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

Biosecurity Amendment (Enhanced Risk Management) Bill 2021[2]

Purpose	This bill seeks to amend the *Biosecurity Act 2015* to: • expand pre-arrival reporting requirements for aircraft and vessels; • create a mechanism to make a human biosecurity group direction; • increase civil and criminal penalties for contraventions relating to biosecurity risks to goods and non-compliance with negative pratique requirements; • conduct a risk assessment for the purposes of making certain determinations or granting an import permit; • permit the Agriculture Minister and Health Minister to authorise the expenditure directly through the Act
Portfolio	Agriculture, Water and the Environment
Introduced	House of Representatives, 1 September 2021
Rights	Life; health; liberty; freedom of movement; privacy; rights of the child; and rights of persons with disability

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, Biosecurity Amendment (Enhanced Risk Management) Bill 2021, *Report 12 of 2021*; [2021] AUPJCHR 118.

2.3 The committee requested a response from the minister in relation to the bill in *Report 11 of 2021*.[3]

Human biosecurity group directions

2.4 The bill seeks to make a number of amendments to the *Biosecurity Act 2015* (Biosecurity Act), including to allow a chief human biosecurity officer or a human biosecurity officer to make a human biosecurity group direction (direction). This direction could cover a class of people on board an aircraft or vessel that is in, or landing in, Australian territory. The officer must be satisfied that one or more individuals in that class have, or have been exposed to, a listed human disease.[4] The direction would initially be in force for no more than eight hours; this may be extended, but by no more than 4 hours.[5] However, if the time expires and the officer is satisfied that the class of individuals still requires management, the officer may consider making a new direction for a further eight to 12 hours.[6]

2.5 A direction would be able to require each individual in the class of individuals specified in the direction to do one or more of the following:

- provide the prescribed contact information of anyone they have been, or will be, in close proximity with (if they know the contact details), and information about their past location;[7]
- go to, and remain at, a specified place for a specified period, and to not visit a specified place, or specified class of place, for a specified period (which cannot be longer than the period during which the direction is in force);[8]
- wear either or both specified clothing and equipment designed to prevent a disease from emerging, establishing itself or spreading. The relevant officer may give an individual an exemption from this requirement; [9]
- undergo a specified kind of examination relating to determining the presence in the individual of a listed human disease. The direction can specify the kind of examinations that require consent for an examination, and how that

3 Parliamentary Joint Committee on Human Rights, *Report 11 of 2020* (16 September 2021), pp. 7-17.

4 Schedule 1, item 16, proposed section 108B.

5 Schedule 1, item 16, proposed paragraph 108C(1)(f) and subsection 108F(3).

6 Statement of compatibility, p. 15.

7 Schedule 1, item 16, proposed section 108K. Note, existing section 635 of the *Biosecurity Act 2015* is applied to this provision (see Schedule 1, item 18), so the privilege against self-incrimination is abrogated, although section 635 contains both a use and derivative use immunity.

8 Schedule 1, item 16, proposed section 108L. See also explanatory memorandum at p. 22.

9 Schedule 1, item 16, proposed section 108M.

consent is to be given.[10] This must be carried out in a manner consistent with appropriate medical standards and appropriate other relevant professional standards;[11]

- for those who have undergone such an examination, require them to provide specified body samples for the purpose of determining the presence of a listed human disease. This only applies if the person gives consent (however, the bill notes that these new powers do not override the existing powers to impose human biosecurity control orders over an individual).[12] The taking of the body samples must also be carried out in a manner consistent with appropriate medical standards and other relevant professional standards.[13] The regulations will prescribe the requirements for taking, storing, transporting, labelling and using the body samples provided.[14]

2.6 The bill also provides that force must not be used against an individual to require compliance.[15] Instead, non-compliance with a direction may result in the imposition of a civil penalty of up to 30 penalty units, or $6,660.[16] This includes a failure by an accompanying person for a child or incapable person to comply with a direction to ensure the compliance of the child or incapable person.[17] The bill also makes amendments to provide that an accompanying person for a child or incapable person may give consent on behalf of the child or incapable person for the purposes of these new directions powers.[18] The Biosecurity Act defines a 'child or incapable person' as someone less than 18 years old, or 18 years and older and either incapable (whether permanently or temporarily) of understanding the general nature and effect of, and purposes of carrying out, a biosecurity measure, or of indicating whether he or she consents to a biosecurity measure.[19]

10 Schedule 1, item 16, proposed section 108N.

11 Schedule 1, item 16, proposed section 108R.

12 Schedule 1, item 16, proposed sections 108P and 108J. In relation to existing human biosecurity control orders, see Part 3 of the *Biosecurity Act 2015*.

13 Schedule 1, item 16, proposed section 108R.

14 Schedule 1, item 16, proposed subsection 108P(4).

15 Schedule 1, item 16, proposed section 108S.

16 Schedule 1, item 16, proposed section 108T.

17 Schedule 1, item 12.

18 Schedule 1, item 13, proposed amendments to section 40.

19 *Biosecurity Act 2015*, section 9.

Summary of initial assessment

Preliminary international human rights legal advice

Rights to life, health, liberty, freedom of movement, privacy and rights of the child and persons with disability

2.7 The power to issue directions to require groups of individuals to provide personal information, specify where individuals must go for up to 12 hours (or longer if a further direction is made), require certain clothing and equipment to be worn and require individuals to undergo specified kinds of examinations, engages a number of human rights. As the directions power is intended to prevent the spread of serious communicable diseases (such as COVID-19), which may cause high levels of morbidity and mortality, the bill may promote the rights to life and health.[20] The right to life requires States parties to take positive measures to protect life.[21] 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.[22] The right to health requires that States parties shall take steps to prevent, treat and control epidemic diseases.[23]

2.8 However, this potentially coercive power is likely to engage and limit a number of rights, including the rights to liberty and freedom of movement, the right to a private life and the rights of the child and persons with disabilities. 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.[24] It applies to deprivations of liberty, rather than mere restrictions on whether a person can freely move around. However, 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. The right to freedom of movement encompasses the right to move freely within a country for those who are lawfully within the country.[25] This right is linked to the right to liberty—a person's movements should not be unreasonably limited by the state. The directions power also limits the right to a private life, which prohibits arbitrary and unlawful interferences with an individual's

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

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

22 See UN Human Rights Committee, *General Comment No. 36: Article 6 (Right to Life)* (2019) [26].

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

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

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

privacy.[26] A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

2.9 There are also specific rights owed to children and to persons with disabilities, which the bill may limit by enabling an accompanying person to give consent on behalf of a 'child or incapable person' to any requirements in the direction, and in requiring the wearing of certain clothing or equipment, which may create particular difficulties for persons with certain impairments.

2.10 Children have special rights under human rights law taking into account their particular vulnerabilities.[27] Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[28] This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[29] Further, States parties are required to assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting the child.[30] The views of the child must be given due weight in accordance with the age and maturity of the child.

2.11 The rights of persons with disabilities includes the obligation for the State to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes.[31] Further, 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.[32] The UN 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.[33] States parties should take appropriate measures to provide access to support for persons with disabilities in exercising their legal

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

27 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

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

29 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).

30 Convention on the Rights of the Child, article 12.

31 Convention on the Rights of Persons with Disability, article 12.

32 Convention on the Rights of Persons with Disability, article 4(1)(c).

33 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [40]–[41].

capacity, and substituted decision-making should be replaced by supported decision-making.[34]

2.12 Protecting public health is a legitimate objective for the purposes of international human rights law, and ensuring the Commonwealth has suitable mechanisms to identify and control the spread of serious communicable diseases appears 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.

2.13 In order to assess the compatibility of this measure with a number of human rights, further information was sought as to:

(a) why the legislation does not require that if an officer is made aware of a disability that would affect a person's ability to comply with the direction, that they must consider making an exemption;

(b) why there is no legislative criteria as to the type of examinations that will require consent (e.g. anything invasive) and a specific requirement that such examinations be undertaken with regard to the dignity, and where necessary, privacy, of the person being examined;

(c) why there is no flexibility for officers to grant exemptions from the requirement to undergo certain examinations;

(d) why the bill provides no guidance as to when body samples must be destroyed (for example, once testing has been completed), noting that body samples can contain sensitive personal information; and

(e) how empowering an accompanying person of a 'child or incapable person' to give consent on their behalf to undergo examinations and provide body samples, without requiring any consideration as to the wishes of the child or incapable person, is compatible with the rights of the child and the rights of persons with disabilities.

Committee's initial view

2.14 As this measure is designed to prevent the spread of serious communicable diseases (such as COVID-19), the committee considered it promotes the rights to life

34 Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15]–[16], [21]. '"Support" is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity. For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication' and '[w]here, 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 replace the "best interests" determinations'.

and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires that Australia takes steps to prevent, treat and control epidemic diseases.

2.15 The committee also considered that these potentially coercive powers also engage and limit a number of other rights, including the rights to liberty and freedom of movement, the right to a private life and the rights of the child and persons with disabilities. The committee considered the measure seeks to achieve the legitimate objective of protecting public health, and ensuring the Commonwealth has suitable mechanisms to identify and control the spread of serious communicable diseases appears rationally connected to that objective. However, the committee noted questions remained as to the proportionality of the measure, and as such sought the minister's advice as to the matters set out at paragraph [2.13].

2.16 The full initial analysis is set out in *Report 11 of 2021*.

Minister's response[35]

2.17 The minister advised:

> ***a) Why the legislation does not require that if an officer is made aware of a disability that would affect a person's ability to comply with the direction, that they must consider making an exemption***
>
> The intention of new section 108M of the Bill is to minimise the risk of contagion of a listed human disease, through the wearing of appropriate protective clothing and equipment, and appropriate instruction in its use. A chief human biosecurity officer or human biosecurity officer may exempt an individual from the requirement to wear protective clothing or equipment under new subsection 108M(3). As the Committee has noted, the legislation does not separately require the officer, if made aware of a disability, to consider making an exemption under subsection 108M(3). The reasons for this approach are threefold.
>
> First, the present drafting of the exemption in subsection 108M(3) provides greater flexibility to appropriately respond in the circumstances of each individual case. Decisions that are made in relation to exemptions will draw upon the officer's clinical expertise or qualifications, taking into account each individual's specific medical needs, the particular epidemiology of the infectious disease and the evolving operational context in which the human biosecurity group direction is given. A requirement to consider the exemption once aware of a disability would be too prescriptive, and it would

35 The minister's response to the committee's inquiries was received on 1 October 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.

not be possible to exhaustively state all the specific circumstances or operational contexts that might give rise to an exemption.

Second, further safeguards in the Bill already ensure that chief human biosecurity officers and human biosecurity officers will properly apply the biosecurity measure in section 108M and will grant exemptions under subsection 108M(3) where appropriate in the circumstances.

In particular, officers must be satisfied that the inclusion of a requirement under section 108M in a human biosecurity group direction would contribute to managing the risk of contagion of a listed human disease, or the risk of a listed human disease entering, emerging, establishing itself or spreading in Australian territory (see new subsection 108B(6)). Further, before making a decision in relation to a biosecurity measure that is included in the group direction (including under section 108M), subsection 34(2) also requires the officer to be satisfied of a number of important considerations. These include that the measure is likely to be effective in managing such risks; that it is appropriate and adapted to manage such risks; that the circumstances are sufficiently serious to justify the measure; that the manner in which the measure is to be imposed is no more restrictive or intrusive than is required in the circumstances; and that the period of the measure is only as long as is necessary.

For example, if a human biosecurity officer is satisfied that a disability would affect a person's ability to comply with the measure under section 108M to wear protective clothing or equipment, then the officer would already be required to consider, among other things, whether this measure would be appropriate or adapted to manage the risk of contagion of the listed human disease. If the officer is not satisfied that the considerations in subsection 34(2) could be met unless an exemption is granted under subsection 108M(3), then that would be the appropriate course of action. Further, this Bill also does not affect the application of any other Australian law, for example, the *Disability Discrimination Act 1992*, that may also be relevant in the clinical decision making and operational application of these provisions.

Finally, the exemption in subsection 108M(3) strikes the right balance between flexibility in clinical decision-making to meet individual needs and the core objective of human biosecurity group directions in managing the human health risks posed by a class of individuals.

The new human biosecurity group direction mechanism is intended to fill a gap in the Commonwealth's biosecurity framework to manage a group of individuals for preliminary assessment and management of risks to human health, for example, where a number of passengers onboard a large incoming cruise vessel have signs or symptoms of a listed human disease. In the context of such time-critical decision-making processes, where there are potentially a large number of individuals to be assessed and contagion risks to be managed, further mandatory decision-making considerations (in

addition to subsection 108B(6) and subsection 34(2) identified above) are not considered necessary.

b) Why there is no legislative criteria as to the type of examinations that will require consent (e.g. anything invasive) and a specific requirement that such examinations be undertaken with regard to the dignity, and where necessary, privacy, of the person being examined

It is not considered necessary to include further specific legislative criteria in the Bill in relation to examinations conducted under section 108N. This is because the existing legislative criteria in the Bill in relation to examinations are already sufficient to ensure informed consent and to safeguard an individual's rights to dignity and, where necessary, privacy. There are a number of reasons for this.

First, the decision of the chief human biosecurity officer or human biosecurity officer to impose a biosecurity measure to undergo an examination under section 108N, and to determine how consent is to be given, will be informed by clinical knowledge and expertise. In order to accommodate the dynamic context of human biosecurity risk, including novel and emerging infectious diseases and rapidly changing medical technology used in examinations for diagnostic purposes, it is necessary for section 108N to be appropriately flexible to meet future needs of managing human health risks.

Second, clinical decisions made in relation to the requirement to undergo an examination under section 108N would also be subject to a number of significant safeguards, which limit measures to only those that are appropriate and adapted to achieving the legitimate objective of protecting human health. As discussed above, subsections 108B(6) and subsection 34(2) require the chief human biosecurity officer or human biosecurity officer to be satisfied of several important considerations before including a biosecurity measure under section 108N in a human biosecurity group direction. For example, if temperature checks are considered to be effective in managing the risk of contagion of a listed human disease by identifying those individuals with a fever, the officer would then need to consider whether the manner in which the requirement for a temperature check is imposed (including whether and how consent is to be given) is no more restrictive or intrusive than is required in the circumstances, and whether it is appropriate and adapted to managing the risk. In some circumstances, the officer may decide that certain examinations would be inappropriate or too intrusive if there is no consent, in which case they can require that consent must be given before undergoing the examination, and also determine how consent can be given.

A further safeguard in new section 108R stipulates that examinations must be carried out in accordance with appropriate medical standards or other relevant professional standards. The chief human biosecurity officer or human biosecurity officer will make the decision on what examination needs to be undertaken in accordance with the human biosecurity group

direction. The Medical Board of Australia sets out a code of conduct for all doctors in Australia. It is not envisaged that the chief human biosecurity officer or human biosecurity officer will always personally undertake the examinations. It is likely they will instruct other medical professionals to undertake those tasks. Appropriate medical and professional standards would apply. This standard usually means the degree of care and skill of the average health care provider who practices in the provider's specialty, taking into account the medical knowledge that is available in the field, or the level at which the average, prudent provider in a given community would practice or how similarly qualified practitioners would have managed the patient's care under the same or similar circumstances. This means the 'standard' is not static but evolves over time as evidence emerges and practice changes. The process must be carried out in accordance with the medical 'standard of the day'. It is important to note that some states and territories have their own legislation governing medical and professional standards. Given that there may be many different types of medical professionals who may need to conduct examinations under new section 108R in different states and territories, it would be too cumbersome to list exactly which standards apply, based on the speciality.

Further, proposed section 108S would ensure that there be no use of force against an individual to require the individual to comply with a biosecurity measure, including an examination under section 108N.

With regard to personal privacy, there are further measures in place to protect the personal information of relevant individuals (for example, in relation to personal medical details disclosed during an examination). Part 2 of Chapter 11 of the Biosecurity Act already contains a detailed regime for the use, record or disclosure of information under the Biosecurity Act, and further protections are afforded to "protected information" which is defined in section 9 as including "personal information" as defined under the *Privacy Act 1988* (Cth). Breaches of the obligations regarding protected information are subject to stringent penalty provisions under section 585 that deals with the unauthorised use, record or disclosure of protected information.

c) Why there is no flexibility for officers to grant exemptions from the requirement to undergo certain examinations

The Bill already contains a number of mechanisms to allow individual circumstances to be taken into account in relation to an examination conducted under new section 108N. In the event that consent is required for the examination, but the individual does not wish to provide such consent, then that requirement would not apply to the individual (subsection 108N(3)), and there is no need to provide a separate exemption. In other situations where the chief human biosecurity officer or human biosecurity officer decides that it is not appropriate for an individual to undergo a certain examination, alternative measures may be considered.

In particular, under existing Part 3 of Chapter 2 of the Biosecurity Act, a human biosecurity control order may be imposed on an individual to manage the risks posed to human health. The order could, for instance, provide for an alternative biosecurity measure, which could be tailored to suit the individual's circumstances, while also achieving the objective of managing human health risks. In this context, the existence of a human biosecurity group direction would not limit the imposition of a human biosecurity control order (see subsection 108J(1)). Further, new subsection 108J(2) would apply so that if an individual in a class specified in the human biosecurity group direction is subject to a human biosecurity control order, the group direction would cease to be in force in relation to that individual. Safeguards already apply for the imposition of a human biosecurity control order, including the general protections under section 34. In addition, relevant medical and other professional standards apply in relation to any alternative examinations conducted under section 90, and also include that there be no use of force against an individual to require the individual to comply with such a biosecurity measure (see sections 94 and 95).

The availability of existing Part 3 human biosecurity control orders therefore creates a flexible mechanism to, in effect, 'carve out' an individual from the application of a human biosecurity group direction. This regime permits consideration of the circumstances of a particular individual, adheres with other relevant obligations in the Biosecurity Act, and upholds medical and professional standards, whilst also securing the legitimate objective of managing the human health risks of a listed human disease.

d) Why the bill provides no guidance as to when body samples must be destroyed (for example, once testing has been completed), noting that body samples can contain sensitive personal information

Under new subsection 108P(1), an individual who has undertaken an examination under section 108N may be required to provide specified body samples for the purposes of determining the presence of certain listed human diseases.

Pursuant to subsection 108P(2), an individual is only required to provide a body sample if the individual consents to do so in the manner specified in the direction as required by subsection 108P(3). Subsection 108P(4) then provides that the regulations must prescribe requirements for taking, storing, transporting, labelling and using body samples provided under subsection 108P(1).

The current framework in subsection 108P(4) of the Bill to allow the requirements for body samples to be prescribed in the regulations offers suitable flexibility for the administrative and procedural nature of such matters, while still retaining suitable clarity and transparency. The prescription of such matters in the regulations is also consistent with the equivalent provisions in the Biosecurity Act for the requirements for body samples in relation to human biosecurity control orders (see subsection 91(3)). Further, the provision of body samples is already subject to the

safeguard in new section 108R that the biosecurity measures must be carried out in a manner consistent with appropriate medical standards and other relevant professional standards. As noted above, some states and territories have their own legislation governing medical and professional standards, which extends to standards in relation to the destruction of body samples. In light of the existing framework in the Bill and the relevant standards, it is not considered necessary to exhaustively set out the circumstances in which body samples must be destroyed, and would in fact create the potential for duplicative or conflicting standards.

Additional safeguards apply through the regime in Part 2 of Chapter 11 of the Biosecurity Act for the use, record or disclosure of information. As discussed above, "protected information" is defined in section 9 of the Biosecurity Act as including "personal information" as defined under the *Privacy Act 1988* and is afforded additional protections. To the extent that the body samples collected under section 108P contain personal information, then this will be dealt with as "protected information" for the purposes of the Biosecurity Act. Additional protections would apply under this framework, together with significant penalties for the unauthorised use, record or disclosure of protected information under section 585. Given the current regime for the confidentiality of information under the Biosecurity Act, it is not considered necessary to impose separate requirements for handling personal information collected in body samples.

e) How empowering an accompanying person of a 'child or incapable person' to give consent on their behalf to undergo examinations and provide body samples, without requiring any consideration as to the wishes of the child or incapable person, is compatible with the rights of the child and the rights of persons with disabilities.

The application of the general protections in section 34 to decisions concerning the human biosecurity group direction would provide for consideration of the rights enshrined in the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disability, and the personal protections enshrined in the International Health Regulations. In making such a direction, and including relevant biosecurity measures, subsection 34(2) requires that further consideration be given to a range of important considerations (discussed above), which seeks to balance the seriousness of the circumstances as well as the public interest in giving a direction or including a measure, against the public interest in upholding an individual's liberty or other rights to ensure that appropriate protections are considered. As noted above, the Bill does not affect the application of any other Australian law that may be applicable in the context, for example the *Disability Discrimination Act 1992*.

Section 40 of the Biosecurity Act is intended to provide an additional mechanism for an accompanying person (such as a family member and guardian) to provide consent on behalf of a child or incapable person, when

the child or person cannot provide consent on their own behalf. This mechanism would be subject to appropriate medical and other professional standards, including the usual practice of assessing the ability of a child or person to provide consent on their own behalf. This is given effect through the requirement in section 108R that appropriate medical and other professional standards apply in relation to examinations conducted under section 108N and for the provision of body samples under section 108P. The clinical expertise and training of the medical professional who is conducting the examination or requesting the body samples would ensure that procedures requiring consent are undertaken in a manner consistent with the rights of the child and persons with a disability. Further, an additional protection is provided in new section 108S, which stipulates that there be no use of force against an individual to require the individual to comply with a biosecurity measure. Where a chief human biosecurity officer or human biosecurity officer decides that it is not appropriate for an individual (including a child or incapable person) to undergo a certain procedure, alternative measures may be considered.

