Chapter 1[1]

New and continuing matters

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

- bills introduced into Parliament between 2 to 4 and 15 to 18 February 2021;
- legislative instruments registered on the Federal Register of Legislation between 22 December 2020 to 27 January 2021;[2] and
- two bills previously deferred.[3]

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

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

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 2 of 2021*; [2021] AUPJCHR 17.

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

3 Data Availability and Transparency Bill 2020 and Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, which were previously deferred in *Report 1 of 2021*.

Bills

Biosecurity Amendment (Strengthening Penalties) Bill 2021[1]

Purpose	This bill seeks to increase civil penalties that could be imposed for non-compliance with requirements under the *Biosecurity Act 2015*
Portfolio	Agriculture, Water and the Environment
Introduced	House of Representatives, 18 February 2021
Right	Criminal process rights

Increased civil penalties

1.4 This bill seeks to increase 28 penalties that apply to specified criminal offences and civil penalty provisions across the *Biosecurity Act 2015* (Biosecurity Act) relating to the management of risk of pests and diseases entering Australian territory. For example, the bill would increase the civil penalty for bringing or importing prohibited or suspended goods in Australian territory from 120 penalty units (currently $26,640)[2] to 1000 penalty units ($222,000).[3]

Preliminary international human rights legal advice

Criminal process rights

1.5 By increasing civil penalties for breaches of certain provisions of the Biosecurity Act this measure may engage criminal process rights. This is because certain civil penalties may, depending on the context, be regarded as criminal for the purposes of international human rights law. In assessing whether a civil penalty may be considered criminal, it is necessary to consider:

- the domestic classification of the penalty as civil or criminal (although the classification of a penalty as 'civil' is not determinative as the term 'criminal' has an autonomous meaning in human rights law);
- the nature and purpose of the penalty: a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity Amendment (Strengthening Penalties) Bill 2021, *Report 2 of 2021*; [2021] AUPJCHR 18.

2 *Crimes Act 1914*, section 4AA.

3 Schedule 1, item 1, table item 14, subsection 185(3).

than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty; and

- the severity of the penalty.

1.6 The statement of compatibility states that the civil penalties will apply to people involved in bringing or importing goods into Australian territory, including importers and biosecurity industry participants (as defined in section 14 of the Biosecurity Act), and states that such persons will reasonably be expected to be aware of their obligations under the Biosecurity Act, because they engage in an activity that is regulated.[4] It states that the upper range of civil penalty amounts in the bill are proposed for contraventions involving 'aggravated circumstances'.[5] However, it is not clear whether these civil penalties could be applied to the general public, including in 'aggravated circumstances'. For example, it is not clear whether a person who brings a prohibited item (such as food or other organic item, such as a souvenir) with them on a plane into Australia, and who fails to declare it to customs, could be liable to pay a revised civil penalty of 1000 penalty units (or $222,000)[6] pursuant to the proposed amendment to subsection 185(3) of the Biosecurity Act.

1.7 If the civil penalty provisions were considered to be 'criminal' for the purposes of international human rights law, this does not mean that the relevant conduct must be turned into a criminal offence in domestic law nor does it mean that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right not to be tried twice for the same offence,[7] and the right to be presumed innocent until proven guilty according to law.[8]

1.8 Further information is required in order to conduct a full assessment of the potential limitation on criminal process rights, in particular:

(a) whether the proposed civil penalties in the bill could apply to members of the public; and
(b) whether any of the proposed civil penalties could be characterised as criminal for the purposes of international human rights law, and if so, how they are compatible with criminal process rights.

4 Statement of compatibility, p. 24.

5 Statement of compatibility, p. 24.

6 The current penalty unit is $222, see *Crimes Act 1914*, section 4AA.

7 International Covenant on Civil and Political Rights, article 14(7).

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

Committee view

1.9 The committee notes that the bill seeks to increase the civil penalties that could be imposed for non-compliance with requirements under the *Biosecurity Act 2015* relating to the management of risk of pests and diseases entering Australian territory.

1.10 The committee notes it is not clear if these provisions could apply to members of the general public (rather than being restricted to an import or export context). The committee notes that these civil penalties may engage criminal process rights, if they are more properly to be regarded as criminal penalties for the purposes of human rights law. If this were the case, the civil penalty provisions in question must be shown to be consistent with the criminal process guarantees.

