[9]

1.87 However, the measure is also likely to engage and limit a number of other human rights, including the rights to freedom of movement, equality and non-discrimination and the right to a private life. The right to freedom of movement encompasses the right to move freely within a country, including all parts of federal States, and the right to leave any country, including a person's own country.[10] It encompasses both the legal right and practical ability to travel within and leave a country and includes the right to obtain the necessary travel documents to realise this right.[11] The freedom to leave a country may not depend on any specific purpose or the period of time the individual chooses to stay outside the country, meaning that

5 International Covenant on Civil and Political Rights, articles 6 (right to life) and 12 (right to health).

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

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

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

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

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

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

travelling abroad and permanent emigration are both protected.[12] Insofar as the effect of the instrument is that Australian citizens and permanent residents ordinarily resident in a country other than Australia will now only be able to leave Australia where they can demonstrate a compelling reason to do so, the right to leave a country (as an aspect of the right to freedom of movement) is limited.

1.88 The amendments may also limit the right to equality and non-discrimination, as the measure treats some people differently from others on the basis of nationality. The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, including on the grounds of nationality.[13] The measures may also limit the right to a private life as the restriction on movement and trade involves interference with a person's private life. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[14] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.[15]

1.89 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and is proportionate to that objective.

1.90 In the context of the COVID-19 pandemic, the UN Human Rights Committee has indicated that implementing emergency and temporary measures may be necessary to protect the rights to life and health. It acknowledged that such 'measures may, in certain circumstances, result in restrictions on the enjoyment of individual rights guaranteed by the Covenant'.[16] Where such restrictions are necessary, they should be 'only to the extent strictly required by the exigencies of the public health situation' and pursue the 'predominant objective' of restoring 'a state of normalcy'.[17] The sanctions imposed in connection with any emergency and temporary measures must also be proportionate in nature.[18]

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

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

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

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

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

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

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

1.91 There is no statement of compatibility assessing the engagement of these rights (noting that one is not legally required, as this instrument is exempt from disallowance).[19] As such, no assessment as to compatibility with human rights has been provided. With respect to the objective of the measure, the explanatory statement states that the automatic exemption was implemented to enable Australian citizens and permanent residents ordinarily residing in a country other than Australia to leave Australian territory to return to their ordinary place of residence. It states that since the commencement of the overseas travel ban in March 2020, those persons have had substantial time in which to take action under the exemption.[20] It further states that:

> The exemption was not intended to enable frequent travel between countries. Further, as repatriation flights continue, it will be critical to manage the numbers of people leaving Australia with the intention of returning in the near future to ensure flight and quarantine availability is prioritised for individuals who have been stranded overseas for some time. The amendment will reduce the pressure on Australia's quarantine capacity, reduce the risks posed to the Australian population from COVID-19, and assist in returning vulnerable Australians back home.[21]

1.92 Seeking to reduce the risks posed to the Australian population from the spread of COVID-19 is likely to constitute a legitimate objective. However, the extent to which limiting the circumstances in which a person may leave Australia would be effective to achieve that is not clear. No information is provided as to how many Australian citizens and permanent residents ordinarily residing in a country other than Australia have entered and left Australia multiple times since March 2020. It is also unclear how limiting the circumstances in which a person may leave Australia (such as, to return to their home in another country after having travelled to Australia) would be effective to protect the Australian community from the spread of COVID-19, noting that those already in Australia would have been required to quarantine when first arriving. Further, it is not clear how often discretionary exemptions are granted by the ABF under section 7 of the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements)

19 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

20 Explanatory statement, pp. 1-2.

21 Explanatory statement, p. 2.

Determination 2020, meaning that the safeguard value of this alternative mechanism for leaving Australia cannot be assessed.[22]

1.93 In order to assess the compatibility of this instrument with international human rights law, further information is required as to:

(a) since its commencement, how many times has an Australian citizen or permanent resident ordinarily resident in a country other than Australia relied on an automatic exemption under paragraph 6(1)(a) of the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 to leave Australia;

(b) in how many cases have people who left Australia pursuant to an automatic exemption under paragraph 6(1)(a) subsequently returned to Australia, and for what reasons;

(c) how is it effective to achieve the stated intention of reducing the risk of COVID-19 in Australia, to prevent a person from leaving Australia; and

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

## Committee view

**1.94 The committee notes that this instrument removes the automatic exemption from the existing overseas travel ban for Australian citizens and permanent residents ordinarily resident in a country other than Australia. As such, those Australians who ordinarily live overseas will no longer be able to automatically leave Australia if they come back to visit, and will instead need to apply for an exemption, demonstrating a compelling reason to leave Australia.**

**1.95 The committee notes that as the measure is intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, the instrument may promote the rights to life and health. However, the committee notes that the measure is also likely to engage and limit a number of rights, including the rights to freedom of movement, equality and non-discrimination and the right to a private life. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.**

22 Further information has been sought as to how often these exemptions are given, and how they operate in practice. See, Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 [F2021L00727], *Report 8 of 2021* (23 June 2021) pp. 2-12; and *Report 9 of 2021* (4 August 2021), pp. 2-10.

**1.96 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this legislative instrument, and as such seeks the minister's advice as to the matters set out at paragraph [1.93].**

# Migration Amendment (Merits Review) Regulations 2021 [F2021L00845][1]

| | |
|---|---|
| **Purpose** | This legislative instrument increases the fee for certain applications to the Administrative Appeals Tribunal from $1,826 to $3,000. The fee applies to applications for review of decisions relating to visas other than protection visas, and includes decisions in relation to sponsorships and nominations |
| **Portfolio** | Home Affairs |
| **Authorising legislation** | *Migration Act 1958* |
| **Last day to disallow** | 15 sitting days after tabling (tabled in the Senate and the House of Representatives on 3 August 2021). Notice of motion to disallow must be given by 18 October 2021[2] |
| **Rights** | Fair hearing; prohibition against expulsion of aliens without due process |

## Increased tribunal application fees

1.97 These regulations increase the fee for applications to the Administrative Appeals Tribunal (AAT) for review of decisions relating to visas (other than protection visas) from $1,826 to $3,000.[3] The new fee is subject to annual increase, from 1 July 2022, consistent with existing legislated indexation arrangements.[4] The fee increase applies to applications for Part 5 reviewable decisions under the *Migration Act 1958* (Migration Act), including decisions to refuse to grant a non-citizen a visa and decisions to cancel a visa held by a non-citizen, as well as decisions in relation to sponsorships and nominations.[5]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Merits Review) Regulations 2021 [F2021L00845], *Report 10 of 2021*; [2021] AUPJCHR 97.

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

3 Schedule 1, item 1. Subparagraph 504(1)(a)(i) of the *Migration Act 1958* authorises the regulations to make provision for the charging of fees payable in connection with the review of decisions made under the Act or the *Migration Regulations 1994*.

4 Schedule 1, item 3.

5 Decisions under the *Migration Act 1958* that are Part 5 reviewable decisions are set out in section 388 of the *Migration Act 1958* and regulation 4.02 of the *Migration Regulations 1994*. See statement of compatibility, p. 3.

## Preliminary international human rights legal advice

### *Right to a fair hearing and prohibition against expulsion of aliens without due process*

1.98 Increasing the application fee for review of migration decisions in the AAT by 64 per cent for decisions regarding the determination of a person's existing rights (for example, cancellation of a visa) appears likely to engage and may limit the right to a fair hearing.[6] The right to a fair hearing provides that in the determination of a person's rights and obligations in a 'suit at law', everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[7] This right encompasses the right to equality before courts and tribunals, which guarantees parties equal access and equality of arms, and requires parties to be treated without any discrimination.[8]

1.99 One dimension of the right to a fair hearing is the right of access to justice.[9] The cost of engaging in legal processes in the determination of one's rights and obligations under law is, in turn, a component of the right of access to justice. The United Nations (UN) Human Rights Committee has stated that the imposition of fees on parties to legal proceedings which would de facto prevent their access to justice might give rise to issues under the right to a fair hearing.[10] The findings of comparable jurisdictions are also relevant in this context. In this regard, the European Court of Human Rights has found that the amount of the fees assessed in light of the particular circumstances of a case (including the applicant's ability to pay them) and the phase of the proceedings at which that restriction has been imposed, are material in determining whether a person has enjoyed the right of access to justice and had a fair

6 For a discussion on the committee's previous comments in relation to increases to court fees for migration matters see Parliamentary Joint Committee on Human Rights, Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020 [F2020L01416], *Report 15 of 2020* (9 December 2020) pp. 2–5; *Report 1 of 2021* (3 February 2021) pp. 103–111.

7 International Covenant on Civil and Political Rights, article 14. The right to a fair hearing applies where domestic law grants an entitlement to the persons concerned: see, *Kibale v Canada* (1562/07) [6.5]. The term 'suit at law' relates to the determination of a right or obligation, and not to proceedings where a person is not contesting a negative decision (for example, a decision to refuse to give a worker a promotion would not necessitate a determination of a matter in which the person had an existing entitlement): see, *Kolanowski v Poland* (837/98) [6.4].

8 UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007) [8].

9 See, United Nations Development Programme, *Programming for Justice: Access for All (a practitioner's guide to a human rights-based approach to access to justice)* (2005).

10 See, UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007) [11]; and *Lindon v Australia*, Communication No. 646/1995 (25 November 1998) [6.4].

hearing.[11] As these regulations significantly increase the application fees for review of migration decisions in the AAT, this may have the effect that, in cases where an individual is unable to afford the filing fee for review of a visa decision involving the determination of their existing rights, their right to a fair hearing may be limited.[12]

1.100 In relation to applications for review of decisions regarding refusal to grant a visa, the measure may also engage and limit the prohibition against expulsion of aliens without due process.[13] This right is protected by article 13 of the International Covenant on Civil and Political Rights, which provides that an alien may be expelled only in accordance with a decision made under law and must be allowed to submit reasons against their expulsion and to have their case reviewed by a competent authority, and be represented for the purpose of that review. The UN Human Rights Committee has indicated that the guarantees in article 14 (the right to a fair hearing) do not generally apply to expulsion or deportation proceedings, but the procedural guarantees of article 13 are applicable to such proceedings.[14] In the context of this measure, increasing application fees for review of decisions to refuse to grant a non-citizen in Australia a visa (the consequence of which would be expulsion or deportation), would engage and may limit article 13.[15] The UN Human Rights

11 *Kreuz v Poland*, European Court of Human Rights, Application No. 28249/95 (2001) [60]. In *Kijewska v Poland*, European Court of Human Rights, Application No. 73002/01 (2007) at [46], the court considered that the refusal by a court to reduce a fee for lodging a civil claim may constitute a disproportionate restriction on an applicant's right of access to a court, and be in breach of article 6 of the European Convention on Human Rights. Further, in *Ciorap v Moldova*, European Court of Human Rights, Application No. 12066/02 (2007) at [95], the court considered that the nature of the complaint or application in question was a significant consideration in determining whether refusing an application for waiver of court fees was a breach of article 6 (in this case, the applicant had sought to lodge a complaint about being force-fed by authorities while detained in prison).

12 To the extent that the effect of this instrument may be to limit a person's ability to challenge a visa decision, the consequence of that decision being the person's deportation from Australia, the measure may also engage and limit a number of other rights, including the rights to protection of the family and the child (if family members are separated and children are affected by the decision); and freedom of movement (if cancellation of a visa prevents a person from re-entering and remaining in Australia as their own country).

13 It is noted that this measure will not affect the full fee exemption for a review of a bridging visa decision that resulted in an individual being placed in immigration detention. See statement of compatibility, p. 5. Thus, article 13 would only be engaged in the context of this measure in relation to individuals who have been refused the grant of a visa but may remain in the community on a bridging visa pending removal.

14 UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [17].

15 Sections 189, 196 and 198 of the *Migration Act 1958* require an unlawful non-citizen (individuals who do not have a valid visa) to be detained and kept in immigration detention until they are: granted a visa (such as a temporary bridging visa pending removal from Australia) or removed from Australia as soon as reasonably practicable.

Committee has stated that article 13 should be interpreted in light of article 14 and encompasses 'the guarantee of equality of all persons before the courts and tribunals…and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable'.[16]

1.101 The statement of compatibility acknowledges that articles 13 and 14 may be engaged insofar as the fee increase may prevent or disincentivise individuals from seeking review by reason of their financial capacity, and without such review, they could otherwise be lawfully removed from Australia under the *Migration Act 1958*.[17] It is noted that these rights may be permissibly limited where such a limitation seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is proportionate.[18] More specifically, in the context of financial restrictions on an individual's access to a tribunal or court – a type of limitation on the right of access to justice – the European Court of Human Rights has emphasised that a restriction will not be compatible with the right 'unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved'.[19] Relevant considerations in assessing whether the financial restriction is proportionate include the individual circumstances of the case, including the applicant's ability to pay the fees, and the phase of the proceedings.[20]

1.102 The statement of compatibility states that the objective of the measure is to reduce migration related backlogs in the AAT and Federal Circuit Court (the court), thereby enhancing the decision-making capacity of both bodies and providing

16 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [17], [63]. See also UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10], where the UN Committee stated that article 13 requires that 'an alien…be given full facilities for pursuing [their] remedy against expulsion so that this right will in all circumstances of [their] case be an effective one'.

17 Statement of compatibility, pp. 4–5.

18 The due process guarantees in article 13 may be departed from, but only when 'compelling reasons of national security' so require. See also UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10]. Note that if there are compelling reasons of national security not to allow an alien to submit reasons against their expulsion, the right will not be limited. Where there are no such grounds, as is the case in relation to this measure, the right will be limited, and then it will be necessary to engage in an assessment of the limitation using the usual criteria (of necessity and proportionality).

19 *Kreuz v Poland*, European Court of Human Rights, Application No. 28249/95 (2001) [55]. See also *Podbielski and PPPU Polpure v Poland*, European Court of Human Rights, Application No. 39199/98 (2005) [63].

20 *Kreuz v Poland*, European Court of Human Rights, Application No. 28249/95 (2001) [60]. See also *Podbielski and PPPU Polpure v Poland*, European Court of Human Rights, Application No. 39199/98 (2005) [64].

individuals with a more timely service.[21] It explains that the increased fee will offset expenditure to provide additional resources to the AAT and the court to reduce the migration related backlogs that have developed as a result of significant increases in the application rates as well as the prospective increase in matters that will be heard in the court.[22] The explanatory statement further notes that the $3,000 fee is intended to strike an appropriate balance between the additional financial burden on individual applicants and the need to provide a high quality, efficient and timely review process, which will ultimately benefit all applicants for merits and judicial review.[23]

1.103 While increasing the capacity and efficiency of the AAT and the court to hear and resolve matters is an important and necessary aim, if the ultimate effect of the measure were to deny access to the AAT for those who could not afford the application fees, it is not clear that revenue raising would, in itself, constitute a legitimate objective for the purposes of international human rights law. In this regard, in considering whether a financial restriction on an individual's access to courts pursues a legitimate aim, the European Court of Human Rights has stated that:

> restrictions which are of a purely financial nature and which…are completely unrelated to the merits of an appeal or its prospects of success, should be subject to a particularly rigorous scrutiny from the point of view of the interests of justice.[24]

1.104 More generally, the UN Human Rights Committee has said that the failure to allow access to an independent tribunal in specific cases would amount to a violation of article 14 if such limitations 'are not necessary to pursue legitimate aims such as the proper administration of justice' or if the access left to a person 'would be limited to an extent that would undermine the very essence of the right'.[25] Where a tribunal fee results in the applicant desisting from their claim and the case never being heard by a tribunal, the very essence of the right of access to justice would likely be impaired and

21 Statement of compatibility, pp. 3 and 5.

22 Statement of compatibility, p. 3.

23 Explanatory statement, p. 8.

24 *Podbielski and PPPU Polpure v Poland*, European Court of Human Rights, Application No. 39199/98 (2005) [65]. In this case the European Court of Human Rights, at [66]–[69], held that 'the principal aim [of the court fees] seems to have been the State's interest in deriving income from court fees in civil cases'. It concluded that 'in the circumstances and having regard to the prominent place held by the right to a court in a democratic society, the Court considers that the judicial authorities failed to secure a proper balance between, on the one hand, the interest of the State in collecting court fees for dealing with claims and, on the other hand, the interest of the applicant in vindicating his claim through the courts…The Court therefore concludes that the imposition of the court fees on the applicant constituted a disproportionate restriction on his right of access to a court'.

25 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [18].

the right to a fair hearing may be breached.[26] Questions therefore remain whether, for those who could not afford the application fee (even a reduced rate) and as a consequence could not apply for a review of a decision, this measure may undermine the very essence of the right to a fair hearing.

1.105 As regards proportionality, the statement of compatibility states that any limitation on the right of access to justice because of financial capacity is reasonable, necessary and proportionate because of the partial fee exemption arrangements.[27] The statement of compatibility states that the Registrar of the AAT can reduce the application fee by 50 per cent if the fee would cause severe financial hardship to the review applicant, and successful applicants for review are entitled to a refund of 50 per cent of the fee.[28] It notes that this partial fee waiver would address any unintended result of the fee increase preventing or disincentivising individuals from seeking review.[29] As to the scope of the measure, the statement of compatibility notes that the fee increase does not apply to protection visas (including permanent and temporary protection visas and safe haven enterprise visas) or fast track reviewable decisions, and does not affect the existing full fee exemption for bridging visa decisions that have resulted in the individual being detained in immigration detention.[30]

1.106 The full fee exemption for individuals in immigration detention and the exclusion of protection visa decisions from the fee increase would likely assist with the proportionality of the measure, as it will ensure that some vulnerable individuals are not prevented from accessing justice because of financial disadvantage. However, questions arise as to whether the partial fee exemption is a sufficient safeguard for others. Unlike application fees for migration matters in the court, which can either be reduced or completely waived in individual cases of financial hardship, the Registrar of the AAT can only reduce the fee by 50 per cent if the fee would cause financial

26 *Kreuz v Poland*, European Court of Human Rights, Application No. 28249/95 (2001) [54], [66] and [67].

27 Statement of compatibility, p. 5.

28 Statement of compatibility, pp. 3 and 5. See *Migration Regulations 1994*, subregulation 4.13(4) and regulation 4.14.

29 Statement of compatibility, p. 5.

30 Statement of compatibility, p. 5; Explanatory statement, p. 7. There is no application fee for review of a protection (refugee) decision, unless the review is not successful, in which case the fee payable is $1,846. The fee for character related visa decisions is $962. See Administrative Appeals Tribunal, *Fees,* https://www.aat.gov.au/apply-for-a-review/migration-and-refugee/refugee/fees and https://www.aat.gov.au/apply-for-a-review/migration-and-refugee/character-related-visa-decisions/fees (accessed 9 August 2021).

hardship.[31] While a partial fee exemption may somewhat assist with proportionality, it may not be adequate in all cases, noting that for some individuals a reduced fee of $1,500 may still be prohibitive. It is also noted that there is no merits review available for fee reduction decisions.[32] In the absence of a full fee waiver and flexibility to consider the individual applicant's ability to pay the reduced fee, it is not clear that a partial fee exemption would be a sufficient safeguard, in itself, to ensure that migration applicants are not prevented from applying to the AAT for review of a decision because of associated application costs. Indeed, the jurisprudence of the European Court of Human Rights suggests that where tribunal fees are so high as to prevent an applicant from filing their claim and pursuing the matter in the tribunal, it would constitute a disproportionate restriction on their right of access to justice.[33] The potential interference with rights is also relevant in this regard. The consequences of a non-citizen not being able to challenge a visa decision due to financial disadvantage may be deportation. In such cases, the interference with rights would appear to be significant, noting that the greater the interference, the less likely the measure is to be considered proportionate.

1.107 Further, it is noted that the increased fee for review of migration decisions is significantly higher than the standard application fee for all other AAT matters ($3,000 for migration matters compared to $962 for all other matters).[34] In light of the guarantees encompassed in the right of equal access to justice and individuals' right to enjoy this right without discrimination, questions arise as to whether this measure,

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31 The committee commented on the recent increase to application fees for migration matters in the Federal Circuit Court (from $690 to $3,330). See Parliamentary Joint Committee on Human Rights, Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020 [F2020L01416], *Report 15 of 2020* (9 December 2020) pp. 2–5; *Report 1 of 2021* (3 February 2021) pp. 103–111. In relation to this legislative instrument, the Attorney-General advised the committee that the increase in fees set the application for migration matters in the FCC at the mid-point between the filing fees in the AAT and the Federal Court. By increasing the AAT application fee to $3,000, questions arise as to whether this measure will result in further increases to the FCC fees in order to achieve the objective of setting the FCC fee for migration matters at a mid-point between the AAT and the Federal Court (which is $4,885 for an appeal from the FCC or $4,895 for an appeal from the AAT).

