

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

Legislative instruments

Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 2) Determination 2021 [F2021L01463]²

Purpose	This legislative instrument establishes an automatic exemption for fully vaccinated Australian citizens and permanent residents to depart Australian territory, provided they meet the specified criteria from 1 November 2021
Portfolio	Health
Authorising legislation	<i>Biosecurity Act 2015</i>
Last day to disallow	This instrument is exempt from disallowance (see subsections 44(3) and 477(2) of the <i>Biosecurity Act 2015</i>)
Rights	Freedom of movement, private life, equality and non-discrimination

2.3 The committee requested a response from the minister in relation to this legislative instrument in [Report 13 of 2021](#).³

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 (Human Coronavirus with Pandemic Potential) Amendment (No. 2) Determination 2021 [F2021L01463], *Report 15 of 2021*; [2021] AUPJCHR 152.

3 Parliamentary Joint Committee on Human Rights, *Report 13 of 2021* (10 November 2021), pp. 22-26.

Exemption to the overseas travel ban

2.4 Since 25 March 2020, Australian citizens and permanent residents have been prohibited from leaving Australian territory unless they have an exemption.⁴ This has been declared by the Minister for Health using emergency powers under the *Biosecurity Act 2015* intended to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australia. A person who fails to comply with this requirement may be subject to a criminal offence, punishable by imprisonment for a maximum of five years, or 300 penalty units, or both.⁵

2.5 The Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 2) Determination 2021 (the determination) sets out an exemption from the ban from 1 November 2021 for persons who have completed a course of a COVID-19 vaccination at least seven days prior to travelling, and can show evidence of this.

2.6 In addition, there already exists the power for officials to grant an exemption, in writing, from the travel ban in ‘exceptional circumstances’, which can be demonstrated by ‘providing a compelling reason for needing to leave Australian territory’.⁶ The determination removes the requirement that the exemption must be in writing for two groups, namely: for children under 12 years of age on the date of travel; and persons who have evidence that they are listed on the Australian Immunisation Register as having a medical contraindication to COVID-19 vaccines. As a result, exemptions from the travel ban could be given orally.

Summary of initial assessment

Preliminary international human rights legal advice

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

2.7 The committee has considered the human rights issues raised by the overseas travel ban on a number of occasions,⁷ most recently stating there is a risk that the longer these emergency powers continue, the less likely it is to be considered a temporary measure and the more likely it is to constitute a significant interference with rights, and emphasising the importance that it be accompanied by sufficient

4 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [[F2021C00819](#)].

5 *Biosecurity Act 2015*, subsection 479(3).

6 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [[F2021C00819](#)], section 7.

7 See Parliamentary Joint Committee on Human Rights, [Report 5 of 2020](#) (pp. 19-21); [Report 7 of 2020](#) (pp. 7-10); [Report 12 of 2020](#) (pp. 6-14); [Report 6 of 2021](#) (pp. 2-7); [Report 8 of 2021](#) (pp. 2-12 and pp. 39-56); and [Report 12 of 2021](#) (pp. 79-104).

safeguards.⁸ By adding an automatic exemption from the travel ban for vaccinated travellers, the measure promotes the right to freedom of movement and the right to a private life, by allowing a greater number of people to leave Australia without the need to apply for an exemption. The right to freedom of movement encompasses the right to move freely within a country, and the right to leave any country, including a person's own country.⁹ The right to a private life prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.¹⁰ A private life is linked to notions of personal autonomy and human dignity, and 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.

2.8 Applying the automatic exemption from the travel ban only to vaccinated travellers, engages the right to equality and non-discrimination.¹¹ This right 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.¹² Discrimination occurs if a measure is directed towards, or exclusively or disproportionately affects, people with a particular protected attribute.¹³ These protected attributes 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. Vaccination status is not one of these protected attributes, so treating unvaccinated persons differently, by only exempting vaccinated travellers from the travel ban, does not constitute direct discrimination under international human rights law.