1.11 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill, and as such seeks the minister's advice as to the matters set out at paragraph [1.8].

Data Availability and Transparency Bill 2020[1]

Purpose	This bill seeks to establish a legislative framework to facilitate the sharing of, and controlled access to, public sector data held by Commonwealth bodies with accredited entities, and to establish the National Data Commissioner
Portfolio	Prime Minister
Introduced	House of Representatives, 9 December 2020
Rights	Privacy

Public sector data sharing scheme

1.12 This bill seeks to establish a legislative framework for the sharing of public sector data, operating in addition to existing legislative mechanisms for data sharing. The bill would enable data custodians (being Commonwealth bodies which control the relevant data and have a right to deal with it)[2] to share their data with accredited users, either directly or via an intermediary termed an 'accredited data service provider'.[3] This would permit the sharing of data even where an existing applicable legislative scheme would prevent disclosure of the relevant data.

1.13 The bill defines 'data' broadly to mean 'any information in a form capable of being communicated, analysed or processed (whether by an individual or by a computer or other automated means)'.[4] The term 'public sector data' means data which is lawfully collected, created or held by or on behalf of a Commonwealth body.[5] An accredited entity with which Commonwealth data may be shared may include:

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Data Availability and Transparency Bill 2020, *Report 2 of 2021*; [2021] AUPJCHR 19.

2 Chapter 1, Part 1.2, subclause 11(2). Per subclause 11(3), Commonwealth entities which operate in national security and intelligence (including the Australian Security Intelligence Organisation and the Office of National Intelligence) are excluded from the definition of 'data custodian'.

3 An entity may be accredited as either a 'user' or 'data service provider' if the National Data Commissioner is satisfied that they meet the criteria for accreditation. See, Chapter 5, Part 5.2, clause 74.

4 Chapter 1, Part 1.2, subclause 10(5).

5 Chapter 1, Part 1.2, subclause 10(2). This subclause notes that 'public sector data' includes: accredited data service provider-enhanced data; and output of which a Commonwealth body is declared by a data sharing agreement to be the data custodian.

non-corporate Commonwealth bodies;[6] entities from other levels of government; and industry, research and other entities in the private sector.[7]

1.14 The sharing of data pursuant to the scheme would be authorised where the sharing is:

(a) for a 'data sharing purpose' (being the delivery of government services; informing government policy; or research and development);[8]

(b) consistent with five 'data sharing principles', including the requirement that the sharing can reasonably be expected to serve the public interest; that any sharing of personal information of individuals is done with their consent, unless it is unreasonable or impracticable to seek their consent; and that appropriate protections are applied to the data;[9]

(c) not explicitly excluded from the scheme;[10] and

(d) in accordance with a data sharing agreement between a data custodian and an accredited user.[11]

1.15 Data scheme entities would be subject to data breach responsibilities, including an obligation to take steps to mitigate a data breach, and a requirement to notify specified persons of a data breach.[12] The unauthorised sharing of data under the scheme would be subject to a civil penalty of 300 penalty units,[13] or imprisonment for up to two years where a person was reckless with respect to the circumstance that the sharing was not authorised.[14]

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6 Chapter 5, Part 5.2, clause 74. See also, explanatory memorandum, p. 47.

7 Explanatory memorandum, p. 4.

8 Chapter 2, clause 15. Subclause 15(2) states that the sharing of data for enforcement-related purposes, or a purpose which relates to, or prejudices, national security, or a purpose prescribed by rules, is precluded.

9 Chapter 2, clause 16.

10 Clause 17 of the bill proposes that sharing of data would be excluded from the scheme in a number of specified instances, including where: it relates to national security or law enforcement; would contravene or infringe rights such as intellectual property; the sharing would be inconsistent with Australia's obligations under international law; the data is being held as evidence before a court, or subject to court/tribunal orders; or it is prohibited under regulations.