The proposed approach to consent to human biosecurity group directions for a child or incapable person would also promote internal consistency in the statutory framework of the Biosecurity Act concerning children and incapable persons. For example, the proposed approach for the human biosecurity group direction is consistent with the existing provision of consent under section 40 by an accompanying person for a child or incapable person in respect of a human biosecurity control order under Part 3 of Chapter 2 of the Biosecurity Act.

Concluding comments

International human rights legal advice

Rights to life, health, liberty, freedom of movement, privacy and rights of the child and persons with disability

2.18 As stated in the initial analysis, the requirements that a direction can only be made if it is appropriate and adapted to the risk posed, where circumstances are sufficiently serious and only for so long as is necessary, and that it is no more restrictive or intrusive than is required in the circumstances, are all important safeguards that help to ensure the proportionality of the measure. There are also some important safeguards built into the new directions power, such as the requirement for consent to be given in certain circumstances, and that the direction can last for no longer than 12 hours in total. However, given the potential impact on a number of human rights, some questions arise as to whether the safeguards are sufficient in all circumstances.

2.19 In relation to the power for the direction for individuals to wear specified types of clothing or equipment, and the officer's power to grant an individual an exemption from this requirement, the minister advised that it was not necessary or appropriate to require the officer to consider making an exemption if made aware of a disability that affected a person's ability to comply with the direction. The minister advised that

the proposed broad exemption power gives greater flexibility to appropriately respond in each individual case, and a requirement to consider the exemption once aware of a disability would be too prescriptive. The minister also noted that existing requirements in subsection 34(2) would require the officer to be satisfied of a number of considerations, including that the measure is appropriate and adapted to manage the relevant risk, and that the bill does not affect the application of any other Australian law such as the *Disability Discrimination Act 1992*. Further, the minister advised that these will be time-critical decision-making processes, with potentially many individuals to be assessed and contagion risks to be managed, and as such further mandatory decision-making considerations are not necessary. From this advice it would appear that, as a matter of law, the power exists for officers to grant an exemption for persons with disability from any requirement to wear certain clothing, and officers, in considering if the measure is appropriate and adapted, should give consideration to such matters. However, much will depend on whether this discretionary exemption power is exercised in practice, and the rights of persons with disabilities may be better protected were guidelines developed providing examples of when exemptions should be made on the basis of disability.

2.20 The direction may also require individuals to undergo a specified kind of examination relating to determining the presence in the individual of a listed human disease. The direction itself can specify the kind of examinations that require consent to the examination, and how that consent is to be given, but there is no legislative criteria as to the type of examinations that must require consent, nor a specific requirement that such examinations be undertaken with regard to the dignity, and where necessary, privacy of the person being examined. The minister advised that it is not considered necessary to include further specific legislative criteria, noting that the decision to require an examination will be informed by clinical knowledge and expertise, and this provision needs to be appropriately flexible to meet future needs of managing human health risks. The minister also noted again the existing requirements that officers must consider before making a direction, including considering that it be no more restrictive or intrusive than required, and be appropriate and adapted to managing the risk. The minister noted that in some circumstances the officer may decide that certain examinations would be inappropriate or too intrusive if there is no consent, in which case they can require that consent must be given and determine how consent can be given. Finally, the minister noted that as examinations must be carried out in accordance with the medical 'standard of the day', and as there may be many different types of medical professionals who may need to conduct examinations in different states and territories, it would be too cumbersome to list exactly which standards apply.

2.21 It may be that such procedures are conducted with appropriate regard to the need for consent for certain types of procedures and having regard to the dignity and privacy of the individual. However, it is noted that much of this would appear to rely on the officer exercising their judgement in the moment, and that standards may differ in different jurisdictions and according to different professions. It would appear

therefore that some legislative guidance as to the kind of examinations that would require consent (for example, where an examination would require inserting something into a person's nose, throat or other orifice) would provide useful guidance to officers and would assist with the proportionality of the measure.

2.22 The minister was also asked as to why there is no flexibility for officers to grant individual exemptions from the requirement for persons to undergo certain examinations. The minister advised that the bill already contains a number of mechanisms to allow individual circumstances to be taken into account in relation to an examination, and where an officer decides that it is not appropriate for an individual to undergo an examination, alternative measures may be considered, such as imposing a human biosecurity control order. The minister advised that the availability of existing control orders therefore creates a flexible mechanism to 'carve out' an individual from the application of a direction under these new powers. However, such a control order may be particularly coercive, with breach of the order subject to up to 5 years imprisonment or 300 penalty units ($66,600).[36] It is not clear that it would always be appropriate to subject an individual to a control order when the officer considers a person should not be subject to an examination because of their personal circumstances. It is therefore not clear why the officer could not be empowered to grant an exemption from the requirement for an examination (noting the power exists to grant an exemption from the requirement to wear certain clothing).

2.23 In relation to why the bill does not say how long body samples will be retained for, and when (and whether) they will be destroyed, the minister noted that the bill provides that the regulations must prescribe requirements for taking, storing, transporting, labelling and using body samples, and this 'offers suitable flexibility for the administrative and procedural nature of such matters', while still retaining suitable clarity and transparency. The minister also noted that the provision of body samples is already subject to the safeguard that the biosecurity measures must be carried out in a manner consistent with appropriate medical standards and other relevant professional standards, and some states and territories have their own legislation governing medical and professional standards, which extends to standards in relation to the destruction of body samples. In light of this the minister advised it is not considered necessary to set out the circumstances in which body samples must be destroyed, and this would create the potential for duplicative or conflicting standards. Further, the minister advised that the Biosecurity Act already sets out procedures for the use, record or disclosure of information, and to the extent that the body samples contain personal information, this will be dealt with as 'protected information' for the purposes of the Biosecurity Act.

36 Biosecurity Act 2015, section 107.

2.24 However, it is noted that the retention of body samples for longer than is necessary for the purposes for which they were taken is likely to be an impermissible limitation on the right to privacy. In *S and Marper v United Kingdom,* the European Court of Human Rights explained that the 'retention of cellular samples is particularly intrusive given the wealth of genetic and health information contained', and the 'mere retention and storing of personal data by public authorities, however obtained, are to be regarded as having direct impact on the private life interest of an individual concerned, irrespective of whether subsequent use is made of the data'.[37] It held that legislation must ensure that the retention of such data is relevant and not excessive in relation to the purposes for which it is stored.[38] While the minister noted some states and territories have standards regarding the destruction of body samples, this implies there are some that do not, and that the standards vary. As such, the lack of legislative guidance as to how long body samples obtained via an examination may be retained under these proposed powers risks this aspect of the measure being an arbitrary interference with the right to privacy. It is also noted that the existing privacy protections in the Biosecurity Act allow for the sharing of personal information to a wide range of people, including any employee of any government department if performing any functions or duties under the Biosecurity Act.[39] The breadth of the persons who may record, disclose or use such personal information suggests this may not operate as an adequate safeguard to protect the right to privacy, noting that body samples can contain sensitive personal information.

2.25 Finally, the bill provides that an accompanying person for a child or incapable person may give consent on behalf of the child or incapable person for the purposes of these new directions powers.[40] The minister advised that the general requirement for officers to consider a number of matters, including proportionality, when making a direction would provide for consideration of the rights of the child and rights of persons with disabilities. The minister advised that allowing an accompanying person to provide consent on behalf of a child or incapable person, when they cannot provide consent on their own behalf, would be subject to medical and other professional standards, including the usual practice of assessing the ability of a child or person to provide consent on their own behalf. The minister advised that where an officer decides that it is not appropriate for an individual (including a child or incapable person) to undergo a certain procedure, alternative measures may be considered (which were previously mentioned to be a human biosecurity control order).

37 See *S and Marper v United Kingdom,* European Court of Human Rights, Application Nos. 30562/04 and 30566/04 (2008) [120] and [121].

38 See *S and Marper v United Kingdom,* European Court of Human Rights, Application Nos. 30562/04 and 30566/04 (2008) [103].

39 *Biosecurity Act 2015*, section 580.

40 Schedule 1, item 13, proposed amendments to section 40 of the *Biosecurity Act 2015*.

2.26 As set out in the initial analysis, the Convention on the Rights of the Child provides that in all actions concerning children, the best interests of the child must be a primary consideration,[41] and when determining a child's best interests, the child's views must be taken into account, consistent with their evolving capacities and taking into account their characteristics (pursuant to article 12 of the Convention).[42] The UN Committee on the Rights of the Child has explained that article 12 of the Convention has the effect that any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.[43]

2.27 Further, the Convention on the Rights of Persons with Disabilities requires health professionals to provide care of the same quality to persons with disabilities as to others including on the basis of free and informed consent.[44] The UN Committee on the Rights of Persons with Disabilities has said:

> In conjunction with the right to legal capacity on an equal basis with others, States parties have an obligation not to permit substitute decision-makers to provide consent on behalf of persons with disabilities. All health and medical personnel should ensure appropriate consultation that directly engages the person with disabilities. They should also ensure, to the best of their ability, that assistants or support persons do not substitute or have undue influence over the decisions of persons with disabilities.[45]

2.28 It is not clear that the obligation to give due weight to the views of the child (according to their age and maturity), or the rights of persons with disabilities to give free and informed consent, has been fully taken into account in this legislation. In particular, it is not clear if an accompanying person gives consent, if this would override the wishes of a young person or person with disability (noting that the Biosecurity Act, as amended by this bill, states that once an accompanying person gives consent on behalf of the child or incapable person, it is taken to be consent by the child or incapable person). While the requirement that examinations and the taking of body samples be carried out in a manner consistent with appropriate medical or other relevant professional standards may operate to safeguard the rights of the

41 Convention on the Rights of the Child, article 3.

42 UN Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [43]. See also, *General Comment No. 20 on the implementation of the rights of the child during adolescence* (2016) [22].

43 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [53].

44 Convention on the Rights of Persons with Disabilities, article 25(d).

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

child and of persons with disabilities, it is not clear this would provide adequate protection. At a minimum, guidelines would be required to guide the exercise of this power and to ensure due weight is given to the views of the child (according to their age and maturity), and to the rights of persons with disabilities to give free and informed consent.

Committee view

2.29 The committee thanks the minister for this response. The committee notes that this bill seeks to introduce a new power for the making of a human biosecurity group direction, which would allow health officers to give directions to people on board aircraft or vessels in Australia if satisfied that one or more individuals have, or have been exposed to, a listed human disease. The direction, which could be in force for up to 12 hours (and remade), could require groups of individuals to provide personal information, specify where individuals must go for up to 12 hours (or longer if further directions are made), require certain clothing and equipment to be worn, and require individuals to undergo specified kinds of examinations.

2.30 As this measure is designed to prevent the spread of serious communicable diseases (such as COVID-19), the committee reiterates that it considers it promotes the rights to life and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires that Australia takes steps to prevent, treat and control epidemic diseases.

2.31 The committee also considers that these potentially coercive powers also engage and limit a number of other rights, including the rights to liberty and freedom of movement, the right to a private life and the rights of the child and persons with disabilities. The committee considers the measure seeks to achieve the legitimate objective of protecting public health, and ensuring that the Commonwealth has suitable mechanisms to identify and control the spread of serious communicable diseases appears rationally connected to that objective.

2.32 The committee considers the bill, and the existing Biosecurity Act, contains significant protections that help to safeguard the proportionality of these measures. However, while there are significant protections in the legislation, some of these protections will depend on how the powers are exercised in practice. The committee therefore considers there is some risk, particularly in relation to the right to privacy, that these powers may not be exercised in a way that is ultimately compatible with this right. The committee is also concerned that there is no specific requirement that body samples collected using these powers be destroyed once they have fulfilled the purposes for which they were collected, noting that cellular samples can contain a wealth of genetic and health information. Finally, the committee is concerned that the ability to obtain consent from an accompanying person of a child or incapable person may not ensure due weight is given to the views of the child (according to their age and maturity), or to the rights of persons with disabilities to give free and informed consent.

Suggested action

2.33 The committee considers that the proportionality of the measure may be assisted were the bill amended to provide:

(a) that guidelines be developed in relation to the exercise of the power in proposed section 108M that set out circumstances as to when officers should grant exemptions from the requirement to wear specified clothing or equipment, on the basis of disability;

(b) non-exhaustive guidance as to the kind of examinations in proposed section 108N that would require consent to be given before they could be undertaken (for example, where an examination would require inserting something into a person's nose, throat or other orifice);

(c) flexibility for officers to grant individual exemptions from the requirement in proposed section 108N for persons to undergo certain examinations;

(d) that body samples collected pursuant to proposed section 108P must be destroyed once they are no longer required for the purposes for which they were collected;

(e) guidelines be developed to explain officers' obligations to ensure due weight is given to the views of the child (according to their age and maturity), and to the rights of persons with disabilities to give free and informed consent when seeking consent for examinations and the taking of body samples.

2.34 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.

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

Crimes Amendment (Remissions of Sentences) Bill 2021[1]

Purpose	This bill seeks to amend the *Crimes Act 1914* to repeal remissions or reductions granted under state or territory laws to those serving federal sentences
Portfolio	Attorney-General
Introduced	Senate, 25 August 2021
Right	Liberty

2.36 The committee requested a response from the Attorney-General in relation to the bill in *Report 11 of 2021*.[2]

Non-recognition of remissions or reductions in sentences for federal offenders

2.37 Section 19AA of the *Crimes Act 1914* currently provides that where a state or territory law provides for the remission or reduction of state or territory prison sentences, this applies also to the remission or reduction of a federal sentence for prisoners in that state or territory.[3] Remissions or reductions are usually granted in recognition of restrictions placed on prisoners that are necessary in various emergency circumstances, like restrictions on out-of-cell time as a result of natural disasters (such as COVID-19) or staffing shortages.

2.38 This bill seeks to repeal section 19AA so that it would no longer apply reductions or remissions in sentences granted to prisoners serving periods of imprisonment for federal offences. The bill would apply to federal offenders who are serving a sentence in a state or territory prison immediately before the date of commencement, meaning that any remissions or reductions they had already been granted are taken to be of no effect. It does not apply to any federal offender already released from prison.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Crimes Amendment (Remissions of Sentences) Bill 2021, *Report 12 of 2021*; [2021] AUPJCHR 119.

2 Parliamentary Joint Committee on Human Rights, *Report 11 of 2021* (16 September 2021), pp. 18-21.

3 *Crimes Act 1914*, section 19AA, although noting it generally does not apply to remit or reduce the non-parole period or pre-release period in respect of the federal sentence.

Summary of initial assessment

Preliminary international human rights legal advice

Right to liberty

2.39 Where a prisoner has already had a remission or reduction applied to their prison sentence, this bill, in cancelling that remission or reduction, will result in some prisoners having to serve a longer period of imprisonment than they otherwise would have. This therefore engages and would appear to limit the right to liberty. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[4] Consideration for parole or other forms of early release must be in accordance with the law and such release must not be denied on grounds that are arbitrary.[5] The United Nations Human Rights Committee has said that the notion of arbitrariness 'is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality'.[6] It is therefore necessary to consider whether the bill, by revoking existing remissions or reductions in sentences, would be denying early release to federal offenders on grounds that are arbitrary. In assessing this, it is useful to consider if the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.40 Mitigating risks to community safety is a legitimate objective for the purposes of international human rights law, and it may be that ensuring offenders serve longer prison sentences is rationally connected to (that is, effective to achieve) this 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 relation to whether the measure is an 'arbitrary' deprivation of liberty, as set out above, it is necessary to consider questions of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness and proportionality.

2.41 In order to assess the compatibility of this measure with the right to liberty, further information is required as to how depriving federal offenders of the benefit of emergency management days already accrued is appropriate, just and predictable and therefore not arbitrary.

Committee's initial view

2.42 The committee considered that cancelling existing remissions or reductions to sentences will result in some federal prisoners having to serve a longer period of

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

5 UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)* (2014) [20].

6 UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)* (2014) [12].

imprisonment than they otherwise would have, which therefore engages and would appear to limit the right to liberty. The committee noted that under the right to liberty consideration for any forms of early release from prison must not be denied on grounds that are arbitrary, which includes questions of inappropriateness, injustice, lack of predictability and due process of law, as well as reasonableness, necessity and proportionality.

2.43 The committee considered that questions remained as to whether the measure was arbitrary, and sought the Attorney-General's advice as to the matters set out at paragraph [2.41].

2.44 The full initial analysis is set out in *Report 11 of 2021*.

Attorney-General's response[7]

2.45 The Attorney-General advised:

> Currently, some prisoners in Victoria are receiving substantial discounts off their sentences, which have not been anticipated or considered by the courts in sentencing. The granting of significant numbers of emergency management days is inappropriate, as it interferes with, and undermines, careful and considered sentencing decisions made by the court. Sentencing courts undertake a complex and detailed consideration of these individual circumstances in determining the appropriate sentence for offenders, informed by precedent and sentencing principles.
>
> Significant sentence discounts applied to serious offenders undermines the seriousness of the conduct to which the sentences relate. In extreme cases, where a court has crafted a sentence to ensure a federal offender is able to access offence-specific rehabilitation programs in prison, such as sex offender treatment, the application of emergency management days may mean that the offender is unable to complete that program in custody. That offender would then be released into the community without the benefit of treatment designed to reduce the risk that they pose to community safety.
>
> These sentence discounts also pose significant operational challenges for intelligence and law enforcement authorities, particularly for managing high risk terrorist offenders. Shifting and shortening sentence expiry dates is unpredictable, and can impact the post-sentence management options for offenders who are eligible for a continuing detention order (CDO) under Division 105A of the *Criminal Code Act 1995* (the Criminal Code) or a control order under Division 104 of the Criminal Code.
>
> The removal of the ability to confer significant sentence discounts in this manner is appropriate. It does not impose any additional punishments on

7 The minister's response to the committee's inquiries was received on 29 September 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.

federal offenders, and does not interfere with the sentence fixed by the court. The measures in the Bill simply restore the sentence that was justly set down by the court. These principles have been upheld in other criminal justice contexts.

For example, the High Court, in the matter of *Kevin Garry Crump v the State of New South Wales [2012] HCA 20,* determined that amendments made to NSW legislation to make it more difficult for the plaintiff to be released on parole did not interfere with the original sentence, or the order made in relation to the plaintiff declaring a minimum term he was required to serve before being eligible for release on parole. The majority considered that the relevant NSW law 'did not impeach, set aside, alter or vary the sentence under which the plaintiff suffers his deprivation of liberty.'[8]

The Committee correctly notes that 'Mitigating risks to community safety is a legitimate objective for the purposes of international human rights law'. The measures in the Bill are proportionate to achieving the legitimate objective of the Bill, which is to protect the community from the risks posed as a result of significant and unpredictable reductions to the head sentences of federal offenders.

Limiting the application of the amendments to remissions that may be granted in the future does not address the risks to community safety posed by the significant reductions in sentences for offenders currently in custody. For this reason, the provisions need to have limited retrospective application.

The measures are proportionate, in that they apply to all federal offenders and do not seek to remove remissions granted to offenders who have already been released from custody.

Concluding comments

International human rights legal advice

Right to liberty

2.46 The Attorney-General advised that the granting of significant numbers of emergency management days (EMDs) is inappropriate as it undermines the considered sentencing decisions made by the court and undermines the seriousness of the conduct to which the sentences relate. The Attorney-General has noted that in extreme cases it may mean that the offender is unable to complete rehabilitation programs while in custody. However, it is noted that section 19AA already provides that the remission or reduction of sentences 'does not remit or reduce the non-parole period or pre-release period', except in relation to reductions to compensate for hardship during periods of industrial action taken by prison warders.[9] As was said

8 *Kevin Garry Crump v the State of New South Wales [2012] HCA 20*, para 60.

9 *Crimes Act 1914*, subsection 19AA(1A).

when this provision was introduced, this is 'designed to ensure that Commonwealth non-parole periods and pre-release periods are served as set by the court, except for strike remissions'.[10] As such, it would appear that any remission or reduction in sentences by the application of EMDs as a result of the COVID-19 pandemic could not apply to non-parole periods, as set by the court. Further, as to whether the remission or reduction by EMDs undermines the sentencing decisions of the courts, the courts have made clear that once a sentence has been imposed, the exercise of judicial power is spent.[11]

2.47 The Attorney-General also emphasised that the measures in the bill do not impose any additional punishments, and do not interfere with the sentence fixed by the court, but rather simply restores the sentence set down by the court. The Attorney-General used the example of a High Court case, which considered legislation that made it more difficult for certain prisoners to be released on parole, noting that it found such legislative changes did not change the sentence under which the prisoner suffered his deprivation of liberty. However, as stated in the initial analysis, the main concern as to whether the measure is arbitrary is that it applies not only to the *prospect* of future grants of remissions (similar to the prospect of release on parole), but also applies retrospectively so that those who have already had remissions applied to their sentence will no longer receive them.[12] As such, the effect of the bill will be to deprive federal offenders of a benefit that has already been granted to them.

2.48 The Attorney-General advised that limiting the application of the amendments to remissions that may be granted in the future does not address the risks to community safety posed by the significant reductions in sentences for offenders currently in custody. However, it is not clear why there are no other measures to address the risks to community safety, noting such prisoners would need to be eligible for parole to be eligible to receive a remission or reduction in sentencing. The Attorney-General also stated that the remissions in sentences can pose operational challenges for intelligence and law enforcement authorities, particularly for managing high risk terrorist offenders. However, it is not clear that any operational difficulties potentially faced by the executive would justify denying a person's release from detention.

10 See Explanatory Memorandum to the Crimes Legislation Amendment (Powers, Offence and Other Measures) Bill 2015, p.73.

11 *Elliott v The Queen* (2007) 234 CLR 38 at 41-42 [5]; [2007] HCA 51 as referenced in *Kevin Garry Crump v the State of New South Wales* [2012] HCA 20 at [60].