2.9 However, 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. If there are groups who are unable to get vaccinated, such as on the basis of their age or

8 See Parliamentary Joint Committee on Human Rights, [Report 12 of 2021](#) (pp. 79-104).

9 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].

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

11 Articles 2 and 26 of the International Covenant on Civil and Political Rights.

12 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.

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

disability,¹⁴ limiting the exemption to only those who are vaccinated may indirectly discriminate against these groups. However, differential treatment will not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.¹⁵

2.10 In order to assess the compatibility of this measure with the right to equality and non-discrimination, further information is required as to:

- (a) why there is no automatic exemption from the travel ban for people who are unable to receive a COVID-19 vaccination on the basis of their age or disability (such as children under 12 years old and those who have a recognised medical contraindication to the vaccine);
- (b) in practice, how will the exemption process likely work for these groups, including whether they could get the exemption on the day of travel, and what recourse would they have were an exemption not granted; and
- (c) how excluding these groups from the automatic exemption process is compatible with the right to equality and non-discrimination.

Committee's initial view

2.11 The committee considered that by adding an automatic exemption from the travel ban for vaccinated travellers, the measure promotes the right to freedom of movement and the right to a private life. The committee noted that as there are some people who are currently ineligible to receive a COVID-19 vaccination (children aged under 12 and a small number with recognised medical contraindications to the vaccines), not providing an automatic exemption from the travel ban for these groups may constitute indirect discrimination on the basis of age or disability. The committee noted that differential treatment will not constitute unlawful discrimination if it is based on reasonable and objective criteria.

14 If there were evidence of certain groups having lower rates of vaccination, for example, on the basis of vaccine availability in certain locations; lower rates among certain minority groups; or because of religious views, this might constitute indirect discrimination on the basis of a protected attribute, such as residence, race or religion. However, as noted above, differential treatment will not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

15 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

2.12 As there is no statement of compatibility accompanying this determination,¹⁶ further information was required to fully assess the human rights compatibility of this measure and the committee sought the minister's advice as to the matters set out at paragraph [2.10].

2.13 The full initial analysis is set out in [Report 13 of 2021](#).

Minister's response¹⁷

2.14 The minister advised:

Why there is no automatic exemption from the travel ban for people who are unable to receive a COVID-19 vaccination on the basis of their age or disability (such as children under 12 years old and those who have a recognised medical contraindication to the vaccine)

There is no automatic exemption from the travel ban for people who are unable to receive a COVID-19 vaccination based on their age or medical contraindication as these cohorts still pose a public health risk to the broader Australian community by not being vaccinated. These cohorts can still be infected with COVID-19 and transmit their infection to others. However, as the vaccination rates in Australia and overseas continue to increase, the risk of these cohorts becoming infected and/or transmitting COVID-19 to others decreases. These cohorts must travel at their own risk, and can only travel overseas if, at the time of departure, they hold proof of being under 12 years of age, or proof of their medical contraindication.

The Overseas Travel Ban is a temporary measure, only to be in place while COVID-19 poses a severe and immediate threat, or is causing harm, to human health on a nationally significant scale. The repeal of the Overseas Travel Ban will also be in line with the National Plan to transition Australia's National COVID-19 Response.

In practice, how will the exemption process likely work for these groups, including whether they could get the exemption on the day of travel, and what recourse would they have were an exemption not granted

The Department of Home Affairs website has information on how the exemption process works concerning outbound international travel. The

16 The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9, provides that only legislative instruments subject to disallowance under the *Legislation Act 2003* require a statement of compatibility. As this legislative instrument is exempt from disallowance it is not required by law to be accompanied by a statement of compatibility.

17 The minister's response to the committee's inquiries was received on 25 November 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.

following information has been taken from the Home Affairs website as at 17 November 2021.

Children under 12 years of age, and Australian citizens and permanent residents with acceptable proof they cannot be vaccinated for medical reasons, are able to travel overseas without seeking an exemption.