32 Administrative Appeals Tribunal, *Migration and Refugee Division Guidelines on reduction of review application fees*, July 2015, [26] https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Reduction-of-Review-Application-Fees.pdf (accessed 10 August 2021).

33 *Kreuz v Poland*, European Court of Human Rights, Application No. 28249/95 (2001) [66]–[67].

34 Administrative Appeals Tribunal, *Fees*, https://www.aat.gov.au/apply-for-a-review/other-decisions/fees and *Apply for a review*, https://www.aat.gov.au/apply-for-a-review (accessed 9 August 2021). There is no application fee for review of decisions relating to Centrelink (first review), National Disability Insurance Scheme decisions, veterans' entitlement and military compensation, and workers compensation.

which imposes a considerably higher fee on those seeking review of migration decisions compared to other decisions (and therefore disproportionally affects migrants), may have a discriminatory effect on vulnerable groups. In the broader context of user fees for essential government services, the UN Office of the High Commissioner for Human Rights has observed that where user fees are imposed by governments, those fees must be structured 'in a manner that, at a minimum, does not prevent the poor and those of low income, as well as other vulnerable groups, from accessing basic and emergency services'.[35]

1.108 In order to assess the compatibility of this measure with the right to a fair hearing and the prohibition against expulsion of aliens without due process, further information is required as to:

(a) for those financially unable to make an application and therefore unable to access review in the AAT, is any consideration given to providing a full financial waiver of the application fees;

(b) what other safeguards, if any, would operate to assist in the proportionality of this measure for those in financial hardship;

(c) why the application fee for review of migration decisions is considerably higher than the standard application fee for all other AAT matters, and what implications does this have for the right of equal access to courts and tribunals; and

(d) whether other less rights restrictive alternatives were considered (such as raising revenue in some other way) and if so, what those alternatives are.

## Committee view

**1.109 The committee notes the regulations increase the fee for applications to the Administrative Appeals Tribunal (AAT) for review of decisions relating to visas (other than protection visas) from $1,826 to $3,000 (a 64 per cent increase). The increased fee applies to decisions to refuse to grant a non-citizen a visa and decisions to cancel a visa held by a non-citizen as well as decisions relating to sponsorships and nominations. To the extent that the measure has the effect of preventing some individuals in Australia from having their visa decision reviewed in the AAT due to an inability to pay the application fee, it may engage and limit the right to a fair hearing and the prohibition against expulsion of aliens without due process. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.**

35 UN Office of the High Commissioner for Human Rights, *Realizing Human Rights Through Government Budgets* (2017), p. 77.

**1.110 The committee notes that increasing the capacity and efficiency of the AAT and Federal Circuit Court to hear and resolve matters is an important and necessary aim. However, the committee also notes that there are questions as to whether revenue raising, in the context of this specific measure, would constitute a legitimate objective for the purposes of international human rights law. Further, the committee notes that while the partial fee reduction would likely assist with the proportionality of this measure, there are questions as to whether this safeguard alone would be sufficient in all circumstances.**

**1.111 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill, and as such seeks the minister's advice as to the matters set out at paragraph [1.108].**

# Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 [F2021L01030][1]

| | |
|---|---|
| **Purpose** | This legislative instrument excludes work for specified employers from being counting towards eligibility for a second or third working holiday working visa, and enables the minister to list such employers in a legislative instrument |
| **Portfolio** | Home Affairs |
| **Authorising legislation** | *Migration Act1958* |
| **Last day to disallow** | 15 sitting days after tabling (tabled in the Senate and the House of Representatives on 3 August 2021). Notice of motion to disallow must be given by 18 October 2021 in both Houses[2] |
| **Rights** | Just and favourable conditions of work; privacy |

## Public listing of employers who may pose a risk to safety or welfare

1.112 This legislative instrument excludes work carried out for specified employers from counting towards eligibility for a second or third working holiday maker (WHM) visa.[3] It gives the minister the power to, by future legislative instrument, specify a person, partnership or unincorporated association (the employer) if satisfied that the employer, or the work, may pose a risk to the safety or welfare of a person performing the work.

1.113 A person who has held their first WHM visa in Australia may be granted a second visa if they have carried out at least three months of 'specified work' during their twelve-month stay.[4] If a person undertakes at least six months of 'specified work'

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021[F2021L01030], *Report 10 of 2021*; [2021] AUPJCHR 98.

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

3 There are two twelve-month visa subclasses under the WHM program: the Work and Holiday (Subclass 462) visa; and the Working Holiday (Subclass 417) visa.

4 WHM visa-holders can work in any area or industry, and there are incentives for people who have been granted such a visa to work in locations and industries specified for this purpose by the minister. Currently, depending on the visa subclass, specified work includes: construction; fishing and pearling; plant and animal cultivation; hospitality and tourism in Northern Australia; mining and tree farming and felling in regional Australia; and bushfire recovery work. See, statement of compatibility, p. 4.

while holding their second WHM visa, they are then eligible to be granted a third WHM visa.

## Preliminary international human rights legal advice

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

1.114 By publicly listing employers that may pose a risk to the health and safety of workers, and bringing this to the attention of visa applicants and holders, and so providing potential employees with the ability to elect not to accept work from those employers, this measure may promote the right to just and favourable conditions of work. This includes the right to safe working conditions.[5] In this regard, the explanatory statement states that this amendment intends to demonstrate that 'any exploitation of migrant workers is totally unacceptable and will not be tolerated'.[6]

1.115 However, because this measure would provide for the listing of individual employers (including potentially their name and other identifying information) on a public list, on the basis that those employers pose a health and safety risk to prospective employees, it also engages and limits the right to privacy. The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.[7] The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

1.116 The statement of compatibility states that 'the new measure is intended to enhance protection for people who have been granted WHM visas by identifying employers who may pose a risk to the safety or welfare of a person'.[8] Listing employers which may pose a health and safety risk to workers in order to give prospective employees the opportunity to decide not to accept employment from them would appear likely to constitute a legitimate objective, and the measure would appear to be rationally connected to that objective.

1.117 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed and accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective. It is noted that the instrument sets out that the minister can make such a listing if the minister is satisfied

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

6 Explanatory statement, p. 1.

7 International Covenant on Civil and Political Rights, article 7.

8 Statement of compatibility, p. 5.

that the employer, or the work, may pose a risk to the safety or welfare of a person performing the work. It does not set out the criteria on which the minister would make this decision. The statement of compatibility states that in making a listing the minister 'can take into account previous convictions for offences such as those relating to the safety and welfare of persons, including employees', and that this would include taking into consideration convictions that have been quashed or pardoned, and convictions for less serious offences that would usually be prohibited from use and disclosure under the Commonwealth Spent Convictions scheme.[9] No information is provided as to why convictions which have been quashed (that is, set aside by a court on the basis that the conviction was wrong) or pardoned should be taken into account. In addition, as the instrument does not set out the matters that may be taken into account, it would appear that the minister could also take into account other information, such as untested allegations of health and safety issues against an employer. This raises some questions as to the proportionality of the potential interference with the right to privacy.

1.118 The statement of compatibility states that the instrument itself will not specify why the minister has determined that an employer has been included, stating that such omission protects the employer's right to privacy.[10] However, it is noted that inclusion on this list indicates that the minister is satisfied that an employer has engaged in conduct endangering the health and safety of their workers, and as such, even though the only identifying information may be an individual's name, the effect on the right to privacy and reputation may be considerable.

1.119 The explanatory statement states that the minister would consider the full circumstances of every potential listing, including by providing a right of reply, before listing an employer in a legislative instrument.[11] This has the capacity to serve as an important safeguard; however it is not clear why the requirement to provide a right of reply (including a requirement to provide reasons for the proposed listing) is not set out in the instrument itself. Further, the explanatory statement notes that an employer cannot seek merits review of the minister's decision to list them, on the basis that their listing does not prevent them from operating or employing workers.[12] This raises questions as to the sufficiency of review options once a decision has been made to list an employer, in particular as this does not address the potential impact on the employer of their listing, including on their reputation. In addition, no information is provided as to why other, less rights restrictive alternatives (such as providing visa holders with information about how to access information about potential employers,

9 Statement of compatibility, p. 7.

10 Statement of compatibility, p. 7

11 Explanatory statement, p. 1.

12 Explanatory statement, p. 10.

rather than publicly listing employers) would be ineffective to achieve the stated objective.

1.120 In order to assess the compatibility of this instrument with the right to privacy, further information is required as to:

(a) why the instrument does not set out the factors the minister can take into account when deciding to list an employer, and why it is proposed that the minister can take into consideration convictions which have been quashed (that is, set aside by a court on the basis that the conviction was wrong) or pardoned;

(b) whether the minister could take into consideration other matters (beyond previous convictions), such as untested allegations of health and safety issues made against an employer, in deciding to list an employer;

(c) why the legislative instrument does not require that the minister must provide employers who are being considered for listing under this measure with reasons for the proposed listing, and a right of reply before such a listing is made;

(d) what mechanism, if any, could an employer use to seek review of the decision to list them, or to otherwise request the removal of their listing;

(e) why other, less rights restrictive alternatives (such as providing visa holders with information about how to access information about potential employers, rather than publicly listing employers) would be ineffective to achieve the stated objective; and

(f) what other safeguards (if any) would protect the right to privacy and reputation of employers?

## Committee view

**1.121 The committee notes that this legislative instrument excludes work for specified employers from being counting towards eligibility for a second or third working holiday working visa, and enables the minister to list such employers in a legislative instrument if the minister is satisfied the employer, or work, poses a risk to safety or welfare.**

**1.122 The committee considers that by publicly listing employers who may pose a risk to the health and safety of workers, and so providing potential employees with the information needed to elect not to accept work from them, this measure may promote the right to just and favourable conditions of work, including safe working conditions.**

**1.123 However, the committee considers that the listing of individual employers on a public list on the basis that they may pose a health and safety risk to prospective employees, also engages and limits the right to privacy and reputation. The committee notes that the right to privacy may be subject to permissible limitations**

**if they are shown to be reasonable, necessary and proportionate. The committee considers the measure seeks to achieve a legitimate objective, but questions remain as to whether the measure is sufficiently circumscribed and contains sufficient safeguards to constitute a proportionate limit on rights.**

**1.124 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this legislative instrument, and as such seeks the minister's advice as to the matters set out at paragraph [1.120].**

# National Redress Scheme for Institutional Child Sexual Abuse Amendment (2021 Measures No. 1) Rules 2021 [F2021L00990][1]

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|---|---|
| **Purpose** | This legislative instrument:<br>• sets out that a redress payment can be made to a person who has been appointed by a court, tribunal or board, or under a Commonwealth, state or territory law, to manage the financial affairs of a person entitled to redress;<br>• specifies the protected symbols used in connection with the Scheme;<br>• allows certain universities to be declared as not State or Territory Institutions for the purpose of the Scheme; and<br>• classifies the Police Citizens Youth Club Limited NSW as a State Institution, allowing this institution to participate in the Scheme as a participating State Institution |
| **Portfolio** | Social Services |
| **Authorising legislation** | *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* |
| **Last day to disallow** | 15 sitting days after tabling (tabled in the Senate and the House of Representatives on 3 August 2021). Notice of motion to disallow must be given by 18 October 2021[2] |
| **Rights** | Effective remedy; rights of the child |

## Participation in the National Redress Scheme for Institutional Child Sexual Abuse

1.125 The National Redress Scheme for Institutional Child Sexual Abuse (the scheme) seeks to provide remedies in response to historical failures of the Commonwealth and other government and non-government organisations to uphold human rights,

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Redress Scheme for Institutional Child Sexual Abuse Amendment (2021 Measures No. 1) Rules 2021 [F2021L00990], *Report 10 of 2021*; [2021] AUPJCHR 99.

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

including the right of every child to protection by society and the state,[3] from physical and mental violence, injury or abuse (including sexual exploitation and abuse).[4]

1.126 Subsection 111(1) of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Redress Act) provides that an institution is a 'state institution' if it is, or was, part of the state, or is, or was, a body established for public purposes by or under a law of a state. Subsection 111(2) of the Redress Act states that an institution is not a state institution if the rules prescribe this.

1.127 This legislative instrument excludes 37 universities from the definition of state institutions for the purposes of the scheme. This has the effect that those institutions may only participate in the scheme if they choose to participate as non-government institutions.[5]

## International human rights legal advice

### *Rights of the child and right to an effective remedy*

1.128 For an individual to be eligible for redress pursuant to this scheme, the relevant institution against which a claim is being made must be participating in the scheme.[6] The prescription of universities as not being state or territory institutions for the purposes of the Redress Act, means that they will not become participating institutions unless the minister is satisfied that the institutions themselves agree to participate in the scheme. Consequently, as this instrument ensures 37 universities are no longer automatically part of the redress scheme, this measure engages and may limit the rights of the child, and the right to an effective remedy. The statement of compatibility states that this measure promotes the right of the child to state-supported recovery for neglect, exploitation and abuse.[7] However, it does not identify that the prescription of these universities may engage and limit the rights of the child or the right to an effective remedy.

1.129 Under international human rights law, the state is obliged to take all appropriate measures to protect children from all forms of violence or abuse, including sexual abuse.[8] The prescription of these institutions, and the potential for delay in securing redress for individuals making a claim in relation to them, therefore engages and may limit the right to an effective remedy, as this right exists in relation to the rights of children. International law requires that effective remedies must be available

3 Article 24 of the International Covenant on Civil and Political Rights.

4 The statement of compatibility to the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017, p. 70.

5 Explanatory statement, p. 1.

6 Redress Act, s. 107.

7 Statement of compatibility, p. 10.

8 Convention on the Rights of the Child, article 19.

to redress violations, noting that children have a special and dependent status.[9] The right to an effective remedy may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse,[10] and 'remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children'.[11] While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), state parties must comply with the fundamental obligation to provide a remedy that is effective.[12] In addition, international human rights law may require an effective remedy to be available against the state, regardless of the availability of civil remedies against other individuals and non-state actors.[13]

1.130 It is questionable whether the fact that the 37 universities prescribed under these rules operate independently of government control[14] is a sufficient basis under international human rights law to potentially exclude victims of abuse from access to the redress scheme. Unless the institutions independently (re)join the Scheme, the state may be responsible for providing redress to survivors of child sexual abuse at these educational institutions. Further, while a person may engage in civil litigation

9 See, United Nations Committee on the Rights of the Child, *General Comment No. 5 (2003): general measures of implementation of the Convention on the Rights of the Child*, [24]. This right to an effective remedy also exists in relation to individuals who are now adults, but regarding conduct which took place when they were children. Article 5(1) of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP3 CRC) provides that a communication can be submitted by any *individual.*

10 UN Human Rights Committee, *General comment No. 31* on t*he nature of the general legal obligation imposed on states parties to the Covenant* CCPR/C/21/Rev.1/Add. 13 (2004) [16]

11 UN Human Rights Committee, *General comment No. 31* on t*he nature of the general legal obligation imposed on states parties to the Covenant* CCPR/C/21/Rev.1/Add. 13 (2004) [15].

12 See UN Human Rights Committee, *General Comment No. 29 on States of Emergency* (Article 4) CCPR/C/21/Rev.1/Add.11 (2001) [14]. See also UN Committee on the Rights of the Child, *General comment No. 16 on State obligations regarding the impact of business on children's rights* CRC/C/GC/16 (2013) [30].The UN Committee on the Convention on the Rights of the Child (CRC Committee) has stressed that in cases of violence, '[e]ffective remedies should be available, including compensation to victims and *access to redress mechanisms* and appeal or independent complaint mechanisms'. See, UN Committee on the Rights of the Child, *General comment No. 13* on t*he right of the child to freedom from all forms of violence* CRC/C/GC/13 (2011) [56] (emphasis added).

13 In *Case of O'Keeffe v Ireland,* the European Court of Human Rights has held that the state itself has a positive duty to take steps to protect children from abuse and to provide an effective remedy. In this case, a victim of sexual abuse by her primary school principal took a case against the State, and the court held that 'a State cannot absolve itself from its obligations to minors in primary schools by delegating those duties to private bodies or individuals'. *Case of O'Keeffe v Ireland*, European Court of Human Rights Application no 35810/09 (2014), para. [150].

14 Explanatory statement, p. 1.

against the relevant institutions, the scheme offers a lower evidentiary burden and a high level of discretion, and therefore potentially affords a more effective remedy, particularly in historical abuse cases which may be harder to prove over time, noting also that civil litigation does not address systemic issues of redress and may not be available in all cases.[15]

1.131 As such there is some risk that exempting these 37 universities from the operation of the redress scheme, and relying on those universities voluntarily joining the scheme, may result in a victim of sexual abuse, whose rights under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child have been violated, not having access to an effective remedy.[16] In assessing the extent of such a risk it would generally be useful to know: how many people would be likely to be affected (including whether any intention to claim against the relevant institutions has been indicated); whether the institutions have indicated an intention to join the scheme voluntarily; and what time limits (if any) may apply to a decision to join.

## Committee view

**1.132 The committee notes that this legislative instrument prescribes 37 universities as not being state or territory institutions for the purposes of the National Redress Scheme for Institutional Child Sexual Abuse. The committee notes that, as a result, if there are persons eligible for redress pursuant to the scheme for conduct at those institutions, they will only be able to seek redress under the scheme if the institutions choose to join the scheme.**

**1.133 The committee considers that this measure engages and may limit the right to an effective remedy, and the rights of the child, including the right to state-supported recovery for neglect, exploitation and abuse. In this regard the committee notes that the state bears the responsibility for providing an effective remedy with respect to violations of the rights of the child. The committee considers there is some risk that exempting these 37 universities from the operation of the**

15 See, for example the national legal service Knowmore's submission to the issues paper on civil litigation systems by the Royal Commission into Institutional Child Sexual Abuse: Knowmore, Submission in Response to Issues Paper 5: Civil Litigation, 17 March 2000, pp. 3-4, https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Issues%20Paper%205%20-%20Submission%20-%2017%20Knowmore.pdf, which lists the procedural and evidentiary hurdles that may restrict the chances of a successful civil claim.

16 See also, previous advice provided with respect to the prescription of 11 private schools. Parliamentary Joint Committee on Human Rights, National Redress Scheme for Institutional Child Sexual Abuse Amendment (2019 Measures No. 1) Rules 2019 [F2019L01491] and National Redress Scheme for Institutional Child Sexual Abuse Amendment (2020 Measures No. 1) Rules 2020 [F2020L00096], *Report 4 of 2020* (9 April 2020), pp. 122-130.

**redress scheme, and relying on the universities voluntarily joining the scheme, may result in a victim of sexual abuse not having access to an effective remedy.**

### Suggested action

**1.134 The committee recommends that the statement of compatibility be updated to identify that this measure engages and may limit the rights of the child and the right to an effective remedy and outline alternative remedies which victims of child sexual abuse may pursue (for example, civil litigation).**

**1.135 The committee draws these human rights concerns to the attention of the minister and the parliament.**

# Bills and instruments with no committee comment[1]

1.136 The committee has no comment in relation to the following bills which were introduced into the Parliament between 3 to 12 August 2021. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:[2]

- Dental Benefits Amendment Bill 2021;
- Electoral Legislation Amendment (Counting, Scrutiny and Operational Efficiencies) Bill 2021;
- Electoral Legislation Amendment (Electoral Offences and Preventing Multiple Voting) Bill 2021;
- Electoral Legislation Amendment (Political Campaigners) Bill 2021;
- Ensuring Northern Territory Rights Bill 2021;
- Export Finance and Insurance Corporation Amendment (Equity Investments and Other Measures) Bill 2021;
- Fair Work Amendment (Improving Paid Parental Leave for Parents of Stillborn Babies) Bill 2021;
- Human Rights (Targeted Sanctions) Bill 2021;
- Public Governance, Performance and Accountability Amendment (Improved Grants Reporting) Bill 2021;
- Ransomware Payments Bill 2021 (No. 2);
- Treasury Laws Amendment (2021 Measures No. 6) Bill 2021; and
- Treasury Laws Amendment (COVID-19 Economic Response No. 2) Bill 2021.

1.137 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 25 June and 4 August 2021.[3] The committee

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 10 of 2021*; [2021] AUPJCHR 100.