12 It is noted that in Victoria, which the statement of compatibility says is the only jurisdiction to have granted COVID-19 related remissions, EMDs are not granted to all prisoners, but only to those that have been of good behaviour while suffering disruption or deprivation during circumstances of an unforeseen and special nature, see *Corrections Act 1986* (Vic), section 58E.

2.49 Finally, the Attorney-General advised that the measures are proportionate as they apply to all federal offenders and do not seek to remove remissions granted to offenders who have already been released from custody. However, it is noted that the application of a measure to all persons within a certain cohort, which results in a longer period of detention, is not likely to improve the proportionality of the measure.

2.50 In conclusion, where a prisoner has already had a remission or reduction applied to their prison sentence, this bill, in cancelling that remission or reduction, will result in some prisoners having to serve a longer period of imprisonment than they otherwise would have, which limits the right to liberty. Under this right, consideration for any forms of early release must be in accordance with the law and such release must not be denied on grounds that are arbitrary. Arbitrariness must be interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. In this case, the Attorney-General has not established that depriving federal offenders of a benefit that has already been granted to them, where they would have a reasonable expectation that their period of imprisonment would be reduced, is not arbitrary. As such, there appears to be a risk that retrospectively depriving prisoners of this benefit lacks predictability and is unjust, and therefore amounts to an arbitrary deprivation of liberty.

Committee view

2.51 The committee thanks the Attorney-General for this response. The committee notes this bill seeks to repeal the recognition of remissions or reductions in prison sentences under state or territory law for federal offenders. The committee notes that during the COVID-19 pandemic, prisoners in Victoria have been granted a high number of remissions or reductions to their sentences in recognition of good behaviour while experiencing greater restrictions placed on prisoners during the pandemic. This bill would mean that existing and future remissions or reductions would not be applied for federal offenders serving periods of imprisonment.

2.52 The committee considers that cancelling existing remissions or reductions to sentences will result in some federal prisoners having to serve a longer period of imprisonment than they otherwise would have, which therefore engages and would appear to limit the right to liberty. The committee notes that under the right to liberty consideration for any forms of early release from prison must not be denied on grounds that are arbitrary, which includes questions of inappropriateness, injustice, lack of predictability and due process of law, as well as reasonableness, necessity and proportionality.

2.53 The committee considers that the measure seeks to achieve the legitimate objective of mitigating risks to community safety by ensuring prisoners are not released early, albeit that the remissions or reductions do not apply to non-parole or non-release periods. However, as set out above, the Attorney-General has not established that depriving federal offenders of a benefit that has already been

granted to them, where they would have a reasonable expectation that their period of imprisonment would be reduced, is not arbitrary. As such, the committee considers there is a risk that depriving prisoners of this benefit lacks predictability and is unjust, and therefore amounts to an arbitrary deprivation of liberty as a matter of international human rights law.

2.54 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: • expand the operation of the disciplinary infringement scheme in dealing with minor breaches of military discipline; • remove the subordinate summary authority, to reduce the number of summary authority levels; and • 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

2.55 The committee requested a response from the minister in relation to the bill in *Report 10 of 2021*.[2]

Service offence to use social media and electronic services to offend

2.56 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.[3]

2.57 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,

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Defence Legislation Amendment (Discipline Reform) Bill 2021, *Report 12 of 2021*; [2021] AUPJCHR 120.

2 Parliamentary Joint Committee on Human Rights, *Report 10 of 2021* (25 August 2021), pp. 8-13.

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

recover, delete or destroy the material.[4] A failure to comply with such an order would also be an offence punishable by up to two years imprisonment.[5]

Summary of initial assessment

Preliminary international human rights legal advice

Right to freedom of expression

2.58 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.[6] 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.[7] This right embraces expression that may be regarded as deeply offensive.[8] 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.

2.59 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. The key issue as to whether this limitation can be justified is whether the limitation is proportionate to the objective being sought.

2.60 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;

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

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

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

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

8 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.

(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 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's initial view

2.61 The committee considered 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. The committee considered that the measure sought to achieve the legitimate objective of maintaining or enforcing military service discipline, and the proposed offence may be effective to achieve this. However, questions remained as to whether the measure is proportionate, and as such the committee sought the minister's advice as to the matters set out at paragraph [2.60].

2.62 The full initial analysis is set out in *Report 10 of 2021*.

Minister's response[9]

2.63 The minister advised:

> To assist the Committee in forming a view on the human rights implications of the proposed s.48A cyber-bullying service offence, namely the proportionality of this provision with Defence members right to freedom of expression, the following additional information is provided in support of responses to the specific matters set out in paragraph 1.31 of the Committee's Report. This additional information may assist the Committee's consideration of the purpose and unique nature of the *Defence Force Discipline Act 1982* (DFDA) to maintain and enforce the high level of

9 The minister's response to the committee's inquiries was received on 8 October 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.

discipline required by the Australian Defence Force to ensure operational readiness and effectiveness and the requirement for proscribing cyber-bullying conduct as a service offence. The purpose of the DFDA is distinct from the criminal law.

The objective of the proposed s.48A service offence (and complementary proposed s.84A Removal order and s.48B Failure to comply with a removal order) is to prevent members of the Defence Force from engaging in cyber-bully [sic] by providing command with an effective and efficient means to deal with cyber-bullying via social media that can adversely impact the good order and discipline of the Defence Force. Collectively, the cyber-bullying offences have a rational connection to the maintenance and enforcement of good order and discipline in the Australian Defence Force, which the High Court has consistently held as the purpose of the discipline system under the DFDA. It will also send a strong message to the 'predominately digitally literate young adult demography' of the Australian Defence Force (source: Inspector-General of the Australian Defence Force submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee) that cyber-bullying of any form is not tolerated and that such behaviour is not consistent with the Defence Value of *Respect.*

Proportionality

The High Court in *McCloy v State of NSW* [2015] HCA 34 established a 'proportionality' test which deals with a legislative measure that may restrict a freedom, and is addressed below.

Suitability: *is there* a *rational connection to the legitimate purpose of the provision?* Yes, the s.48A 'offensive' cyber-bullying offence is directly related to the purpose of the provision which is to prevent members of the Defence Force from engaging in cyber-bully [sic] by providing command with an effective and efficient means to deal with cyber-bullying by social media that can adversely impact the good order and discipline of the Defence Force.

Necessary: *is there an obvious or compelling alternative reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom?* No there is not. Administrative sanctions (see below response to question (e)) lack an immediate and public deterrent effect for maintaining or enforcing service discipline nor preventing the misuse of social media as proscribed by s.48A.

Adequate in its balance. Only defined aspects of the freedom of expression will be limited. The limited aspects are necessary and reasonable within a disciplined Defence Force. Consider for example a social media post that made 'offensive' comments (applying the reasonable person test), concerning the commanding officer of a unit - the social media post being visible to the commanding officer's unit. The importance of the restrictive measure by application of s.48A will enable the maintenance and enforcement of discipline where a reasonable person (service tribunal) determines that the use of social media etc. is regarded as 'offensive'. S.48A

does not restrict the freedom of expression in all circumstances, but for social media use that is reasonably regarded in the circumstances as 'offensive'. An interpretive provision dealing with 'offensive' modelled on s.8 of the *Online Safety Act 2021* and s.473.4 of the *Criminal Code* will be included.

The scope of s.48A extends to cyber-bullying by a Defence member to *another person,* meaning that cyber-bullying can include any person. To the extent that such behaviour could amount to conduct undertaken after hours by a Defence member or beyond the scope of defence duty, it is appropriate and relevant to note what McHugh J said in *Re Aird; ex parte Alpert* (with whom Gleeson CJ, Gummow and Hayne JJ agreed), a case which involved a member of the Army who was off-duty on recreational leave in another country who challenged his prosecution before a superior service tribunal:

> *'A soldier who...undermines the discipline and morale of his army...does so whether he is on active service or recreation leave.'*[10]

In the present context, the reference to the offence can be readily substituted with the proposed cyber-bullying offence.

I am satisfied, and the Committee can be satisfied that s.48A and its element of 'offensive' social media use, meets the criteria of proportionality test as laid down by the High Court in *McCloy,* and as a consequence does not exceed the implied limitation on freedom of speech.

Additionally I consider that the Full Court of the Federal Court decision in *Chief of the Defence Force v Gaynor* (2017) 344 ALR 317 suggests that the courts recognise that reasonable restrictions can be placed on a Defence member's use of social media where that use would compromise their capacity to be a member of, undermine the reputation of, the Australian Defence Force.

Furthermore the decision of *Comcare v Banerji* (2019) 372 ALR 42 suggests that the High Court itself is not unsympathetic to constraints on social media communications where that is reasonably necessary to protect the integrity and good reputation of public institutions such as the Australian Defence Force.

However, noting the issues raised by the Committee I believe the Bill would benefit from a suitable interpretive provision in relation to offensive behaviour in a similar manner to its depiction in the *Online Safety Act 2021* s.8 and the *Criminal Code* s.473.4.

10 Re Aird; Ex parte Alpert {2004) 220 CLR 308 at 314, 324, 325 and 356 - (21004) 220 CLR 308 at314, 324, 325 and 356; cited with approval in Cowen per Keiffel O; Bell and Keane JJ).

The DFDA

The DFDA provides a system of military discipline that applies to members of the Defence Force at all times, whether they are deployed on operations or exercises within Australia or overseas, in times of peace, conflict and war. The purpose of the DFDA is to enable the Chief of the Defence Force, through delegated command authorities, to enforce and maintain discipline within the Defence Force. The legitimacy of legislation for the purposes of military discipline has been consistently upheld by the High Court of Australia.[11]

Disciplinary breaches under the DFDA. The DFDA regulates three kinds of disciplinary breaches:

a. **Disciplinary infringements:** examples include absence without leave, absence from duty, disobeying a lawful command. These are minor forms of disciplinary breaches.

b. **Service offences:** examples include assaulting a superior officer, theft of service property, alteration / falsification of service documents, conduct relating to operations against an enemy force. Some service offences have elements that are the same or similar to a civilian offence.

c. **Territory offences:** these are service offences applicable by virtue of the incorporation of the law of the Australian Capital Territory and certain Commonwealth law into the DFDA through s.61. With some exceptions, generally only superior tribunals may deal with these offences.

Service tribunals. An offence under the proposed s.48A may only be prosecuted before a Summary Authority (being either a Commanding Officer or Superior Summary Authority) or a superior service tribunal (being either a General or Restricted Court Martial or a Defence Force magistrate).

Breaches of military discipline. The DFDA must deal with a wide range of breaches of military discipline at various levels or ranges of seriousness and in a wide variety of circumstances, not just those that cross the criminal threshold and in a benign domestic setting. It must be effective when it is most needed, when units are deployed on operations and in situations of conflict. As far as possible breaches must be dealt with by the appropriate commander in the theatre of operations.

Punishments. The DFDA provides for a number of punishments (14 in total) that may be imposed by a service tribunal ranging from receiving a reprimand to imprisonment for life. This range of punishments is subject to

11 See *Private R v Cowen* [2020] HCA 31. The exception to this line of authority is *Lane v Morrison* (2009) 239 CLR 230 which unanimously found that the establishment of the Australian Military Court as a legislative court operated outside of the traditional system of military justice supported by s51(vi) of the Constitution.

limitations dependent upon the service tribunal determining the matter and the rank of the convicted Defence member.

A Summary Authority cannot impose a punishment of imprisonment. Examples of the punishments that a Summary Authority may impose include: extra duties, stoppage of leave, a fine (up to specified limits, normally 7 days pay), forfeiture of seniority and for members below non-commissioned rank, a period of detention (see Schedule 2 Part 2 of the Bill).

A Restricted Court Martial and Defence Force magistrate cannot impose a punishment of imprisonment greater than 6 months. Only a General Court Martial can impose a punishment of imprisonment greater than 6 months.

While the maximum punishment for the proposed s.48A is 2 years imprisonment, only a General Court Martial can impose such a punishment and this would be for the most serious of matters. The majority of prosecutions against the proposed s.48A would occur before a Summary Authority who cannot impose a punishment of imprisonment as noted above.

As a service offence the proposed s.48A is able to be applied in a wide range of circumstances as there is a requirement to allow offending to be dealt with at an appropriate level while sending a clear message that cyber-bullying is treated seriously. Offences attracting greater than 2 years maximum imprisonment are prescribed offences and cannot be dealt with by a Summary Authority. Alignment with the maximum punishment available as a criminal matter is available as a Territory Offence under DFDA s.61, such as s.474.17 Misuse of a carriage service, but this can only be dealt with by a superior service tribunal.

It is also important to note that in determining what punishment to impose and / or order to make on a convicted Defence member a service tribunal must have regard to the principles of sentencing applied by the civil courts, from time to time and the need to maintain discipline in the Defence Force (see DFDA s.70). A prosecution before a civilian court following conviction and punishment, does not have regard to the need to maintain discipline in the Defence Force.

Protections - review and appeal. All proceedings before a service tribunal resulting in a conviction are subject to an automatic review by command (a Reviewing Authority (a senior ranking member of the Defence Force appointed by the Chief of the Defence Force or a Service Chief)) which is supported by a report on the proceedings provided by a legal officer (see DFDA ss.152 and 154). A Reviewing Authority is bound by an opinion on a question of law in the legal report (see DFDA s.154(2)). The Reviewing Authority may refer the issue on a question of law to the Judge Advocate General for an opinion (see DFDA s.154(3)).

A Reviewing Authority has the power to quash a conviction on specified grounds and, in undertaking their review, may take into account credible

and admissible evidence that was not reasonably available during the proceedings (see DFDA s.158); order a new trial (see DFDA s.160); substitute a conviction for an alternative offence to the [original] service offence (see DFDA s.161); and quash a punishment and / or revoke an order and substitute the punishment and / or order with a different, but no more severe, punishment and / or order (see DFDA s.162).

Defence members convicted either before a Summary Authority or a superior service tribunal have the right to petition a Reviewing Authority for a review of their conviction (see DFDA s.153) in addition to the 'automatic' review mentioned above. They also may petition the Chief of the Defence Force or a Service Chief for a 'further' review of their conviction following either the 'automatic' review or review on petition to a Reviewing Authority (see DFDA s.155).

Defence members convicted before a superior service tribunal may appeal to the Defence Force Discipline Appeal Tribunal (see *Defence Force Discipline Appeals Act 1955* s.20) or to the Federal or High Court.

Oversight of military discipline. In addition to the 'protections' mentioned above, the operation of the military discipline system is overseen by the Judge Advocate General and the Inspector-General of the Australian Defence Force who both provide annual reports to Parliament on the operation of the DFDA and military justice as a whole. The Inspector-General conducts regular 'military justice audits' which include surveys of Defence members on issues relating to the application of discipline. The results of those surveys are provided to senior command of the Defence Force and published in Annual Reports.

Policy and procedural guidance. To support the administration of discipline as provided by the DFDA, Defence has comprehensive policy guidance and procedural forms.

The purpose of the policy guidance is to provide procedural and practical guidance to those members of the Defence Force involved in the disciplinary process from the initial investigation of a service offence, determination of whether or not to charge a Defence member with a service offence, determination of whether a charge should be referred to a Summary Authority for prosecution or to the Director of Military Prosecutions for consideration of prosecution before a superior tribunal, and guidance for Summary Authorities trying a service offence.

The policy guidance includes:

a. *Commanders' Guide to Discipline* - issued by the Chief of the Defence Force.

b. *Summary Discipline Manual* - issued by the Vice Chief of the Defence Force.

Specific questions raised by the Committee

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

The purpose of the proposed s.48A cyber-bullying offence is to prevent defence members from using a social media service or relevant electronic service (as defined within s.48A(2)), in a way that a reasonable person would regard as offensive or as threatening, intimidating, harassing or humiliating another person. As presently drafted, there is no explanatory provision within the Bill or the Act regarding the meaning of 'offensive' generally, or specifically in aid of s.48A.

I recognise that one of the benefits of the proposed s.48A cyber-bullying offence is that there are many and varied circumstances of social media etc. use that s.48A will deal with. On one level, s.48A as drafted, does not require further detail or explanation. But overall, on balance and having regard to the questions raised by the Committee, I believe all Defence members should be fully aware of what is to be considered 'offensive' social media use, contrary to s.48A.

In response to the Committee's questions, I consider that the Bill would benefit by including interpretative guidance of the use of a social media service etc. in a way that a reasonable person would regard as "offensive". The 'reasonable person' should be I believe be guided in the legislation in making this assessment. This guidance would be achieved by including within the Bill an interpretive provision along similar lines to s.8 of the *Online Safety Act 2021* and s.473.4 of the *Criminal Code* (which deals with 'offensive' use of social media and telecommunication services respectively), and which could be suitability modified for inclusion within the DFDA to address the meaning of 'offensive' social media etc. use for the purpose of s.48A. This will require further drafting instructions to the Office of Parliamentary Counsel (OPC), a revised Explanatory Memorandum and Additional Legislative Approval process. I have instructed Defence to proceed with instructions to OPC for an interpretive clause for inclusion within s.48A as follows:

48A (xx) Determining whether social media etc. use is offensive

(1) The matters to be taken into account in deciding for the purposes of this Part whether a reasonable person would regard a particular use of a social media service or relevant electronic service, as being, in all the circumstances, offensive, include:

(a) the standards of morality, decency and propriety generally accepted by reasonable adults; and

(b) the literary, artistic or educational merit (if any) of the material; and

(c) the general character of the material (including whether it is of a medical, legal or scientific character).

Appropriate policy guidance will be provided in the *Summary Discipline Manual* to assist an 'authorized member' to determine if there are reasonable grounds for believing that a Defence member has committed the service offence of 'cyber-bullying' and cause the person to be charged.

This policy guidance will also assist a Summary Authority trying a charge against s.48A.

At all times legal advice, provided by Australian Defence Force legal officers is available to assist those involved in either the investigation or prosecution of a cyber-bullying matter. This provision of legal advice also extends to an accused person.

(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;

The term 'offensive' is intended to stand-alone and capture social media use that a reasonable person would regard as offensive without the requirement of any 'profound or serious effects' (see proposed interpretive provision for s.48A above).

The maintenance and enforcement of discipline requires that Defence must be able to deal with cyber-bullying as defined by any of the elements within s.48A. This is essential to maintaining discipline, morale, protecting other Defence members and maintaining the reputation of Defence by upholding the Defence Value of *Respect.*

Defence must be able to deal with cyber-bullying on a number of levels. It is envisaged that the majority of matters would be for lower level offending and be tried before a Summary Authority where appropriate. More serious offending or complicated matters would be referred to the Director of Military Prosecutions for determination of prosecution before a superior tribunal either under proposed s.48A or as a Territory offence (i.e., relevant *Criminal Code* offence) or for referral to civilian authorities as is the practice for other service offences of a serious nature.

(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;

Yes. It is possible for members of the Australian Defence Force to be prosecuted for a service offence (including a Territory offence) committed in circumstances which have little link to their service in the Defence Force (see *Private R v Cowen* [2020] HCA 31), other than the offence being committed as a Defence member.

Conduct of the kind proscribed by the proposed offence impacts upon the discipline of the Defence Force regardless of the identity or status of the victim or whether it occurs within or outside regular hours of duty. Australian Defence Force personnel are required to maintain a high

standard of personal behaviour at all times and conduct of this kind is inimical to a disciplined force.

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

A Defence member's freedom of expression is not unduly restricted by the proposed s.48A, but will be restricted only to the extent that a reasonable person in the circumstances would regard the member's social media use as 'offensive or as threatening, intimidating, harassing or humiliating another person'.

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

Defence has in place a Media and Communication Policy including Personal/Private Social Media Policy which places the following restrictions upon members of the Defence Force:

7.11 Private social media profiles of Defence personnel must not use any Defence branding, logo, official title, position or organisational grouping connected to or representing Defence. The exception is Linked In, where personnel are permitted to reflect their role within Defence, provided no operational or classified information is contained in the profile.

7.12 If a profile appears to be representing Defence, and is administered by Defence personnel, all content and activity will be deemed departmental public comment and that individual will be accountable for compliance with the requirements of this policy.

7.13 Defence personnel using social media in a private capacity must not:

a. join or remain a member of a group, forum, site or discussion that is involved in or promotes behaviour that is exploitative, objectifying or derogatory or in any other way breaches any relevant legislation or Defence policies;

b. post any defamatory, vulgar, obscene, abusive, profane, threatening, racially or ethnically hateful or otherwise offensive or illegal information or material;

c. criticise the work or administration of the Department, Group or Service; and must professionally and impartially serve the government of the day;

d. forecast, announce or promote Defence activities that have not been disclosed previously in the public domain;

e. use imagery of Defence activities that is not cleared for public release or represents Defence negatively in the public domain; or

f. claim or appear to represent Defence as an official spokesperson.

Currently breaches of the policy may be dealt with by way of administrative action, which may include termination of the member's service in the Australian Defence Force pursuant to the relevant Defence regulation (see for example *Chief of the Defence Force v Gaynor* (2017) 344 ALR 317). Administrative action by a decision-maker does not address legislative requirements of DFDA s.70, which includes the need to maintain discipline in the Defence Force which follows a conviction for a service offence (such as the proposed s.48A) and consideration of punishment action, including specific and general deterrence (see DFDA Part IV).

The deterrent effect of being able to deal with breaches of military discipline swiftly under the provisions of the DFDA are not able to be achieved through administrative action, such as termination, formal warning or censure. While administrative action may be appropriate in certain circumstances, it is not an effective means of promptly addressing instances of cyber-bullying which may occur in operational environments such as overseas deployments or in close quarter environments such as on-board Navy ships.

I have enclosed a copy of the proposed Supplementary Memorandum addressing the issues raised in the Committee's Report.