These cohorts must have the requisite proof of their age or medical contraindication, and can show this proof to a Department Home Affairs employee if requested to do so by a Department Home Affairs employee.

If an Australian citizen or permanent resident is departing Australia, they will need to show evidence that they have a medical contraindication reported to the Australian Immunisation Register (AIR) for all COVID-19 vaccines available in Australia. As proof, they should provide their Australian COVID-19 Vaccination Certificate issued by Services Australia. If someone cannot get any of the approved COVID-19 vaccines for medical reasons, that will be recorded on their immunisation history statement and COVID-19 digital certificate. If a temporary medical contraindication has been recorded on the AIR, the COVID-19 digital certificate will display a 'valid to' date. Only eligible health professionals as defined on the Department of Health website can report medical contraindications to the AIR.

Specific questions on the exemption process should be directed to the Department of Home Affairs and/or the Minister for Home Affairs Hon Karen Andrews MP as the policy owners of the exemptions process.

Specific questions on the Australian COVID-19 Vaccination Certificate should be directed to Services Australia and/or the Minister for Government Services, Senator the Hon Linda Reynolds CSC.

How excluding these groups from the automatic exemption process is compatible with the right to equality and non-discrimination

The effects of the COVID-19 pandemic have been devastating in Australia. Hundreds of thousands have been infected with COVID-19, and thousands have lost their lives due to COVID-19. COVID-19 has significantly affected the wider Australian community socially and financially. To prevent COVID-19 and its dangerous variants from entering, emerging, establishing and spreading in Australian territory, strict measures were implemented by various Australian Government, state and territory legislation.

Determinations made under section 477 of the *Biosecurity Act 2015* (Cth) apply despite any provision of any other Australian law (being a law of the Commonwealth, or of a State or Territory). The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 is an example of a section 477 requirement.

Australia's process of reopening its international borders is and will continue to be based on public health advice. The amendments to the Overseas Travel Ban was one of the first steps in winding back restrictions on overseas

travel, largely based on vaccination rates in Australia at the time the amendment decision was made. It is important at-risk cohorts of Australians and permanent residents are managed appropriately as Australia reopens to the world. It is important to note again that the Overseas Travel Ban is a temporary measure, and can only be in effect as long as there is sufficient public health justification.

Concluding comments

International human rights legal advice

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

2.15 The initial analysis noted that the measure promotes the rights to freedom of movement and a private life by adding an automatic exemption from the travel ban for vaccinated travellers. However, further information was sought as to the compatibility of the measure with the right to equality and non-discrimination in relation to persons who are unable to receive the COVID-19 vaccination, including those under the age of 12 years who are not currently eligible to receive the COVID-19 vaccination, and those who have a recognised medical contraindication to the COVID-19 vaccines¹⁸ on the basis of their pre-existing impairment. For these groups there is no automatic exemption from the travel ban, and as such they may be disproportionately affected by the ban on the basis of their age or disability. These groups may be granted an exemption from the travel ban without the need for officials to set out the exemption in writing but, unlike vaccinated travellers, they must still demonstrate that they have a compelling reason for needing to leave Australia. As noted in the initial analysis, differential treatment will not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective, and is a proportionate means of achieving that objective.¹⁹

2.16 The minister advised that there is no automatic exemption from the travel ban for persons unable to receive the COVID-19 vaccination because these cohorts still pose a public health risk to the broader Australian community by being unvaccinated. The minister stated that these cohorts can be infected with COVID-19 and transmit the infection to others in the community, and it is important to appropriately manage at-risk cohorts as restrictions on overseas travel are wound back. The minister noted that as vaccination rates increase in Australia and overseas, the risk of these cohorts becoming infected and/or transmitting COVID-19 to others will decrease. The explanatory statement also emphasised the need to reduce the burden of COVID-19

18 See Australian Technical Advisory Group on Immunisation (ATAGI), *Clinical guidance on use of COVID-19 vaccine in Australia in 2021*, version 7.0, 19 August 2021.