2 Inclusion in the list is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

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

has commented on six legislative instruments from this period in this report. The committee has determined not to comment on the remaining instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

***Private Members' and Senators' bills that may limit human rights***

1.138 The committee notes that the following private members' and senators' bills appears to engage and may limit human rights. Should either of these bills proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill:

- Human Rights (Children Born Alive Protection) Bill 2021; and
- International Human Rights and Corruption (Magnitsky Sanctions) Bill 2021.

# Chapter 2

## Concluded matters

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

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

## Bills and legislative instruments

### Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021[2]

### Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923]

| | |
|---|---|
| **Purpose** | The Aged Care and Other Legislation Amendment (Royal Commission No. 1) Bill 2021 seeks to amend the *Aged Care Act 1997* and the *Aged Care Quality and Safety Commission Act 2018* to:<br>• set out requirements and preconditions in relation to the use of restrictive practices;<br>• empower the secretary of the Department of Health to conduct reviews in relation to the delivery and administration of home care arrangements; and<br>• remove the requirement for the minister to establish a committee to be known as the Aged Care Financing Authority<br>The Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 amends the *Quality of Care Principles 2014* to set out requirements in relation to the use of |

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

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 and Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], *Report 10 of 2021*; [2021] AUPJCHR 101.

| | |
|---|---|
| | restrictive practices and responsibilities of approved providers relating to behaviour support plans. |
| **Portfolio** | Health |
| **Bill introduced** | House of Representatives, 27 May 2021<br>*Received Royal Assent 28 June 2021* |
| **Last day to disallow legislative instrument** | 15 sitting days after tabling (tabled in the Senate and the House of Representatives on 3 August 2021). Notice of motion to disallow must be given by 18 October 2021[3] |
| **Rights** | Prohibition against torture and other cruel, inhuman or degrading treatment; rights to health; privacy; freedom of movement; liberty; equality and non-discrimination; rights of persons with disability |

2.3 The committee requested a response from the minister in relation to the bill in *Report 7 of 2021*.[4]

## Background

2.4 The Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019[5] came into force on 1 July 2019. This legislative instrument regulates the use of physical and chemical restraints by approved providers of residential aged care and short-term restorative care in a residential setting. The Parliamentary Joint Committee on Human Rights undertook an inquiry (2019 inquiry) into the instrument, as part of its function of examining legislation for compatibility with human rights, and reported on 13 November 2019.[6] Among other things the committee recommended that there be better regulation of the use of restraints in residential aged care facilities, including in relation to exhausting alternatives to restraint, taking preventative measures and using restraint as a last resort; obtaining or confirming informed consent; improving oversight of the use of restraints; and having mandatory reporting requirements for the use of all types of restraint.[7] In response to this report the government introduced amendments to the Quality of Care Principles to make it clear that restraint must be used as a last resort, refer to state and territory laws regulating

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

4 Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2021), pp. 2-10.

5 F2019L00511.

6 Parliamentary Joint Committee on Human Rights, Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 (13 November 2019).

7 Parliamentary Joint Committee on Human Rights, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (13 November 2019), recommendation 2, pp. 54–55.

consent and require a review of the first 12 months operation of the new law.[8] The review, finalised in December 2020, made a number of recommendations, including to clarify consent requirements, strengthen requirements for alternative strategies, require an assessment of the need for restraint in individual cases and for monitoring and reviewing the use of restraint.[9]

2.5 In addition, the Royal Commission into Aged Care Quality and Safety considered the use of restrictive practices. The final report of the Counsel Assisting the Commission recommended new requirements be introduced to regulate the use of restraints in residential aged care and that these requirements should be informed by the report of the independent review, the committee's 2019 inquiry report and the approach taken by the National Disability Insurance Scheme Rules.[10] The Royal Commission into Aged Care Quality and Safety's Final Report made a number of recommendations to regulate the use of restraints.[11] The Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 (the bill) is stated to be in response to the recommendations of the Royal Commission and the independent review. [12] The bill received Royal Assent on 28 June 2021 and the Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 (the instrument) was made the same day.

## Regulation of the use of restrictive practices in aged care

2.6 This bill (now Act) amended the *Aged Care Act 1997* (the Act) to require that the Quality of Care Principles must set out certain requirements regarding the use of

8 See Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019. See also Australian Government response to the Parliamentary Joint Committee on Human Rights report on the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019*, 18 March 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/QualityCareAmendment/Government_Response (accessed 9 June 2021).

9 See Australian Healthcare Associates, *Independent review of legislative provisions governing the use of restraint in residential aged care: Final report*, December 2020, https://www.health.gov.au/sites/default/files/documents/2021/02/independent-review-of-legislative-provisions-governing-the-use-of-restraint-in-residential-aged-care-final-report.pdf (accessed 9 June 2021).

10 See *Royal Commission into Aged Care Quality and Safety Counsel Assisting's Final Submissions*, 22 October 2020, recommendation 29, p. 151, https://agedcare.royalcommission.gov.au/sites/default/files/2021-02/RCD.9999.0541.0001.pdf (accessed 9 June 2021).

11 See Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect – Volume 3A, The New System*, 2021, recommendation 17, pp. 109–110, https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-3a_0.pdf (accessed 9 June 2021).

12 Explanatory memorandum, p. 1.

restrictive practices. It inserted a definition into the Act of what constitutes a 'restrictive practice' – namely, any practice or intervention that has the effect of restricting the rights or freedom of movement of the care recipient.[13] The amendments in the bill ensure that the Quality of Care Principles must:

- require that a restrictive practice is only used as a last resort to prevent harm and after consideration of the likely impact of the practice on the care recipient;
- require that, to the extent possible, alternative strategies are used and any alternative strategies used or considered are documented;
- require that a restrictive practice is used only to the extent that it is necessary and in proportion to the risk of harm;
- require that if a restrictive practice is used it is used in the least restrictive form, and for the shortest time, necessary to prevent harm;
- require that informed consent is given to the use of a restrictive practice;
- require that the use of a restrictive practice is not inconsistent with any rights and responsibilities specified in the User Rights Principles; and
- provide for the monitoring and review of the use of a restrictive practice in relation to a care recipient.[14]

2.7 The bill also provided that the Quality of Care Principles may provide that a requirement specified in the Principles does not apply if the use of a restrictive practice is necessary in an emergency.[15]

2.8 The instrument sets out the detailed circumstances in which a restrictive practice can be used in relation to a care recipient and the responsibilities of approved providers relating to restrictive practices and behaviour support plans.[16] A restrictive practice includes the use of a chemical restraint, environmental restraint, mechanical

13 Schedule 1, item 3, proposed new section 54-9.

14 Schedule 1, item 3, proposed new subsection 54-10(1).

15 Schedule 1, item 3, proposed new subsection 54-10(2).

16 The responsibilities of approved providers relating to restrictive practices are set out in schedule 1 and commence from 1 July 2021. The responsibilities of approved providers relating to behaviour support plans are set out in schedule 2 and commence from 1 September 2021. The explanatory statement states that the amended behaviour support plan requirements commence from 1 September 2021 to allow sufficient time for aged care providers to prepare to meet these requirements: p. 2.

restraint, physical restraint or seclusion in relation to a care recipient.[17] A restrictive practice may be used by an approved provider where the specified requirements set out in the instrument are satisfied.[18]

2.9 The instrument also sets out additional requirements regarding the assessment of the necessity of the use of restrictive practices. For the use of restrictive practices other than chemical restraint, an approved health practitioner (meaning a medical practitioner, nurse practitioner or registered nurse) who has day-to-day knowledge of the care recipient must have assessed the recipient as posing a risk of harm to themselves or others, assessed the use of restrictive practice as necessary, and documented the assessments.[19] For the use of chemical restraints, a medical practitioner or nurse practitioner must have assessed the care recipient as posing a risk of harm to themselves or others, assessed the use of chemical restraint as necessary, and prescribed medication for the purpose of using the chemical restraint.[20] This assessment, as well as other specified matters, such as the reasons why chemical restraint is necessary, must be documented in the care and services plan/behaviour support plan.[21] Additionally, the approved provider must be satisfied that the care recipient or the restrictive practices substituted decision-maker has given informed consent to the prescribing of medication.[22]

2.10 However, certain requirements relating to the use of restrictive practices, such as requiring the restrictive practice to be used as a last resort or with the informed consent of the care recipient, do not apply if the restrictive practice is necessary in an emergency.[23] The exemption of certain requirements only applies while the

17 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, section 15E. Each type of restrictive practice is defined in subsections 15E(2)–(6).

18 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, sections 15F and 15FA.

19 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, subsection 15FB(1).

20 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, subsection 15FC(1).

21 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, paragraph 15FC(1)(b).

22 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, paragraph 15FC(1)(c). The instrument notes that codes of appropriate professional practice for medical practitioners and nurse practitioners require practitioners to obtain informed consent before prescribing medication.

23 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, subsections 15FA(2), 15FB(2) and 15FC(2).

emergency exists, noting that if there is a need for the ongoing use of a restrictive practice it must be set out in the behaviour support plan.[24]

2.11 The instrument also sets out the responsibilities of approved providers while restrictive practices are being used, such as monitoring the care recipient and the necessity for the restrictive practice, and following the emergency use of a restrictive practice, such as informing the restrictive practices substitute decision maker and ensuring specified matters are documented in the care and services plan/behaviour support plan.[25] While the instrument requires certain matters relating to the use of restrictive practice to be documented, if the use is in accordance with the Quality of Care Principles, including the amendments made by this instrument, it is not a reportable incident.[26]

2.12 Finally, from 1 September 2021, the instrument introduces other responsibilities of approved providers relating to behaviour support plans.[27] Behaviour support plans are prepared by the approved provider, in consultation with the care recipient and relevant health practitioners, and must include specified matters, including information about the care recipient's behaviour and support needs and alternative strategies for addressing behaviours of concern.[28] Where the use of restrictive practice is assessed as necessary by an approved health, medical or nurse practitioner, additional matters must be set out in the behaviour support plan, including the care recipient's behaviours of concern that necessitate the use of the restrictive practice; how the restrictive practice is to be used, including duration, frequency and intended outcome; best practice alternative strategies that must be used before using the restrictive practice; monitoring and review requirements; and a record of the giving of informed consent by the care recipient or their restrictive practices substituted decision-maker.[29] The behaviour support plan must also set out additional specified matters if a restrictive practice is used and if there is a need for

24 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, subsections 15FA(3), 15FB(3) and 15FC(3); schedule 2, item 9, section 15HE.

25 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, sections 15GA and 15GB; schedule 2, items 6–8, subparagraphs 15GB(b)–(d).

26 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 11, subsection 15MB(2).

27 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 2.

28 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 2, item 9, sections 15HA, 15HB and 15HG.

29 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 2, item 9, section 15HC.

ongoing use of a restrictive practice.[30] The approved provider must also review a behaviour support plan on a regular basis and as soon as practicable after any change in the care recipient's circumstances.[31]

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Multiple rights*

2.13 Setting out requirements relating to when restrictive practices can be used by aged care providers engages a number of human rights. To the extent that the bill strengthens the responsibilities of approved providers by enhancing safeguards regarding the use of restrictive practices, the measure may assist in ensuring rights are not limited and may promote other rights,[32] including:

- ***the prohibition on torture or cruel, inhuman or degrading treatment or punishment***:[33] the United Nations (UN) Committee on the Rights of Persons with Disabilities has stated that Australia's use of restrictive practices (which includes chemical and physical restraints) on persons with disability may raise concerns in relation to freedom from torture and cruel, inhuman or degrading treatment or punishment and has recommended that Australia take immediate steps to end such practices.[34] The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also raised concerns and called for a ban on the use of restraints in the health-care context, noting that such restraint may constitute torture and ill-treatment in certain circumstances;[35]

30 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 2, item 9, sections 15HD and 15HE.

31 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 2, item 9, section 15HF.

32 As identified in the statement of compatibility, pp. 4–6.

33 International Covenant on Civil and Political Rights, article 7; Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5.

34 United Nations (UN) Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia, adopted by the committee at its tenth session,* CRPD/C/AUS/CO1 (2013) [35]-[36].

35 UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, A/HRC/22/53 (2013) [63]; UN General Assembly, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*, A/63/175 (2008) [55].

- ***the right to health***: which includes the right to be free from non-consensual medical treatment.[36] Australia also has obligations to provide persons with disability with the same range, quality and standard of health care and programmes as provided to other persons;[37]
- ***the right to privacy***: which includes the right to personal autonomy and physical and psychological integrity, and extends to protecting a person's bodily integrity against compulsory procedures.[38] Similarly, no person with disability shall be subjected to arbitrary or unlawful interference with their privacy;[39]
- ***the right to freedom of movement and liberty***: the right to liberty prohibits States from depriving a person of their liberty except in accordance with the law, and provides that no one shall be subject to arbitrary detention.[40] The existence of a disability shall also, in no case, justify a deprivation of liberty.[41] The right to freedom of movement includes the right to liberty of movement within a country.[42] A restriction on a person's movement may be to such a degree and intensity that it would constitute a 'deprivation' of liberty, particularly if an element of coercion is present.[43] These rights may be engaged and limited by intentional restrictions of voluntary movement or

36 International Covenant on Economic, Social and Cultural Rights, article 12. See UN Committee on Economic, Social and Cultural Rights, *General Comment No.14: The Right to the Highest Attainable Standard of Health* (2000) [8].

37 Convention on the Rights of Persons with Disabilities. See also UN Committee on Economic, Social and Cultural Rights, *General Comment No.14: The Right to the Highest Attainable Standard of Health* (2000), [8]. The rights of persons with disabilities are relevant insofar as some aged care residents may have physical or mental impairments that constitute a disability.

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

39 Convention on the Rights of Persons with Disabilities, article 22.

40 International Covenant on Civil and Political Rights, article 9. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

41 Convention on the Rights of Persons with Disabilities, article 14.

42 International Covenant on Civil and Political Rights, article 12.

43 United Nations Human Rights Committee, *General Comment No.27: Article 12 (Freedom of Movement)* (1999) [7]; see also United Nations Human Rights Council, *Report of the Working Group on Arbitrary Detention*, A/HRC/22.44 (2012) [55] and [57]; *Foka v Turkey*, European Court of Human Rights Application No.28940/95, Judgment (2008) [78]; *Gillan and Quinton v United Kingdom*, European Court of Human Rights Application No.4158/05, Judgment (2010) [54]-[57]; *Austin v United Kingdom*, European Court of Human Rights Application Nos. 39692/09, 40713/09 and 41008/09, Grand Chamber (2012) [57]; *Gahramanov v Azerbaijan*, European Court of Human Rights Application No.26291/06, Judgment (2013) [38]-[45].

behaviour by the use of a device, or removal of mobility aids, or physical force, and limiting a care recipient to a particular environment;

- ***the rights of persons with disability***: as set out in the Convention on the Rights of Persons with Disabilities, including the right to equal recognition before the law and to exercise legal capacity;[44] the right of persons with disabilities to physical and mental integrity on an equal basis with others;[45] and the right to freedom from exploitation, violence and abuse;[46] and
- ***the right to equality and non-discrimination***: which provides that everyone is entitled to enjoy their rights without discrimination of any kind, including on the basis of age or disability.[47]

2.14 However, noting the complex interplay of existing laws regulating the use of restraints by approved providers, if the regulation of restraints for aged care providers leads to confusion as to when restraint is, or is not, permitted in residential aged care facilities, the practical operation and effect of the measure may mean, depending on the adequacy of the safeguards, that in practice this measure could limit the human rights set out above. As such, it is necessary to consider if the safeguards and protections set out in the bill ensure sufficient protection so as not to limit the human rights of aged care recipients.

2.15 In order to fully assess the compatibility of this bill with human rights, further information is required, in particular:

(a) why the bill does not prohibit the use of restrictive practices unless used in accordance with a behavioural support plan;

(b) who determines that the requirements for the use of a restrictive practice is met, for example who determines that a restrictive practice is the last resort, the least restrictive and used to the extent that is necessary and proportionate;

(c) what are the criteria for determining whether a situation constitutes an 'emergency' and who makes this determination;

(d) why is it appropriate to enable the Quality of Care Principles to override any of the requirements set out in the bill in an emergency, in particular the requirements that the restrictive practice: be used only to the extent

44 Convention on the Rights of Persons with Disabilities, article 12. This includes an obligation to ensure that all measures that relate to legal capacity provide for appropriate and effective safeguards to prevent abuse.

45 Convention on the Rights of Persons with Disabilities, article 17.

46 Convention on the Rights of Persons with Disabilities, article 16.

47 International Covenant on Civil and Political Rights, article 26.

necessary and in proportion to the risk of harm; be used in the least restrictive form and for the shortest time; and be monitored and reviewed;

(e) in requiring informed consent for the use of a restrictive practice, how long does such consent remain valid and, in the case of chemical restraint, is consent required only when medication is prescribed, or is it also required (or required to be confirmed) when medication is administered;

(f) who will monitor and review the use of restrictive practices, and will they be independent from the person who used the restrictive practice;

(g) why does the bill not appear to provide that each use of a restrictive practice must be documented; and

(h) will a restrictive practice undertaken in an emergency and therefore not in accordance with the requirements be a reportable incident.

***Committee's initial view***

2.16 The committee welcomed these proposed amendments as it considered these offered much stronger protections regarding minimising the use of restraints against vulnerable aged care residents. The committee considered this bill may assist in ensuring there are appropriate safeguards to protect the right not to be subjected to torture and other cruel, inhuman or degrading treatment, and may also promote the rights to health, privacy, freedom of movement, liberty, equality and non-discrimination and the rights of persons with disability.

2.17 However, some questions remained as to how some of these restrictions on the use of restraints will operate in practice, and so the committee sought the minister's advice as to the matters set out at paragraph [2.14].

2.18 The full initial analysis is set out in *Report 7 of 2021*.

## Minister's response[48]

2.19 The minister advised:

> As stated in the scrutiny report the Royal Commission Response Bill No. 1 provides that the *Quality of Care Principles 2014* can make provisions for the requirements of approved providers of residential aged care (approved providers) for the use of restrictive practices. The operationalised specific details of approved provider requirements have been included in the

48 The minister's response to the committee's inquiries was received on 22 June 2021. 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.

proposed amendments to the Quality of Care Principles. The exposure draft of the principles, the Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 is now publicly available on the Department of Health's website and should be read in conjunction with the Royal Commission Response Bill No.1.

*Behaviour Support Plans*

From 1 September 2021, the proposed amendments to the Quality of Care Principles will introduce new responsibilities for approved providers to implement behaviour support plans for care recipients that need them. Under these responsibilities, a restrictive practice may not be used unless assessed as necessary in the behaviour support plan. The only exception to this is where there is a situation which may be deemed an emergency. The Quality of Care Principles specify details of what needs to be included in a behaviour support plan, including having best practice behaviour support strategies that are responsive to the care recipient's needs and seek to reduce or eliminate the need for restrictive practices. These supports should be individualised and address the underlying causes of the behaviours of concerns, while safeguarding the quality of life of care recipients.

Behaviour support plans also need to specify where the use of a restrictive practice has been assessed or necessary and where a restrictive practice is being used. While approved health practitioners (a medical practitioner, nurse practitioner or registered nurse) may assess a restrictive practice as necessary, it is important to note that comprehensive behaviour support planning and management is intended to reduce the use of restrictive practices.

Behaviour support plans should be developed in consultation with the care recipient, their nominated representative, any relevant health practitioners, and their restrictive practice substitute decision-maker if the care recipient lacks the capacity to provide informed consent.

The intention of these provisions in the Quality of Care Principles is to ensure the approved provider takes a more preventative approach in relation to the use of restrictive practices by considering alternative strategies in the first instance, while examining and seeking to understand the cause of the behaviours. The approved provider should consider any past events or experiences that led to behaviours of concern to help prevent future behaviours of concern occurring that may be related, to these causes or triggers.

If a behaviour support plan includes a restrictive practice that has been assessed as necessary, any use of a restrictive practice must be reviewed regularly or as soon as practicable after any change in the care recipient's circumstances. This includes any circumstance where a restrictive practice is used in an emergency. Any changes in behaviour should mean that the use of the restrictive practice should be reconsidered and reduced or stopped as soon as practicably possible.

*Who can assess a restrictive practice as necessary?*

The proposed amendments to the Quality of Care Principles set that an approved health practitioner who has day-to-day knowledge of the care recipient can assess that the use of a restrictive practice, other than chemical restraint, is necessary and that the care recipient poses a risk of harm to themselves or others. An approved health practitioner is defined as medical practitioner, a nurse practitioner or a registered nurse as defined by the *Health Insurance Act 1973*. Additionally, these assessments need to be documented.