Concluding comments

International human rights legal advice

Rights to freedom of expression

2.64 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.

2.65 The minister has advised that there are many and varied circumstances of social media and other uses that this proposed service offence will deal with, and the term 'offensive' is intended to be stand-alone and capture social media use that a reasonable person would regard as offensive without the requirement of any 'profound or serious effects'. The minister has advised that the government plans to move amendments to the bill to include interpretative guidance as to what use a reasonable person would regard as 'offensive', along similar lines to that contained in the *Online Safety Act 2021* (Online Safety Act) and the *Criminal Code Act 1995* (Criminal Code). This guidance would provide that the matters to be taken into account in deciding whether a reasonable person would regard the use of a social media service or relevant electronic service to be offensive include 'the standards of morality, decency and propriety generally accepted by reasonable adults'.

2.66 It is noted that the provisions in the Online Safety Act and the Criminal Code referenced by the minister apply in a different context to this proposed service offence. Section 473.4 of the Criminal Code applies a definition of what might be considered 'offensive' in relation only to a Part of the Criminal Code relating to depictions of sexual material, particularly that involving child abuse. It does not apply to the more general offence of using a postal or other service that reasonable persons would regard as menacing, harassing or offensive[12] (which has been held to require that the communication be likely to have a serious effect on the emotional well-being of who it is addressed to).[13] The Online Safety Act contains an interpretative clause of 'offensive' but this is in the context of the material being 'menacing, harassing or offensive', and with the added requirement that it is likely that the material was intended to have an effect of causing serious harm to a particular person.[14] In contrast, the proposed service offence would use this definition in a general context, such that it would prohibit the use of social media or other electronic services in a way that a reasonable person would consider to be contrary to the standards of morality, decency and propriety. This would appear to capture a potentially wide variety of uses, and as the minister advised, such uses need not have any profound or serious effects.

2.67 As stated in the initial analysis, 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).[15] The European Court of Human Rights has consistently held that freedom of expression constitutes 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment'. It applies both to information and ideas that may be favourably received or regarded as inoffensive, as well as to those that offend, shock, or disturb. It is 'all the more important when it comes to conveying ideas which offend, shock or challenge the established order'. This is a requirement of pluralism, tolerance, and broadmindedness 'without which there is no "democratic society"'. The courts have held the same is true when the persons concerned are members of the defence force,

12 Section 473.4 of Schedule 1 of the *Criminal Code Act 1995* applies in relation to Part 10.6 of the Criminal Code. The offence, in section 471.12, to use a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive, is contained in Part 10.5 of the Criminal Code.

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

14 *Online Safety Act 2021*, sections 7 and 8.

15 See *Palomo Sánchez and Others v. Spain*, European Court of Human Rights (Grand Chamber), Application Nos. 28955/06, 28957/06, 28959/06, and 28964/06 (2011) [53]; *Handyside v. the United Kingdom*, European Court of Human Rights (Grand Chamber), Application No. 5493/72 (1976) [49].

although limitations are permissible to ensure military discipline is not undermined.[16] The courts have also held that discussion of ideas must be tolerated in the army of a democratic State,[17] and while freedom of expression is subject to exceptions, these must be construed strictly, and the need for any restrictions must be established convincingly.[18] The courts have also held that special scrutiny is required when criminal punishment is imposed for offences related to freedom of expression.[19]

2.68 In this case, while breach of a service offence does not result in the imposition of criminal punishment, it could result in the imposition of imprisonment for up to two years. The minister advised that the range of punishments depends on the service tribunal determining the matter and the rank of the convicted defence member. The minister advised that a summary authority cannot impose a punishment of imprisonment, which can only be imposed by a superior service tribunal. However, it is noted that a summary authority can impose a period of detention of up to 14 or 28 days,[20] which still results in a significant deprivation of liberty, and as a matter of law any offensive use is liable to be punished by up to two years imprisonment.

2.69 Further, the service offence applies not only to conduct by an ADF member in the course of their employment, but also in their personal capacity. The minister advised that it would be possible for an ADF member to be prosecuted for this offence 'committed in circumstances which have little link to their service in the Defence Force', and 'regardless of the identity or status of the victim' or whether it occurs within or outside regular hours of duty. As the Judge Advocate General for the Defence Force has said, an offence which requires no connection to the discipline of the defence force beyond the accused being a member of the ADF is exceptional. Other service offences have either explicit connection to service in the ADF or a close civilian criminal law counterpart with equivalent penalties, which means that ADF members charged are not being treated more harshly than other members of the community.[21] The Judge Advocate General has cautioned 'care should be taken before legislatively intruding into the otherwise private lives of Defence members by imposing obligations

16 See *Engels and Others v The Netherlands*, European Court of Human Rights, Application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (1976) [100]; and *Vereinigung Demokratischer Soldaten Österreichs et Gübi v Austria*, European Court of Human Rights, Application No. 5153/89 (1994) [27].

17 *Vereinigung Demokratischer Soldaten Österreichs et Gübi v Austria*, European Court of Human Rights, Application No. 15153/89 (1994) [38].

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

19 *Bingöl v. Turkey*, European Court of Human Rights, Application No. 36141/04 (2010) [41].

20 See Schedule 2 Part 2 of the Bill, in particular item 23, proposed section 69B.

21 Judge Advocate General, *Report for the period 1 January to 31 December 2020* (June 2021) [93]-[94].

on their private behaviour stricter than those required of other Australian citizens, and then giving summary discipline authorities the power to enforce those obligations'.[22]

2.70 Given the breadth of the potential restriction on an ADF member's right to freedom of expression by prohibiting any speech that is deemed to be offensive according to broadly stated notions of morality, decency and propriety; that a period of detention or imprisonment may be imposed; and as the minister advises, it is intended to apply to members in their personal capacity and without any link to their service, the onus is on the government to establish this is a permissible limit on the right to freedom of expression. In this regard, as stated in the initial analysis, maintaining or enforcing military service discipline would be likely to constitute a legitimate objective for the purposes of international human rights law,[23] and having an enforceable service cyber-bullying offence may be rationally connected to that objective. The key question is whether the measure is a proportionate way to achieve the stated objective.

2.71 In this regard, the minister provided detailed advice as to the process for review of any convictions for a service offence, including a right of automatic review and right to apply for review, and appeal rights. These review and oversight rights help to assist with the proportionality of the measure. However, there appear to be no other safeguards that would ensure the measure is proportionate to the objectives sought to be achieved. The minister advised that there is no less rights restrictive way of achieving the objective of maintaining military discipline, as administrative sanctions, such as termination, formal warning or censure, cannot promptly address instances of cyber-bullying in operational environments such as overseas or on board a navy ship. However, no information was provided as to why such administrative sanctions cannot be imposed promptly in operational environments. It is also not clear why the service offence could not be restricted to use of social media and other electronic services which threaten, intimidate, harass or humiliate another person. It remains unclear why prohibiting merely offensive uses, including those unrelated to defence service, is required to achieve the purpose of maintaining military discipline. Under the current phrasing of the service offence it would appear that even private messages between an ADF member and civilian friend, that a reasonable person might regard as offensive, could make an ADF member liable for prosecution under this proposed offence. For example, it would appear that sexual messages, even between

22 Judge Advocate General, *Report for the period 1 January to 31 December 2020*, (June 2021) [95]. See also the submission by the current Judge Advocate General who endorsed these comments in relation to this bill, see Senate Foreign Affairs, Defence and Trade Legislation Committee, *Inquiry into the provisions of the Defence Legislation Amendment (Discipline Reform) Bill 2021,* Submission 2.

23 Noting that limits can be placed on the right to freedom of expression to protect public order, which would include order within the defence force, see *Engels and Others v The Netherlands*, European Court of Human Rights, Application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (1976) [98].

consenting adults (if one were an ADF member), may breach this proposed service offence. It is also not clear if the discussion of ideas (such as questioning the legacy of the ANZACs) might give rise to prosecution if it were deemed offensive.

2.72 Noting the breadth of the potential restriction on an ADF member's right to freedom of expression; that a period of detention or imprisonment may be imposed; that the service offence applies to members in their personal capacity and without any link to their service; and that it appears there may be less rights restrictive ways to enforce military discipline, it has not been established that a service offence of using social media services or relevant electronic services in a way that a reasonable person would regard as merely offensive, is a permissible limit on the right to freedom of expression.

Committee view

2.73 The committee thanks the minister for this response. 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. 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 only constitute cyber-bullying.

2.74 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.

2.75 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. The committee welcomes the minister's commitment to amend the bill to provide greater clarity as to the factors that should be considered in determining if content may be considered 'offensive'. However, while limitations on the right to freedom of expression are permissible to ensure military discipline is not undermined, the committee considers it has not been established that the offence relating to uses that may be regarded as 'offensive' would be a permissible limit on this right. This is particularly so noting the breadth of the potential restriction on an ADF member's right to freedom of expression; that a period of detention or imprisonment may be imposed; that the service offence applies to members in their personal capacity and without any link to their service;

and that it appears there may be less rights restrictive ways to enforce military discipline.

Suggested action

2.76 The committee considers that the proportionality of the measure may be assisted were proposed section 48A of the bill amended to:

(a) limit the offence to uses of social media or other electronic services that a reasonable person would regard as threatening, intimidating, harassing or humiliating to another person (and not merely offensive); or

(b) the prohibition on offensive uses of social media or other electronic services be restricted to situations where there is a connection to service in the ADF and the need to maintain military discipline.

2.77 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.

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

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

Purpose	This bill sought 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 *Received Royal Assent on 2 September 2021*
Rights	Freedom of association; political participation

2.79 The committee requested a response from the minister in relation to the bill in *Report 10 of 2021*.[2]

Increasing unique party membership for non-parliamentary parties

2.80 This bill (now Act) amends 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.[3] Further, the bill provides 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.[4] 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.

2.81 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.[5]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Electoral Legislation Amendment (Party Registration Integrity) Bill 2021, *Report 12 of 2021*; [2021] AUPJCHR 121.

2 Parliamentary Joint Committee on Human Rights, *Report 10 of 2021* (25 August 2021), pp. 14-17.

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

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

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

Summary of initial assessment

Preliminary international human rights legal advice

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

2.82 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 common goal and to form and join an association.[6] 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.[7] 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.[8] Any conditions which apply to the exercise of the right to participate in public affairs should be based on objective and reasonable criteria.[9]

2.83 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.[10]

2.84 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

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

7 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.

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

9 UN Human Rights Committee, *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].

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

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.

Committee's initial view

2.85 The committee noted that the bill engaged and may limit the right to freedom of association, and the right to participate in political affairs. The committee noted that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate, and sought the minister's advice as to the matters set out at paragraph [2.84].

2.86 The full initial analysis is set out in *Report 10 of 2021*.

Minister's response[11]

2.87 The minister advised:

> The Government introduced the Bill to increase the member requirement for political party registration to 1,500 members to strengthen the integrity of Australia's electoral framework, by ensuring parties maintain a genuine level of community support.
>
> If a group has a genuine base of community support, meeting the requirement for 1,500 unique members should not be onerous or a barrier to the formation of new political parties.
>
> The Joint Standing Committee on Electoral Matters (JSCEM) recommended that the membership requirements for political party registration be increased to 1,500 unique members in its report on the 2013 federal

11 The minister's response to the committee's inquiries was received on 13 October 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.

election. JSCEM also recommended an increase in party membership requirements in its 2016 report.

To the extent that the Bill engages and limits the right of citizens to take part in the conduct of public affairs, it is proportionate to the legitimate end sought and is reasonable and necessary in the circumstances.

The member requirements for non-parliamentary parties have not increased since they were first introduced in 1984. As noted in the Explanatory Memorandum, the increase to 1500 unique members is proportionate to the increase in Australia's national voting population since that time (currently approximately 17 million people). This threshold is also proportionally less restrictive than equivalent thresholds under State electoral laws, and does not prevent candidates from an unregistered party from standing for election as 'Independent' candidates.

The Bill clarifies the existing requirement for parties to rely on 'unique' members for the purposes of registration. This requirement has been in the *Commonwealth Electoral Act 1918* since 2000. It is an important safeguard against potential fraud and ensures that political parties have a genuine base of community support. The limitation of the right is therefore consistent with Article 25 of the International Covenant on Civil and Political Rights.

The Australian Electoral Commission (AEC) manages the registration and membership requirements of all federal political parties. As per the *Party Registration Guide* and membership testing methodology at the time, the AEC required parties to provide a list of 500-550 members. The AEC has no line of sight to membership beyond this. Further information as to which non-parliamentary parties meet the requirement of 1,500 members will be available once new party membership lists are reviewed by the AEC.

Concluding comments

International human rights legal advice

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

2.88 The minister advised that the objective of increasing the minimum required unique membership of a non-parliamentary political party from 500 to 1500 members is to strengthen the integrity of Australia's electoral framework by ensuring parties maintain a genuine level of community support, noting that if they have such support meeting this requirement should not be onerous or a barrier to the formation of new political parties. The minister also advised that the requirement for parties to rely on 'unique' members (so that members cannot be counted as members of two different non-parliamentary parties for the purposes of the 1500 membership requirement) has been in legislation since 2000 and is an important safeguard against potential fraud and ensures that political parties have a genuine base of community support.

2.89 As to why the figure of 1500 members was chosen, the minister noted that the Joint Standing Committee on Electoral Matters (JSCEM) recommended that the

membership requirements be increased to 1500 unique members in its report on the 2013 federal election, and recommended an increase in its report on the 2016 election. However, it is noted that the JSCEM's report on the 2013 election recommended, in addition to the 1500 membership requirement, that a separate requirement also be established to allow for emerging parties to contest a federal election, but only within a particular state or territory, with a suitable lower membership number residing in that state or territory, as provided on a proportionate population or electorate number basis.[12] Further, the JSCEM's report in relation to the 2016 election recommended an increase to 1000 members, rather than 1500.[13] The minister also advised that these membership requirements have not increased since they were first introduced in 1984, and this increase is proportionate to the increase in Australia's national voting population. The minister also advised that this threshold is proportionally less restrictive than equivalent thresholds under State electoral laws. 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).[14]

2.90 The minister's response did not specifically address the question as to whether, and how, increasing the minimum required unique membership 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. Nor did the minister specifically explain why a membership of 1500 is considered to be indicative of a foundation of national community support (whereas 500 members is not). The minister was unable to provide the requested advice as to how many federally-registered political parties currently have less than 1500 registered members (as this information is not kept by the Australian Electoral Commission) and did not provide any advice as to whether this amendment may have the effect of discriminating against parties representing minority groups.

2.91 In the context of minimum membership requirements, the European Court of Human Rights has said, in relation to the right to freedom of association, that where

12 Joint Standing Committee on Electoral Matters, *Interim report on the inquiry into the conduct of the 2013 Federal Election: Senate voting practices*, May 2014, recommendation 4, p. 57.

13 Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2016 federal election and matters related thereto*, November 2018, recommendation 4, p. 28.

14 In this context, see Council of Europe's Venice Commission, *Guidelines on Political Party Regulation by OSCE/ ODIHR and Venice Commissio*n (2010) [76]: 'Given variances in the size and nature of states throughout the OSCE region, it is generally best that the minimum number to establish support be determined, at least at the local and regional level, not as an absolute number but rather a reasonable percentage of the total voting population within a particular constituency'.

the authorities introduce significant restrictions on the rights of political parties, particularly where such changes have a detrimental impact on opposition parties 'the requirement that the Government produce evidence to demonstrate that the amendments were justified is all the more pressing'.[15] The court has also said that:

> a minimum membership requirement would be justified only if it allowed the unhindered establishment and functioning of a plurality of political parties representing the interests of various population groups. It is important to ensure access to the political arena for different parties on terms which allow them to represent their electorate, draw attention to their preoccupations and defend their interests.[16]

2.92 As such, although the objective of ensuring parties maintain a genuine level of community support may, in general, be capable of constituting a legitimate objective for the purposes of international human rights law, questions remain as to whether the measure addresses a pressing and substantial concern. Apart from stating that the number has not increased for some time, that it's a proportionate increase, and that it was recommended by JSCEM (although as noted above, the measure does not fully reflect these recommendations), little evidence has been provided to demonstrate that the measure addresses a substantial and pressing concern. This is relevant noting findings of the European Court of Human Rights that in view of the essential role played by political parties in the proper functioning of democracy, the ability to limit the right to freedom of association, where political parties are concerned, should be construed strictly, and 'only convincing and compelling reasons can justify restrictions on such parties' freedom of association'.[17]

2.93 Further, as the minister has not provided information as to the likely effect of this amendment on political parties and whether parties representing minority groups may be particularly affected, it is not clear whether this measure will have a disproportionate impact on certain political parties.[18]Noting the onus is on the state to produce evidence to demonstrate that these minimum membership requirements

15 *Republican Party of Russia v. Russia*, European Court of Human Rights, Application No. 12976/07 (2011) [118].

16 *Republican Party of Russia v. Russia*, European Court of Human Rights, Application No. 12976/07 (2011) [119].

17 *Christian Democratic People's Party v. Moldova,* European Court of Human Rights, Application No. 28793/02 (2006) [67].

18 In the context of minimum membership requirements, the European Court of Human Rights has observed that 'small minority groups must also have an opportunity to establish political parties and participate in elections with the aim of obtaining parliamentary representation'. While noting that on occasion individual interests must be subordinated to those of a group, the court stated that 'a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'. See *Republican Party of Russia v. Russia*, European Court of Human Rights, Application No. 12976/07 (2011) [114].

are appropriate, and noting the minister's response did not provide all the necessary information, it has not been established that the increase from 500 to 1500 unique party members is compatible with the right to freedom of association. Noting that candidates from an unregistered party (which may be unregistered as the party cannot achieve the required membership) are not prevented from standing for election as an independent candidate, it may be that this measure does not impermissibly limit the right to participate in public affairs.[19] However, it is noted that the right to freedom of association is an essential adjunct to the right to participate in public affairs, and as such, noting the information available, it is also not possible to conclude as to the compatibility of this measure with the right to participate in public affairs.

Committee view

2.94 The committee thanks the minister for this response. The committee notes that this bill, now an Act, amended the registration eligibility requirements for a federal non-parliamentary party by increasing the minimum membership from 500 to 1500 unique members.

2.95 The committee considers that the bill engages and limits the right to freedom of association, and may limit the right to participate in public affairs. The committee notes the minister's advice that the objective of increasing the minimum required unique membership is to strengthen the integrity of Australia's electoral framework by ensuring parties maintain a genuine level of community support, noting that if they have such support meeting this requirement should not be onerous or a barrier to the formation of new political parties. However, in view of the essential role played by political parties in the proper functioning of democracy, the committee notes the onus is on the government to justify any restrictions on political parties.

2.96 In this regard the committee considers that insufficient evidence has been provided to establish that the measure addresses a substantial and pressing concern. As the minister has not provided information as to the likely effect of this amendment on political parties and whether parties representing minority groups may be particularly affected, it is not clear if this will have a disproportionate impact on certain political parties. As such the committee considers it has not been established that the increase from 500 to 1500 unique party members is compatible with the right to freedom of association or, potentially, the right to participate in public affairs.

2.97 The committee notes with some concern from a scrutiny perspective that this bill passed both Houses of Parliament four sitting days after its introduction, and

19 UN Human Rights Committee, *General Comment No. 25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) [26].

one day after the committee reported that it required further information to complete its human rights scrutiny of this legislation.

2.98 As the bill has now passed both Houses of Parliament, the committee makes no further comment.

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: • increase the existing newly arrived resident's waiting period (NARWP) for carer payment and carer allowance from 104 weeks to 208 weeks; • remove the 104 week qualifying residency requirement for parenting payment as this payment already has a 208 week NARWP; • ensure the existing 208 week NARWP applies to relevant temporary visa holders for the low income health care card and Commonwealth seniors health card; • increase the existing NARWP for family tax benefit Part A from 52 weeks to 208 weeks; • introduce a new NARWP of 208 weeks for family tax benefit Part B; and • 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

2.99 The committee requested a response from the minister in relation to this bill in *Report 10 of 2021*.[2]

Increased waiting period for social security payments

2.100 This bill seeks to standardise the newly arrived resident's waiting period for social security payments by applying a consistent four-year (or 208-week) waiting period across all relevant payments and concession cards (including low income health

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 12 of 2021*; [2021] AUPJCHR 122.

2 Parliamentary Joint Committee on Human Rights, *Report 10 of 2021* (25 August 2021), pp. 18-30.

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 pay.[3] The increased waiting period would apply prospectively to people granted the relevant visa on or after the commencement of these amendments.[4] 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.[5]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.101 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.

2.102 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.[6] Social security benefits must be adequate in amount and duration.[7] 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.[8] The right to social security also includes the right to access benefits to prevent access to health care from being unaffordable.[9] The right to an adequate standard of living requires states to take steps to ensure the

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

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

5 Statement of compatibility, p. 13.

6 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).

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

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

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

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.[10] Additionally, the right to health includes the right to enjoy the highest attainable standard of physical and mental health, and requires available, accessible, acceptable, and quality health care that is affordable for all.[11]

2.103 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.[12] The right to maternity leave includes an entitlement for parental leave with pay or

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

11 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).

12 The Australian Government on ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 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].

comparable social security benefits for a reasonable period before and after childbirth.[13]

2.104 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 of resources available.[14] Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.[15] 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

2.105 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.[16] 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.[17] 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

13 The UN Committee on Economic, Social and Cultural Rights has further explained that the obligations of States 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).

14 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.

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

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

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

security and to an adequate standard of living. The United Nations (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 the child.[18] Australia is also required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[19] This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[20]

Right to equality and non-discrimination

2.106 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.[21] 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).[22] 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.[23] The 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

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

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

20 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).

21 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.

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

23 *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'.