11 Chapter 2, clauses 18–19.

12 Chapter 3, Part 3.3.

13 Chapter 2, subclauses 14(1) and (3).

14 Chapter 2, subclauses 14(2) and (4).

1.16 The bill would further provide for the establishment of the National Data Commissioner (the Commissioner), who would serve as statutory regulator for the scheme and whose role would include 'advocating for the sharing and release of public sector data more generally'.[15] The Commissioner would be empowered to enforce the scheme, including by assessing, monitoring and investigating data scheme entities. The Commissioner would have several enforcement powers, including the ability to: suspend, cancel or impose conditions on an entity's accreditation; issue written directions to a data scheme entity; impose a civil penalty; issue infringement notices; accept and enter into enforceable undertakings; and apply for injunctions.[16]

Preliminary international human rights legal advice

Right to privacy

1.17 This bill would facilitate the sharing of an extremely wide range of data held by Commonwealth bodies with other government and non-government entities (excluding only that data which is explicitly excluded from the scheme).[17] The bill defines the term 'public sector data' very broadly, and the term 'data' itself refers to *any* information capable of being communicated, analysed or processed.[18] The explanatory memorandum states that this data includes personal information, as defined by the *Privacy Act 1988* (Privacy Act).[19] In addition, the scheme would override a range of existing secrecy provisions preventing the sharing of data,[20] in order to facilitate the sharing of data. Commonwealth bodies hold an extremely broad range of complex information, including sensitive personal information about individuals in relation to: health; migration and citizenship; child support; social security; employment; disability; and Indigenous affairs. Given the breadth and depth of information which could be shared, and with a wide group of entities, the proposed measure engages and limits the right to privacy.

1.18 The right to privacy is multi-faceted. It comprises respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[21] It prohibits arbitrary

15 Chapter 4, Part 4.2, see, clause 4.

16 Chapter 5, Part 5.5.

17 The sharing of data for an enforcement-related purposes, a purpose relating to or prejudicing national security, or a purpose prescribed by the rules, would be precluded under this scheme. See, Chapter 2, subclause 15(2). See also, Chapter 1, Part 1.2, subclause 11(3), which excludes specific entities from participation in the scheme.

18 Chapter 1, Part 1.2, subclauses 10(2) and (5).

19 Explanatory memorandum, p. 16.

20 Chapter 2, clause 23.

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

and unlawful interferences with an individual's privacy, family, correspondence or home.[22] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life,[23] meaning that any interference with a person's privacy—including one provided for by law—should be in accordance with the provisions, aims and objectives of the International Covenant on Civil and Political Rights, and be reasonable in the particular circumstances.[24] The right to privacy also includes the right to control the dissemination of information about one's private life, and requires that States Parties take effective measures to ensure that information concerning a person's private life does not reach the hands of persons who are not authorised by law to receive, process and use it.[25] It also requires that legislation must specify in detail the precise circumstances in which an interference with privacy will be permitted.[26]

1.19 The right to privacy may be subject to permissible limitations where the limitation:

(a) pursues a legitimate objective;

(b) is rationally connected to that objective; and

(c) is a proportionate means of achieving that objective.

Legitimate objective and rational connection

1.20 The explanatory memorandum states that this data sharing scheme is intended to facilitate greater data availability and use, in order to support economic and research opportunities, and streamline service delivery.[27] The second reading speech highlights the recent pressures placed on public service delivery following the 2020 bushfire season and the COVID-19 pandemic, and the subsequent roll-out of programs like the JobKeeper payment.[28] It states that greater data sharing will support a 'tell us once' approach to public service delivery by breaking down

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

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

24 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)* (1988) [4].

25 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)* (1988) [10].

26 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)* (1988) [8].

27 Explanatory memorandum, p. 3.

28 See, Minister for the National Disability Insurance Scheme and Minister for Government Services, the Hon Stuart Robert MP, Second Reading Speech on the Data Availability and Transparency Bill, 9 December 2020.

information silos between agencies, as well as supporting collaboration between Commonwealth and State and Territory governments on nationally significant policies and programs.[29] The explanatory memorandum further identifies that data could be permissibly shared under this scheme in order to support the delivery of government services, including by improving user experiences through simplified or automated systems such aspre-filled forms.[30] It would appear, therefore, that this bill seeks to achieve several broad objectives.

1.21 However, the statement of compatibility does not itself identify what objectives the bill seeks to achieve, nor does it articulate whether and how those objectives constitute a legitimate objective for the purposes of international human rights law. A legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. It is not sufficient that a measure seeks an outcome regarded as desirable or convenient. For example, administrative convenience (such as the pre-filling of forms), in and of itself, is unlikely to be sufficient to constitute a legitimate objective to warrant limiting the right to privacy for the purposes of international human rights law. Consequently, further information is required as to the objectives which this measure seeks to achieve, and whether and how those objectives constitute a legitimate objective for the purposes of international human rights law, and how the measure is likely to be effective to achieve those objectives.