The proposed amendments to the Quality of Care Principles set that only a medical practitioner or nurse practitioner can assess whether a chemical restraint is necessary. These professions are required to comply with their appropriate professional codes of practice and any applicable state and territory legislation in the state they practice. Prescribing medical or nurse practitioners are required to document the reason they have prescribed medication for the purpose of chemical restraint and they must have obtained informed consent from the care recipient or, if the care recipient lacks capacity, from their restrictive practice substitute decision-maker.

If medication has been prescribed as a chemical restraint, approved providers must engage with the prescribing practitioner and the care recipient to communicate the impact and effectiveness of the restraint and any conditions around its use. The approved provider is required to satisfy themselves that the prescribing practitioner has obtained informed consent for the use of the medication as a chemical restraint.

*Emergency use of restrictive practices*

The term 'emergency' in new subsection 54-10(2) is not expressly defined, and therefore has its ordinary meaning. In aged care the scope of emergency situations can be quite broad and adopting a prescriptive definition is likely to result in unintended consequences and may exclude situations of genuine emergency. This could foreseeably have the impact of placing the safety, health and wellbeing of care recipients and others at risk.

An emergency situation only applies while there is an immediate risk or harm to a care recipient or other person. Once this risk has ceased the emergency situation has passed, emergencies are not intended to last for long periods of time and are not a mechanism for approved providers to justify the continuous use of a restrictive practice.

If a restrictive practice is required after the immediate risk of harm has passed, this would be considered ongoing use and is not subject to emergency exemptions. Additionally, ongoing use of a restraint requires informed consent prior to its use.

The proposed amendments to the Quality of Care Principles detail the responsibilities that must be met following the emergency use of restrictive practices. This includes:

- informing the restrictive practices substitute decision maker about the use of the restrictive practice, if the care recipient lacked capacity to consent to the use of the restrictive practice; and
- documenting the reasons for the restrictive practice and the alternative strategies that were considered or used prior.

These responsibilities must be met as soon as practicable after the restrictive practice starts to be used.

During an emergency approved providers must still seek to ensure the least restrictive form of a restrictive practice is being applied and that it is used for the shortest time possible. Approved providers must also continually seek to consider whether an alternative strategy can be used and whether the restrictive practice can be reduced or stopped. These requirements are intended to ensure the use of restrictive practices are reduced and the inappropriate use of restrictive practices are eliminated.

Approved providers should be actively engaged in care recipients' behaviour support planning, which should significantly reduce the occurrence of emergencies. Approved providers must consider and manage triggers for care recipients' behaviour to prevent an emergency in the care planning for care recipients.

In practice, the Aged Care Quality and Safety Commission (the Commission) will be able to question the circumstances in which emergency use of a restrictive practice was activated.

*Informed consent arrangement for the use of restrictive practices*

The proposed amendments to the Quality of Care Principles inserts a new term, restrictive practices substitute decision-maker. A restrictive practices substitute decision-maker, for a restrictive practice in relation to a care recipient, means a person or body that, under the law of the state or territory in which the care recipient is provided with aged care, can give informed consent to the following if the care recipient lacks the capacity to give that consent:

- the use of the restrictive practice in relation to the care recipient; and
- if the restrictive practice is chemical restraint, the prescribing of medication for the purpose of using the chemical restraint.

State and territory legislation regulates who can give informed consent to the use of a restrictive practice and the prescribing of medication for the purpose of using that medication as a chemical restraint. The proposed amendments to the Quality of Care Principles do not affect the operation of any law of a state or territory in relation to restrictive practices. They seek to complement and clarify those state and territory laws that protect individuals from interference from their personal rights and liberties.

Care recipients must provide informed consent to the use of a restrictive practice wherever possible. If a care recipient does not have capacity to

consent, consent must be obtained from someone with authority to provide it, in this case, a restrictive practices substitute decision-maker.

Informed consent must be obtained before the restrictive practice is used, unless the restrictive practice is necessary in an emergency. If the use of a restrictive practice was used in an emergency and the care recipient lacked capacity to consent to the use of the restrictive practice, the restrictive practice substitute decision-maker must be informed as soon as practicable after the restrictive practice starts to be used.

If the ongoing use of a restrictive practice is assessed as necessary, informed consent for the ongoing use of the practice is required. Perpetual or ongoing approval cannot be given to the use of a restrictive practice. The care recipient or their restrictive practice substitute decision maker may withdraw their consent at any time. Therefore, the approved provider should take steps to regularly communicate with the care recipient or their restrictive practices substitute decision-maker, and obtain informed consent contemporaneously.

*Monitoring and review of the use of a restrictive practice*

The proposed amendments to the Quality of Care Principles stipulate that the use of restrictive practice must be regularly monitored, reviewed, and documented.

An approved provider must monitor a care recipient while a restrictive practice is being used, including monitoring of the following:

- signs of distress or harm;
- side effects and adverse events;
- changes in mode or behaviour;
- changes in well-being, including the care recipient's ability to engage in activities that enhance quality of life and are meaningful and pleasurable;
- changes in the care recipient's ability to maintain independent function (to the extent possible), and
- changes in the care recipient's ability to engage in activities of daily living (to the extent possible).

The proposed amendments to the Quality of Care Principles will also outline how the use of restrictive practices are to be reviewed, which includes consideration of:

- the outcome of its use and whether he intended outcome was achieved;
- whether an alternative strategy could be used to address the care recipient's behaviours of concern;

- whether a less restrictive form of the restrictive practice could be used to address the care recipient's behaviours of concern;
- whether there is an ongoing need for its use; and
- if the restrictive practice is chemical restraint–whether the medication prescribed for the purpose of using the chemical restraint can or should be reduced or stopped.

An approved provider must also review a behaviour support plan for a care recipient and make any necessary revisions on a regular basis and as soon as practicable after any change in the care recipient's circumstances.

Additionally, the use of a restrictive practice must also be continually monitored, reviewed and documented. If there is a change to a care recipient's circumstances or behaviour, a review should be completed to understand what has changed and whether the existing strategies remain best practice for the care recipient. This includes any circumstance where a restrictive practice is used in an emergency.

From 1 July 2021 all use of restraint, including the use of anti-psychotics will be reported to the Department of Health through My Aged Care under the National Aged Care Mandatory Quality Indicator Program.

Any use of restrictive practices that is inconsistent with their legislative requirements will need to be reported by an approved provider to the Commission under the Serious Incident Response Scheme. This ensures the Commission is able to focus on the incidents that pose the greatest risk to care recipients.

The Commission's oversight of restrictive practices is being strengthened through the appointment of a Senior Practitioner. Additionally, the Commission's powers will be expanded with the ability to impose civil penalties where an approved provider is not meeting its restrictive practice obligations.

*Documenting and reporting restrictive practice use*

Aged care providers are required to document and address the care needs of their care recipients under the *Aged Care Act 1997*. However, the proposed amendments to the Quality of Care Principles detail the specific matters required to be documented in relation to the use of restrictive practices and alternative strategies that have been used or considered, including their effectiveness.

## Concluding comments

### *International human rights legal advice*

*Multiple Rights*

2.20 As noted in the preliminary analysis, to the extent that the bill, and the legislative instrument, strengthen the responsibilities of approved providers by

enhancing safeguards regarding the use of restrictive practices, the measure may assist in ensuring rights are not limited and may promote other rights.[49] The preliminary analysis stated that the measure may not itself directly limit human rights, noting that the regulation of the use of restraints in the Quality of Care Principles adds a layer of regulation on approved providers, but does not appear to affect existing state and territory laws and the common law regarding the use of restraints and informed consent.[50] However, noting the complex interplay of existing laws regulating the use of restraints by approved providers, if the regulation of restraints for aged care providers leads to confusion as to when restraint is, or is not, permitted in residential aged care facilities, the practical operation and effect of the measure may mean, depending on the adequacy of the safeguards, that in practice this measure could limit a number of human rights.[51] As such, it is necessary to consider if the safeguards and protections set out in both the bill and the legislative instrument ensure sufficient protection so as not to limit the human rights of aged care recipients.

2.21 The measure provides significant protections which are aimed at reducing the use of restraint, ensuring that informed consent is obtained prior to the use of restraint, and monitoring and reviewing the use of restraint. In particular, the

49 As identified in the *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021*, statement of compatibility, pp. 4–6. These rights include the rights to health, privacy, liberty, freedom of movement, equality and discrimination, the rights of people with disability, and the prohibition on torture or cruel, inhuman or degrading treatment of punishment.

50 See Parliamentary Joint Committee on Human Rights, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (13 November 2019), pp. 45–47. Note also in relation to the *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021* that the explanatory memorandum, at p. 10, states: 'This Bill is not intended to affect the operation of those state and territory laws, which protect individuals from undue interference with their personal rights and liberties in relation to the use of restrictive practices'. Note in relation to the *Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021* [F2021L00923], at p. 15, the explanatory statement states: 'The amendments introduced by the Amending Principles do not affect the operation of those state and territory laws [that regulate who can give informed consent to the use of restrictive practices, including chemical restraint], which protect individuals from undue interference with their personal rights and liberties in relation to the use of restrictive practices'.

51 For a discussion on the issue of legal vagueness in relation to the rights implications of a legislative instrument, see Parliamentary Joint Committee on Human Rights, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (13 November 2019), pp. 45–47. The High Court has found that vagueness remains a significant issue in considering the 'practical operation and effect' of legislation. In considering the impact of legislation on rights and freedoms, for example, the High Court has found that it is this *practical operation and effect* of any impugned measures that must be justified, regardless of any ultimate judicial interpretation of their proper construction: *Brown v Tasmania* (2017) 261 CLR 328 (Kiefel CJ, Bell and Keane JJ), [37], [77] and [79], [117]-[118] and [148]-[151].

requirements that restrictive practices only be used as a last resort; after considering all alternative strategies; to the extent necessary and proportionate; in the least restrictive form and for the shortest time; in accordance with the care and services plan/behaviour support plan; and after informed consent is given, would likely serve as important safeguards to ensure better protection around the use of restraints in aged care facilities.

2.22 However, the strength of these safeguards will depend on how they operate in practice. In this regard, some questions remain in relation to the development and implementation of behaviour support plans; the use of restraints in an emergency; the requirement of informed consent; and the monitoring and review of the use of restrictive practices.

Behaviour support plans

2.23 While the bill itself does not prohibit the use of restrictive practices unless used in accordance with a behaviour support plan, the legislative instrument clarifies that the use of a restrictive practice must comply with any relevant provisions in the care and services plan/behaviour support plan.[52] This is an important safeguard as the behaviour support plan sets out an individualised approach to the use of restrictive practice in relation to a care recipient. The matters to be included in a behaviour support plan are relatively comprehensive (as outlined in paragraph [2.12]) and would likely help to reduce the use of restrictive practices and ensure that the least rights restrictive approach is implemented.[53] Although, noting the effect of this instrument is to prohibit, except in an emergency, the use of a restrictive practice unless used in accordance with a behaviour support plan, it remains unclear why this was not provided for in the bill itself.

2.24 However, there are some questions regarding the practical operation of a behaviour support plan. In particular, it is not clear who assesses a restrictive practice as necessary for the purposes of inclusion in a behaviour support plan; who develops and implements a behaviour support plan; and who decides when the requirements, including that the restrictive practice be used in compliance with the plan, apply. The instrument provides that it is a requirement for the use of a restrictive practice that it be assessed as necessary by an approved health practitioner who has day-to-day knowledge of the care recipient or a medical practitioner or nurse practitioner in the

52 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, paragraph 15FA(1)(g); schedule 2, item 2, paragraph 15FA(1)(g).

53 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 2, item 9, section 15HC.

case of chemical restraint.[54] If a restrictive practice is assessed as necessary by a health, medical or nurse practitioner, the specific details regarding the use of the restrictive practice must be set out in the behaviour support plan. The plan is prepared, reviewed and revised by the approved provider in consultation with the care recipient or their representative (if they lack capacity to be consulted) and the relevant health practitioners, including the approved health practitioner who made the assessment regarding the necessity of using the restrictive practice. The approved provider, as opposed to the relevant health practitioner, decides whether the requirements set out in the instrument are satisfied in relation to the use of a restrictive practice. It remains unclear who within the approved provider would make these decisions in practice, for example, does the person require certain training or qualifications in order to determine whether the use of a restrictive practice is a last resort, the least restrictive and used only to the extent that is necessary and proportionate as well as in compliance with the matters set out in the behaviour support plan. The minister's response did not clarify this issue. As it remains unclear who determines whether a restrictive practice is the 'least restrictive' and 'proportionate', and the criteria relevant to making such a determination, much will depend on how use of restrictive practices pursuant to behaviour support plans occurs in practice. In relation to similar issues raised in the context of NDIS providers, the committee has previously stated that the government may need to monitor behaviour support plans to ensure that their use is compatible with Australia's human rights obligations.[55]

2.25 Another relevant consideration is how the matters in the behaviour support plan interact with the other requirements for the use of restrictive practices. The behaviour support plan may set out matters relating to the ongoing use of a restrictive practice where it is indicated as necessary following a review. It is not clear that an approved health practitioner is required to assess the ongoing use of restrictive practice as necessary, as a review of a behaviour support plan is undertaken by an approved provider, although the relevant health practitioner must be consulted. Where a behaviour support plan indicates a need for the ongoing use of a restrictive practice, it is unclear how the requirement to comply with these matters in a behaviour support plan would interact with the other requirements that a restrictive practice only be used as a last resort to prevent harm, to the extant necessary and proportionate to the risk of harm and in the least restrictive form, and for the shortest time necessary, to prevent harm. There appears to be some inconsistency between requiring compliance with a behaviour support plan that allows for the ongoing use of a restrictive practice and the requirements that a restrictive practice is only used as a last resort, to the extent necessary and proportionate, in the least restrictive form and

54 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, sections 15B and 15C.

55 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) p. 48.

for the shortest time necessary. This apparent inconsistency may create uncertainty around the practical implementation of the requirements.

Use of restraints in an emergency

2.26 Certain requirements relating to the use of restrictive practices do not apply if such practices are necessary in an emergency (as discussed at paragraph [2.10]). As noted in the preliminary analysis, this may create a gap in protection for the use of restrictive practices and undermine the overall effectiveness of the requirements as a safeguard. What constitutes an emergency is not defined in the bill or legislative instrument. The minister stated that the term 'emergency' is not expressly defined and has its ordinary meaning. The minister noted that the scope of emergency situations can be quite broad and adopting a prescriptive definition is likely to result in unintended consequences and may exclude situations of genuine emergency, thereby creating a risk to the safety, health and wellbeing of care recipients. While noting that the lack of definition of 'emergency' in the legislation may provide flexibility and allow different cases to be treated differently based on individual needs and circumstances, there is also a risk that without sufficient clarity as to the scope of any such power or discretion, broad powers may be exercised in such a way as to be incompatible with human rights.

2.27 The minister also noted that some requirements continue to operate during an emergency. For example, the restrictive practice must still be used only to the extent necessary and proportionate to the risk of harm, and in the least restrictive form, and for the shortest time, necessary to prevent harm. The continued operation of certain requirements would likely serve as a safeguard to ensure that restraints are used in the least rights-restrictive way even in an emergency. In addition, the minister stated that an emergency only applies while there is an immediate risk of harm to a care recipient or other person and once this risk has ceased, the emergency exemptions do not apply. If there is a need for ongoing use of a restrictive practice, this is subject to the requirements set out in the instrument. The provisions specifying that the emergency exemptions only apply while the emergency exists may assist with the proportionality of this measure by ensuring that the exemptions are time limited. Although, noting the lack of definition of emergency, the strength of this safeguard will depend on the length and frequency of emergencies in practice.

2.28 Furthermore, the responsibilities of approved providers following the emergency use of restrictive practices and the requirement to set out matters in behaviour support plans if a restrictive practice was used, including in an emergency, may also operate as safeguards in relation to the emergency use of restraints. The requirement to document matters in the behaviour support plan relating to the emergency use of restraint, such as the behaviours that necessitated the use of the restrictive practice and alternative strategies that were considered or used prior to the use of restraint, would ensure that relevant information is recorded for the purposes of monitoring and review. This could operate as a useful accountability mechanism. In

this regard, the minister advised that the Aged Care Quality and Safety Commission will be able to question the circumstances in which emergency use of a restrictive practice occurred. The explanatory statement to the instrument also states that a lack of evidence of the approved provider obtaining consent prior to the use of restraint (noting that informed consent does not need to be obtained in an emergency) may lead to the Commission investigating the approved provider for non-compliance.[56] It stated that if emergencies are recurring and for extended periods of time, this may indicate to the Commission that the approved provider has not provided a safe environment for care recipients.[57] While this oversight framework would likely be an important safeguard, it does not appear to be provided for in the legislation. In the absence of a legislative requirement for the emergency use of restraints to be reviewed and monitored by the Commission, such a discretionary safeguard may not be sufficient of itself.

Informed consent

2.29 A key protection contained in the measure is the requirement that informed consent be given to the use of a restrictive practice. Informed consent may be given by the care recipient or where they lack capacity to give that consent, the restrictive practices substitute decision-maker. A restrictive practices substitute decision-maker means a person or body that can give informed consent to the use of a restrictive practice in relation to the care recipient and to the prescribing of medication for the purpose of using a chemical restraint, if the care recipient lacks the capacity to give that consent.[58] The explanatory statement to the instrument states that state and territory legislation regulates who can give informed consent to the use of a restrictive practice and the prescribing of medication for chemical restraints.[59] It notes that the instrument complements but does not affect the operation of these laws.[60] Regarding the timing of consent, the effect of the instrument appears to be that informed consent must have been given before the use of any restrictive practice, unless the use is necessary in an emergency. In the case of an emergency and where the care recipient lacks the capacity to consent to the use of restrictive practice, the approved

56 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, p. 18.

57 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, p. 18.

58 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 2, section 4.

59 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, p. 8.

60 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, pp. 8 and 15.

provider must, as soon as practicable after the restraint is used on a care recipient, inform the restrictive practices substitute decision-maker about that use.

2.30 Regarding the ongoing use of a restrictive practice, the behaviour support plan must record the giving of informed consent to the ongoing use of the restrictive practice by the care recipient or their substitute decision-maker. However, it is not clear how informed consent would be obtained for the ongoing use of a restrictive practice, noting that this would seemingly require consent to be given for all future uses of a restraint. The explanatory statement to the instrument states that the approved provider should take steps to regularly communicate with the care recipient or their substitute decision-maker and obtain informed consent contemporaneously.[61] It states that informed consent for the ongoing use of a restrictive practice is required but perpetual or ongoing approval cannot be given to the use of a restrictive practice.[62] It is unclear whether the approved provider is required to obtain informed consent prior to each use of a restrictive practice, even where that restrictive practice is used on an ongoing basis in accordance with the care recipient's behaviour support plan. Clarification of this in the legislation would likely assist approved providers in complying with the requirement to obtain informed consent.

2.31 The requirement to obtain informed consent contemporaneously before the use of a restrictive practice (except in an emergency) is an important safeguard to ensure that the human rights of care recipients are not limited. The use of physical and chemical restraints against a person without their consent may engage and limit the right to privacy, which includes the right to personal autonomy and physical and

61 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, p. 15.

62 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, pp. 31–32.

psychological integrity, and protects against compulsory procedures.[63] The requirement to obtain informed consent may therefore protect these rights as well as the rights of people with disability,[64] noting that some aged care recipients would be considered persons with disabilities for the purposes of the Convention on the Rights of Persons with Disabilities.[65] In this regard, the Committee on the Rights of Persons with Disabilities has emphasised that prior to the provision of medical treatment or health care or the making of decisions relating to a person's physical or mental integrity, decision-makers must obtain the free and informed consent of persons with disabilities.[66] Consent should be obtained through appropriate consultation and not as a result of undue influence.[67]

2.32 While the requirement to obtain informed consent is an important protection, there are concerns that the ability to obtain this consent from a restrictive practices

63 See, *MG v Germany*, UN Human Rights Committee Communication No. 1428/06 (2008) [10.1]. Note also that article 7 of the International Covenant on Civil and Political Rights expressly prohibits medical or scientific experimentation without the free consent of the person concerned. Article 7 may not be engaged in relation to non-experimental medical treatment, even when given without consent, unless it reaches a certain level of severity. See *Brough V Australia*, UN Human Rights Committee Communication No. 1184/03 (2006) [9.5], where the Committee concluded that the prescription of anti-psychotic medication to the author without his consent did not violate article 7, noting that the medication was intended to control the author's self-destructive behaviour and treatment was prescribed by a General Practitioner and continued after examination by a psychiatrist. However, with respect to persons with disability, the UN Committee on the Rights of Persons with Disabilities has held that 'forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law an infringement of the rights to personal integrity (art. 17); freedom from torture (art. 15); and freedom from violence, exploitation and abuse (art. 16). This practice denies the legal capacity of a person to choose medical treatment and is therefore a violation of article 12 of the Convention': *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [42].