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'.[24]

2.107 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective (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),[25] is rationally connected to that objective and is a proportionate means of achieving that objective.[26] 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'.[27]

Right to protection of the family

2.108 Australia also has obligations to provide the widest possible protection and assistance to the family.[28] 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

24 *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].

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

26 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].

27 *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].

28 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.

generally a limitation on the right to protection of the family.[29] An important element of protection of the family[30] is to ensure family members are not involuntarily 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.[31] 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.[32]

2.109 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.

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29 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].

30 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.

31 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.

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

Committee's initial view

2.110 The committee noted 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 noted 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.

2.111 The committee considered questions remained as to whether the measure was proportionate and sought the minister's advice as to the matters set out at paragraph [2.109].

2.112 The full initial analysis is set out in *Report 10 of 2021*.

Minister's response[33]

2.113 The minister advised:

> Data on how many people have been granted or denied an exemption from the NARWP since 2018 is not available in the timeframe requested by the Committee. All people who have become a permanent visa holder under the Migration Program since 2018 are subject to the NARWP and must serve the relevant waiting period, unless they meet criteria for an exemption.
>
> *Purpose and nature of Australia's welfare payment system*
>
> The primary purpose of Australia's welfare payment system – encompassing social security, family assistance and paid parental leave payments – is to provide financial support to individuals and families who are unable to fully support themselves. Payment settings are designed to target payments to those most in need and encourage people to support themselves where they are able.
>
> Unlike most other countries, Australia's system is a non-contributory, residence-based system, which is funded from general revenue. For this reason, the settings for most payments include both ongoing residence requirements and residence-based waiting or qualification periods, including the Newly Arrived Resident's Waiting Period (NARWP).
>
> These settings contribute to the overall sustainability of the welfare payment system by appropriately directing resources to where they are needed in line with the broader purpose and principles of the system.

33 The minister's response to the committee's inquiries was received on 9 September 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.

Purpose of the NARWP and proposed changes

The NARWP is a longstanding policy in the Australian welfare payment system. It reflects the expectation that new migrants seeking to settle permanently in Australia will make plans for their own support during their initial settlement period.

The NARWP applies primarily to new migrants settling permanently in Australia under the skilled and family streams of the Migration Program. These visa holders are generally well placed to support themselves and their families, through existing resources, work or support from family. In applying for a relevant visa, applicants are generally required to acknowledge there is a waiting period for most welfare payments. Visa grant letters also remind individuals about this waiting period. This ensures visa applicants and holders are aware of the expectations and rules that apply to them.

Since 2019, the NARWP has been four years for most working age income support payments, such as JobSeeker Payment, Parenting Payment and Youth Allowance, and concession cards, such as the Commonwealth Seniors Health Card and Low Income Health Care Card. The Australian Government considers four years to be an appropriate period for new permanent migrants to be self-reliant before seeking to access the Australian welfare payment system.

Increasing the existing NARWP for carer and family payments to four years brings these payments into line with the four-year NARWP that already exists for most other payments and concession cards. This will standardise the rules across payments and ensure they more consistently reflect the existing expectations underpinning the NARWP.

The changes are connected to both the legitimate objective of the NARWP and the broader residence-based nature of the Australian welfare payment system.

Exemptions and safeguards available

The carer and family payments subject to this measure are not specifically for women. However, it is acknowledged that women are more likely to access these payments, as they are often more likely to assume caring responsibilities for children and/or family members with a disability. This is the case for the general Australian population, not just migrants.

There is a comprehensive list of exemptions from the NARWP, including for carer and family payments, and all of these existing exemptions are being maintained under this measure. A number of these exemptions are targeted at and/or particularly benefit migrants with caring and/or parental responsibilities.

These exemptions provide safeguards that enable new permanent migrants, especially women, to access support through the welfare

payment system in circumstances where it is not (or is no longer) appropriate for the objectives and expectations of the NARWP to apply.

For example, holders of certain Carer visas (subclasses 116 and 836) are exempt from the NARWP for Carer Payment and Carer Allowance and have immediate access to these payments, where eligible. This reflects the specific nature of these visas, which are for people coming to Australia to care for a family member with no other reasonable care options. As such, holders of these visas are not expected to support themselves through work or to rely on their family member who may have limited capacity to provide financial support due to their disability. Those granted Carer Payment are automatically exempt from the NARWP for Family Tax Benefit and can access this additional assistance where eligible if they have children.

In addition, migrants who experience a substantial change in circumstances after coming to Australia can be exempt from the NARWP for Special Benefit. A substantial change in circumstances may include illness, injury, job loss, family and domestic violence, or having new or increased caring responsibilities for a child or adult with disability. This exemption recognises that migrants in these circumstances may no longer be able to support themselves as they had originally planned and provides a mechanism for them to access financial support if in need and otherwise eligible. Those granted Special Benefit are automatically exempt from the NARWP for Family Tax Benefit and Carer Allowance and can access this additional assistance where eligible if they have children and/or other caring responsibilities.

New permanent migrants also have access to other services and supports outside of the welfare payment system, where eligible, including Medicare, schools, tertiary education, employment services, settlement services, the National Disability Insurance Scheme and carer supports and services, including through the Carer Gateway.

Access to these services and supports will not change under this measure and is not dependent on being granted an exemption from the NARWP for a particular payment. New permanent migrants will continue to be able to access broader services and supports while they are serving the NARWP for welfare payments.

People do not have to apply for an exemption to the NARWP. Eligibility for an exemption is assessed when a person lodges a claim for payment with Services Australia. The claim form asks for information that enables Services Australia to determine if the person should be exempt from any waiting period as part of assessing the claim. If the person is exempt, and they meet all other requirements for the payment, their claim for payment will be granted.

These processes are well established within Services Australia and are complemented by other processes for ensuring individuals get the support they need. For example, in cases involving family and domestic violence, individuals are automatically referred to a Services Australia social worker.

Communication and appeal rights

Migrants can refer to a range of resources to become familiar with the NARWP rules. The general information on the Department of Home Affairs website in relation to certain visa types notes waiting periods for payments may apply and links to more detailed information on the Services Australia website.

The detailed information on the Services Australia website is available at: www.servicesaustralia.gov.au/individuals/topics/newly-arrived-residents-waiting-period/30726. This page also links to information about the exemptions available depending on the person's circumstances or visa class.

Information on the existing waiting periods is also available on the Department of Social Services website at: https://www.dss.gov.au/about-the-department/international/policy/social-security-payments-residence-criteria and information on the proposed changes is at: https://www.dss.gov.au/living-in-australia-and-overseas/recent-and-upcoming-policy-changes.

Existing websites and communication products will be updated and further information on the changes, including details on the exemptions, will be distributed to key audiences, subject to passage of the legislation.

Migrants can also contact Services Australia to obtain advice specific to their individual circumstances. This includes advice on any applicable waiting periods and exemptions. Existing review and appeal processes will remain in place and apply to decisions on eligibility for payment, including whether a waiting period applies and whether a person meets the criteria for an exemption. These processes include internal review by an Authorised Review Officer and further avenues of appeal to the Administrative Appeals Tribunal. A person's review and appeal rights, and the associated processes are clearly outlined in decision notices issued by Services Australia and on the Services Australia website at: http://www.servicesaustralia.gov.au/individuals/topics/reviews-and-appeals/34676.

Conclusion

The targeting of welfare payments is an essential strategy for managing the distribution of available resources. It promotes general welfare by ensuring the welfare payment system supports those who need it most while remaining sustainable for current and future generations. Residence-based waiting and qualification periods, including the NARWP, play a crucial role in targeting immediate access to welfare payments.

This measure is designed to standardise the current duration rules of the NARWP and provide a consistent approach across income support, family assistance, paid parental leave payments and concession cards. This will better enable the NARWP to achieve its intended purpose of ensuring migrants support themselves and their families when first granted permanent residency. This supports the broader principles underpinning

Australia's welfare payments system, including it is appropriately and effectively targeted.

This measure is the least restrictive approach to achieving these objectives. It does not introduce new principles or settings to the welfare payment system, rather it applies the existing principles and settings consistently across payment types. It also ensures current safeguards are maintained.

As noted in the Statement of Compatibility with Human Rights, to the extent this measure places a limitation on human rights, this limitation is reasonable and proportionate in the context of achieving the objectives outlined above, while ensuring a safety net remains available for those in need, including through a comprehensive range of exemptions and rights of review and appeal.

Concluding comments

International human rights legal advice

Rights to social security, adequate standard of living, health, maternity leave, equality and non-discrimination, protection of the family and rights of the child

2.114 Regarding the objective being pursued by the measure, the minister advised that the primary purpose of the welfare payment system in general is to provide financial support to those who are unable to support themselves. The minister noted that the measure is intended to standardise the waiting period rules across payments and reflects the expectation that new migrants will support themselves. The minister advised that the newly arrived resident's waiting period plays a crucial role in the targeting of welfare payments, which promotes general welfare by ensuring the welfare system supports those who need it most while remaining sustainable for current and future generations.

2.115 In general terms, as noted in the preliminary analysis, 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.[34] 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 proposed limitations may be for the purpose of promoting general welfare. However, noting that the measure would have a disproportionate impact on certain vulnerable groups, including newly arrived migrants, parents and women experiencing financial disadvantage, some questions remain as to whether the measure would, in practice, promote general welfare for the purpose of international human rights law. There are also questions as

34 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].

to whether the measure addresses a public or social concern that is pressing and substantial enough to warrant limiting rights. Standardising the waiting period rules and ensuring migrants support themselves may appear to be objectives directed towards achieving an outcome that is desirable or convenient, such as meeting community expectations, rather than addressing a pressing public or social concern. Further, in the context of retrogressive measures, the UN Committee on Economic, Social and Cultural Rights has stated:

> There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the…rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party 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 party's maximum available resources.[35]

2.116 It is not apparent that careful consideration has been given to alternative measures, as was done when similar amendments were introduced in 2018. The Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018 sought to increase the waiting periods for various social security payments.[36] Responding to concerns raised during the Senate Committee inquiry process, particularly in relation to the disproportionate adverse impact on vulnerable persons, the *Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Act 2018* introduced a shorter waiting period for certain payments, including those payments affected by this bill, and did not apply a waiting period for family tax benefit part B. The revised statement of compatibility for the 2018 bill noted that allowing migrants to have immediate access to family tax benefit part B 'recognises that this payment provides additional support for single parent and single income families to assist them to balance work and family responsibilities, particularly when their children are young'.[37] This new bill seeks to increase the waiting period for those payments that were left subject to a shorter, or no, waiting period in 2018. No information has been provided as to what has changed between 2018 to 2021 to require these changes.

2.117 As to whether the measure is rationally connected to the stated objectives, the minister stated that the measure will enable the newly arrived resident's waiting period to achieve its intended purpose of ensuring migrants support themselves. The minister stated that this supports the broader objectives of the welfare system,

35 UN Committee on Economic, Social and Cultural Rights, *General Comment 13: The Right to Education* (1999) [45].

36 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 145-159.

37 Revised explanatory memorandum to the Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018, p. 39.

namely, targeting payments to those most in need and providing financial support to those who are unable to support themselves. The preliminary analysis noted that 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 ensure the financial sustainability of the welfare payment system. However, questions remain as to whether the measure would necessarily be effective to achieve the broader objectives of supporting and targeting those most in need, noting that the effect of the measure would be to restrict access to social security payments to potentially vulnerable groups who may not be able to financially support themselves. For example, 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 earning up to $151,350 will have access to paid parental leave.[38] This example suggests that the measure may not necessarily target those most in need.[39] In this way, there appears to be a risk that the measure may frustrate one of the key principles underpinning the welfare system; namely that payments are appropriately and effectively targeted to persons experiencing financial disadvantage.

2.118 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; whether any less rights restrictive alternatives could achieve the same stated objective; and the extent of any interference with human rights. As to the existence of safeguards, the preliminary analysis noted that the various waiting period 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. By allowing individual circumstances to be taken into account in applying the waiting period, for example, a migrant may be exempt from the waiting period for special benefit where they experience a substantial change in individual circumstances, the measure provides some flexibility to treat different cases differently. This flexibility would appear to assist with the proportionality of the measure.

38 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).

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

2.119 However, the preliminary analysis also noted that the strength of the exemptions as a safeguard will likely depend on how the exemption process operates in practice. In this regard, the minister advised that people subject to the waiting period do not have to apply for an exemption. Rather, eligibility for an exemption is assessed when a person applies for a social security payment, with the claim form asking for information relevant to determining whether a waiting period exemption applies. If the person is assessed as exempt and meets the other eligibility criteria, they will be paid the relevant social security payment. However, it remains unclear how many people have been granted or denied an exemption from the waiting period since 2018, as the minister noted that this data is not available. The minister stated that there are also other processes for ensuring such persons get the support they need, for example, individuals experiencing domestic and family violence are automatically referred to a Services Australia social worker. The minister also noted that migrants can refer to a range of resources, including information available on the Services Australia and Department of Social Services websites, to inform themselves about the waiting period rules.

2.120 It appears that in practice the onus is placed on the individual subject to the waiting period to demonstrate their eligibility for an exemption. This means, at a minimum, the individual must be aware of the available exemptions and have sufficient knowledge and capability that when applying for the relevant social security payment they provide the necessary information to demonstrate their eligibility for an exemption. It is not clear if this exemption process would be accessible to all vulnerable individuals, noting that some may have accessibility issues, for example because of language barriers or difficulties around the requirement to discuss, and provide evidence for, potentially sensitive matters, such as domestic violence. The supports outlined in the minister's response, primarily online resources, may not be sufficient to overcome these accessibility concerns. There may be a risk that for those migrants who experience economic precarity and do not qualify for a waiting period exemption, or are unable to provide the necessary evidence to navigate the exemptions process, the measure could significantly interfere with their rights (as set out in the preliminary analysis) and their ability to meet their basic needs as well as those of their children.[40]

2.121 In addition, the exemptions do not appear to apply to all social security payments subject to the waiting period, and access to certain payments appears to be contingent on eligibility for other payments. For example, migrants who experience a

40 This bill was referred to the Senate Community Affairs Legislation Committee for inquiry and report. Several submitters to this inquiry, including the Law Council of Australia, Settlement Council of Australia and Federation of Ethnic Communities' Councils of Australia, have raised concerns that this bill would have a particularly adverse impact on vulnerable persons, including women experiencing domestic violence and economic advantage. See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ConsistentWaitingPeriod/Submissions (accessed 16 September 2021).

substantial change in circumstances, such as illness, injury, new caring responsibilities or family and domestic violence, may be exempt from the waiting period for special benefit, and those granted special benefit will be automatically exempt from the waiting period for family tax benefit and carer allowance. However, such persons would not be eligible for carer payment, as an exemption on the grounds of a change in circumstances does not apply to carer payment. Only holders of certain carer visas will be exempt from the waiting period for carer payment and carer allowance.[41] It is noted that unlike other social security payments, special benefit is a time-limited payment and is payable for a maximum of 13 weeks (although there is a discretion to pay special benefit for a greater period of time depending on the person's circumstances).[42] Noting that the exemptions are intended to enable migrants to access support through the welfare system in circumstances where it is not (or is no longer) appropriate for the objectives and expectations of the waiting period to apply, it is not clear why exemptions do not apply to all payments affected by this bill, including a change of circumstances exemption for carer payment.

2.122 The gaps in exemptions for carer payment raises particular concerns as it may have a discriminatory effect on women, noting that women currently account for 71 per cent of carer payments.[43] As a matter of international human rights law, Australia has immediate obligations to ensure the rights to social security and an adequate standard of living are made available in a non-discriminatory way.[44] As part of the obligation not to discriminate, the UN Committee on Economic, Social and Cultural Rights has stated that 'States parties should give special attention to those individuals and groups who traditionally face difficulties in exercising [the] right [to social security]', including women, the unemployed, minority groups and non-nationals, and States should consider the impact of any policy changes on these groups.[45] While the exemptions may operate as a safeguard for certain individuals, the notable gaps in the exemptions may weaken the strength of this safeguard in practice.

2.123 As to the possibility of oversight and the availability of review, the minister advised that existing review and appeal processes will remain in place and apply to decisions on eligibility for payment, including whether a waiting period applies and

41 Statement of compatibility, p. 17.

42 *Social Security Act 1991*, section 729A; *Social Security Guide: Version 1.284*, 9 August 2021, [3.7.1.70] https://guides.dss.gov.au/guide-social-security-law/3/7/1/70 (accessed 16 September 2021).

43 Australian Institute of Health and Welfare, *Disability Support Pension and Carer Payment*, 16 September 2021, https://www.aihw.gov.au/reports/australias-welfare/disability-support-pension-and-carer-payment (accessed 16 September 2021).

44 See, UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [40].

45 United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [22] and [31].

whether a person meets the criteria for an exemption. The review processes include internal review by an Authorised Review Officer and further avenues of appeal to the Administrative Appeals Tribunal. The availability of internal and external review in relation to decisions not to grant an exemption for the waiting period is likely to operate as an important safeguard and assist with the proportionality of this measure.

2.124 Another consideration in assessing proportionality is whether there are less rights restrictive alternatives available to achieve the stated objective.[46] The preliminary analysis raised questions as to whether applying a four-year waiting period to access social security payments for all new 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'.[47] In this regard, the minister stated that the government considers four years to be an appropriate period for new permanent migrants to be self-reliant before seeking to access the welfare payment system. The minister further stated that the measure is the least rights restrictive approach because it applies the existing principles and settings consistently across payments and maintains the current safeguards, namely the exemptions. It is unclear, however, why four years is considered to be an appropriate period of time, noting that the minister's response did not contain information as to the basis on which this assessment was made. There remain concerns that the blanket application of a four-year waiting period for all new migrants may not be the least rights restrictive approach, particularly for new migrants who live in economic precarity but do not qualify for an exemption.

2.125 In conclusion, while the general objectives of ensuring a financially sustainable social security system and targeting those most in need may be capable of constituting legitimate objectives, some questions remain as to whether the measure promotes general welfare, noting its disproportionate impact on vulnerable groups, and whether it addresses a pressing public or social concern. While the measure appears rationally connected to some stated objectives, it is not clear that it would necessarily be effective to achieve the broader objectives of supporting and targeting those most in need. As regards proportionality, the exemptions to the four-year waiting period may operate as an important safeguard for certain individuals, providing some flexibility to treat different cases differently. However, the effectiveness of this safeguard may be weakened by gaps in the availability of exemptions, including in relation to carer payment, and it may not be that the measure represents the least rights restrictive

46 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)].

47 Statement of compatibility, p. 24.

approach. As such, there appears to be a risk that the measure may not constitute a permissible limitation on the rights to social security, adequate standard of living, health, maternity leave, equality and non-discrimination, protection of the family and rights of the child.

Committee view

2.126 The committee thanks the minister for this response. 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).

2.127 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.

2.128 The committee considers that the general objectives of ensuring a financially sustainable social security system and targeting those most in need constitutes a legitimate objective, although noting some questions remain as to whether the measure would in practice promote general welfare and address a pressing public or social concern for the purpose of international human rights law. Regarding proportionality, the committee notes that the exemptions to the four-year waiting period may operate as an important safeguard for certain individuals, providing flexibility to treat different cases differently. However, the committee is concerned that the effectiveness of this safeguard may be weakened by gaps in the applicability of exemptions, including in relation to carer payment, and that the measure may not represent the least rights restrictive approach. As such, the committee considers there is some risk that the measure may not constitute a permissible limitation on the rights to social security, adequate standard of living, health, maternity leave, equality and non-discrimination, protection of the family and rights of the child.

Suggested action

2.129 The committee considers that the proportionality of the measure may be assisted were the bill amended to provide that stand-alone exemptions be made available for all payments subject to the newly arrived resident's waiting period.

2.130 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.

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

Legislative instruments

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 [F2021L00727]

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 3) Instrument 2021 [F2021L01232][1]

Purpose	The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 extended the human biosecurity emergency period until 17 September 2021 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 3) Instrument 2021 extends the human biosecurity emergency period for a further three months until 17 December 2021
Portfolio	Health
Authorising legislation	*Biosecurity Act 2015*
Last day to disallow	These instruments are 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

2.132 The committee requested a further response from the minister in relation to the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 in *Report 9 of 2021*.[2]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 [F2021L00727] and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 3) Instrument 2021 [F2021L01232], *Report 12 of 2021*; [2021] AUPJCHR 123.

2 Parliamentary Joint Committee on Human Rights, *Report 9 of 2021* (4 August 2021), pp. 2-10.

Extension of the human biosecurity emergency period

2.133 On 18 March 2020 the Governor-General declared that a human biosecurity emergency exists regarding the listed human disease 'human coronavirus with pandemic potential', namely COVID-19.[3] Sections 475 and 476 of the *Biosecurity Act 2015* (Biosecurity Act) allow the Governor-General to make, and extend, the human biosecurity emergency period for a period of up to three months if the Minister for Health is satisfied of certain criteria. During a human biosecurity emergency period, sections 477 and 478 of the Biosecurity Act allow the Minister for Health to determine emergency requirements, or give directions, that he or she is satisfied are necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australian territory or part of Australian territory. A person who fails to comply with an emergency requirement or direction may commit a criminal offence, punishable by imprisonment for a maximum of five years, or 300 penalty units, or both.

2.134 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 extended the human biosecurity emergency period until 17 September 2021. The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 3) Instrument 2021 extends the human biosecurity emergency period for a further three months until 17 December 2021. The effect of these instruments is that any determinations made under section 477 of the Biosecurity Act that are still in effect will continue to apply for the duration of the human biosecurity emergency period (unless revoked earlier).[4] These include:

- mandatory pre-departure COVID-19 testing and mask wearing for passengers and aircrew travelling on an international flight to Australia;[5]
- restrictions on cruise ships entering Australian territory or ports;[6]

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

4 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 [F2021L00727], explanatory statement, p. 3; Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 3) Instrument 2021 [F2021L01232], explanatory statement, p. 3.