19 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

on Australia's public health and quarantine systems, noting that fully vaccinated persons travelling overseas pose less of a risk to Australia's public health and quarantine systems than non-vaccinated persons.²⁰

2.17 The measure appears to pursue a legitimate objective, namely that of protecting the quarantine and health resources needed to prevent and control the entry, and the emergence, establishment or spread of COVID-19 in Australia. Noting that unvaccinated persons pose a greater risk of becoming infected and/or transmitting COVID-19, it also appears that not granting an automatic exemption to at-risk cohorts is likely to be rationally connected to (that is, effective to achieve) the objective sought to be achieved.

2.18 The committee has considered the human rights issues raised by the overseas travel ban on a number of occasions.²¹ Most recently, as regards proportionality, the committee has stated there is a risk that the longer these emergency powers continue, the less likely it is to be considered a temporary measure and the more likely it is to constitute a significant interference with rights, and emphasised the importance that it be accompanied by sufficient safeguards.²² In this regard, the exemption process for persons who are not granted an automatic exemption may operate as a safeguard, as it would provide flexibility to treat different cases differently, having regard to the merits of an individual case. However, the strength of this safeguard depends on how it is likely to work in practice. In this regard, the minister advised that the Department of Home Affairs website has the relevant information on how the exemption process works concerning outbound international travel. In particular, the website states that children under 12 years of age and Australian citizens and permanent residents with acceptable proof they cannot be vaccinated for medical reasons, are able to travel overseas without seeking an exemption.²³ The minister stated that these cohorts must have the requisite proof of their age or medical contraindication and show this proof to a Department of Home Affairs employee if requested to do so. While not explicitly stated in the minister's response, it appears that this evidence may be able to be provided at the airport on the day of travel. The website states that a child's passport will be used as proof of age.²⁴ For those who have a medical contraindication, the minister stated that evidence of this contraindication must be reported in the

20 Explanatory statement, p. 1.

21 See Parliamentary Joint Committee on Human Rights, [Report 5 of 2020](#) (pp. 19-21); [Report 7 of 2020](#) (pp. 7-10); [Report 12 of 2020](#) (pp. 6-14); [Report 6 of 2021](#) (pp. 2-7); [Report 8 of 2021](#) (pp. 2-12 and pp. 39-56); and [Report 12 of 2021](#) (pp. 79-104).

22 See Parliamentary Joint Committee on Human Rights, [Report 12 of 2021](#) (pp. 79-104).

23 Department of Home Affairs, *Leaving Australia*, 2 December 2021, <https://covid19.homeaffairs.gov.au/leaving-australia> (accessed 2 December 2021).

24 Department of Home Affairs, *Vaccinated travellers*, 2 December 2021, <https://covid19.homeaffairs.gov.au/vaccinated-travellers> (accessed 2 December 2021).

Australian Immunisation Register and persons should provide their Australian COVID-19 digital certificate as proof of their medical contraindication.²⁵ The website states that if a person cannot provide evidence of their medical contraindication being listed in the Australian Immunisation Register, they will need to apply for an exemption to leave Australia.²⁶

2.19 While at-risk cohorts are not granted an automatic exemption, it appears they may still be granted an exemption to travel overseas if they can provide the requisite evidence to a Department of Home Affairs employee. The requisite evidence is clearly set out on the Department of Home Affairs website and appears to be only information strictly necessary to establish that a person is under 12 years of age or has a medical contraindication to the COVID-19 vaccination. If a person is refused a medical exemption because they are unable to prove they have a medical contraindication to the COVID-19 vaccination, they may still apply for an exemption to leave Australia.²⁷ This exemption process assists with the proportionality of the measure. In addition, as noted by the minister, this is a temporary measure that will only remain in effect for as long as there is sufficient public health justification. For these reasons, the measure's differential treatment of certain persons on the basis of age and disability appears to be based on reasonable and objective criteria such that it is reasonable, necessary and proportionate.