64 These rights include the rights to equality and non-discrimination and equal recognition before the law; the right to respect a person's physical and mental integrity; the right to consent to medical treatment; and the right not to be forced to undergo mental health treatment. See Convention on the Rights of Persons with Disabilities, articles 5, 12, 14, 17 and 25(d). See also Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [31].

65 Convention on the Rights of Persons with Disabilities, article 1, which states that 'persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

66 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [41]–[42].

67 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [41].

substituted decision-maker may weaken this protection. It is acknowledged that while the instrument, which introduces the term 'restrictive practices substitute decision-maker', does not affect the operation of state and territory legislation that regulates substituted decision-making (including who can give informed consent), it does complement and clarify those laws and is therefore relevant in assessing the safeguard value of the informed consent requirement.

2.33 Article 12 of the Convention on the Rights of Persons with Disabilities provides that persons with disabilities have the right to equal recognition before the law, which includes the right to enjoy legal capacity on an equal basis with others in all aspects of life. It also requires States parties to take appropriate measures to provide access to support for persons with disabilities in exercising their legal capacity. The Committee on the Rights of Persons with Disabilities has confirmed that there can be no derogation from article 12, which describes the content of the general right to equality before the law under the International Covenant on Civil and Political Rights.[68] In other words, 'there are no permissible circumstances under international human rights law in which this right may be limited'.[69] The denial of legal capacity to care recipients through the provision of a restrictive practices substituted decision-maker would therefore engage this right.[70] The Committee on the Rights of Persons with Disabilities has stated that substituted decision-making should be replaced by supported decision-making.[71] Supports may include peer support, advocacy, assistance with communication or advance planning, whereby a person can state their will and preferences in advance should they be unable to do so at a later point in time. The Committee on the Rights of Persons with Disabilities has noted that 'where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must

68 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [1], [5].

69 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [5].

70 The Committee on the Rights of Persons with Disabilities has made clear that practices that deny the right of people with disability to legal capacity in a discriminatory manner, such as substituted decision-making regimes, must be 'abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others': *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [7]. For a discussion of the academic debate regarding the interpretation and application of article 12, particularly in relation to substituted decision-making, see, eg, Bernadette McSherry and Lisa Waddington, 'Treat with care: the right to informed consent for medical treatment of persons with mental impairments in Australia', *Australian Journal of Human Rights*, vol. 23, issue no. 1, pp. 109–129.

71 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15]–[16], [21]. The features of a supported decision-making regime are detailed in paragraph [29].

replace the "best interests" determinations'.[72] States are also required to create appropriate and effective safeguards for the exercise of legal capacity to protect people with disability from abuse.[73]

2.34 The explanatory statement to the instrument notes that the care recipient should be supported or assisted to make their own decisions, including communicating with them in a way they can understand and providing them with an opportunity to discuss their concerns and expectations.[74] While encouraging supported decision-making is a positive step, it is not a legislative requirement and thus may not effectively protect the right to equal recognition before the law in practice. As such, while requiring informed consent from the care recipient before the use of restrictive practice would protect article 12, in the absence of effective safeguards for the exercise of legal capacity, the ability for a substituted decision-maker to consent to a restrictive practice in relation to the care recipient would appear to undermine this protection.

Monitoring, review, and oversight

2.35 While a restrictive practice is being used, the approved provider is required to monitor the care recipient for certain things, such as for signs of distress or harm; regularly monitor, review and document the necessity of the restrictive practice; and monitor the effectiveness of the restrictive practice.[75] Following the use of an emergency restrictive practice, the approved provider must document in the care and services plan/behaviour support plan certain matters, including the reasons the emergency restraint was necessary.[76] Regarding review of a behaviour support plan, the plan must be reviewed on a regular basis and as soon as practicable after any change in the care recipient's circumstances. It is unclear what constitutes review on a 'regular basis'. The explanatory statement states that if a care recipient's behaviour needs are stable and do not change over a 12-month period, 'a review must be

72 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [21].

73 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [20]; Convention on the Rights of Persons with Disabilities, article 12(4).

74 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, p. 15.

75 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, section 15GA.

76 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 9, section 15GB.

completed within the 12 months'.[77] It further states that it is expected that a plan will be reviewed 'significantly more frequently than every 12 months'.[78] It is unclear, however, why the legislation does not reflect this expectation, for example by stating that a review must be completed within a specified timeframe, such as at least every 12 months, noting that discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time.

2.36 While these review and monitoring frameworks appear to be an important safeguard, there remain concerns about the approved provider being both the person using the restrictive practice and the person documenting, monitoring and reviewing the use of the restrictive practice. This lack of independence may undermine the effectiveness of the monitoring and review mechanisms. In terms of external oversight, the Aged Care Quality and Safety Commissioner will only be notified of reportable incidents. The instrument clarifies that the use of a restrictive practice will not be a reportable incident if it is used in a transition care program in a residential care setting and in accordance with the Quality of Care Principles.[79] Therefore, if a restrictive practice is used in accordance with the requirements set out in the instrument (including in an emergency), it would not be a reportable incident and the Commissioner would not be notified of its use. As discussed at paragraph [2.28], there appears to be little oversight by the Aged Care Quality and Safety Commission of emergency use of restraints.

2.37 Furthermore, the minister noted that from 1 July 2021, all use of restraint, including chemical restraint, will be reported to the Department of Health through My Aged Care under the National Aged Care Mandatory Quality Indicator Program. However, as this information will presumably be reported by the approved providers, this reporting process does not address concerns regarding the lack of independence of those using, monitoring and reporting incidents of the use of restraint.

Concluding remarks

2.38 The effect of the instrument is to prohibit, except in an emergency, the use of a restrictive practice unless the use complies with the requirements specified in the instrument, including compliance with a behaviour support plan. To the extent that these requirements strengthen the responsibilities of approved providers by enhancing safeguards regarding the use of restrictive practices, the measure may assist in ensuring rights are not limited and may promote other rights. However,

77 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, p. 32.

78 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], explanatory statement, p. 32.

79 Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923], schedule 1, item 11, section 15NB(2).

depending on the adequacy of the safeguards and noting the complex interplay of existing laws regulating the use of restraints by approved providers, the practical operation and effect of the measure could limit a number of human rights.

2.39 The measure contains a number of important safeguards that would likely provide protection so as to help protect the human rights of aged care recipients. These include the requirements set out in the instrument, including using restraint as a last resort, to the extent necessary and proportionate, in the least restrictive form and for the shortest time; the behaviour support plans; and the monitoring and review frameworks. The strength of these safeguards, however, will depend on how they are applied in practice. Questions remain as to how the behaviour support plans will be implemented in practice, including who within the approved provider would make decisions about the use of restrictive practices, and how certain matters in the behaviour support plan would interact with other requirements for the use of restrictive practices. There are also concerns regarding the use of restraints in an emergency, noting that certain requirements do not apply to such use, and the lack of independence of those who use, monitor and review the use of restrictive practices. Other factors, such as staffing ratios, may also undermine the effectiveness of these protections in practice.[80]

## Committee view

**2.40 The committee notes that this bill (now Act, noting that it has passed both Houses of Parliament) set out certain requirements regarding the use of restrictive practices in aged care facilities. These requirements were subsequently included in recent amendments to the Quality of Care Principles, as set out in the Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021. This instrument strengthens existing requirements, and provides that restraints may only be used in aged care facilities: as a last resort; after considering all alternative strategies; to the extent necessary and proportionate; in the least restrictive form and for the shortest time; after informed consent is given; in accordance with a behaviour support plan; and that the use of a restrictive practice is monitored and reviewed. However, certain requirements do not apply in 'emergency' situations.**

**2.41 The committee welcomes these amendments to the Quality of Care Principles, noting that many of these amendments directly address recommendations made by the committee in its 2019 inquiry into the regulation of restraints under the Quality of Care Principles, particularly that restraints should**

80 Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect – Volume 3A, The New System*, 2021, recommendation 17, pp. 109–110. At page 111, the report noted that changed behaviours of care recipients can be 'very difficult to manage, particularly in residential aged care facilities where there are inadequate numbers of staff and inadequate access to expertise and resources'.

**only be used as a last resort and after all other alternatives to restraint have been exhausted.**

**2.42 The committee notes that to the extent that these requirements strengthen the responsibilities of approved providers by enhancing safeguards regarding the use of restrictive practices, the measure may assist in ensuring rights are not limited and may promote other rights. In particular, the committee considers the measure may assist in ensuring there are appropriate safeguards to protect the right not to be subjected to torture and other cruel, inhuman or degrading treatment, and may also promote the rights to health, privacy, freedom of movement, liberty, equality and non-discrimination and the rights of persons with disability.**

**2.43 However, some questions remain as to how some of these restrictions on the use of restraints will operate in practice, particularly in relation to the development and implementation of behaviour support plans, the use of restraints in an emergency, the requirement of informed consent, and the monitoring and review of the use of restrictive practice. The committee notes that the strength of the safeguards accompanying this measure will depend on how they are applied in practice.**

### Suggested action

**2.44 The committee considers that the compatibility of the measure with human rights may be assisted were the instrument amended to:**

**(a) specify who within the approved provider may make decisions regarding the use of a restrictive practice, and the criteria on which those decisions are to be made;**

**(b) require all emergency uses of restrictive practices to be reported to the Aged Care Quality and Safety Commission Care Commission;**

**(c) set out a model of supported, rather than substituted, decision-making in relation to obtaining informed consent for the use of a restrictive practice;**

**(d) require that the person or body who monitors and reviews the use of a restrictive practice must be independent from the person who used the restrictive practice, or at a minimum, ensure that a more senior practitioner monitor and review the use of the restrictive practice; and**

**(e) require the Department of Health to table a report in Parliament, at least annually, on the use of restrictive practices in relation to care recipients, including the proportion of restrictive practices used in an emergency.**

**2.45 The committee recommends that the explanatory statement to the legislative instrument be updated to reflect the information which has been provided by the minister.**

**2.46 The committee draws these human rights concerns to the attention of the minister and the Parliament.**

# Crimes Legislation Amendment (Economic Disruption) Regulations 2021 [F2021L00541][1]

| | |
|---|---|
| **Purpose** | This legislative instrument allows the Official Trustee in Bankruptcy to recoup costs, charges, expenses and remuneration incurred in exercising its statutory functions, duties and powers. It also updates definitions, repeals duplicate sections and specifies certain offences as serious offences for the purposes of the *Proceeds of Crime Act 2002* |
| **Portfolio** | Home Affairs |
| **Authorising legislation** | *Crimes Act 1914* and *Proceeds of Crime Act 2002* |
| **Last day to disallow** | 15 sitting days after tabling (tabled in the Senate and the House of Representatives on 11 May 2021). |
| **Rights** | Fair trial and fair hearing; privacy |

2.47 The committee requested a response from the minister in relation to these regulations in *Report 8 of 2021*.[2]

## Expansion of the application of the *Proceeds of Crime Act 2002*

2.48 The *Proceeds of Crime Act 2002* (Proceeds of Crime Act) establishes a scheme to confiscate the proceeds of crime. It sets out a number of processes relating to the confiscation of property, many of which relate to whether a person has, or is suspected of having, committed a 'serious offence'. If a person is reasonably suspected of committing a 'serious offence', a court is able to make a restraining order against property under a person's effective control and to forfeit this property unless the person can establish that, on the balance of probabilities, it was not derived from unlawful activity.[3] In addition, if a person is convicted of a serious offence, all property subject to a restraining order will automatically forfeit six months after the date of conviction unless the person can prove it was not the proceeds of unlawful activity or an instrument of a serious offence.[4] What constitutes a 'serious offence' is defined to include offences subject to a certain period of imprisonment involving unlawful

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Economic Disruption) Regulations 2021 [F2021L00541], *Report 10 of 2021*; [2021] AUPJCHR 102.

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2021* (23 June 2021), pp. 13-20.

3 *Proceeds of Crime Act 2002*, sections 18, 29, 47 and 73.

4 *Proceeds of Crime Act 2002*, sections 29, 92 and 94. See summary of this from explanatory memorandum, p. 74.

conduct that causes a 'benefit' (including a service or advantage) to a person of a certain value.[5] These regulations amend the definition of 'serious offence' to include various offences relating to child sexual abuse for the purposes of the Proceeds of Crime Act.[6] This has the effect of expanding the application of the Proceeds of Crime Act.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights to a fair trial and fair hearing and privacy*

2.49 The expansion of the Proceeds of Crime Act to cover additional offences may engage and limit the right to a fair trial and fair hearing and the right to privacy.[7] The right to a fair trial and fair hearing is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Specific guarantees of the right to a fair trial in relation to a criminal charge include the presumption of innocence,[8] the right not to incriminate oneself,[9] and the guarantee against retrospective criminal laws.[10] The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[11] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.[12]

2.50 Given the potential severity of forfeiting and selling an individual's property, without a finding of guilt, forfeiture orders could be considered a penalty, and if this were the case, then the Proceeds of Crime Act regime would engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights. The committee has previously raised concerns that the underlying regime established by the Proceeds of Crime Act for the freezing, restraint or forfeiture of property may be considered 'criminal' for the purposes of international human

5 *Proceeds of Crime Act 2002*, section 338 (definition of 'serious offence').

6 Schedule 1, items 10–18.

7 International Covenant on Civil and Political Rights, articles 14, 15 and 17.

8 International Covenant on Civil and Political Rights, article 14(2).

9 International Covenant on Civil and Political Rights, article 14(3)(g).

10 International Covenant on Civil and Political Rights, article 15(1).

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

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

rights law.[13] For example, a forfeiture order may be made against property where (relevantly) a court is satisfied that the property is 'proceeds' of an indictable offence or an 'instrument' of one or more serious offences.[14] The fact a person has been acquitted of an offence with which the person has been charged does not affect the court's power to make such a forfeiture order.[15] Further, a finding need not be based on a finding that a particular person committed any offence.[16]

2.51 Considering existing human rights concerns with the regime established by the Proceeds of Crime Act, any amendments to that regime by these regulations may raise similar concerns. In particular, expanding the application of the regime to cover additional conduct and offences, without a finding of criminal guilt beyond reasonable doubt, may limit the right to be presumed innocent and the prohibition against double punishment. In this regard, if the forfeiture and sale of a person's property may properly be regarded as a penalty, it may be that, as a matter of international human rights law, these processes would constitute a criminal penalty, such that the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights would apply.

2.52 The test for whether a matter should be characterised as a 'criminal charge' for the purposes of international human rights law relies on three criteria:

(a) the domestic classification of the offence;

(b) the nature of the offence; and

(c) the severity of the penalty.[17]

2.53 In relation to (a), it is clear that the forfeiture regime is defined under Australian domestic law as civil in nature. However, the term 'criminal' has an autonomous meaning in human rights law, such that a penalty or other sanction may be 'criminal' for the purposes of the International Covenant on Civil and Political Rights even though it is considered to be 'civil' under Australian domestic law.

2.54 In relation to (b), a penalty will likely be considered criminal under international human rights law if it is intended to punish and deter and the penalty

13 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44th Parliament* (24 November 2015) pp. 43–44; *Twenty-Sixth Report of the 44th Parliament* (18 August 2015) pp. 7–11*; Report 1 of 2017* (16 February 2017) pp. 29–31; *Report 2 of 2017* (21 March 2017) p. 6; *Report 4 of 2017* (9 May 2017) pp. 92–93; *Report 1 of 2018* (6 February 2018) pp. 112–122; *Report 11 of 2020* (24 September 2020) pp. 36–41; *Report 13 of 2020* (13 November 2020) pp. 74–79.

14 *Proceeds of Crime Act 2002*, section 49.

15 *Proceeds of Crime Act 2002*, sections 51 and 80.

16 *Proceeds of Crime Act 2002*, section 49(2)(a).

17 For further detail, see the Parliamentary Joint Committee on Human Rights, *Guidance Note 2*: *Offence provisions, civil penalties and human rights* (December 2014).

applies to the public in general as opposed to being in a particular regulatory or disciplinary context. It is clear that the Proceeds of Crime Act has wide application and applies to general criminal conduct that may occur across the public at large. The Proceeds of Crime Act sets out the objectives of the Act which include 'to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories'.[18] While deterrence and punishment may not be the only objective of the Proceeds of Crime Act regime, it is clearly one of the objectives,[19] and as such would appear to meet the test that it is intended to punish and deter.

2.55 Moreover, the Proceeds of Crime Act is structured such that a forfeiture order under the Act is conditional on a person having been convicted of a serious criminal offence, or a court being satisfied on the balance of probabilities that a person has engaged in conduct constituting a 'serious criminal offence'. Such a judgment would appear to entail a finding of 'blameworthiness' or 'culpability' on the part of the respondent, which, having regard to a number of English authorities, would suggest that the provision may be criminal in character.[20] In addition, the Canadian courts have considered confiscation, or 'forfeiture proceedings', as being a form of punishment, and characterised them as a 'penal consequence' of conviction.[21]

2.56 In relation to (c), the severity of the penalty, forfeiture orders can involve significant sums of money, sometimes far in excess of any financial penalty that could be applied under the criminal law. For example, the Australian Federal Police's (AFP) 2012-13 Annual Report notes that one single operation resulted in $9 million worth of assets being forfeited.[22] More recently, in a 2019 operation, the AFP forfeited three properties valued at $4.2 million.[23] As such, in certain instances, the proceeds of crime orders may be so severe as to be considered a criminal penalty.

2.57 As such, it may be that proceedings for the forfeiture and sale of a person's assets may be considered criminal for the purposes of international human rights law, because of the nature of the offence and the severity of the penalty. However, it is difficult to reach a concluded view on this matter without undertaking a full review of the provisions of the Proceeds of Crime Act, noting that the Act was introduced prior to the establishment of the Parliamentary Joint Committee on Human Rights and as such, was not accompanied by a statement of compatibility with human rights.

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18 *Proceeds of Crime Act 2002*, section 5(2).

19 *Proceeds of Crime Act 2002*, paragraph 5(c).

20 See *Goldsmith v Customs and Excise Commissioners* [2001] 1 WLR 16733; *R v Dover Magistrates Court* [2003] Q.B. 1238.

21 *R v Green* [1983] 9 C.R.R. 78; *Johnston v British Columbia* [1987] 27 C.R.R. 206.

22 Australian Federal Police, *Annual Report 2012-13*, 101.

23 Australian Federal Police, *$4.2 million in assets forfeited to the Commonwealth*, 8 June 2019, https://www.afp.gov.au/news-media/media-releases/42-million-assets-forfeited-commonwealth (accessed 15 June 2021).

Assessing the forfeiture orders under the Proceeds of Crime Act as involving the determination of a criminal charge does not suggest that, in all instances, such measures will be incompatible with human rights. Rather, it requires that such measures are demonstrated to be consistent with the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights.

2.58 The rights to a fair trial and fair hearing and 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. The statement of compatibility acknowledges that the regulations limit the right to privacy insofar as they expand the definition of 'serious offences', thereby enhancing restraint and confiscation action under the Proceeds of Crime Act.[24] However, it does not address the implications of the measure on the right to a fair trial and fair hearing.

***Committee's initial view***

2.59 The committee noted that in light of its previous concerns regarding the compatibility of the Proceeds of Crime Act with the rights to a fair trial and fair hearing and privacy, there is a risk that the amendments to this regime by these regulations raise similar human rights concerns.

2.60 The committee considered that the measure likely pursues a legitimate objective and would appear to be rationally connected to this objective. However, in the absence of a foundational human rights assessment of the Proceeds of Crime Act, the committee noted that it is difficult to assess the adequacy of the safeguards identified in the statement of compatibility. As such, the committee sought the minister's advice as to whether the measure is proportionate.