Proportionality

1.22 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider whether a proposed limitation: is sufficiently circumscribed; accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective. Another relevant factor in assessing whether a measure is proportionate is whether there is the possibility of oversight and the availability of review.

1.23 The statement of compatibility briefly lists several measures in the bill, which it states assist with the proportionality of any limitation on the right to privacy. Foremost, it highlights that the sharing of data will only be permissible under this scheme where it is for a permitted data sharing purpose. That is, the 'delivery of government services'; 'informing government policy and programs'; and 'research and development'.[31] However, these purposes are broadly framed and not defined in the bill. For example, it is unclear whether the 'delivery of government services'

29 See, Minister for the National Disability Insurance Scheme and Minister for Government Services, the Hon Stuart Robert MP, Second Reading Speech on the Data Availability and Transparency Bill, 9 December 2020.

30 Explanatory memorandum, p. 22.

31 Chapter 2, clause 15.

would encompass the sharing of data for purposes related to the withholding of government services (such as identifying ways in which to reduce certain social security payments). The bill provides that in considering whether sharing is for a data sharing purpose, the data scheme entity must comply with the rules and any data codes and guidelines.[32] However, there is no legislative requirement that such codes and guidelines be made[33] and it is not clear whether they will contain further detail as to what is captured by these three permitted purposes. Consequently, questions remain as to what safeguard value the data sharing purposes have.

1.24 The bill further explicitly precludes the sharing of some data under this scheme: for 'enforcement-related purposes'; for 'a purpose which relates to, or prejudices, national security'; or for another purpose prescribed by the rules.[34] In addition, the bill excludes Commonwealth national security-related entities from being accredited to share data under the scheme.[35] These exclusions assist with circumscribing the type of information that might be shared. However, without knowing what further purposes (if any) may be excluded pursuant to any rules made under this clause, it is difficult to assess the full extent of data that might be excluded from the scheme. In addition, having regard to the excluded data sharing purposes, it is unclear why the Australian Federal Police (AFP) is not explicitly excluded from accreditation under the scheme, noting that the sharing of any operational data held by the AFP is excluded.[36]

1.25 The statement of compatibility further identifies the 'data sharing principles' as a mechanism by which to manage the risks of sharing data across all aspects of a data-sharing project.[37] These principles relate to: the sharing of data only for an appropriate project or program of work; data only being made available to appropriate people; data only being shared in an appropriately controlled environment; the application of appropriate protections to the data; and that data outputs are to be agreed.[38] These data sharing principles help to safeguard the right to privacy, particularly the requirement that appropriate protections must be applied to the data, including that only the data reasonably necessary to achieve the data sharing purpose is shared and that the sharing of personal information be minimised

32 Chapter 2, Part 3.2, clauses 26 and 27.

33 Chapter 6, Part 6.4, clauses 126 and 127

34 Chapter 2, subclause 15(2).

35 Chapter 1, Part 1.2, subclause 11(3). This excludes, for example, the Australian Criminal Intelligence Commissioner, the Australian Security Intelligence Organisation, and the Office of the National Ombudsman.

36 Chapter 2, subclause 17(2)(ii).

37 Statement of compatibility, p. 83.

38 Chapter 2, clause 16.

as far as possible without compromising the data sharing purpose.[39] However, some questions remain as to the safeguard value of the data sharing principles in terms of regulating the purposes for which information may be disclosed. In particular, subclause 16(2)(a) provides that data may be shared where the sharing can reasonably be expected to serve the 'public interest'. This term is not defined in the bill, and the explanatory memorandum states only that the manner in which sharing will serve the public interest will be required to be clearly considered and articulated before an agreement is entered into.[40] It is not clear what considerations would be considered relevant in an assessment of the 'public interest' in a specific context.[41] In particular, it is not clear whether factors in considering the public interest will include consideration of the right of individual's to protection of their private information. Further, no guidance is provided as to what kinds of matters would *not* be relevant in terms of demonstrating that a particular data sharing project would be in the public interest.