Committee view

2.20 The committee thanks the minister for this response. The committee notes this determination provides an exemption from the overseas travel ban for persons who have completed a course of a COVID-19 vaccination at least seven days prior to travelling and can show evidence of this. It also removes the requirement that exemptions for those who can provide a compelling reason for needing to leave Australian territory, be in writing, if it relates to children under 12 or those with recognised medical contraindication to the COVID-19 vaccines.

25 See also Department of Home Affairs, *Vaccinated travellers*, 2 December 2021, <https://covid19.homeaffairs.gov.au/vaccinated-travellers> (accessed 2 December 2021).

26 Department of Home Affairs, *Vaccinated travellers*, 2 December 2021, <https://covid19.homeaffairs.gov.au/vaccinated-travellers> (accessed 2 December 2021). For information about travel restrictions and exemptions for unvaccinated Australians and permanent residents, see Department of Home Affairs, *Leaving Australia*, 2 December 2021, <https://covid19.homeaffairs.gov.au/leaving-australia> (accessed 2 December 2021).

27 The committee has previously considered the adequacy of the exemptions process, raising concerns about the lack of access to independent review in relation to a decision to refuse an exemption; and the breadth of the discretion conferred on authorised officers to grant or refuse an exemption, noting that it is not subject to external oversight. See Parliamentary Joint Committee on Human Rights, *Report 12 of 2021* (pp.79–104).

2.21 By adding an automatic exemption from the travel ban for vaccinated travellers, the committee considers this measure promotes the rights to freedom of movement and a private life, by allowing a greater number of people to leave Australia without the need to apply for an exemption.

2.22 The measure also engages the right to equality and non-discrimination. The committee notes that this right applies to those with a protected attribute recognised under international human rights law, such as race, sex, nationality or disability. The committee considers that a person's vaccination status, or opposition to vaccination, is not a protected attribute, and as such, treating unvaccinated persons differently, by only exempting vaccinated travellers from the travel ban, does not constitute direct discrimination against unvaccinated persons.

2.23 The committee notes that as there are some people who are currently ineligible to receive a COVID-19 vaccination (children aged under 12 and a small number with recognised medical contraindications to the vaccines), not providing an automatic exemption from the travel ban for these groups may constitute indirect discrimination on the basis of age or disability. The committee notes that differential treatment will not constitute unlawful discrimination if it is based on reasonable and objective criteria.

2.24 The committee considers the measure pursues a legitimate objective, namely that of protecting the quarantine and health resources needed to prevent and control the entry, and the emergence, establishment or spread of COVID-19 in Australia. Noting the minister's advice that unvaccinated persons pose a greater risk of becoming infected and/or transmitting COVID-19, the committee considers that not granting an automatic exemption to at-risk cohorts is likely to be effective to achieve this objective. The committee notes that while these cohorts are not granted an automatic exemption, they may still be granted an exemption to travel overseas if they can provide the requisite evidence to a Department of Home Affairs employee. The committee considers that this exemption process, as well as the temporary nature of the measure, assists with the proportionality of the measure. For these reasons, the committee considers that the differential treatment of certain persons on the basis of age and disability appears to be based on reasonable and objective criteria such that it is reasonable, necessary and proportionate, and has concluded its examination of this legislative instrument.

2.25 Finally, noting the human rights implications of legislative instruments dealing with the COVID-19 pandemic, the committee reiterates²⁸ its expectation that

28 The committee first stated this in Parliamentary Joint Committee on Human Rights, *Report 5 of 2020: Human rights scrutiny of COVID-19 legislation*, 29 April 2020. The committee also wrote to all ministers advising them of the importance of having a detailed statement of compatibility with human rights for all COVID-19 related legislation in April 2020 (see media statement of 15 April 2020, available on the committee's [website](#)).

all such legislative instruments should be accompanied by a detailed statement of compatibility with human rights, which may alleviate the need for the committee to require further information from the minister to assess human rights compatibility.

Dr Anne Webster MP

Chair