5 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements – Incoming International Flights) Determination 2021 [F2021L00061].

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

- a ban on Australian citizens or permanent residents leaving Australia as a passenger on an outgoing aircraft or vessel unless otherwise exempted;[7] and
- restrictions on the trade of retail outlets at international airports.[8]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to life, health, freedom of movement, equality and non-discrimination and privacy

2.135 The extension of the human biosecurity emergency period, and the consequent extension of the mandatory pre-departure testing and mask wearing, restrictions on cruise ships, overseas travel ban, and restrictions on the trade of retail outlets at international airports, for a further three months, engages a number of human rights. As the measures are intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, they may promote the rights to life and health.[9] The right to life requires States parties to take positive measures to protect life.[10] The United Nations (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.[11] The right to health requires that States parties shall take steps to prevent, treat and control epidemic diseases.[12] With respect to the COVID-19 pandemic specifically, the 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'.[13]

7 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2021C00358].

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

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

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

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

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

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

2.136 However, extending the biosecurity emergency period, and thereby continuing to enliven the various powers under the Biosecurity Act and extending existing determinations, is 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. The right to freedom of movement encompasses the right to move freely within a country, including all parts of federal States, and the right to leave any country, including a person's own country.[14] It encompasses both the legal right and practical ability to travel within and leave a country and includes the right to obtain the necessary travel documents to realise this right.[15] The freedom to leave a country may not depend on any specific purpose or the period of time the individual chooses to stay outside the country, meaning that travelling abroad and permanent emigration are both protected.[16] Insofar as the effect of the instruments is the continued prevention of Australian citizens and permanent residents from travelling outside Australia (unless an exemption applies) and cruise ships from entering Australian territory or Australian ports (unless an exemption applies), the right to move freely within a country and the right to leave the country, including for travelling abroad, is limited.

2.137 The application of the travel ban to Australian citizens and permanent residents may 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.[17] The measures may also limit the right to a private life as the restriction of 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.[18] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.[19]

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

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

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

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

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

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

2.138 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and is proportionate to that objective. In the context of the COVID-19 pandemic, the 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'.[20] Where such restrictions are necessary, they should be 'only to the extent strictly required by the exigencies of the public health situation' and pursue the 'predominant objective' of restoring 'a state of normalcy'.[21] The sanctions imposed in connection with any emergency and temporary measures must also be proportionate in nature.[22] Noting the UN Human Rights Committee's advice and the evolving situation of the COVID-19 pandemic, it is important to periodically assess the necessity and proportionality of each extension of the human biosecurity emergency period and the consequent extension of the relevant emergency powers. Regular assessment of emergency measures that restrict rights will help to ensure that they are only to the extent strictly necessary and pursue the predominant objective of restoring a state of normalcy.

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

(a) whether there are effective safeguards or controls over each of these measures, including the possibility of monitoring and access to review;

(b) in relation to the exemption process under the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020, since the outward travel ban was imposed:

(i) how many applications for exemptions have been made and of those, how many have been granted or denied;

(ii) what are the main reasons why exemption applications have been granted and the main reasons why exemptions have been denied;

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

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

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

(iii) what are the top 20 countries where exemptions have been granted for travel, and what are the top 20 countries where exemptions have been denied for travel;

(iv) what is the basis for not applying the 'exceptional circumstances' individual exemption criteria to Papua New Guinea and India, and has any assessment been made as to whether this will have a disproportionate effect on persons on the basis of nationality;

(v) what controls are there over the decisions made by departmental officers to grant or not grant exemptions, and are there any internal review processes over such decisions; and

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

Committee's initial view

2.140 These measures which are designed to prevent the spread of COVID-19, promote the rights to life and health, but may also limit the right to freedom of movement, equality and non-discrimination and the right to a private life. As there was no statement of compatibility accompanying this instrument, questions remained as to whether all of the measures were reasonable, necessary and proportionate, and so the committee sought the minister's advice as to the matters set out at paragraph [2.139].

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

Minister's first response[23]

2.142 The minister advised:

> *Governor-General's extension to the human biosecurity emergency period*
>
> The extension of the human biosecurity period is necessary to ensure the Minister for Health can continue to exercise the emergency powers under the *Biosecurity Act 2015* (Act) to determine requirements or give directions necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australia.
>
> The committee has previously noted that if the temporary measures were to be extended multiple times, the cumulative time period in which the measures could be in effect could be significant. The Governor-General agreed to extend the human biosecurity emergency period for a further

23 The minister's response to the committee's inquiries was received on 19 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.

three months until 17 September 2021, a decision that was informed by specialist medical and epidemiological advice provided by the Australian Health Protection Principal Committee (AHPPC) and the Chief Medical Officer. The AHPPC advised that the international COVID-19 situation continues to pose an unacceptable risk to public health and therefore the extension of the emergency period is an appropriate response to that risk to ensure the protection of the right to life and the right to health.

Determinations made under section 477 of the Act

In your report you note that it is necessary to periodically assess the necessity and proportionality of each extension of the human biosecurity emergency period and relevant emergency powers. Before determining an emergency requirement, I must be satisfied under section 477(4) of the Act the requirement is likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined, the requirement is appropriate and adapted to achieve the purpose for which it is to be determined, the requirement is no more restrictive or intrusive than is required in the circumstances, the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances and the period during which the requirement is to apply is only as long as is necessary.

These tests set by the legislation intrinsically ensure that each requirement is directed to a health need and is a necessary, appropriate, adapted and proportionate response to that health need. I have reviewed these tests and each of the requirements every time that I have recommend an extension of the emergency period.

Comments following Minister's first response

2.143 The committee noted with some disappointment that the minister's response did not answer the committee's specific questions, and sought again a response to the matters set out at paragraphs (a) and (b) in [2.139] above.

2.144 The full initial analysis is set out in *Report 9 of 2021*.

Minister's second response[24]

2.145 The minister advised:

The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 (Declaration) commenced on

24 The minister's response to the committee's inquiries was received on 1 October 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.

18 March 2020 and has been extended six times, with the most recent extending the Declaration until 17 December 2021.

This is in a context where the COVID-19 situation continues to escalate both globally and within the Australian community, particularly as new variants emerge. As at 3 September 2021, there have been over 218,960,000 cases of COVID-19 reported globally, including approximately 4,550,000 deaths.

In Australia, as at 1200 hrs, 3 September 2021, there have been 58,210 cases of COVID-19 reported, including 1,032 deaths. Of particular concern is the New South Wales Delta variant outbreak. New South Wales, Victoria and the Australian Capital Territory are in lockdown to help reduce the number of daily infections.

Safeguards and controls for the use [of] human biosecurity emergency powers

Chapter 8 of the *Biosecurity Act 2015* (Act) provides that the Governor-General may declare that a human biosecurity emergency exists following a recommendation by me as the relevant Minister for Health and Aged Care. This Declaration may be extended for a period of up to three months following a similar recommendation.

With this Declaration in place, I am then able to make any necessary emergency determinations to support the implementation of urgent public health measures to address COVID-19. My recommendations and decisions must be informed by public health advice, which is provided to me by the Chief Medical Officer (CMO), and/or the Australian Health Protection Principal Committee (AHPPC).

Recommendations to declare or extend a human biosecurity emergency

Before I can make a recommendation to the Governor-General, I must first be satisfied of the following matters:

- a listed human disease is posing a serious and immediate threat, or is causing harm, to human health on a nationally significant scale
- the Declaration is necessary to prevent or control:
    - the entry of the listed human disease into Australian territory or part of Australian territory
    - the emergence, establishment or spread of the listed human disease in Australian territory or part of Australian territory.

These considerations provide a number of safeguards and controls on the use of emergency powers. For example, a decision must be in relation to a "listed human disease" which is a disease that may be communicable and cause significant harm to human health. A listed human disease must be determined in writing by the Director of Human Biosecurity (who is the CMO) in consultation with the Chief Health Officer for each state and

territory and with the Director of Biosecurity (who is the Secretary of the Department of Agriculture, Water and the Environment).

A further requirement for recommending a human biosecurity emergency declaration is that I must also consider the period that it is necessary to prevent or control the entry, or the emergence, establishment or spread, of the listed human disease. I also note declarations are limited and must not be longer than three months.

Exemptions process for the Overseas Travel Ban Determination

The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (Overseas Travel Ban Determination) restricts Australian citizens and permanent residents from travelling outside of Australia by air or sea, subject to limited exceptions.

I have consulted with the Department of Home Affairs, who has advised me on the following responses.

Applications for exemptions

The number of applications for travel exemptions that have been granted, between the introduction of the travel ban on 25 March 2020 and 31 July 2021 is as follows:

- 397,905 requests[25] for an outwards travel exemption were received[26]
- 189,336 requests for an outwards travel exemption were approved
- 109,789 requests for an outwards travel exemption were refused.

Reasons for exemptions

The categories for travel exemption requests by reporting category is detailed in the following table, which was for the period between 25 March 202 [sic] and 31 July 2021.

Category	**Approved**	**Refused**
Response to the COVID-19 outbreak	837	207

25 Requests prior to 1 August 2020 may include more than one person, and individuals may have submitted more than one request.

26 The sum of approved and refused requests may not equate to the total number of requests received in the same period, as requests may be otherwise finalised (persons found to meet an already exempt category, withdrawn requests; or requests that did not contain sufficient information for referral to a decision maker); or received or finalised outside the reporting period.

Critical industries and businesses	26,470	9,356
Urgent medical treatment	1,366	1,445
Travelling overseas for a compelling reason for at least 3 months	95,996	31,235
Urgent and unavoidable personal business	14,066	8,754
Compassionate and compelling grounds	48,039	58,690
National interest	2,562	102
Total	189,336	109,789

Note that the sum of approved and refused requests may not equate to the total number of requests received in the same period, as requests may otherwise by finalised outside of the reporting period.

Countries with approved exemptions

Between 1 August 2020 and 31 July 2021, the following destination countries received the most approvals for exemption requests under the Overseas Travel Ban Determination:

1. United Kingdom - 17,003
2. China- 16,538
3. United States of America - 15,520
4. India- 12,956
5. Pakistan - 5,893
6. New Zealand- 5,345
7. Singapore-4,575
8. Canada-4,155
9. Papua New Guinea-4,144
10. Japan-4,129
11. Germany - 3,201
12. Indonesia - 2,806
13. Hong Kong - 2,751
14. Ireland - 2,742
15. Thailand - 2,634
16. France - 2,583
17. Lebanon - 2,577
18. United Arab Emirates - 2,397
19. Republic of Korea - 2,140
20. Malaysia - 2,007

This data includes individuals who may have submitted more than one request, and the countries are listed as declared by the applicant on the travel exemption request.

Papua New Guinea and India

Australia has expressed concerns about the slow rate of the vaccination rollout in Papua New Guinea, as well as the potentially catastrophic impact

of the Delta variant. In response, Australia has implemented policy settings to help manage the impact of potential transmission of COVID-19 as a result of travel between the two countries.

The Biosecurity (Human Biosecurity Emergency) (human Coronavirus with Pandemic Potential) (Emergency Requirements-High Risk Country Travel Pause) Determination 2021 (High Risk Country Travel Pause Determination) commenced on 3 May 2021 and remained in force until it repealed itself at the start of 15 May 2021. At the time, there was approximately 400,000 new cases of COVID-19 and almost 4,000 deaths reported on one day in India. As a result, overseas travellers who had acquired a COVID-19 infection in India and were returning to Australia were putting pressure on Australia's public health system. The temporary pause was used to allow case numbers in quarantine to stabilise and ensure the integrity of the quarantine system.

Controls on decision-making and access to review

Quality assurance reviews of decisions are regularly undertaken to ensure travel exemptions are in line with policy guidelines. The travel exemption program includes senior officers who review feedback from individuals dissatisfied with the travel exemption decision making process through the Global Feedback Unit. Individuals who have had a decision denied may also request an internal review.

Further, I note that public scrutiny of the Government's response to COVID-19, including implementation and management of the travel exemptions program, remains ongoing through regular Senate Estimates and Senate Select Committee hearings on Australian Government's response to the COVID-19 pandemic.

Concluding comments

International human rights legal advice

Rights to life, health, freedom of movement, equality and non-discrimination and privacy

2.146 It is noted that since the preliminary analysis, which considered the extension of the human biosecurity emergency period until 17 September 2021, the human biosecurity emergency period has subsequently been extended for a further three months until 17 December 2021. Noting the UN Human Rights Committee's advice that public health measures that restrict rights should be 'only to the extent strictly required by the exigencies of the public health situation'[27] and in light of the evolving situation of the COVID-19 pandemic, it is important to periodically assess the necessity

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

and proportionality of each extension of the human biosecurity emergency period and the consequent extension of the relevant emergency powers.

2.147 In general terms, the measures appear to pursue the legitimate objective of controlling and preventing the entry and spread of COVID-19 in Australia, and insofar as the measures seek to protect public health and the rights and freedoms of others, they appear to be rationally connected to that objective. The key question is whether the measures are proportionate. In assessing proportionality, relevant considerations include the extent of any interference with rights; whether the proposed limitations are sufficiently circumscribed and accompanied by adequate safeguards, including the possibility of monitoring and oversight; and whether there are other less rights restrictive ways to achieve the objective being pursued.

2.148 The temporary nature of these measures is relevant in considering the extent of any interference with rights.[28] While each extension of the human biosecurity emergency period only lasts for three months, it may be extended multiple times. Since it was first declared on 18 March 2020, the minister noted that the human biosecurity emergency period has been extended six times, with the most recent extension until 17 December 2021. As previously noted, where temporary measures are extended multiple times, the cumulative time period in which the measures could be in effect may be significant.[29] There is a risk that the longer the human biosecurity emergency period is extended, the less likely it is to be considered a temporary measure and the more likely it is to constitute a significant interference with rights.

2.149 As to the existence of safeguards and controls over the measures, the minister stated that before recommending the extension of a human biosecurity emergency period, he must be satisfied that a listed human disease is posing a serious and imminent threat, or is causing harm, to human health on a nationally significant scale; and the declaration is necessary to prevent or control the entry, emergence, establishment or spread of the disease in Australian territory. Before making an emergency determination, the minister must also be satisfied that the requirement will likely be effective, and appropriate and adapted, to achieve its purpose; the requirement and the manner in which it is to be applied is no more restrictive or intrusive than is required in the circumstances; and the period during which the

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

29 See, Parliamentary Joint Committee on Human Rights, *Report 12 of 2020* (15 October 2020) pp. 6–13; *Report 14 of 2020* (26 November 2020) pp. 71–81.

requirement is to apply is only as long as is necessary.[30] To the extent that these requirements help to ensure that the emergency powers are only used to the extent strictly necessary, they would likely assist with the proportionality of the measures.

2.150 Another key safeguard is the availability of exemptions in relation to the overseas travel ban determination.[31] Travel exemptions are available to certain persons, such as an aircraft or vessel crew member, and may apply to other persons in exceptional circumstances, such as where an Australian citizen or permanent resident provides a compelling reason for needing to leave Australia.[32] The Outward Travel Restrictions Operation Directive (the Directive) provides some guidance as to how the exemption process may operate in practice.[33]

2.151 Noting that the effectiveness of this safeguard will depend on how the exemptions process operates in practice, it is relevant to consider the number of applications for exemptions that have been made and of those, how many have been granted or denied, as well as the reasons for granting or denying exemptions. In this regard, the minister advised that between 25 March 2020 and 31 July 2021, 397,905 applications for an outwards travel exemption were received,[34] and 189,336 requests were approved (approximately 63 per cent) and 109,789 requests were refused

30 *Biosecurity Act 2015*, subsection 477(4).

31 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2021C00358].

32 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2021C00358], sections 6 and 7. See also Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021 [F2021L01068], which removes an automatic exemption from this overseas travel ban for Australian citizens and permanent residents ordinarily resident in a country other than Australia. The Parliamentary Joint Committee on Human Rights considered this legislative instrument in *Report 10* (25 August 2021) pp. 36–41.

33 Department of Home Affairs, Outward Travel Restrictions Operation Directive, V.9, https://www.homeaffairs.gov.au/covid-19/Documents/outward-travel-restrictions-operation-directive.pdf (accessed 8 October 2021). See also Department of Home Affairs, *Travel restrictions and exemptions* (5 October 2021), https://covid19.homeaffairs.gov.au/travel-restrictions (accessed 8 October 2021). An overview of the Directive is set out in Parliamentary Joint Committee on Human Rights, *Report 8 of 2021* (23 June 2021) pp. 8–10.

34 The minister noted that applications may include more than one person and individuals may have submitted more than one application. The minister further noted that the total number of approved and refused requests may not equate to the total number of requests received in the same period, as requests may be otherwise finalised (persons found to meet an already exempt category, withdrawn requests; or requests that did not contain sufficient information for referral to a decision maker); or received or finalised outside the reporting period.

(approximately 37 per cent).[35] The minister indicated that the most common reasons for granting a travel exemption were travelling overseas for a compelling reason for at least three months; critical industries and businesses; and compassionate and compelling grounds—although it is noted in relation to the latter category that more exemption applications were refused than approved on this ground.[36] The minister further advised that between 1 August 2020 and 31 July 2021, the destination countries that have received the most approvals for exemption requests include the United Kingdom, China, the United States of America and India. However, it is not clear what the approval rate is for each destination country as a proportion of the total number of applications made. While the preliminary analysis noted that the destination country appears to be a relevant consideration in the granting or refusal of an exemption, evidenced by the 'exceptional circumstances' exemption not applying to individuals seeking to travel to Papua New Guinea (PNG) or India, the most recent version of the Directive does not specify that exemptions do not apply to travel to these countries.[37] The minister stated that policy settings are used to manage the potential transmission of COVID-19 as a result of travel between Australia and PNG, although the exact policy settings were not specified. In relation to India, the minister noted that the previous ban on travel between India and Australia repealed itself on 15 May 2021.[38] While it appears that exemptions now apply to all destination countries, without further information as to the approval rate for each country, it remains unclear what bearing the destination country has on whether an application for a travel exemption is more or less likely to be approved.

2.152 Noting that approximately 63 per cent of exemption applications were approved in the reporting period, indicating that there is a reasonable likelihood that an exemption may be granted to an individual seeking to travel outside Australia, the measures appear to contain flexibility to enable the circumstances of each individual

35 The minister noted that the sum of approved and refused requests may not equate to the total number of requests received in the same period, as requests may otherwise by finalised outside of the reporting period. As such the percentage of approved or refused applications has been calculated on the basis of the total number of applications that were approved or refused (as opposed to applications received).

36 Between 25 March 2020 and 31 July 2021, of the 189,336 applications approved and 109,789 applications refused, 48,039 applications were approved for travel on compassionate and compelling grounds and 58,690 applications were refused on this ground.

37 Department of Home Affairs, Outward Travel Restrictions Operation Directive, V.9, https://www.homeaffairs.gov.au/covid-19/Documents/outward-travel-restrictions-operation-directive.pdf (accessed 8 October 2021). See also Department of Home Affairs, *Travel restrictions and exemptions* (5 October 2021), https://covid19.homeaffairs.gov.au/travel-restrictions (accessed 8 October 2021).

38 See Parliamentary Joint Committee on Human Rights, *Report 6 of 2021* (13 May 2021) pp. 2–7; *Report 8 of 2021* (23 June 2021) pp. 39–47.

case to be considered, which assists with the proportionality of the measures. However, questions remain as to whether the discretion to grant an exemption is sufficiently circumscribed and exercised in a manner that is compatible with human rights; whether there are sufficient controls over the measure, including the possibility of monitoring and oversight; and whether there are other less rights restrictive ways to achieve the objective being pursued.

2.153 As noted in the preliminary analysis, there appears to be a broad discretion conferred on authorised officers of the Australian Border Force and the Department of Home Affairs in relation to approving or refusing exemption requests. In this regard, the minister advised that quality assurance reviews of decisions are regularly undertaken to ensure travel exemptions are in line with policy guidelines. The minister also noted that through the Global Feedback Unit, senior officers review feedback from individuals who are dissatisfied with the travel exemption decision making process. The minister further noted that individuals who have been denied an exemption may request an internal review. While the availability of internal review assists somewhat with the proportionality of the measures, without independent external review, this may not in itself be a sufficient safeguard.

2.154 International human rights law jurisprudence states that laws conferring discretionary powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.[39] This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. There may be a risk that given the breadth of discretion conferred on authorised officers, noting that decisions to grant an exemption can be made by junior officers (APS3 officers and above), and in the absence of external review or other sufficient controls and oversight over the measure, the exemption application and approval process may be inconsistently applied.[40] For example, it is up to the decision maker to determine the appropriate level of evidence required, raising concerns that different evidentiary standards may be applied in different cases.[41] For these reasons, concerns remain that the measure may not be accompanied by adequate safeguards, including the

39 *Hasan and Chaush v Bulgaria,* European Court of Human Rights App No.30985/96 (2000) [84].

40 For example, there are reports of individuals being granted an exemption after several applications, even where circumstances have not changed, suggesting that there may be some inconsistency in the exemption approval process. See Avneet Arora, 'International travel ban extended yet again for Australian citizens and permanent residents', SBS, 11 June 2021, https://www.sbs.com.au/language/english/international-travel-ban-extended-yet-again-for-australian-citizens-and-permanent-residents (accessed 18 June 2021).