1.26 In addition, paragraph 16(2)(c) states that the sharing of personal information is to be done with the consent of the individuals concerned, unless it is 'unreasonable or impracticable' to seek their consent. While requiring the consent of individuals could significantly safeguard the right to privacy, it is not clear how broadly the exception of 'unreasonable or impracticable' is applied. The explanatory memorandum states that this reflects the standard of consent contained in the Privacy Act, and should be interpreted using relevant guidance on consent from the Australian Information Commissioner.[42] It further states that whether seeking consent is reasonable or impracticable may depend on the amount, nature and sensitivity of the data involved, and whether individuals gave informed consent for uses including the proposed sharing at the point the data was originally collected.[43] However, it is questionable whether an individual could be said to have voluntarily consented to the onward sharing of their data under this scheme if their original consent was provided in order to apply for government services on which they may rely in order to meet their basic needs (for example, providing personal information to Medicare or Services Australia), given it is not clear if the alternative option would

39 Chapter 2, subclause 16(8).

40 Explanatory memorandum, p. 24.

41 There is legislative precedent for the inclusion of matters which are deemed relevant to the disclosure of information in the public interest. For example, the *Right to Information Act 2009* (QLD) sets out a list of factors which favour disclosure in the public interest, including that the disclosure could reasonably be expected to: promote open discussion of public affairs and enhance the Government's accountability; reveal environmental or health risks or measures relating to public health and safety; or contribute to positive and informed debate on important issues or matters of serious interest. (see, Schedule 4, Part 2).

42 Explanatory memorandum, p 24.

43 Explanatory memorandum, p 24.

be to opt out of receiving that service altogether. This raises questions as to the safeguard value of any prior consent provided by an individual when they provided their personal information to a Commonwealth entity in the first instance. In addition, no comprehensive guidance is provided as to the circumstances in which it may be deemed unreasonable and impracticable to seek the consent of affected individuals in order to share their personal information. For example, it is unclear whether it would be deemed impracticable to seek the consent of many affected persons in relation to a large project requiring the sharing of personal social security or health information, simply because of the number of affected persons.

1.27 In addition, subclause 16(8) requires that only data which is reasonably necessary to achieve the data sharing purpose is to be shared, and personal information is to be minimised as far as possible without compromising that data sharing purpose. The statement of compatibility states that applying the principles requires parties to only share data, including personal information, that is reasonably necessary to give effect to the permitted project.[44] As noted above, this could operate as a significant safeguard, as it may result in data being shared which de-identifies or anonymises the individual to whom the data relates. However, this protection is qualified by the requirement that this does not compromise the data sharing purpose. As noted at paragraph [1.23], the data sharing purposes are broadly framed. For example, a data sharing purpose which relates to the delivery of a large government service could potentially require the sharing of a range of personal identifiable information in order to achieve that purpose. The explanatory materials do not provide any information as to whether and in what manner any projects or programs under this data sharing scheme would, for example, require the de-identification of personal information unless it was not possible to achieve the specific data sharing objective without doing so. Rather, they state that particular treatments of data, such as de-identification, encryption, or cleaning data, needed to make it suitable for the user 'are best determined by the data custodian', and decisions made under this principle will have regard to the need for data provided to be useful and to achieve the purpose of sharing.[45] This raises questions as to whether this would adequately safeguard the right to privacy in all instances.

1.28 The statement of compatibility also notes that the sharing of data under this scheme would be excluded if the sharing was inconsistent with Australia's obligations under international law.[46] The explanatory memorandum states that this will ensure that Australia's international commitments are upheld, including under bilateral or multilateral agreements, and that where the Australian Government has collected data from a foreign government, that data cannot be shared through this scheme

44 Statement of compatibility, p. 83.

45 Explanatory memorandum, p. 26.

46 Statement of compatibility, p. 83. See also, Chapter 2, subclause 17(5).

unless the foreign government has agreed to the sharing.[47] This may serve as a useful safeguard, although it is noted that it is unclear how, and on what basis, an assessment that a data sharing agreement is inconsistent with Australia's international legal obligations (including human rights obligations) would be triggered and subsequently tested. While it would appear that the Commissioner may investigate an alleged breach of the scheme by a data entity in response to a complaint by another entity,[48] or self-initiate an assessment of a data scheme entity,[49] it is unclear how, and based on what expertise, the Commissioner would determine that a particular data sharing agreement is inconsistent with international law.[50]