2.61 The full initial analysis is set out in *Report 8 of 2021*.

## Minister's response[25]

2.62 The minister advised:

> The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving legitimate objectives, for the following reasons:

24 Statement of compatibility, pp. 18–25.

25 The minister's response to the committee's inquiries was received on 21 July 2021. 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.

The POC Act is civil in nature

The restraint and forfeiture powers available to law enforcement where property is linked to, or a person commits, a 'serious offence' (as expanded by the Regulations) are properly characterised as civil for the purposes of international human rights law. Proceedings under the POC Act are subject to civil rules of evidence and are conducted in accordance with civil, not criminal, procedure.

The Committee's Guidance Note 2 states that the test for whether a penalty can be classified as 'criminal' relies on three criteria:

- the domestic classification of the penalty;
- the nature and purpose of the penalty; and
- the severity of the penalty.

On the domestic classification of the penalty, section 315 of the POC Act expressly provides that the relevant restraint and forfeiture powers are characterised as civil in nature under Commonwealth law.

On the nature and purpose of the penalty, the predominant purpose of the POC Act is not to deter or punish persons for breaching laws. Paragraphs 5(a)-(ba) of that Act make it clear that the focus is primarily on remedying the unjust enrichment of persons who profit at society's expense, while paragraphs (d)-(da) are focussed on the removal of illicit funds from the legitimate economy. In addition, actions taken under the POC Act make no determination of a person's guilt or innocence and can be taken against assets without finding any form of culpability against a particular individual (see sections 19 and 49 of the POC Act).

On the severity of the penalty, Guidance Note 2 provides that a penalty is likely to be considered criminal for the purposes of human rights law if the penalty is imprisonment or a substantial pecuniary sanction. Proceedings under the POC Act cannot in themselves create any criminal liability and do not expose individuals to criminal sanctions (or a subsequent criminal record). Further, orders made under the POC Act cannot be commuted into a period of imprisonment.

On whether the penalty is substantial, the POC Act contains mechanisms to allow an affected party to exclude property from an order where it is not the proceeds or instrument of a crime, or to compensate a person for the lawfully derived component of their property (see, for example, the compensation orders at sections 77 and 94A of the POC Act). This ensures that the property that is ultimately taken from the suspect reflects the quantum that has been derived or realised from crime, ensuring that orders are aimed primarily at preventing the retention of ill-gotten gains, rather than the imposition of a punishment or sanction.

In assessing the POC Act against Guidance Note 2, for the reasons stated, it does not meet the criteria for a penalty being classified as 'criminal' and therefore in the Department's view is considered to be civil in nature.

*Right to a fair trial and fair hearing*

The relevant restraint and forfeiture powers are properly characterised as civil in nature for the purposes of international human rights law. These powers do not engage the criminal process guarantees as set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) and are otherwise consistent with the right to a fair trial and fair hearing under the ICCPR.

Proceedings under the POC Act are civil proceedings heard by Commonwealth, State and Territory Courts in accordance with the relevant civil procedures of those courts and under civil rules of evidence. This affords an affected person adequate opportunity to present their case, such that the right to a fair hearing is not limited. The Regulations do not affect the civil court procedures applicable to proceedings under the POC Act.

Affected persons will also be given notice of applications under the POC Act. Where the POC Act allows an order to proceed without notice, there are justifiable reasons for doing so. For example, restraining orders (which are interim in nature) can be made over property *ex parte* to ensure that a subject is not tipped-off to law enforcement suspicions, and cannot dispose of the property before the order can be made.

*Right to privacy*

The Committee has questioned whether prescribing the offences specified in items 10-18 of the Regulations as 'serious offences' for the purposes of the POC Act is proportionate in achieving its legitimate objectives, noting that a person can be required to forfeit property linked to an offence where they have been acquitted of this offence or their conviction has been subsequently quashed.

As noted in the Explanatory Statement, the Regulations are compatible with the right to privacy. The POC Act already contains extensive safeguards that ensure the Regulations are the "least rights restrictive option" that still achieves the legitimate objective of preserving public order and the rights and freedoms of those subject to serious criminal behaviour.

These include:

- if an individual's property is subject to a restraining order, a court may be able to make allowances for expenses to be met out of property covered by the restraining order (section 24), exclude property from the scope of the order or revoke the order (sections 24A, 29, 42), or refuse to make the order where it is not in the public interest to do so (sections 17(4) and 19(3))
- if an individual's property is restrained and subject to a forfeiture order or automatic forfeiture, a court can exclude the person's interest from the scope of the order or from automatic forfeiture (sections 73, 94 and 102)

- a court can refuse to make an order in relation to an 'instrument' of an offence in certain circumstances, including where making the order is not in the public interest (sections 47(4), 48(2) and 49(4))
- an individual may also seek a compensation order for the proportion of the value of the property they did not derive or realise from the commission of an offence (sections 77 and 94A) or a buy back order (sections 57 and 103), and
- where an individual acquires property that constituted 'proceeds' or an 'instrument' of crime in the legitimate situations outlined under section 330(4), this property ceases to be 'proceeds' or an 'instrument' of crime and generally cannot be subject to restraint or forfeiture. This ensures that third parties who acquire property legitimately are adequately protected.

In addition, section 322 of the POC Act provides persons against whom a confiscation order has been made, or who have an interest in forfeited property, with the right to appeal the order. The POC Act also includes protections preventing the destruction or disposal of property that is under a forfeiture order, forfeited by operation of the Act or is subject to a pecuniary penalty order, a literary proceeds order, or an unexplained wealth order, until the conclusion of any relevant appeal period, except in limited circumstances. This is an important safeguard to ensure that a person's property is not destroyed or disposed of prematurely.

Proceeds of crime authorities are Commonwealth agencies that are bound by an obligation to act as model litigants, and must not commence legal proceedings unless satisfied that litigation is the most suitable method of dispute resolution (paragraph 4.2 of Schedule 1 and Appendix B of the Legal Services Directions 2017). They are required to act honestly and fairly in handling litigation, including litigation brought under the POC Act. This requirement includes, but is not limited to, an obligation not to take advantage of a claimant who lacks resources to litigate a claim and not to rely on technical defences except in limited circumstances.

For these reasons, to the extent that the amendments to the Regulations, in amending the definition of what constitutes a 'serious offence', limit the right to a fair trial, the right to a fair hearing, and the right to privacy, those limitations are proportionate to achieving a legitimate objective.

## Concluding comments

### *International human rights legal advice*

*Rights to a fair trial and fair hearing and privacy*

2.63 The preliminary analysis noted that insofar as the measure expands the application of the Proceeds of Crime Act regime to additional conduct and offences without a finding of guilt against the individual, it engages and appears to limit the right to privacy and the right to a fair hearing and fair trial, including the right to be presumed innocent and the prohibition against double punishment (where the

penalty is considered 'criminal' for the purposes of international human rights law). While the measure likely pursues a legitimate objective and would appear to be rationally connected to that objective, the preliminary analysis raised questions as to whether the measure is proportionate.

2.64 With respect to the right to privacy, the minister referenced the safeguards contained in the Proceeds of Crime Act and stated that these safeguards ensure the measure is the least rights restrictive option. The safeguards identified by the minister are those provisions in the Proceeds of Crime Act outlined in the preliminary analysis.[26] As noted in the preliminary analysis, these provisions may operate as safeguards and would appear to provide the court with some flexibility to treat different cases differently, having regard to the individual circumstances of each case. For instance, a court may make allowances for living expenses to be met or may exclude a specified interest in the property if satisfied the interest is neither the proceeds of unlawful activity nor an instrument of any serious offence.[27] Depending on the scope and nature of the forfeiture order, these provisions may also assist to minimise the potential interference with rights, noting that the greater the interference with human rights, the less likely the measure is to be considered proportionate. The right to appeal against an order and protections against the premature destruction or disposal of forfeited property before the appeal period has concluded may also assist with the proportionality of this measure.

2.65 However, as noted in the preliminary analysis, it is not clear that these safeguards alone would be sufficient for the purposes of ensuring that the limitation on rights is proportionate under international human rights law. In particular, it does not appear that the safeguards relating to the right to privacy (as discussed above at paragraph [2.64]) would also serve as safeguards in relation to the limit on the right to a fair hearing and fair trial. The minister states that proceedings under the Proceeds of Crime Act are civil in nature and civil court procedures and rules of evidence would ensure the affected person is afforded an adequate opportunity to present their case. The opportunity for an affected individual to present their case to an independent court in a public hearing and appeal an unfavourable decision would serve as a general safeguard with respect to the right to a fair hearing.[28] However, in cases where the forfeiture and sale of a person's property may properly be regarded as a criminal

26 Parliamentary Joint Committee on Human Rights, *Report 8 of 2021* (23 June 2021) p. 18. See also statement of compatibility, para [60].

27 *Proceeds of Crime Act 2002*, sections 17(4), 19(3), 24, 24A, 29, 42, 57, 73, 94, 102 and 103.

28 In assessing the human rights compatibility of measures that interfere with a person's property, such as non-conviction based confiscation orders, the European Court of Human Rights has suggested that procedural safeguards, such as the opportunity for an affected individual to put their case to a court in adversarial proceedings, may assist with the proportionality of such a measure. See, eg, *Gogitidze and Others v Georgia,* European Court of Human Rights, Applicant no. 36862/05 (2015), at [114]–[115].

penalty due to the nature of the offence and the severity of the penalty (noting that in some cases, forfeiture orders can involve sums of money far in excess of any financial penalty that could be applied under criminal law),[29] these civil court procedures may not be an adequate safeguard in relation to the right to a fair trial and criminal process rights.[30]

2.66 Further, concerns remain that confiscating, forfeiting and selling assets, without any conviction of criminal guilt, may not necessarily be the least rights restrictive option to achieve the stated objective. This is particularly the case where a forfeiture order is made against a person who has been acquitted of an offence or had their conviction quashed.[31] It is unclear the extent to which the safeguards referenced above (at paragraph [2.64]) would ensure the least rights restrictive option is applied, as much will depend on how these provisions are applied in practice. In this regard, it is noted that some of these safeguards are discretionary, for example, a court *may* make allowances for expenses to be met out of the forfeited property but is not required to do so.[32] Where a measure limits a human right, discretionary safeguards alone may not be sufficient for the purpose of a permissible limitation under

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29 For example, the Australian Federal Police's (AFP) 2012-13 Annual Report notes that one single operation resulted in $9 million worth of assets being forfeited. More recently, in a 2019 operation, the AFP forfeited three properties valued at $4.2 million. See Australian Federal Police, *Annual Report 2012-13*, 101 and Australian Federal Police, *$4.2 million in assets forfeited to the Commonwealth*, 8 June 2019, https://www.afp.gov.au/news-media/media-releases/42-million-assets-forfeited-commonwealth (accessed 15 June 2021).

30 The committee has previously raised concerns that the underlying regime established by the Proceeds of Crime Act for the freezing, restraint or forfeiture of property may be considered 'criminal' for the purposes of international human rights law. See Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44th Parliament* (24 November 2015) pp. 43–44; *Twenty-Sixth Report of the 44th Parliament* (18 August 2015) pp. 7–11*; Report 1 of 2017* (16 February 2017) pp. 29–31; *Report 2 of 2017* (21 March 2017) p. 6; *Report 4 of 2017* (9 May 2017) pp. 92–93; *Report 1 of 2018* (6 February 2018) pp. 112–122; *Report 11 of 2020* (24 September 2020) pp. 36–41; *Report 13 of 2020* (13 November 2020) pp. 74–79.

31 *Proceeds of Crime Act 2002*, section 80. The jurisprudence of the European Court of Human Rights indicates that in cases where an administrative confiscation order is considered to be a criminal penalty, such an order may be incompatible with the prohibition against retrospective criminal laws and the right to be presumed innocent where the affected individual has not been convicted of a criminal offence. See, eg, *Varvara v Italy,* European Court of Human Rights, Application No. 17475/09 (2013). At [66]–[67], the European Court of Human Rights stated: 'a system which punished persons for an offence committed by another would be inconceivable. Nor can one conceive of a system whereby a penalty may be imposed on a person who has been proved innocent, or in any case, in respect of whom no criminal liability has been established by a finding of guilt'. At [72]–[73], the Court held that the confiscation order, which was considered to be a criminal penalty and which was imposed on the applicant despite no finding of guilt, was 'incompatible with the principle that only the law can define a crime and prescribe a penalty'.

32 *Proceeds of Crime Act 2002*, section 24. See also, eg, sections 17(4), 24A, 42, 47(4) and 57.

international human rights law.[33] This is because discretionary safeguards are less stringent than the protection of statutory processes and the strength of such safeguards will depend on how they are exercised in practice.

*Concluding remarks*

2.67 In light of the existing human rights concerns with the Proceeds of Crime Act regime as a whole, as outlined in the preliminary analysis, there remains a risk that the amendments to this regime by this measure raise similar human rights concerns. In particular, questions remain as to whether the measure is proportionate, noting that much will depend on whether the penalty is considered 'criminal' for the purposes of international human rights law. It is not clear that the safeguards contained in the Proceeds of Crime Act, many of which are discretionary, would be sufficient in all circumstances to ensure that any limitation on rights is proportionate. It is also not clear that the measure pursues the least rights restrictive option, particularly in circumstances where a forfeiture order is made against a person who has been acquitted of an offence or had their conviction quashed. It is therefore not possible to conclude that the measure is compatible with the rights to a fair trial and privacy.

## Committee view

**2.68 The committee thanks the minister for this response. The committee notes that these regulations amend the definition of what constitutes a 'serious offence' for the purposes of the Proceeds of Crime Act, which have the effect of broadening the application of the restraint and forfeiture provisions under that Act.**

**2.69 The committee notes its previous concerns regarding the compatibility of the Proceeds of Crime Act with the rights to a fair trial and fair hearing and privacy and considers that there remains a risk that this measure raises similar human rights concerns. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.**

**2.70 The committee considers that the Proceeds of Crime Act regime provides law enforcement agencies with important and necessary tools in the fight against crime. In this regard, the committee considers that the measure likely pursues the legitimate objective of protecting public order and the rights and freedoms of others, particularly children, and would appear to be rationally connected to this objective.**

**2.71 However, the committee considers that questions remain as to whether the measure is proportionate. The committee notes that while there are some safeguards contained in the Proceeds of Crime Act which may assist with the proportionality of the measure, many of these safeguards are discretionary and it is not clear that they would be sufficient in all circumstances to ensure that any limitation on rights is proportionate. It is also not clear to the committee that the**

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

**measure pursues the least rights restrictive option, particularly in circumstances where a forfeiture order is made against a person who has been acquitted of an offence or their conviction quashed. As such, the committee considers that it is not possible to conclude that the measure is compatible with the rights to a fair trial and privacy.**

**2.72 The committee draws these human rights concerns to the attention of the minister and the Parliament.**

# Health Insurance (General Medical Services Table) Regulations 2021 [F2021L00678]

# Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021 [F2021L00681][1]

| | |
|---|---|
| **Purpose** | The Health Insurance (General Medical Services Table) Regulations 2021 implements annual Medicare indexation and recommendations from the MBS Review Taskforce relating to general surgery and orthopaedic services (the first instrument)<br><br>The Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021 amends cardiac services and indexes diagnostic imaging services and two items for the management of bulk-billing pathology services (the second instrument) |
| **Portfolio** | Health and Aged Care |
| **Authorising legislation** | *Health Insurance Act 1973* |
| **Last day to disallow** | 15 sitting days after tabling (tabled in the House of Representatives on 3 June 2021 and the Senate 15 June 2021). |
| **Rights** | Health; social security |

2.73 The committee requested a response from the minister in relation to these legislative instruments in *Report 8 of 2021*.[2]

## Amendments to the Medicare Benefits Schedule

2.74 These two legislative instruments make changes to the Medicare Benefits Schedule (MBS), which is the list of health professional services that the Australian Government subsidises. Both apply an indexation rate of 0.9 per cent to relevant listed items. The first instrument makes a total of 752 amendments to the MBS in relation to general surgery and orthopaedic services by adding 202 items, amending 334 items, and deleting 216 items. The second instrument makes several amendments, including consolidating and removing some procedures related to cardiac services on the MBS.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Health Insurance (General Medical Services Table) Regulations 2021 [F2021L00678] and Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021 [F2021L00681], *Report 10 of 2021*; [2021] AUPJCHR 103.

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2020* (23 2021), pp. 21-26.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights to health and social security*

2.75 By providing for a number of surgeries to be available to individuals at a subsidised rate (and applying an indexation of 0.9 per cent to those items), this measure appears to promote the rights to health and social security. The right to health refers to the right to enjoy the highest attainable standard of physical and mental health.[3] In particular, in relation to accessibility, the United Nations Economic, Social and Cultural Rights Committee has noted that 'health facilities, goods and services must be affordable for all…including socially disadvantaged groups'.[4] The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.[5]

2.76 However, as these instruments make a significant number of detailed amendments to the MBS, questions arise as to whether they may have the effect of reducing access to existing subsidised healthcare services and/or reducing the rebate ultimately available to patients receiving relevant treatment. The first instrument makes a total of 752 amendments, including deleting 216 items and amending 334 items. The second instrument introduces new items and removes cardiac surgical procedures that are stated to no longer represent best practice.[6] The statements of compatibility for both instruments are brief and provide no detailed analysis of the effect of the instruments. They state only that the instruments maintain existing arrangements and the protection of human rights by ensuring access to publicly subsidised medical services which are clinically appropriate and reflective of modern clinical practice.[7]

2.77 The explanatory materials state that these amendments have been made in response to the findings of the MBS Review Taskforce relating to restructuring the

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

4 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (2000) [12].

5 International Covenant on Economic, Social and Cultural Rights, article 9. See also, UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008).

6 Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021, explanatory statement, p. 32.

7 Health Insurance (General Medical Services Table) Regulations 2021 [F2021L00678], statement of compatibility, p. 29; and Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021 [F2021L00681], statement of compatibility, p. 33.

MBS, incentivising best clinical practice and combining like procedures.[8] However, it is not clear whether this process of consolidation and amendment may have the effect that some procedures are ultimately more expensive for patients (for example, if a surgical procedure would previously have been covered by multiple MBS items, which will now be consolidated and provide the patient with a lower rebate than they currently receive), or if some procedures will no longer be subsidised at all, and no equivalent procedure is now subsidised. As such, it is not clear whether elements of this instrument may constitute a retrogressive measure with respect to the rights to health and social security, and if so, require justification.

*Retrogressive measures*

2.78 Australia has obligations to progressively realise economic, social and cultural rights using the maximum of resources available,[9] and has a corresponding duty to refrain from taking retrogressive measures, or backwards steps with respect to their realisation.[10] 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.

2.79 With respect to a legitimate objective, article 4 of the International Covenant on Economic, Social and Cultural Rights establishes that States Parties may limit economic, social and cultural rights only insofar as this may be compatible with the nature of those rights,[11] and 'solely for the purpose of promoting the general welfare in a democratic society'.[12] This means that the only legitimate objective in the context of the International Covenant on Economic, Social and Cultural Rights is a limitation for the 'promotion of general welfare'. The term 'general welfare' refers primarily to

8 See, Health Insurance (General Medical Services Table) Regulations 2021 [F2021L00678], statement of compatibility, p. 28. Information about the review can be found here: https://www.health.gov.au/initiatives-and-programs/mbs-review?utm_source=health.gov.au&utm_medium=callout-auto-custom&utm_campaign=digital_transformation [Accessed 17 June 2021].

9 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)* (1990) [9]. The obligation to progressively realise the rights recognised in the ICESCR imposes an obligation on States to move 'as expeditiously and effectively as possible' towards the goal of fully realising those rights.

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

11 That is, the measure would not constitute a non-fulfilment of the minimum core obligations associated with economic, social and cultural rights. See, CESCR, *General Comment No. 3: the nature of states parties' obligations* (14 December 1990) E/1991/23(Supp) [10]. See also Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review* vol. 9, no. 4, 2009, pp. 580–581.

12 Article 4.

the economic and social well-being of the people and the community as a whole, meaning that a limitation on a right which disproportionality impacts a vulnerable group may not meet the definition of promoting 'general welfare'.[13] The United Nations Committee on Economic, Social and Cultural Rights has indicated that if any deliberately retrogressive measures are taken, the state has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State's maximum available resources.[14]

2.80 The statements of compatibility provide a brief descriptive outline of the requirements associated with a retrogressive measure, but do not analyse whether and in what manner those requirements are engaged by either instrument, nor an analysis of whether, if any of the measures are retrogressive, they are justified under international human rights law.