41 Department of Home Affairs, Outward Travel Restrictions Operation Directive, V.9, https://www.homeaffairs.gov.au/covid-19/Documents/outward-travel-restrictions-operation-directive.pdf, [9] (accessed 8 October 2021).

availability of external review and oversight. It is also unclear whether there are other less rights restrictive ways to achieve the objective being pursued (such as vaccination and quarantine requirements). This is particularly important in the context of restrictions on the right to freedom of movement, noting the UN Human Rights Committee's advice that such restrictions cannot merely serve permissible purposes but must also be proportionate and the least intrusive measure to achieve the objective.[42]

2.155 In conclusion, while the measures appear to pursue the legitimate objective of controlling and preventing the entry and spread of COVID-19 in Australia, questions remain as to whether the extension of the biosecurity period is proportionate. It is noted that there are safeguards required to be met before the minister can make an emergency determination, including that the minister be satisfied that the determination will likely be effective, and appropriate and adapted, to achieve its purpose; be no more restrictive or intrusive than is required in the circumstances; and applied only as long as is necessary. This requirement, as well as the temporary nature of each extension, assists with the proportionality of the measures. In particular, it may help to ensure that each extension of the human biosecurity emergency period is proportionate and that the emergency powers are only used to the extent strictly necessary.

2.156 However, noting that the human biosecurity emergency period has been extended six times lasting for almost two years, most recently until 17 December 2021, there is a risk that the longer this emergency period is extended, and the consequent emergency powers continue to be enlivened, the less likely it is to be considered a temporary measure and the more likely it is to constitute a significant interference with rights. This is of particular concern in relation to the overseas travel ban due to the considerable extent to which this interferes with rights, particularly the right to freedom of movement. It is therefore important that this measure is accompanied by sufficient safeguards to ensure it is a proportionate limit on rights. In

42 UN Human Rights Committee, *General Comment No 27: Article 12 (Freedom of movement)* (1999) [14], where the committee stated 'it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected'. In the context of COVID-19 related measures, the UN Human Rights Committee has stated that '[w]here possible, and in view of the need to protect the life and health of others, States parties should replace COVID-19-related measures that prohibit activities relevant to the enjoyment of rights under the Covenant with less restrictive measures that allow such activities to be conducted, while subjecting them as necessary to public health requirements, such as physical distancing': *Statement on derogations from the Covenant in connection with the COVID-19 pandemic* (2020) [2(b)].

this regard, the availability of exemptions from the travel ban is an important safeguard. However, there remain concerns as to the adequacy of this safeguard in practice, noting that there is no access to external review; the discretion conferred on authorised officers is broad and not subject to external oversight; and it is not clear that the travel ban represents the least rights restrictive approach to achieving the stated objective. It is also noted that individuals seeking an exemption on compassionate and compelling grounds were more likely to be refused than approved. As such, extending the biosecurity period until 17 December 2021, with the consequent extension of the travel ban, may risk disproportionately limiting the rights to freedom of movement and a private life for those denied the right to leave Australia. Further, if the measures disproportionately affect certain nationalities, they may impermissibly limit the right to equality and non-discrimination.

Committee view

2.157 The committee thanks the minister for this response. The committee notes that the instruments extended the human biosecurity emergency period for a further three months each, most recently until 17 December 2021. Consequently, the following determinations will continue to operate until the end of the human biosecurity emergency period:

- **mandatory pre-departure COVID-19 testing and mask wearing for passengers and aircrew travelling on an international flight to Australia;**
- **restrictions on cruise ships entering Australian territory or ports;**
- **a ban on Australian citizens or permanent residents leaving Australia as a passenger on an outgoing aircraft or vessel unless otherwise exempted; and**
- **restrictions on the trade of retail outlets at international airports.**

2.158 As the committee has previously stated when these determinations were originally introduced, these measures, which are designed to prevent the spread of COVID-19, promote the rights to life and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires Australia takes steps to prevent, treat and control epidemic diseases. However, the committee notes that these measures, in particular the ban on the outward travel of Australian citizens and residents, may also limit the right to freedom of movement, equality and non-discrimination and the right to a private life. In light of the unprecedented nature of the COVID-19 pandemic and the necessity for States to confront the threat of widespread contagion with emergency and temporary measures, the committee acknowledges that such measures may, in certain circumstances, restrict human rights. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.159 The committee considers that while the extension of the biosecurity period pursues the legitimate objective of controlling and preventing the entry and spread

of COVID-19, questions remain as to whether all aspects of this are proportionate. The committee notes that the measures are time limited and accompanied by some important safeguards. In particular, before making an emergency determination, the minister must be satisfied that the determination will likely be effective, and appropriate and adapted, to achieve its purpose; be no more restrictive or intrusive than is required in the circumstances; and applied only as long as is necessary. This requirement, as well as the temporary nature of each extension, would assist with the proportionality of the measures.

2.160 However, the committee notes that as the human biosecurity emergency period has been extended six times for almost two years, there is a risk that the longer this emergency period is extended, and the consequent emergency powers continue to be enlivened, the less likely it is to be considered a temporary measure and the more likely it is to constitute a significant interference with rights. Noting the considerable extent to which the overseas travel ban interferes with rights, the committee notes that it is particularly important that this measure is accompanied by sufficient safeguards. While the availability of exemptions to the overseas travel ban is an important safeguard, it is unclear whether it would be sufficient in all circumstances, noting that there is no access to external review; the discretion conferred on authorised officers is broad and not subject to external oversight; and it is not clear that the travel ban represents the least rights restrictive approach to achieving the stated objective. As such, the committee considers that extending the biosecurity period until 17 December 2021, with the consequent extension of the travel ban, may risk disproportionately limiting the rights to freedom of movement and a private life for those denied the right to leave Australia. Further, if the measures disproportionately affect certain nationalities, they may impermissibly limit the right to equality and non-discrimination.

2.161 However, the committee welcomes the government's announcement that the overseas travel ban will be lifted in the near future, which is likely to address many of the human rights concerns raised above.

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

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

2.163 The committee requested a response from the minister in relation to this legislative instrument in *Report 10 of 2021*.[2]

Removal of automatic exemption to leave Australia

2.164 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).[3] This legislative instrument removes an automatic exemption from this ban for Australian citizens and permanent residents ordinarily resident in a country other than Australia.[4] 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

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 12 of 2021*; [2021] AUPJCHR 124.

2 Parliamentary Joint Committee on Human Rights, *Report 10 of 2020* (25 August 2021), pp. 36-41.

3 *Biosecurity Act 2015*, section 479.

4 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.

employee for an exemption, and to demonstrate a compelling reason for needing to leave Australian territory.[5]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.165 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.[6] The right to life requires States parties to take positive measures to protect life.[7] 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.[8] The right to health requires that States parties shall take steps to prevent, treat and control epidemic diseases.[9] 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'.[10]

2.166 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.[11] It

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

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

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

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

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

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

11 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].

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.[12] The freedom to leave a country may not depend on any specific purpose or the period of time the individual chooses to stay outside the country, meaning that travelling abroad and permanent emigration are both protected.[13] 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.

2.167 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.[14] The measures may also limit the right to a private life as the restriction on movement 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.[15] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.[16]

2.168 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.

2.169 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, and questions remain regarding the proportionality of the measure.

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

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

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

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

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

16 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).

(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's initial view

2.171 The committee noted 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 noted that the measure is also likely to engage and limit a number of other rights, and considered further information was required to assess the human rights implications of this legislative instrument, and as such sought the minister's advice as to the matters set out at paragraph [2.170].

2.172 The full initial analysis is set out in *Report 10 of 2021*.

Minister's response[17]

2.173 The minister advised:

> *How many times was the automatic exemption used?*
>
> The number of Australia citizens or permanent residents ordinarily residing in a country other than Australia who relied on an automatic exemption under paragraph 6(1)(a) to leave Australia cannot be quantified due to the nature of the exemption. As the exemption is automatic there is no application process required of the traveller, and no obligation for the Australian Border Force (ABF) to record the number of persons who have made use of the exemption.

17 The minister's response to the committee's inquiries was received on 28 September 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.

How many times has a person subsequently returned after using the automatic exemption and for what reasons?

As noted above, there is no obligation for the ABF to record the number of persons using the automatic exemption, and it follows that there would be no record of the reasons for returning as these did not need to be provided under the automatic exemption.

Reduction of public health risk

Managing travel volume is one of the few effective ways the Government has been able to manage pressures on Australia's quarantine and health system capacity and is an important mechanism for controlling the spread of COVID-19 in the Australian community.

The automatic exemption for permanent residents under the Overseas Travel Ban was designed to allow Australian citizens and residents ordinarily resident in another country to leave Australian territory to return to their usual country of residence. Given the length of time that the automatic exemption operated (from commencement of the Overseas Travel Ban in March 2020 to August 2021), sufficient time was provided for persons falling into this category and wishing to return to their usual place of residence to do so.

As COVID-19·continues to pose an ongoing threat to the health of Australians, it is critical to manage the number of people leaving Australia who may then return to ensure flight and quarantine availability is prioritised for individuals who have been stranded overseas for some time.

Less restrictive ways to achieve the stated objective

Before I make any emergency requirement determination, I must first be satisfied under paragraph 477(4)(d) of the Biosecurity Act 2015 that the requirement is no more restrictive or intrusive than is required in the circumstances. The recent COVID-19 outbreaks in the community, particularly involving the Delta strain of the virus which was introduced into Australia by travellers arriving from overseas, has posed a significant risk to the health of the Australian community. The Determination, as amended, is necessary to reduce the risk of bringing overseas-acquired cases of COVID-19 into Australia and thereby prevent or control the spread of COVID-19 in Australia.

Concluding comments

International human rights legal advice

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

2.174 The minister stated that the measure is necessary to reduce the risk of overseas-acquired COVID-19 cases from entering Australia, explaining that an important mechanism for controlling the spread of COVID-19 in Australia is managing

travel volume, which, in turn, manages pressures on Australia's quarantine and health system capacity. The minister stated that as COVID-19 continues to pose an ongoing threat to the health of Australians, it is critical to manage the number of people leaving Australia, who may then return, to ensure flight and quarantine availability is prioritised for individuals who have been stranded overseas for some time. In this regard, the number of persons who are ordinarily resident of another country who have left Australia and sought to return is a relevant consideration in assessing whether the measure would likely be effective to achieve the stated objective. The minister advised that the number of times an Australian citizen or permanent resident ordinarily resident in a country other than Australia has relied on the automatic exemption cannot be quantified due to the nature of the exemption. The minister further noted that there is neither a record of the number of persons using the automatic exemption nor a record of the reasons for those persons returning to Australia.

2.175 Without information as to how many Australians ordinarily residing in another country have entered and left Australia multiple times since March 2020, it is not possible to conclude that limiting the circumstances in which a person may leave Australia would in fact 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 and, if such persons returned to Australia, would be required to quarantine again. As such, it has not been established that the measure is necessarily rationally connected to the stated objective, noting that where a measure limits rights, the onus is on the state to justify the reasonableness and necessity of the measure.

2.176 Regarding proportionality, the explanatory statement noted that in exceptional circumstances, the ABF Commissioner or an ABF employee may grant an exemption from the requirement not to travel outside Australian territory.[18] The person seeking the exemption is required to demonstrate that they have a compelling reason for needing to leave Australia. To the extent that this provides the measure with flexibility, allowing the ABF Commissioner to take into account the merits of each individual case, it may assist with proportionality. However, there are some concerns that this exemption process alone may not be a sufficient safeguard, noting that there is no access to independent review in relation to a decision to refuse an exemption; and the discretion conferred on authorised officers to grant or refuse an exemption is broad and not subject to external oversight. There also appears to be a risk the exemption application and approval process may be inconsistently applied. As such,

18 Explanatory statement, p. 1.

this alternative mechanism for leaving Australia may not be a sufficient safeguard to ensure that any limitation on rights is proportionate in all circumstances.[19]

2.177 As to whether the measure represents the least rights restrictive approach, the minister noted that prior to making any emergency requirement determination, he must first be satisfied under paragraph 477(4)(d) of the *Biosecurity Act 2015* that the measure is no more restrictive or intrusive than is required in the circumstances. While this requirement assists with the proportionality of this measure, it remains unclear whether there may be less rights restrictive alternatives available, noting that such alternatives were not addressed in the minister's response. This is particularly important considering the UN Human Rights Committee's advice that any emergency and temporary measures that restrict rights in response to the COVID-19 pandemic should be 'only to the extent strictly required by the exigencies of the public health situation' and proportionate in nature.[20]

2.178 In conclusion, while the measure appears to pursue a legitimate objective, it has not been established that it is rationally connected to that objective or a proportionate means of achieving the objective. As such, there is a risk that this measure may not permissibly limit the rights to freedom of movement, equality and non-discrimination, and privacy.

Committee view

2.179 The committee thanks the minister for this response. 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.

2.180 The committee considers that insofar as the measure is intended to prevent the spread of COVID-19 in Australia, which has the ability to cause high levels of morbidity and mortality, it may promote the rights to life and health. However, the committee notes that the measure also engages and limits a number of rights,

19 This concern has previously been raised by the committee. See Parliamentary Joint Committee on Human Rights, *Report 8 of 2021* (23 June 2021) pp. 2-12; *Report 9 of 2021* (4 August 2021), pp. 2-10; and this report, *Report 12 of 2021* (20 October 2021) pp. 79–96.

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

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.

2.181 The committee considers that the measure pursues the legitimate objective of seeking to reduce the risks posed to the Australian population from the spread of COVID-19. However, the committee notes that questions remain as to whether the measure would necessarily be effective to achieve the stated objective, noting that it is unclear how many Australians who are ordinarily resident in another country have left Australia and sought to return. The committee also notes that it is unclear whether the measure is a proportionate means of achieving the stated objective. As such, the committee considers there to be a risk that the measure may not permissibly limit the rights to freedom of movement, equality and non-discrimination, and privacy.

2.182 However, the committee welcomes the government's announcement that the overseas travel ban will be lifted in the near future, which is likely to address many of the human rights concerns raised above.

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

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

2.184 The committee requested a response from the minister in relation to this legislative instrument in *Report 10 of 2021*.[3]

Increased tribunal application fees

2.185 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.[4] The new fee is subject to annual increase, from 1 July 2022, consistent with existing legislated indexation arrangements.[5] 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

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Merits Review) Regulations 2021 [F2021L00845], *Report 12 of 2021*; [2021] AUPJCHR 125.

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

3 Parliamentary Joint Committee on Human Rights, *Report 10 of 2021* (25 August 2021), pp. 42-50.

4 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*.

5 Schedule 1, item 3.

decisions to cancel a visa held by a non-citizen, as well as decisions in relation to sponsorships and nominations.[6]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.186 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.[7] 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.[8] 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.[9]

2.187 One dimension of the right to a fair hearing is the right of access to justice.[10] 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.[11] The findings of comparable

6 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.

7 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.

8 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].

9 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].

10 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).

11 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].

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 hearing.[12] 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.[13]

2.188 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.[14] 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.[15] 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

12 *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).

13 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).

14 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.

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

deportation), would engage and may limit article 13.[16] The UN Human Rights 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'.[17]

2.189 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]

2.190 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

16 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.

17 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'.

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 PPU 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 PPU Polpure v Poland*, European Court of Human Rights, Application No. 39199/98 (2005) [64].

objective for the purposes of international human rights law. Regarding proportionality, 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; successful applicants for review are entitled to a refund of 50 per cent of the fee; a full fee exemption applies to individuals in immigration detention; and protection visa decisions are excluded from the fee increase. This would likely assist with the proportionality of the measure. However, questions arise as to whether the partial fee exemption is a sufficient safeguard for other applicants.

2.191 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's initial view

2.192 The committee noted that 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.

2.193 The committee noted 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 noted 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 noted 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. The committee considered further information was required to assess the human rights implications of this measure and sought the minister's advice as to the matters set out at paragraph [2.191].

2.194 The full initial analysis is set out in *Report 10 of 2021*.

Minister's response[21]

2.195 The minister advised:

> ***(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***
>
> Most migrants are expected to have the financial capacity to support their stay in Australia, and the fee increase for certain applications for review would represent only a small additional impost in the totality of expenses associated with temporary or permanent migration to Australia (such as travel and accommodation). In considering the impact of this fee increase, it is important that the Committee be mindful of the predominant cohorts of applicants that would be affected.
>
> Of the 15,969 applications lodged in the Migration and Refugee Division (MRD) of the AAT between 1 July 2020 and 30 June 2021:
>
> - 66 per cent related to protection visas and would not be subject to the fee increase
> - 9 per cent were related to visitor visas
> - 6 per cent were related to temporary work and skilled related visas
> - 4 per cent were nomination and sponsorship refusals
> - 3 per cent were related to family visas
>
> Notwithstanding the limited pool of applicants affected by the fee increase, it is acknowledged that paying the fee of $3000 within statutory time limits may cause financial distress to a small number of applicants, and in this circumstance, the AAT member may reduce the fee payable by up to 50 per cent ($1500).
>
> Generally, for those not in immigration detention, the statutory timeframe to lodge a review application is 28 days from the date of being deemed notified of the department's decision to refuse a visa application. Should a person be financially unable to afford the maximum reduced rate of $1500 upon this notification, the 28 day period provides an opportunity to secure the funds required to lodge an application for merits review. If securing the necessary minimum $1500 is not achievable, than an application may not be made.
>
> Nevertheless, maintaining the existing fee structure in the *Migration Regulations 1994* for applications for review under Part 5 of the *Migration Act 1958* (the Act) (*'Part 5 reviewable decisions')*, including the 50 per cent

21 The minister's response to the committee's inquiries was received on 5 October 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.

cap in discounting the fee, should be considered reasonable in balancing the additional benefits of the package, in providing additional resources to the AAT and the Federal Circuit Court (FCC) to address migration related backlogs, against the associated costs. Please refer to the following link for further information concerning the AATs funding and application related revenue: www.transparency.gov.au/annualreports/administrativeappealstribunal/reporting-year/2019-20-26 . In this context, it should be noted that an application for merits review in the MRD is an independent review conducted by a Tribunal Member, and that in the 2019-20 financial year, applications lodged in the MRD made up 55% of all matters received in the AAT.

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

In addition to the above, many applicants affected by the increased fee will have had the ability to work in Australia while awaiting the Department's visa decision, and will likely retain the ability to work during the statutory timeframe to lodge a review of a visa refusal or cancellation decision and throughout the period of the review.

In the circumstance of an applicant who is awaiting their review decision and holds a bridging visa without permission to work, if they are suffering financial hardship they may apply to change their bridging visa conditions, seeking to be granted permission to work so that they may support themselves in Australia.

(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.

As highlighted previously, MRD matters make up more than 50% of all applications for review lodged with the AAT. In addition to this volume, migration matters are often highly complex and decisions often rely on subjective criteria. Whilst applications in some divisions of the AAT do not attract a fee, such as review of a National Disability Insurance Scheme decision, or may be subject to a full fee waiver, such as successful reviews of protection visa decisions, the present fee amendment should be viewed within the specific context of the service sought by the review applicant (that of merits review of a migration matter), and the costs of providing that service.

As mentioned in the 2021-22 Federal Budget, the increase to the fee is part of a funding package for the AAT and the FCC that provided additional resources to the AAT and the FCC to reduce the migration related backlogs that have developed.

> Raising the fee for *Part 5 reviewable decisions* made under the Act ensures a direct link between the benefits of this package and the cohort impacted by the fee increase. Relevantly, while the package benefits review applications made under Part 7 of the Act (certain protection visa decisions – '*Part 7 reviewable decisions'*), the fee increase does not affect them. It should be noted that imposing a fee increase to *Part 7 reviewable decisions* could have resulted in a lower overall increase per application required to offset the costs of the package. However, even though a *Part 7 reviewable decision* does not attract a fee unless the review matter is unsuccessful, it was considered that imposing the fee increase upon this cohort ran a higher risk of causing financial hardship and may increase the risk of non-compliance with *non-refoulement* obligations. Additionally, this could have included those who may already be receiving financial support under the Status Resolution Support Services program.
>
> For these reasons, it is clear that through only applying the fee increase to *Part 5 reviewable decisions,* the amendments took into account the potential financial vulnerability of applicants of *Part 7 reviewable decisions* in delivering a funding package that is proportionate and reasonable. It is also clear that in the context of the specific cohort of those affected by these amendments, the fee remains reasonable and does not fetter an individual's existing right to submit reasons and have their case reviewed by a competent authority, and that the associated package should result in a more timely assessment of these claims.

Concluding comments

International human rights legal advice

Rights to a fair hearing and prohibition against expulsion of aliens without due process

2.196 In regards to whether the measure pursues a legitimate objective, the minister stated that the increased application fee will form part of a funding package to provide additional resources to the Administrative Appeals Tribunal (AAT) and the Federal Circuit Court (the court) to reduce migration related backlogs. As noted previously, increasing the capacity and efficiency of the AAT and the court to hear and resolve matters is an important and necessary aim. However, if the ultimate effect of the measure were to deny access to the AAT for those who could not afford the application fees, even at a reduced rate, 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, the European Court of Human Rights has observed that:

> restrictions [on an individual's access to courts] 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.[22]

2.197 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'. [23] Where a tribunal fee results in the applicant not being able to lodge a 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 the right to a fair hearing may be breached.[24]

2.198 In the context of this measure, the increased application fee, which may have the effect of restricting an individual's access to justice, appears to be of a purely financial nature as its stated objective is revenue raising and the fee amount is not dependent on the merits of the application or its prospects of success. There are concerns that for those who cannot afford the application fee (even at a reduced rate) and as a consequence are prevented from applying for a review of a decision, the measure may undermine the very essence of the right to a fair hearing. The measure would also appear to render the practical efficacy of review meaningless in such cases, noting that the right to review under article 13 must be in all circumstances an *effective* one.[25]

2.199 In assessing whether the proposed limitation is proportionate, relevant considerations include whether the measure is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated

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22 *Podbielski and PPU 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'.