1.29 The statement of compatibility further states that the requirement that users and data service providers must be accredited in order to participate in the scheme protects the right to privacy.[51] In order for the Commissioner to accredit an entity for participation, they must be satisfied that the entity meets the criteria for accreditation under clause 77. This involves an assessment of their capability to: manage scheme data accountably and responsibly; apply the data sharing principles; minimise the risk of unauthorised access, sharing or loss of scheme data; and designate an appropriate qualified person to oversee management of scheme data.[52] This may operate as a useful safeguard, including because it necessitates an assessment of the entity's capacity to manage the scheme data responsibly. However, while the bill does establish a mechanism by which accredited entities may complain to the Commissioner about other accredited entities,[53] it is not clear whether and how those entities would be subject to ongoing project-by-project monitoring of their continued suitability for accreditation under the scheme. While the bill clearly provides that the Commissioner may suspend or cancel an accreditation,[54] the question is how this power would be triggered in practice.

1.30 The statement of compatibility further notes the requirement that personal information which is shared under the scheme must be handled in accordance with existing protections in the Privacy Act or comparable state or territory privacy

47 Explanatory memorandum, p. 28.

48 Chapter 5, Part 5.3.

49 Chapter 5, Part 5.4.

50 In this regard one relevant consideration is the question of whether the National Data Commissioner and their office will be sufficiently independent, and adequately funded and staffed, such that they could effectively monitor this scheme.

51 Statement of compatibility, p. 83.

52 Chapter 5, Part 5.2, clause 77.

53 Chapter 5, Part 5.3.

54 Chapter 5, Part 5.2, clause 81.

protections.[55] The explanatory memorandum explains that this clause has the effect that non-government entities and state and territory government authorities that are not covered by the Privacy Act must either become covered by the Privacy Act or be covered by their own jurisdiction's privacy laws.[56] The Privacy Act and associated Australian Privacy Principles (APPs) do provide safeguard value with respect to the right to privacy. However, the statement of compatibility does not explain what such compliance would mean in the context of this proposed scheme, and how it would serve as a safeguard considering the substantial potential breadth of the data sharing scheme. Further, compliance with the APPs and the Privacy Act are not a complete answer to concerns about interference with the right to privacy for the purposes of international human rights law, noting that this bill would enable the disclosure and use of personal data regardless of any prohibitions in the Privacy Act, so long as it complied with this bill.

1.31 Finally, the statement of compatibility notes the safeguard value of the requirements for mitigation and notification of any data breaches under the scheme; the presence of civil and criminal sanctions for unauthorised sharing of data; the requirement that a register of data sharing agreements and accredited entities be made public; and that an annual report of the scheme be published.[57] These measures have the capacity to serve as useful safeguards, providing for enforcement and external oversight of the scheme. However, no information is provided as to why the scheme would only permit a data scheme entity to complain to the Commissioner about a suspected breach under the scheme, but would not appear to enable an individual whose data has been shared under this scheme to make a complaint. Consequently, it is unclear whether and how an individual could formally complain about matters such as a suspected data sharing breach, suspected data misuse, or to express concerns as to the sharing or use of their data. In addition, some questions remain as to the capacity for the Commissioner to provide genuine independent regulatory oversight of the scheme, given that one of their functions is to advocate for the acceptance of the benefits of sharing and releasing public sector data.[58] In addition, the bill provides that a data sharing agreement may allow the accredited user to provide 'output data' (that is, data that is the result or product of the use of public sector data) to a third party.[59] It is not entirely clear who this output data might be provided to and in what circumstances. In addition, while the bill provides that such data may be required to first be shared with the individuals to whom it relates so they may validate or correct it,[60] it is not clear what safeguard

55 Statement of compatibility, p. 83.

56 Explanatory memorandum, p. 35.

57 Statement of compatibility, p. 83.

58 Chapter 4, Part 4.2, subclause 42(1)(d).

59 Chapter 1, Part 1.2, subclause 10(4).

value this would have in terms of their right to privacy. In addition, the bill provides that the output might be shared in circumstances prescribed by rules,[61] which could permit sharing in far broader circumstances.[62]