2.81 As such, in order to assess the compatibility of this measure with the rights to health and social security further information is required, and in particular:

(a) whether these instruments reduce the quantum of benefits available for any specific MBS items, that could adversely affect the rebate payable to patients;

(b) where these instruments remove MBS items entirely, whether any of those items are not covered by, or replaced with, alternative MBS items;

(c) whether these instruments have the effect of reducing the quantum of benefit for specific medical procedures, including those procedures which are currently covered by multiple MBS items and will now be covered by one item;

(d) what is the objective sought to be achieved by the instruments, and whether this constitutes a legitimate objective (being one which is solely for the purpose of promoting general welfare);

(e) whether and how the measures are rationally connected to (that is, effective to achieve) that objective; and

13 Limburg Principles on the Implementation of the ICESCR, June 1986 [52]. See also, Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review* vol. 9, no. 4, 2009, p. 573; Erica-Irene A Daes, The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, *Study of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, E/CN.4/Sub.2/432/Rev.2 (1983), pp. 123–4.

14 UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999) [45].

(f) whether and how the measures constitute a proportionate means by which to achieve the objective (having regard to whether the measures are accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same objective; and the possibility of oversight and the availability of review).

***Committee's initial view***

2.82 The committee noted that having regard to the significant number of detailed changes to the MBS, and the complex nature of the surgeries and services involved, it is not clear whether these instruments may have the effect of either reducing access to subsidised surgical services, or reducing the rebate provided to patients receiving some services. If this were the case, this may constitute a retrogressive measure, a type of limitation under international human rights law. The committee considered further information was required to assess the human rights implications of the instruments, and as such sought the minister's advice as to the matters set out at paragraph [2.81].[15]

2.83 The full initial analysis is set out in *Report 8 of 2021*.

## Minister's response[16]

2.84 The minister advised:

> **Information on cardiac changes made in the *Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021***
>
> *(a) Whether this instrument reduces the quantum of benefits available for any specific MBS items, that could adversely affect the rebate payable to patients*
>
> A total of four cardiac items (38285, 38286, 38274 and 38358), which are for the primary procedural services, have had a schedule fee reduction, and therefore a reduced rebate payable to patients. These reductions on fees have been based on expert advice from the profession and clinical experts. A summary of the fee changes is as follows:
>
> - The fee for item 38285 was reduced from $198.95 to $160.55.
> - The fee for item 38286 was reduced from $179.20 to $144.60
> - The fee for item 38274 was reduced from $940.80 to $777.60

15 The committee's expectations as to the content of statements of compatibility are set out in its *Guidance Note 1*. See, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

16 The minister's response to the committee's inquiries was received on 3 August 2021. 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.

- The fee for item 38358 was reduced from $2,957.65 to $2,089.00

The schedule fee has been reduced, based on clinical advice, for two procedural services for the insertion and removal of implanted loop recorders:

- the fee for item 38285 has been reduced from $198.95 to $160.55 (a reduction of 20 per cent)
- the fee for item 38286 has been reduced from $179.20 to $144.60 (a reduction of 20 per cent).

These changes reflect a reduction in the complexity for the insertion and removal of implanted loop recorders due to improvements in technology of the device. These procedures can also now be provided to patients in the outpatient setting, potentially reducing exposure to out-of-pocket cost related to a hospital admission.

Item 38274, which is for the transcatheter closure of ventricular septal defect, has been amended to remove the imaging component of the procedure (which is provided under item 55130). Although the schedule fee for item 38274 has been reduced from $940.80 to $777.60, if the provider is required to provide the imaging component, they are able to claim the imaging service under item 55130 (which has an indexed fee $174.10), as well as the fee for item 38274. Under this change, patients will still receive the same total rebate (plus the increase for indexation) prior to the 1 July 2021 changes.

Item 38358, which is for the extraction of chronically implanted leads, has been amended to clarify the service is to be performed by an appropriately trained provider. The fee has been amended, as this service is also provided with item 90300, which is for a standby cardiothoracic surgeon to ensure patient safety for this complex procedure. Under this change, patients will still receive the same total rebate (plus the increase for indexation) prior to the 1 July 2021 changes.

*(b) Where this instrument removes MBS items entirely, whether any of those items are not covered by, or replaced with, alternative MBS items*

As part of phase 2 of cardiac changes which were recommended by the MBS Review Taskforce, a total of 59 cardiac items were removed.

A significant finding from the review of cardiac services items was the need to modernise the cardiac services section of the MBS to reflect contemporary clinical practice, clarify appropriate use of the items, differentiate clinical indications and ensure patients receive procedures in line with current best practice.

The MBS Review Taskforce made 65 recommendations to improve the appropriate use and criteria under which cardiac services are delivered. The items marked for deletion are intended to provide for the following scenarios, either independently or in combination in the revised schedule:

- Combine similar surgical procedures
- lncentivise advanced techniques
- Remove procedures that no longer represent best practice or are unsafe
- Reduce low value interventions

Therefore, deleted items are captured either in new items or amended items, or are being removed because they no longer reflect current evidence-based practice.

*(c) Whether this instrument has the effect of reducing the quantum of benefit for specific medical procedures, including those procedures which are currently covered by multiple MBS items and will now be covered by one item*

Apart from the four items which have had an amended fee (items 38285, 38286, 38274 and 38358), the changes to cardiac services, which include the bundling of multiple items into a single item, provide rebates that have been calculated in either a cost neutral way (with the net rebate remaining the same), or an increase to the schedule fee to reflect complexity (and therefore an increase to the patient rebate).

*(d) What is the objective sought to be achieved by the instrument and whether this constitutes a legitimate objective (being one which is solely for the purpose of promoting general welfare)*

The following changes to cardiac services aim to promote patient welfare:

- **Combining similar surgical procedures:** this improve the consistency of billing between providers and therefore the consistency of rebates for patients.
- **lncentivising advanced techniques:** higher fees (and therefore rebates) will be provided to encourage providers to employ advanced surgical techniques that improve patient outcomes and reduce complications.
- **Removing procedures that no longer represent best practice or are unsafe:** Patients will more likely receive improved interventions and no longer be exposed to outdated techniques that are no longer supported by evidence.
- **Reduction in low value interventions:** Patients are much less likely to undergo procedures that are not required or may be better provided for by another service.

Furthermore, in many instances, service providers will be able to receive rebates for procedures that will now be aligned with Australian and international best practice clinical guidelines.

*(e) Whether and how the measures are rationally connected to (that is, effective to achieve) that objective*

The majority of the cardiac items from 1 July 2021 will align with the latest Australian and international best practice clinical guidelines.

The new cardiac changes made in the regulation amendment sees a change to cardiac procedural services where providers will be required to practice in alignment with the latest evidence-based guidelines that reduce procedural complications, reduce recovery time and improve long-term health outcomes. These changes are supported by the representative stakeholder groups relevant to cardiac service provision.

*(f) Whether and how the measures constitute a proportionate means by which to achieve the objective (having regard to whether the measures are accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same objective; and the possibility of oversight and the availability of review)*

The cardiac changes made in the regulation amendment will achieve the objective of providing high-value, evidence-based medicine to the Australian public. These changes are accompanied by sufficient safeguards that allow for revision procedures when required and clear alignment with best practice.

The Department of Health will monitor the changes and will conduct a standard post implementation review in the appropriate timeframes.

**Information on general surgery changes made in the *Health Insurance (General Medical Services Table) Regulations 2021***

*(a) Whether this instrument reduces the quantum of benefits available for any specific MBS items, that could adversely affect the rebate payable to patients*

Fee changes arising from implementation of the Government's response to the MBS Review Taskforce (the Taskforce) for general surgery services aim to better reflect the relative complexity of performing the medical procedures provided by the items. Fees were determined based on expert advice from the medical profession, clinical experts and consumer representatives.

Five general surgery items (amended items 30388, 30574 and 30443, and new items 30791 and 31585) which provided for laparotomy, appendicectomy, subsequent necrosectomy, cholecystectomy and removal of gastric band have reduced fees in recognition of being simpler procedures relative to existing MBS services. A summary of the fee changes is as follows:

- The fee for item 30388 reduced from $1,647.45 to $1,108.20.
- The fee for item 30574 reduced from $127.10 to $64.10.

- The fee for item 30443 reduced from $762.45 to $668.45.
- The fee for new item 30791 is $453.35. This item is for a subsequent necrosectomy, which used to be billed under item 30577, which has a current fee of $1,133.30.
- The fee for new item 31585 has a fee of $865.85. This item is for the removal of adjustable gastric band, which used to be billed under item 31584 that has a current fee of $1,601.50.

Savings generated through the reduced fees for these items have been reinvested into other more complex general surgery items.

*(b) Where this instrument removes MBS items entirely, whether any of those items are not covered by, or replaced with, alternative MBS items*

The services covered by the removed general surgery items have either been combined into new; considered to be provided more appropriately under other existing items; or determined to be obsolete as they no longer reflect modern clinical practice.

*(c) Whether this instrument has the effect of reducing the quantum of benefit for specific medical procedures, including those procedures which are currently covered by multiple MBS items and will now be covered by one item*

The MBS Review aimed to simplify the Medicare Benefits Schedule (MBS) by developing items that represent complete medical services (through the consolidation of similar items). In these cases, fees were determined based on the weighted average of the component services.

*(d) What is the objective sought to be achieved by the instrument and whether this constitutes a legitimate objective (being one which is solely for the purpose of promoting general welfare)*

The changes to the general surgery items implement the Government's response to the recommendations of the MBS Review Taskforce for general surgery services. The changes promote patient welfare through:

- updating services to support evidence-based practice;
- providing greater flexibility in procedure approach which will support surgeons to provide best practice treatment tailored to individual patient needs;
- combining services that are similar procedures separated by means of access to simplify the MBS and improve billing transparency for patients; or
- removing services that no longer represent best practice.

*(e) Whether and how the measures are rationally connected to (that is, effective to achieve) that objective*

The measure implements the recommendations made by the clinician-led MBS Review Taskforce.

*(f) Whether and how the measures constitute a proportionate means by which to achieve the objective (having regard to whether the measures are accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same objective; and the possibility of oversight and the availability of review)*

The implemented recommendations of the Taskforce for general surgery services will contribute to the Government's objective of providing high-value, evidence-based medical services to the Australian public. Consultation with relevant clinical bodies and consumer representatives during implementation provides assurance that the measure is proportionate to the recommendations of the Taskforce.

The Department will closely monitor the impact of the changes on patients, in consultation with the sector, through a post implementation review process.

**Information on orthopaedic changes made in the *Health Insurance (General Medical Services Table) Regulations 2021***

*(a) Whether this instrument reduces the quantum of benefits available for any specific MBS items, that could adversely affect the rebate payable to patients*

Fee changes to items for orthopaedic surgery arising from the implementation of the Government's response to recommendations of the MBS Review Taskforce (the Taskforce) aim to better reflect the relative complexity of performing the relevant medical services. Fees were determined based on expert advice from the medical profession, clinical experts and consumer representatives.

One orthopaedic surgery item (49527) has a reduced fee from $1,650.65 to $1,371.25, to better reflect the intended purpose of the item descriptor for the provision of minor revision knee replacement procedures. The fee has been reduced because the described procedure is now less complex, relative to the more complex revision knee replacement (49533). This reduction of this fee was based on expert advice from the profession and clinical experts.

Savings generated through this fee reduction have been reinvested into item 49533.

*(b) Where this instrument removes MBS items entirely, whether any of those items are not covered by, or replaced with, alternative MBS items*

The services covered by the removed orthopaedic items have either been combined into new items; considered to be provided more appropriately under other existing items; or determined to be obsolete as they no longer reflect modern clinical practice.

*(c) Whether this instrument has the effect of reducing the quantum of benefit for specific medical procedures, including those procedures which are currently covered by multiple MBS items and will now be covered by one item*

The MBS Review aimed to simplify the Medicare Benefits Schedule (MBS) by developing items that represent complete medical services (through the consolidation of similar items).in these cases, fees were determined based on the weighted average of the component services.

*(d) What is the objective sought to be achieved by the instrument and whether this constitutes a legitimate objective (being one which is solely for the purpose of promoting general welfare)*

The changes to the orthopaedic items implement the Government's response to the recommendations of the MBS Review Taskforce for orthopaedic services. The changes promote patient welfare through:

- updating services to support evidence-based practice;
- providing greater flexibility in procedure approach which will support surgeons to provide best practice treatment tailored to individual patient needs;
- combining services that are similar procedures separated by means of access to simplify the MBS and improve billing transparency for patients; or
- removing services that no longer represent best practice.

*(e) Whether and how the measures are rationally connected to (that is, effective to achieve) that objective*

The measure implements the recommendations made by the clinician-led MBS Review Taskforce.

*(f) Whether and how the measures constitute a proportionate means by which to achieve the objective (having regard to whether the measures are accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same objective; and the possibility of oversight and the availability of review)*

The implemented recommendations of the Taskforce for orthopaedic services will contribute to the Government's objective of providing high-value, evidence-based medical services to the Australian public. Consultation with relevant clinical bodies and consumer representatives during implementation provides assurance that the measure is proportionate to the recommendations of the Taskforce.

The Department will closely monitor the impact of the changes on patients, in consultation with the sector, through a post implementation review process. In addition, given the scale and complexity of the changes made to the orthopaedic items, the post-implementation review process will be

expedited to ensure there are no unintended consequences or service gaps for patients.

## Concluding comments

### *International human rights legal advice*

*Rights to health and social security*

2.85 With respect to the Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021, the minister advised that Medicare benefits have been reduced with respect to four relevant procedures based on advances in technology, and the possibility for some procedures to be performed on an outpatient basis (rather than hospital admission), which may have the effect of reducing out-of-pocket expenses for patients. The minister also advised that the instrument removes 59 items, stating that these changes are intended to provide for combined procedures, incentivise the use of different procedures, remove outdated procedures, and reduce rates of low-value interventions. The minister stated that the instrument will not, otherwise, reduce the quantum of benefits payable for relevant procedures.

2.86 With respect to the Health Insurance (General Medical Services Table) Regulations 2021, the minister advised that 216 deleted items had either been combined into new items, considered to be provided more appropriately under other existing items, or determined to be obsolete as they no longer reflect modern clinical practice. He stated that fees had been reduced with respect to six items, because of simplified procedures associated with those items, and noted that the savings from those reductions were being re-invested into more complex surgery items. As to whether this instrument has the effect of reducing the quantum of benefit for specific medical procedures, (including those procedures which were covered by multiple MBS items and will now be covered by one item), the minister stated that the MBS Review aimed to simplify the MBS by developing items that represent complete medical services (through the consolidation of similar items), and that in these cases, fees were determined based on the weighted average of the component services.

2.87 Insofar as these changes mean a patient has reduced access to a specific subsidised surgical service, or receives a lower rebate for some services, it would appear that there is some risk that, for some patients, these amendments may constitute a retrogressive measure with respect to the right to health and social security. Being a type of limitation under international human rights law, a retrogressive measure may be permissible where it seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) the objective, and constitutes a proportionate means by which to achieve the objective.

2.88 The minister advised that the objective behind these amendments is to promote patient welfare by: combining similar surgical procedures (to improve billing consistency); incentivise the use of advanced techniques; remove procedures that no longer represent best practice (or are unsafe); and reduce low value interventions.

Improving general health outcomes, and the provision of advanced healthcare services, is likely to constitute a legitimate objective for the purposes of international human rights law, and it would appear that these amendments may be rationally connected to those objectives.

2.89 With respect to proportionality, the minister stated that consultation with relevant clinical bodies and consumer representatives during the implementation of these amendments provides assurance that the measures are proportionate to the recommendations of the MBS Taskforce, and stated that the department will monitor the impact of the changes through a post implementation review process. These two processes have the capacity to serve as important safeguards. However, it is noted that it is not clear if individual patients, who in some instances may now have to pay a higher gap fee payment, can apply to pay a reduced rate based on their financial circumstances.

2.90 In general, by providing for a number of surgeries to be available to individuals at a subsidised rate (and applying an indexation of 0.9 per cent to those items), this measure appears to promote the rights to health and social security. However, as noted, for some patients, the reduction (or removal) of Medicare item benefits for specific procedures may have the effect of reducing their access to subsidised medical services, or otherwise reducing the subsidy payable to them. Given the breadth and complexity of the amendments made by these two legislative instruments, it is difficult to determine the extent of any such cohort. Much will depend on how the amendments operate in practice, and monitoring and review of these changes will be important to ensure any reduction in social security benefits remains proportionate to the objectives sought to be achieved.

## Committee view

**2.91 The committee thanks the minister for this response. The committee notes that these two legislative instruments make a significant number of amendments to the Medicare Benefits Schedule (MBS) in relation to general surgery, orthopaedic services and cardiac services, and apply an indexation of 0.9 per cent to those services.**

**2.92 The committee considers that applying an indexation to MBS services, and providing for a number of surgeries to be made available to individuals at a subsidised rate, promotes the rights to health and social security. The committee also notes that where these instruments reduce access to subsidised surgical services, or reduce the rebate provided to patients receiving some services, this may constitute a retrogressive measure (or backwards step) with respect to those rights. The committee notes that a retrogressive measure may be permissible where it seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) the objective, and constitutes a proportionate means by which to achieve the objective.**

**2.93 The committee notes that these amendments are intended to promote patient welfare by combining similar surgical procedures (to improve billing consistency) and incentivise the use of advanced techniques. The committee considers that these are legitimate objectives, and that these instruments are rationally connected to them. With respect to proportionality, the committee considers that the extent to which the amendments may have the effect of reducing access to subsidised surgical services, or reducing the rebate provided to patients receiving some services, will depend on how they operate in practice. In this regard, the committee welcomes the minister's advice that these amendments, and their effects on patients, will be monitored and reviewed.**

**2.94 The committee considers that it would be of great assistances to its scrutiny of legislative instruments which make complex changes to medical benefits if the explanatory materials accompanying these instruments included the type of detailed information provided in this response.**

### Suggested action

**2.95 The committee recommends that the statement of compatibility with human rights be updated to include the information provided in this response.**

# Instruments made under the *Charter of the United Nations Act 1945*

## Charter of the United Nations Amendment Bill 2021[1]

| | |
|---|---|
| **Purpose** | These 12 legislative instruments[2] impose sanctions on individuals and entities under the *Charter of the United Nations Act 1945.*<br><br>This bill seeks to amend the *Charter of the United Nations Act 1945* to specify that listings and revocations made under the Act be made by legislative instrument, and seeks to confirm the validity of action that has been taken, or which may in the future need to be taken, in respect of conduct relating to existing listings that were made but not registered on the Federal Register of Legislation at the time of their making. |
| **Portfolio** | Foreign Affairs and Trade |
| **Bill introduced** | House of Representatives, 11 August 2021 |
| **Last day to disallow legislative instruments** | 15 sitting days after tabling (tabled in the House of Representatives on 27 May 2021 and the Senate on 15 June 2021).[3] |
| **Rights** | Privacy; fair hearing; effective remedy |

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Instruments made under the *Charter of the United Nations Act 1945* and Charter of the United Nations Amendment Bill 2021, *Report 10 of 2021*; [2021] AUPJCHR 104.

2 The 12 legislative instruments, all made under the *Charter of the United Nations Act 1945*, have the following registration numbers: [F2021L00626]; [F2021L00627]; [F2021L00628]; [F2021L00631]; [F2021L00636]; [F2021L00638]; [F2021L00639]; [F2021L00641]; [F2021L00644]; [F2021L00647];[F2021L00648]; [F2021L00649] (collectively known as 'the legislative instruments'). Note that there were a further nine legislative instruments registered on the same date made under the *Charter of the United Nations Act 1945*, however, as these related solely to organisations, and not individuals, the committee makes no comment on these: see [F2021L00632]; [F2021L00633]; [F2021L00634]; [F2021L00635]; [F2021L00637]; [F2021L00640]; [F2021L00642]; [F2021L00643]; [F2021L00645].

3 Note that the legislative instruments were originally classified as exempt from disallowance, however, on 2 August were reclassified as disallowable.