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

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

25 UN Human Rights Committee, *General Comment No. 15: The position of aliens under the covenant* (1986) [10], where the Committee stated that the article 13 requires that 'an alien…be given full facilities for pursuing his remedy against so that this right will in all circumstances of his case be an effective one'.

objective; as well as the individual circumstances of the case, including the applicant's ability to pay the fees, and the phase of the proceedings.[26]

2.200 A key safeguard accompanying this measure is the partial fee waiver, which allows the Registrar of the AAT to reduce the application fee by 50 per cent if the fee would cause severe financial hardship to the review applicant.[27] There is also a full fee waiver for individuals in immigration detention and all successful applicants for review are entitled to a refund of 50 per cent of the fee. As previously noted, the full fee exemption for individuals in immigration detention and the exclusion of protection visa decisions from the fee increase assists 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, it is not clear that the partial fee waiver 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 hardship.[28] 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 merits review is not available for fee reduction decisions.[29]

2.201 Regarding the adequacy of the partial fee waiver, the minister stated that most migrants are expected to have the financial capacity to support their stay in Australia, and the fee increase would represent a small additional impost in the totality of expenses associated with temporary or permanent migration to Australia.

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

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

28 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).

29 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).

Notwithstanding, the minister acknowledged that paying the application fee of $3000 within the statutory time limit of 28 days may cause financial distress to some applicants, and in these circumstances, they may receive a partial fee waiver, but if the applicant is unable to pay the reduced fee of $1500 in the 28 day time period, then the application may not be made. The minister further noted that the applicant may have the ability to work in Australia and will likely retain that ability during the statutory timeframe to lodge a review of a visa refusal or cancellation decision. If the applicant holds a bridging visa without permission to work, the minister stated that if they are suffering financial hardship, they may apply to change their bridging visa conditions so that they may be granted permission to work and support themselves. However, noting that visa processing times may generally be longer than 28 days (particularly in the context of the COVID-19 pandemic), in practice, it would not appear that an applicant would be able to apply and change their bridging visa conditions, secure employment and save the necessary funds to afford the full or partial application fee within the 28 day statutory timeframe.[30] As such, the applicant's ability to apply to change their bridging visa conditions and seek permission to work in Australia while awaiting their review would appear to have no safeguard value. Further, depending on the individual circumstances of the applicant, the ability to work during the statutory timeframe may not necessarily ameliorate the financial hardship caused by the application fee. For example, if all or the majority of the applicant's earnings are used to cover everyday living expenses, they may be unable to save sufficient funds to cover the application fee.

2.202 Thus, in the absence of the availability of a full fee waiver and flexibility to consider the individual applicant's ability to pay the reduced fee, a partial fee waiver does not appear to be a sufficient safeguard 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 a tribunal, it would constitute a disproportionate restriction on their right of access to justice.[31] 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

30 Department of Home Affairs, *Visa processing times*, 24 May 2021, https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times (accessed 12 October 2021). While it is not clear exactly how long it might take for an application to change bridging visa conditions would take, the Department of Home Affairs' advice that processing times generally for visa decisions is delayed suggests that there may also be delays in other visa-related decisions, noting that the Department is prioritising processing of visa applications for travellers who are exempt from our travel restrictions to help those who need urgent travel.

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

significant, noting that the greater the interference, the less likely the measure is to be considered proportionate.

2.203 In addition, it is not clear that the measure represents the least rights restrictive way of achieving the stated objective. The minister stated that by only applying the fee increase to Part 5 reviewable decisions, having regard to the potential financial vulnerability of applicants of Part 7 (protection visa) reviewable decisions, the measure is proportionate and reasonable. The minister noted that while applying a fee increase to both Part 5 and Part 7 reviewable decisions would have lowered the overall increase in fees per application (noting that protection visa decisions constitute 66 percent of applications lodged in the AAT between 1 July 2020 and 30 June 2021), it was considered that increasing the application fee for protection visa decisions would have caused greater financial hardship to applicants and may have risked non-compliance with Australia's *non-refoulement* obligations. While excluding protection visa decisions from the fee increase would ensure certain applicants are not prevented from accessing justice, it does not address the question of whether increasing the application fee by 64 per cent for review of other migration decisions is the least rights restrictive way of achieving the stated objective. Indeed, it seems that providing the registrar with the discretion to grant a full fee waiver where appropriate, having regard to the individual circumstances of each applicant and the merits of their case, including their ability to pay the reduced fee, would be a less rights restrictive alternative to imposing a blanket fee increase to all applications for review of Part 5 reviewable decisions. More broadly, it is not clear whether consideration has been given to other less rights restrictive ways of raising revenue for the AAT and the court.

2.204 Further, as previously noted, 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).[32] In light of the guarantees encompassed in the right of equal access to justice and individuals' right to enjoy this without discrimination, questions arise as to whether this measure, which imposes a considerably higher fee on those seeking review of migration decisions compared to other decisions (and therefore disproportionally affects non-nationals), may have a discriminatory effect on vulnerable groups. Regarding the difference in fees, the minister stated that the higher fee for migration matters should be viewed within the specific context of the service sought by the applicant, namely merits review of a migration matter, and the costs of providing that specific service. The minister noted that migration matters are highly complex and represent 50 per cent of all applications for review. While the minister's response

32 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.

provides an explanation as to why a higher fee is applied to migration matters, the discriminatory effect of the measure remains the same. It is noted that the UN Office of the High Commissioner for Human Rights has recommended that user fees for essential governments services 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'.[33] There appears to be a risk that the increased application fee for review of migration decisions could prevent vulnerable migrants experiencing financial hardship from accessing the services of the AAT.

2.205 In conclusion, while increasing the capacity and efficiency of the AAT and the court to hear and resolve matters is an important and necessary aim, it is not clear that revenue raising would, in itself, constitute a legitimate objective for the purposes of international human rights law. While the availability of a partial fee waiver may assist with proportionality in certain cases, it is unlikely to be an adequate safeguard for those who cannot afford to pay the partial fee. In such cases, if the effect of the measure was to prevent an individual from applying to the AAT for review of a decision, it would likely constitute a disproportionate restriction on their right to access to justice and undermine the very essence of the right to a fair hearing. For these reasons, there is a significant risk that for those individuals who cannot afford to pay the application fee, the measure impermissibly limits their right to access to justice – a dimension of the right to a fair hearing and the prohibition against expulsion of aliens without due process.

Committee view

2.206 The committee thanks the minister for this response. The committee notes 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 (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 engages and limits 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.

2.207 The committee notes that the increased application fee forms part of a funding package to increase resources to the AAT and the Federal Circuit Court. The committee notes that while increasing the capacity and efficiency of the AAT and the court to hear and resolve matters is an important and necessary aim, it is unclear

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

that revenue raising would, in itself, constitute a legitimate objective for the purposes of international human rights law. The committee considers that the availability of a partial fee waiver may assist with proportionality in certain cases. However, for those who cannot afford to pay the reduced fee, the committee considers that the partial fee waiver is unlikely to be an adequate safeguard. To the extent that the effect of the measure may prevent an individual from applying to the AAT for review of a decision, the committee considers this would likely undermine the very essence of the right to a fair hearing. As such, for those individuals who cannot afford to pay the application fee, the committee considers there to be a significant risk that the measure impermissibly limits the right to access to justice – a dimension of the right to a fair hearing and the prohibition against expulsion of aliens without due process.

Suggested action

2.208 The committee considers that the proportionality of the measure may be assisted were the legislative instrument amended to:

(a) provide the Registrar of the Administrative Appeals Tribunal with the discretion to provide an applicant with a full fee waiver, having regard to the individual circumstances of the applicant, including their ability to pay the reduced fee, and the merits of their case; and

(b) allow an applicant to seek review of the Registrar's decision to grant or refuse a fee waiver application.

2.209 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.

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

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

Purpose	This legislative instrument excludes work for specified employers from being counted 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

2.211 The committee requested a response from the minister in relation to the regulations in *Report 10 of 2021*.[3]

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

2.212 This legislative instrument excludes work carried out for specified employers from counting towards eligibility for a second or third working holiday maker (WHM) visa.[4] 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.

2.213 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

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 [F2021L01030], *Report 12 of 2021*; [2021] AUPJCHR 126.

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

3 Parliamentary Joint Committee on Human Rights, *Report 10 of 2021* (25 August 2021), pp. 51-55.

4 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.

their twelve-month stay.[5] If a person undertakes at least six months of 'specified work' while holding their second WHM visa, they are then eligible to be granted a third WHM visa.

Summary of initial assessment

Preliminary international human rights legal advice

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

2.214 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.[6] 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'.[7]

2.215 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.[8] 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.

2.216 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. However, questions remain as to the proportionality of the measure.

5 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.

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

7 Explanatory statement, p. 1.

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

2.217 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's initial view

2.218 The committee considered 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.

2.219 However, the committee considered 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 noted that the right to privacy may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee considered 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, and as such sought the minister's advice as to the matters set out at paragraph [2.217].

2.220 The full initial analysis is set out in *Report 10 of 2021*.

Minister's response[9]

2.221 The minister advised:

> ***(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;***
>
> As stated in the Explanatory Statement, the changes made by the Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 (the Regulations) aim to promote the clear message that any exploitation of working holiday maker (WHM) visa holders is totally unacceptable and will not be tolerated. The Regulations do not set out the factors the Minister can take into account when deciding to list an employer because the aim of the amendment is to provide powers which are broad in scope, as necessary to allow the Minister to respond to the broad type of potential abuse or exploitation faced by WHM visa holders that could jeopardise the overall reputation of the WHM visa program.
>
> Before listing an employer in a legislative instrument, the Minister may consider the full circumstances of an employer, including convictions as well as allegations and previous relevant police charges. This enables the Minister to review, as comprehensively as possible, the suitability of an employer, including whether the employer has shown a history of behaviours that pose health and safety risks. The Explanatory Statement accompanying the Regulations confirms that the Minister can take into consideration convictions which have been quashed to the extent permitted by the *Crimes Act 2014.* However, the Explanatory Statement further clarifies that it is not envisaged that the Minister would in fact do this, but would focus on more recent offending:
>
> > "To the extent that the Crimes Act 2014 permits the Minister to take into account previous convictions, including convictions that have been quashed/pardoned or convictions for less serious offences that would usually be prohibited from use and disclosure under the Commonwealth-Spent Convictions scheme, it is not envisaged that this would occur. The exercise of the discretion to list a business in a legislative instrument would be focussed on

9 The minister's response to the committee's inquiries was received on 30 September 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.

recent offending that suggests a current risk to working holiday makers."[10]

(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;

In deciding to list an employer the Minister may consider untested allegations of health and safety issues made against an employer in order to identify a pattern of behaviour.

The intention of regulation 1.15FB is that the Minister may specify an employer to be an excluded employer if the Minister is satisfied that either the employer themselves (under reg 1.15FB(2)(a)) or the performance of the work in the employment of the employer (under reg 1.15FB(2)(b)) poses a risk to the safety or welfare of the WHM visa holder. The instrument therefore provides for the Minister to take into consideration other matters beyond previous convictions. For example, an exclusion under regulation 1.15FB(2)(a) could be associated with the criminal record of the employer while an exclusion under regulation 1.15FB(2)(b) could occur because of health and safety issues at the employer's workplace.

This is to further the broad aim of the amendments which is to assist WHM visa holders in finding employment with safe and healthy working conditions by dissuading them from commencing or continuing employment with an employer who may pose a risk to their safety or welfare, if they wish to apply for a subsequent WHM visa.

(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;

Employers will be provided with an opportunity to make submissions prior to listing in a legislative instrument, in accordance with the principles of common law procedural fairness. The Minister would consider the full circumstances of every case, including by providing a right of reply, before listing a business in a legislative instrument.

Before the Minister declares a person to be an excluded employer, the Minister must give the person a written notice:

(a) stating that the Minister proposes to make such a declaration and the reasons for it; and

(b) inviting the person to make a written submission to the Minister, within the period covered below, setting out reasons why the Minister should not make the determination.

10 See Explanatory Statement to the Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021, page 10 under Item [2].

The employer will have an opportunity to correct any incorrect information and outline any extenuating circumstances for consideration during this period (known as the 'show cause' period).

The 'show cause' period will be either;

(a) 28 days after the day the person is given notice by the Minister; or

(b) the period stated in the notice for the making of a written submission (whichever is the greater period for the employer).

If the Minister declares a person to be an excluded employer, the Minister must, as soon as reasonably practicable, give the person notice of that decision.

The exclusion comes into effect from the time the exclusion is published. The exclusion has effect during the period specified in the instrument (unless revoked sooner).

(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;

As noted above, the exclusion comes into effect from the time the exclusion is published and has effect during the period specified in the instrument (unless revoked sooner).

The employer will have had an opportunity to correct any incorrect information and outline any extenuating circumstances for consideration during the 'show cause' period outlined above in answer to question (c).

There is no provision for an employer to seek merits review of the Minister's decision to list a business in a legislative instrument.

The effect of the listing is that working holiday maker visa holders cannot count future work for the employer towards eligibility for a second or third WHM visa. Nevertheless, a WHM visa holder may freely choose or accept to continue working for an employer who is included on the legislative instrument.

The decision to exclude merits review of the Minister's decision to list an employer is consistent with the established grounds for excluding merits review set out in the Administrative Review Council guidance document: *What decisions should be subject to merit review?*[11] The decision to list an employer has a somewhat limited impact as it does not directly preclude an employer from continuing to operate their business or be an employer. Rather, only those employees who are WHM visa holders may be directly impacted by the listing of an employer, and even then, the WHM visa holder is not precluded from continuing with that employment. On balance the government does not consider that merits review is appropriate in this

11 Administrative Review Council booklet (1999): Administrative Review Council What decisions should be subject to merit review? Access online from AG website (refer paragraphs 4.56 and 4.57).

context, as the amendments do not prevent the individual or business from continuing to operate, or from employing other workers.

(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;

In order to support the safety and wellbeing of WHM visa holders and minimise the likelihood of them choosing to work for employers who may pose a risk, it is necessary to use legislation to restrict excluded employers from offering work that qualifies as specified work.

The measure is intended to enhance protection of WHM visa holders by identifying certain employers and regulating that working for such employers will not count as specified work for the purposes of eligibility for a subsequent WHM visas.

It should be noted that the information that may result in the listing of an employer is often in the public domain already, including in media reports. However, the Government considers it appropriate to additionally put in place a public and concise listing of excluded employers by way of legislative instruments made under the Regulations. The existence and accessibility of such a listing assists to protect the overall international reputation of the WHM visa program. To provide this information to just WHM visa holders via less restrictive alternatives (such as just informing visa holders how to access information about potential employers) would only assist on a specific individual level for WHM visa holders. It would be ineffective in achieving the wider objective of strengthening the overall international reputation of the WHM visa program and encouraging employers of WHM visa holders to maintain the highest standards in their employment practices.

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

Subregulation 1.15FB(3) ensures that the Minister has flexibility to identify a business by any appropriate means, which include the specified methods of (1) listing the name of the person, partnership or unincorporated association, or (2) the Australian Business Number, or (3) any other information that identifies the person, partnership or unincorporated association.

As noted in the Statement of Compatibility with Human Rights, the identification and outlining of these three categories of 'information' has been included so that the minimum personal information is disclosed whilst ensuring that cases of 'wrong identity' do not occur. Importantly, the listing instrument itself will not specify why the Minister has determined that an employer has been included. Such omission protects the employer's right to privacy. Inclusion on the instrument will only occur after Ministerial consideration of the full circumstances and where it is necessary to ensure

the protection and safety of WHM visa holders and proportionate to potential privacy risks.

This approach has been adopted to ensure that the Minister has the flexibility to ensure that the relevant employers are clearly identifiable to WHM visa holders. The power would be exercised by the Minister having regard to privacy considerations and, wherever possible, would avoid naming individuals. An individual would only be named if no other means of identifying the employer was possible. It is anticipated that specifying an individual by name in the legislative instrument would be a rare occurrence.

Concluding comments

International human rights legal advice

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

2.222 As noted in the preliminary analysis, ensuring that WHM visa holders are aware of employers that may pose a risk to their health and safety may promote the right to just and favourable conditions of work. Listing employers who 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. However, questions remain as to whether the measure constitutes a proportionate limit on the right to privacy of employers included on the list of excluded employers. In assessing the proportionality of the measure, relevant considerations include whether the limitation is sufficiently circumscribed, whether there are appropriate safeguards accompanying the measure and whether there are other less rights restrictive means to achieve the objective.

2.223 In relation to whether the minister's power to list an employer is sufficiently circumscribed, the minister advised that in making a listing it would be possible to rely on a wide range of matters, including 'convictions as well as allegations and previous relevant police charges'. The legislative instrument itself does not set out the factors to be considered, only that an employer may be listed if the minister is satisfied that they may pose a risk to the safety or welfare of workers, or the performance of work for the employer may pose a risk to safety or welfare.[12] The lack of factors guiding the minister's decision-making provides the minister with a broad discretion to list an employer. The minister has advised that the factors that may be taken into account are not included in the legislative instrument in order to provide powers which are broad in scope, as necessary to respond to 'the broad type of potential abuse or exploitation faced by WHM visa holders'. The power of the minister to consider anything the minister considers relevant, including untested allegations, raises concerns regarding the protection of the right to reputation noting those allegations may not be properly established. It is also unclear why it is necessary for the minister

12 Subregulation 1.15FB(2).

to consider quashed or pardoned convictions in this assessment. Although the minister has advised it is not envisaged that consideration of quashed or pardoned convictions would occur, as the legislative instrument does not list what can or cannot be considered, there is a risk that under the legislation a broad range of considerations, including pardoned convictions and untested allegations, could be considered. The measure would more likely be considered sufficiently circumscribed if it included some guidance as to the type of factors that the minister must consider in making a decision to list an employer.

2.224 Another relevant factor in assessing the proportionality of the measure is whether the measure is accompanied by sufficient safeguards. The minister has advised that employers will be provided with an opportunity to make submissions prior to listing, in accordance with the principles of common law procedural fairness. The minister has stated that written notice 'must' be given to an employer stating the reasons for the decision to list them and an employer is provided with a right of reply before listing. Such processes would assist with the proportionality of this measure, helping to ensure employers are not incorrectly listed. However, it is noted that none of these processes are contained in the legislative instrument itself, and aside from general principles of procedural fairness (which would require an affected employer to bring a judicial review claim if these were not applied) there is no legislative requirement for the minister to apply these processes. It is not clear why these processes cannot be set out in the legislative instrument itself.

2.225 The minister also advised that no merits review of a decision to list an employer is available as the decision 'has a somewhat limited impact' and does not 'directly preclude an employer from continuing to operate their business or be an employer'. While it is acknowledged that the listing will not directly prevent an employer from operating their business, inclusion on a publicly accessible list that states that the employer may pose a risk to health and safety may have a great impact on the reputation of the employer, which in turn could harm their business. Noting this, it is not clear why there is no provision for independent merits review of the decision to include an employer on the list. It is also not clear what an employer can do to seek to be removed from the list should circumstances change in the future.

2.226 The scope of personal information published on the list is also relevant in considering the extent of any interference with the right to privacy. The minister advised that when naming an employer, the minister will avoid naming individuals and would only do so where no other means of identifying the employer was possible. This is an important safeguard, and if individuals were not named this would significantly safeguard the right to privacy. However, as this is not specified in the legislative instrument, the risk remains that individuals may be named in broader circumstances. Further, it is noted that some businesses, particularly small businesses or sole traders, may operate under names that readily identify the business owner, and public listing in these instances may therefore still cause great reputational damage to the individual. The minister has further advised that the list will not specify the reasons

why an employer has been included. 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 the employer's name, the effect on the right to privacy and reputation may be considerable. Further consideration could be given to allow for employers who are listed to ask to have the reasons for their inclusion on the list added, to allow employers some control over any reputational damage.

2.227 Finally, another relevant factor in assessing the proportionality of a measure is whether there are other less rights-restrictive measures available to achieve the stated objective. The statement of compatibility stated that the objective of the measure was 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'.[13] The minister advised that providing a list of excluded employers to WHM visa holders and applicants, rather than to the general public, would only assist the objective of the measure 'on a specific individual level' and would be ineffective in achieving the objective of strengthening 'the overall international reputation of the WHM visa program and encouraging employers of WHM visa holders to maintain the highest standards in their employment practices'. It remains unclear however why these objectives cannot be achieved by ensuring information on excluded employers is provided to all WHM visa holders (be it in physical form, or accessible via a secure website), as it would appear that WHM visa holders would still be aware of what employers not to work for, employers would be aware of this, and the international reputation would likely be enhanced by such processes. As such, the public nature of the list does not appear to be the least rights-restrictive approach to achieving the objective of the measure.

Committee view

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

2.229 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.

2.230 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

13 Statement of compatibility, p. 5.

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.

2.231 The committee considers that the measure pursues the legitimate objective of seeking to improve the safety and well-being of migrant workers and that this measure is likely to be effective to achieve that objective. However, noting the breadth of the minister's discretion to include employers on the list, the lack of independent merits review, the power to include individual names, and the public accessibility of the list, the committee considers the measure risks being a disproportionate limit on the right to privacy.

Suggested action

2.232 The committee considers that the proportionality of the measure may be assisted were the legislative instrument amended to:

- **(a) set out the matters the minister may have regard to when considering whether to list an employer;**
- **(b) set out the process of making a decision to include an employer on the list, including that written reasons must be provided to the employer and the employer has a right of reply;**
- **(c) provide for independent merits review of the minister's decision to list an employer, including the ability to seek review of a listing if the employer can demonstrate they have improved their health and safety record;**
- **(d) state that individuals will not be named unless there is no other way of identifying the employer; and**
- **(e) provide that the list not be made publicly available, but only made available to those requiring access (such as WHM visa holders and applicants).**

2.233 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.

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

Dr Anne Webster MP

Chair