1.32 These measures listed in the statement of compatibility may have the capacity to operate as important safeguards with respect to the right to privacy in practice. However, in order to assess the extent to which they may assist with the proportionality of this measure, it is necessary to analyse the intended and potential breadth of the data which could be captured by this scheme. In this regard, the statement of compatibility does not articulate the ways in which these measures may limit the right to privacy, such as by outlining the possible ways in which a specified class of data could be collected, shared and used under this scheme. Without a clear articulation of the manner in which this proposed scheme might limit the right to privacy in practice (through the collection, use and disclosure of data held by the Commonwealth bodies) it is difficult to assess the safeguard value of the measures set out in the statement of compatibility. This is a significant consideration given that this measure is intended to operate extremely broadly, encompassing all public service data held by the Commonwealth government (except where explicitly excluded from the scheme), and to permit the sharing of potentially vast volumes of data, including personal information, to non-government entities. In doing so the measures in this bill would override numerous existing specific legislative safeguards preventing data sharing in specific contexts. Further, while the data sharing principles in the bill would provide high level guidance in relation to the proposed framework for data sharing, the bill would also establish wide-ranging discretion to make legislative instruments and non-legislative guidelines and codes,[63] the content of which is unclear and thus it is not clear how these further measures could alter the operation of the scheme in practice.

1.33 Lastly, in assessing the proportionality of a proposed measure it is necessary to consider the extent of any interference with human rights. The greater the

60 Chapter 2, subclause 21(1)(b)(ii).

61 Chapter 2, paragraphs 21(1)(b)(iii) and 21(2)(b).

62 It is noted that while subclause 19(10) provides that the agreement must specify circumstances that meet the requirements in subclause 21(1), subclause 21(1) instead refers to subclause 19(9) (rather than 19(10)).

63 Clause 126 provides that the Commissioner may, by legislative instrument, make codes of practice about the data sharing scheme. Clause 127 provides that the Commissioner may make written guidelines (which are not a legislative instrument) in relation to matters for which the Commissioner has functions under the bill. Clause 133 states that the Minister may make rules prescribing matters required or permitted by the bill to be prescribed by rules, or necessary or convenient to be prescribed for carrying out or giving effect to the bill. Clause 134 states that the Governor-General may make regulations prescribing matters required or permitted by the bill to be prescribed by regulations, or necessary or convenient to be prescribed for carrying out or giving effect to the bill.

interference, the less likely the measure is to be considered proportionate. As noted at paragraph [1.17], Commonwealth bodies hold complex personal information of substantial breadth and depth (such as data relating to: health; migration and citizenship; social security; employment; disability; and Indigenous affairs), and are often subject to specific legislative secrecy and data disclosure limitations.[64] Yet, under clause 23 of this bill, authorisation under this overarching legislation would override any existing Commonwealth, State or Territory law that restricts or prohibits disclosure. As such, this scheme would permit a Commonwealth body to disclose personal data regardless of any law that currently prohibits this, and without parliamentary oversight of the specific privacy implications of sharing that type of data. While sharing data in some contexts may have limited privacy implications, there may be other data (such as health data) which if shared using this umbrella type legislation may have significant privacy implications. Accordingly, in assessing proportionality, it is necessary to consider if there are less rights restrictive alternatives which would be effective to achieve the goals of this scheme. For example, it may be less rights restrictive to require that, in order to participate in the scheme, the legislation associated with each Commonwealth body be amended in order to specifically invoke these data sharing powers. This would require an examination and explanation of the necessity of sharing data in the specific context, having regard to any existing secrecy provisions. This is the mechanism by which monitoring and investigatory powers under the *Regulatory Powers (Standard Provisions) Act 2014* are invoked (including in Part 5.5 of this bill). Such an approach would provide individual Commonwealth bodies, and the Parliament, with an opportunity to first analyse the specific privacy issues arising in that individual context and consider whether it would be appropriate to override any secrecy provisions introduced for targeted application in that area, rather than this being left to the agency when faced with a request for disclosure.