2.96 The committee requested a response from the minister in relation to the instruments in *Report 8 of 2021*.[4]

## Freezing of individuals' assets

2.97 The *Charter of the United Nations Act 1945* (Charter of the UN Act), in conjunction with various instruments made under that Act,[5] gives the Australian government the power to apply sanctions to give effect to decisions of the United Nations (UN) Security Council. Australia is bound by the *Charter of the United Nations 1945* (UN Charter) to implement UN Security Council decisions.[6] Obligations under the UN Charter may override Australia's obligations under international human rights treaties.[7] However, the European Court of Human Rights has stated there is presumption that UN Security Council Resolutions are to be interpreted on the basis that they are compatible with human rights, and that domestic courts should have the ability to exercise scrutiny of sanctions so that arbitrariness can be avoided.[8]

2.98 These 12 legislative instruments list almost 300 individuals as subject to sanctions, the effect of which is that their existing money and assets are frozen and it is an offence for a person to provide any future assets to these persons. The legislative instruments are stated as giving effect to UN Security Council resolution 1373, which requires Australia, as a UN Member State, to freeze the assets of persons 'who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts'.[9] The legislative instruments were made between 2001 and 2020 but were only registered on the Federal Register of Legislation on 26 May 2021. They were previously gazetted, but not registered – the effect of which appears to be that before they were registered the instruments did not apply to a person to the extent that they disadvantaged or imposed liabilities on the person.[10]

4 Parliamentary Joint Committee on Human Rights, *Report 8 of 2020* (23 June 2021), pp. 27-35.

5 See, in particular, the Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2019C00308].

6 *Charter of the United Nations 1945*, articles 2 and 41.

7 *Charter of the United Nations 1945*, section 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

8 *Al-Dulimi and Montana Management Inc. v Switzerland,* European Court of Human Rights (Grand Chamber), Application No. 5809/08 (2016) [140] and [146].

9 United Nations Security Council, Resolution 1373(1)(c), S/RES/1373 (2001), made on 28 September 2001.

10 See *Legislation Act 2003*, subsection 12(2) and the explanatory statements accompanying the legislative instruments.

2.99 The Charter of the United Nations Amendment Bill 2021 seeks to confirm the validity of action that has been taken, or which may in the future need to be taken, in respect of conduct relating to listings that were not registered on the Federal Register of Legislation at the time of their making. It also seeks to provide that anything that would have been invalid but for these amendments is taken to have been valid despite any effect that may have on the accrued rights of any person, and this applies in relation to civil and criminal proceedings, including proceedings that are pending or concluded.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights to privacy and fair hearing*

2.100 As the committee has previously set out,[11] sanctions may operate variously to both limit and promote human rights. For example, sanctions prohibiting the proliferation of weapons of mass destruction will promote the right to life. Sanctions could also promote human rights globally. However, the committee's examination of Australia's sanctions regimes has been, and is, focused solely on measures that impose restrictions on individuals that may be located in Australia. It is not clear whether any of the listings in these legislative instruments has affected individuals in Australia, but it is clear that some of the listings apply in relation to Australian citizens (or former citizens).[12]

2.101 The effect of a listing is that it is an offence for a person to make an asset directly or indirectly available to, or for the benefit of, a listed person.[13] A person's assets are therefore effectively 'frozen' as a result of being listed. For example, a financial institution is prohibited from allowing a listed person to access their bank account. This can apply to persons living in Australia or could apply to persons outside Australia. A listing by the minister is not subject to merits review, and there is no requirement that an affected person be given any reasons for why a decision to list a person has been made.

11 This includes consideration of sanctions imposed under the *Autonomous Sanctions Act 2011.* See, most recently, Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 112–122. See also *Report 6 of 2018* (26 June 2018) pp. 104–131; *Report 4 of 2018* (8 May 2018) pp. 64–83; *Report 3 of 2018* (26 March 2018) pp. 82–96; *Report 9 of 2016* (22 November 2016) pp. 41–55; *Thirty-third Report of the 44th Parliament* (2 February 2016) pp. 17–25; *Twenty-eighth Report of the 44th Parliament* (17 September 2015) pp. 15–38; *Tenth Report of 2013* (26 June 2013) pp. 13–19; *Sixth Report of 2013* (15 May 2013) pp. 135–137.

12 See for example Charter of the United Nations Act 1945 Listing 2018 (No. 2) [F2021L00639]; Charter of the United Nations Act 1945 Listing 2015 (No. 3) F2021L00648]; and Charter of the United Nations Act 1945 Listing 2019 (No. 1) [F2021L00649].

13 *Charter of the United Nations Act 1945*, section 21.

2.102 The scheme provides that the minister may grant a permit authorising the making available of certain assets to a listed person.[14] An application for a permit can only be made for basic expenses; a legally required dealing; where a payment is contractually required; or an extraordinary expense dealing.[15] A basic expense includes foodstuffs; rent or mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.[16]

2.103 The listing of a person under the sanctions regime may therefore limit a range of human rights, in particular the right to a private life; right to an adequate standard of living; and right to a fair hearing.

*Right to privacy*

2.104 Article 17 of the International Covenant on Civil and Political Rights prohibits arbitrary or unlawful interference with an individual's privacy, family, correspondence or home. The freezing of a person's assets and the requirement for a listed person to seek the permission of the minister to access their funds for basic expenses imposes a limit on that person's right to a private life, free from interference by the State. The measures may also limit the right to privacy of close family members of a listed person. Once a person is listed under the sanctions regime, the effect of the listing is that it is an offence for a person to directly or indirectly make any asset available to, or for the benefit of, a listed person (unless it is authorised under a permit to do so). This could mean that close family members who live with a listed person will not be able to access their own funds without needing to account for all expenditure, on the basis that any of their funds may indirectly benefit a listed person (for example, if a spouse's funds are used to buy food or public utilities for the household that the listed person lives in).

2.105 The need to get permission from the minister to access money for basic expenses could, in practice, impact greatly on a person's private and family life. For example, it could mean that a person whose assets are frozen would need to apply to the minister whenever they require funds to purchase medicines, travel or meet other basic expenses. The permit may also include a number of conditions. These conditions are not specified in the legislation and accordingly, there is wide discretion available to the minister when imposing conditions on the granting of a permit.

*Right to a fair hearing*

2.106 The right to a fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights. The right applies both to criminal and civil proceedings, to cases before both courts and tribunals. The right applies where rights

14 *Charter of the United Nations Act 1945*, section 22.

15 Charter of the United Nations (Dealing with Assets) Regulations 2008, section 5.

16 Charter of the United Nations (Dealing with Assets) Regulations 2008, subsection 5(3).

and obligations, such as personal property and other private rights, are to be determined. In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal and have a reasonable opportunity to present their case. Ordinarily, the hearing must be public, but in certain circumstances, a fair hearing may be conducted in private. When a person is listed by the minister there is no requirement that the minister hear from the affected person before a listing is made or continued; no requirement for reasons to be provided to the affected person; no provision for merits review of the minister's decision; and no review of the minister's decision to grant, or not grant, a permit allowing access to funds, or review of any conditions imposed.

*Limitations on human rights*

2.107 The rights to a private life and a fair hearing may be subject to permissible limitations under international human rights law. In order to be permissible, the measure must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective. In the case of executive powers which seriously disrupt the lives of individuals subjected to them, the existence of safeguards is important to prevent arbitrariness and error, and ensure that the powers are exercised only in the appropriate circumstances.

2.108 The use of international sanctions regimes to apply pressure to governments and individuals in order to end the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law. However, there are concerns that the sanctions regime may not be regarded as proportionate, in particular because of a lack of effective safeguards to ensure that the regime, given its potential serious effects on those subject to it, is not applied in error or in a manner which is overly broad in the individual circumstances.

2.109 On the basis of the significant human rights concerns identified by the committee previously in relation to sanctions regimes that apply to individuals, the committee has previously recommended[17] that consideration be given to the following measures, several of which have been implemented in relation to a comparable regime in the United Kingdom, to ensure the compatibility of the sanctions regimes with human rights:

- the provision of publicly available guidance in legislation setting out in detail the basis on which the minister decides to list a person;
- regular reports to Parliament in relation to the regimes including the basis on which persons have been listed and what assets, or the amount of assets, that have been frozen;

17 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 53; *Report 6 of 2018* (26 June 2018) pp. 128–129; and *Report 2 of 2019* (2 April 2019) p. 122.

- provision for merits review before a court or tribunal of the minister's decision to list a person;
- provision of merits review before a court or tribunal of an automatic designation where an individual is specifically listed by the UN Security Council Committee;
- regular periodic reviews of listings;
- automatic reconsideration of a listing if new evidence or information comes to light;
- limits on the power of the minister to impose conditions on a permit for access to funds to meet basic expenses;
- review of individual listings by the Independent National Security Legislation Monitor;
- provision that any prohibition on making funds available does not apply to social security payments to family members of a listed person (to protect those family members); and
- consultation with operational partners such as the police regarding other alternatives to the imposition of sanctions.

2.110 In order to assess the human rights compatibility of these legislative instruments, further information is required, in particular:

(a) whether consideration has been given to, and any action taken to implement, the committee's previous recommendations as set out at paragraph [2.109];

(b) whether any of the individuals subject to listing under these legislative instruments have been, at any time during their listing, in Australia, and if so, how many;

(c) how many of the listings in these legislative instruments are currently valid; and

(d) noting that these listings, some dating back almost 20 years, have only recently been registered, and noting that the *Legislation Act 2003* provides that a legislative instrument will not apply before the instrument is registered to the extent that a person's rights would be disadvantaged, what remedies, if any, does a person against whom action has been taken pursuant to these listings have.

***Committee's initial view***

2.111 The committee considered these listings engage and limit the right to a fair hearing and private life for those in Australia. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and

proportionate. The committee considered further information was required to assess the human rights implications, and as such sought the minister's advice as to the matters set out at paragraph [2.110].

2.112 The full initial analysis is set out in *Report 8 of 2021*.

## Minister's response[18]

2.113 The minister advised:

> The Department of Foreign Affairs and Trade (the Department) will ensure that a Statement of Compatibility with Human Rights is prepared for all future counter-terrorism financial sanctions listings to assist the Committee with its consideration of the human rights implications of such listings.
>
> All listings included in the legislative instruments registered on 26 May 2021 have been validly made in accordance with the requirements of the Act. The legislative instruments have been registered to put beyond doubt any question as to the enforceability of the validly made listings contained within the instruments. The legislative instruments have been registered in the same form in which they were first published in the Commonwealth Gazette and, therefore, include both current and historical listings dating back to 2001. The legislative instruments include 37 individuals currently subject to Australian counterterrorism financial sanctions. None of these individuals have been in Australia at any time during their listing. The legislative instruments also contain the names of individuals whose listings have since lapsed or been revoked.
>
> As required by regulation 40 of the *Charter of the United Nations (Dealing with Assets) Regulations 2008,* all persons and entities subject to financial sanctions under Australian sanctions law are set out in a Consolidated List, available on the DFAT website.
>
> Registration of these listings as legislative instruments does not alter the scheme established by the Act or any rights owed to persons under the scheme to seek review or revocation of a listing, or compensation for persons wrongly affected. To the extent that a person considers that they were disadvantaged as a result of action taken in reliance on a listing that person may seek judicial review of the action. Any such application would be determined on a case by case basis.
>
> The Department acknowledges the Committee's advice that the instruments are subject to disallowance. At the time of registration, DFAT acted on advice that the instruments were not subject to disallowance,

18 The minister's response to the committee's inquiries was received on 23 July 2021. 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.

noting that the instruments give effect to Australia's obligations under international law. In this regard, and in response to the Committee's broader comments about the operation of the scheme more generally, it is important to note that the framework established by Part 4 of the Act gives effect to Australia's obligations under United Nations Security Council (UNSC) Resolution 1373 (Resolution 1373) and provides a robust and agile framework to counter the financing of terrorism.

Australia is required to give effect to UNSC resolutions as a matter of international law. Consistent with these obligations, the Minister is required under international law to list an individual or entity for counter-terrorist financial sanctions if reasonably satisfied that the listing criteria are met. The listing criteria for counter-terrorism financial sanctions are set out in Resolution 1373 and implemented in Australia law by Regulation 20 of *United Nations (Dealing with Assets) Regulations 2008,* which provides that:

> *the Minister must list a person or entity if the Minister is satisfied that the person or entity is a person or entity mentioned in paragraph 1 (c) of Resolution 1373;*

that is:

- a person who commits, or attempts to commit, terrorist acts or participates in or facilitates the commission of terrorist acts;
- an entity owned or controlled directly or indirectly by such persons; or
- a person or an entity acting on behalf of, or at the direction of such persons and entities.

Counter-terrorism financial sanctions listings are publicly available. Historically, and in accordance with the process set out in the Act, they have been gazetted in the Commonwealth Gazette. As noted above, all persons and entities currently subject to targeted financial sanctions, including individuals subject to counter-terrorism financial sanctions, are listed on the Consolidated List, which is available on DFAT's website.

In recognition of the potentially significant implications of counter-terrorism financial sanctions decisions, section 15A of the Act provides for the automatic repeal of listings after three years, if not otherwise continued by the Minister deciding to relist. The automatic repeal mechanism does not prevent the Minister from reviewing a listing at any time. In advance of any relisting, the Department invites submissions from affected persons or their authorised representatives to inform the Minister's decision.

A person can apply at any time to have their listing revoked or seek judicial review of a listing decision. The Act does not provide for merits review. The exclusion of merits review in relation to sanctions-related decisions is warranted by the seriousness of the foreign policy and national security

considerations involved, as well as the sensitive nature of the evidence relied on in reaching those decisions.

The Government considers that counter-terrorism financial sanctions listings are subject to the appropriate level of reporting, transparency and oversight given their nature as international obligations. The listings are subject to: automatic repeal after three years unless continued by the Minister deciding to relist; Senate Estimates scrutiny; parliamentary disallowance; parliamentary committee scrutiny; Independent National Security Legislation Monitor self-initiated 'own motion reviews'; Joint Standing Committee on Foreign Affairs and Trade requests for private briefings; and judicial review.

The Act provides the Minister with certain permit granting powers, consistent with the scope of UNSCR 1373 and subsequent relevant resolutions, including UNSC Resolution 1452 (2002) (UNSCR 1452). The Minister has a broad discretion to issue, on her own initiative, permits authorising the provision of specified assets to a listed person or the use of or dealing with assets owned or controlled by a listed person. Requests by asset owners or holders for authorisation to use or deal with assets owned or controlled by listed persons must be for basic expense dealings, contractual dealings or extraordinary expense dealings. The restrictions in relation to authorised dealings, as set out in Part 3 of the *Charter of the United Nations (Dealing with Assets) Regulations 2008,* are in accordance with our international obligations under UNSCR 1373 and UNSCR 1452.

The Government is satisfied that Australia's United Nations sanctions regimes are compatible with human rights. The Government keeps its sanctions regimes under regular review.

## Concluding comments

### *International human rights legal advice*

*Rights to privacy and fair hearing*

2.114 The initial analysis noted that while sanctions can promote human rights globally, the committee's examination of Australia's sanctions regimes has been, and is, focused on measures that impose restrictions on individuals that may be located in Australia. As such, further information was sought as to whether any of the individuals subject to listing under these legislative instruments have been, at any time during their listing, in Australia, and if so, how many. The minister advised that the legislative instruments include 37 individuals currently subject to Australian counterterrorism financial sanctions, and that none of these individuals have been in Australia at any time during their listing. As such, in relation to those currently subject to listing, this

limits the scope of Australia's human rights obligations to these individuals[19] and it is unlikely that sanctions on them would breach Australia's human rights obligations. However, it is noted that the minister's response did not address the question as to whether any individuals listed over the past 20 years have been in Australia, and as such it is not possible to assess whether any previously listed individuals were owed human rights obligations.

2.115 Noting that the listings were previously gazetted, but not registered – the effect of which appears to be that before they were registered the instruments did not apply to a person to the extent that they disadvantaged or imposed liabilities on the person[20] – further advice was sought as to what remedies, if any, a person against whom action has been taken pursuant to these listings has. The minister advised that compensation is available for persons wrongly affected by the listing and a person may seek judicial review if disadvantaged by any action taken in reliance of a listing. However, since this advice was provided, a bill has been introduced that seeks to retrospectively validate listings (which would include these listings) which had not been correctly registered.[21] It also seeks to provide that anything that would have been invalid but for these amendments is taken to have been valid despite any effect that may have on the accrued rights of any person, and this applies in relation to civil and criminal proceedings.[22] As such, if this bill becomes law it would appear that compensation would not be available for anyone adversely affected by the listing. As such, it is not clear that persons affected by the earlier listings would have access to an effective remedy for any potential violation of their rights, noting that judicial review alone may not be sufficient.[23]

2.116 The minister's response did not directly address the question of whether consideration has been given to, and any action taken to implement, the committee's previous recommendations regarding the sanctions regime. Instead, the minister advised the government considers the sanctions regime is compatible with human

19 Noting that the scope of a State party's obligations under human rights treaties extends to all those within the State's jurisdiction. For instance, article 2(1) of the International Covenant on Civil and Political Rights requires states parties 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.

20 See *Legislation Act 2003*, subsection 12(2) and the explanatory statements accompanying the legislative instruments.

21 See Charter of the United Nations Amendment Bill 2021 introduced into the House of Representatives on 11 August 2021.

22 Charter of the United Nations Amendment Bill 2021, Item 6, proposed subsection 38A(5).

23 See article 2(3) of the International Covenant on Civil and Political Rights which requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the Covenant.

rights, noting that: sanctions are automatically repealed after three years (unless the minister decides to relist); while merits review is unavailable, judicial review is available; and a person can apply to the minister to have their listing revoked. Additionally, the minister noted there is parliamentary oversight of the listings, and the potential for the Independent National Security Legislation Monitor to self-initiate 'own motion reviews'.

2.117 As the committee has previously found, the sanctions regime may not be regarded as proportionately limiting the right to privacy and fair hearing, in relation to those located in Australia. This is particularly because of a lack of effective safeguards to ensure that the regime, given its potential serious effects on those subject to it, is not applied in error or in a manner which is overly broad in the individual circumstances.[24] However, noting the advice that none of the persons who are currently subject to the sanctions have ever been in Australia, it would appear that none of the current listings risk being incompatible with Australia's human rights obligations.

## Committee view

**2.118 The committee thanks the minister for this response. The committee notes that these 12 legislative instruments list almost 300 individuals as subject to sanctions, the effect of which is that their money and assets are frozen. The committee notes with some concern that while the legislative instruments were made over the last 20 years, they were only recently registered on the Federal Register of Legislation.**

**2.119 The committee considers that sanctions regimes operate as important mechanisms for applying pressure to regimes and individuals with a view to ending the repression of human rights internationally. The committee notes the importance of Australia acting in concert with the international community to prevent egregious human rights abuses arising from situations of international concern.**

**2.120 However, the committee regards it as important to recognise that the sanctions regime operates independently of the criminal justice system, and may be used regardless of whether a listed person has been charged with or convicted of a criminal offence. For those in Australia who may be subject to sanctions, requiring ministerial permission to access money for basic expenses could, in practice, impact greatly on a person's private and family life. Further, as the minister, in making a listing, is not required to hear from the affected person or provide reasons for the listing, and there is no merits review of any of the minister's decisions, such listings engage and limit the right to a fair hearing for those in Australia. The committee**

24 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2020* (23 June 2021), pp. 27-35.

**notes it has previously made a number of recommendations to improve the proportionality of the sanctions regime.[25]**

**2.121 Noting the minister's advice that none of the persons who are currently subject to listing are in Australia, the committee considers that none of the current listings would risk being incompatible with Australia's human rights obligations. As no information was provided as to whether persons previously subject to listings were in Australia during the period of their listing, it is not possible to conclude as to whether the expired listings were compatible with Australia's human rights obligations.**

**2.122 Noting that the Charter of the United Nations Amendment Bill 2021 seeks to retrospectively validate these listings and ensure the listings are taken to have been valid despite any effect this may have on the accrued rights of any person, it appears that compensation would not be available for anyone adversely affected by the listing. As such, it is not clear that persons affected by the earlier listings would have access to an effective remedy for any potential violation of their rights, noting that judicial review alone may not be sufficient.**

**2.123 The committee welcomes the department's commitment to ensure that a statement of compatibility with human rights is prepared for all future counter-terrorism financial sanctions listings to assist the committee with its consideration of the human rights implications of such listings, noting that such statements are required as a matter of law.[26]**

**2.124 The committee has concluded its examination of these legislative instruments.**

**Dr Anne Webster MP**

**Chair**

25 See Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 53; *Report 6 of 2018* (26 June 2018) pp. 128–129; and *Report 2 of 2019* (2 April 2019) p. 122.

26 See *Human Rights Parliamentary Scrutiny Act 2011*, section 9 and *Legislation Act 2003*, paragraph 15J(2)(f)