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

(a) what is the specific objective the measure seeks to achieve, including what public or social concern the measure seeks to address, which is pressing and substantial enough to warrant limiting the right to privacy;

(b) why the Australian Federal Police is not listed as an excluded entity under proposed subclause 11(3), noting that it is a law enforcement body;

(c) in what type of circumstances is it likely that data will be shared, or not shared, for a data sharing purpose (with examples provided as to what

64 In 2010, the Australian Law Reform Commission identified 506 secrecy provisions across 176 pieces of Commonwealth legislation. See, Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia (ALRC report 112)* (17 June 2010) [3.20].

is, and is not, likely to be considered to be for 'the delivery of government services'; 'informing government policy and programs'; and 'research and development');

(d) what considerations would be considered relevant (and irrelevant) in an assessment of the 'public interest' for the purpose of proposed subclause 16(2), and why does the bill not specifically reference the need to consider the right to privacy;

(e) in what circumstances, and based on what factors, would it be considered unreasonable or impracticable (under proposed paragraph 16(2)(c)) to seek the consent of individuals whose personal information would be shared, and would the provision of any government service be contingent on the individual giving their consent to the proposed sharing of their data;

(f) whether and in what manner accredited entities would be subject to ongoing monitoring (or auditing) of their continued compliance with the data sharing scheme, and their suitability for continued accreditation;

(g) why the scheme would not permit an individual to complain to the National Data Commissioner about a matter associated with the data sharing scheme, such as to report a suspected breach or data misuse, or to express concerns as to the sharing or use of their data in a specific context;

(h) noting the requirement that the sharing of personal information be minimised as far as possible without compromising the data sharing purpose, in what circumstances would the data sharing purpose be compromised by not sharing personal information;

(i) in what circumstances does the bill provide, and is it intended that the rules will provide, that a data sharing agreement may allow the accredited user to provide shared output data to a third party, and what protections apply to protect personal privacy in such circumstances; and

(j) why other, less rights restrictive alternatives would not be effective to achieve the intended objectives (such as amendments to individual pieces of legislation to invoke this data sharing scheme which take into account the specific data to be shared and the specific circumstances in which it is appropriate to share such data).

Committee view

1.35 The committee notes that the bill seeks to establish a legislative framework, that overrides existing laws, to facilitate the sharing of, and controlled

access to, public sector data held by Commonwealth bodies with accredited entities.

1.36 The committee notes that, in doing so, the measure engages and limits the right to privacy. The committee notes that this right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.37 The committee notes that this data sharing scheme is intended to facilitate greater data availability and use, in order to support economic and research opportunities, and streamline government service delivery. Noting the recent pressures placed on public service delivery following the 2020 bushfire season and the COVID-19 pandemic, greater data sharing is likely to support a 'tell us once' approach to public service delivery. The committee considers that these appear to important objectives.

1.38 However, the committee notes that the statement of compatibility does not, itself, set out what objectives are sought to be achieved by the bill. Accordingly, the committee considers that further information is required in order to assess whether the stated objectives constitute a legitimate objective for the purposes of international human rights law. Further, the committee notes that, while the statement of compatibility provides a list of safeguards with respect to the right to privacy, the extent to which the proposed scheme may limit the right to privacy is not clear.

1.39 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill, and as such seeks the minister's advice as to the matters set out at paragraph [1.34].

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020[1]

Purpose	This bill seeks to amend the *Fair Work Act 2009* and other legislation to: • provide regular casual employees a statutory pathway to ongoing employment by including a casual conversion entitlement in the National Employment Standards; • extend two temporary JobKeeper flexibilities to businesses significantly impacted by the COVID-19 pandemic; • allow the nominal life of greenfields agreements made in relation to the construction of a major project to be extended; • ensure industrial instruments do not transfer where an employee transfers between associated entities at the employee's initiative; and • amends various Fair Work Commission processes and powers
Portfolio	Industrial Relations
Introduced	House of Representatives, 9 December 2020
Rights	Rights to work and just and favourable conditions of work; freedom of association; fair hearing; equality and non-discrimination

Strengthening compliance and enforcement measures

1.40 The bill seeks to amend the *Fair Work Act 2009* (Fair Work Act) to introduce a number of compliance and enforcement measures.[2] For example, the bill would prohibit employers advertising employment with a rate of pay that is less than the national minimum wage.[3] It would introduce a new criminal offence for employers

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, *Report 2 of 2021*; [2021] AUPJCHR 20.

2 Schedule 5.

3 Schedule 5, Part 3, item 24, proposed section 536AA.

who dishonestly engage in a systematic pattern of underpaying one or more employees.[4] The bill would also increase the penalty for sham contracting.[5]

Preliminary international human rights legal advice

Rights to work and just and favourable conditions of work

1.41 To the extent that these compliance and enforcement measures are effective in reducing underpayment of employees and incentivising greater compliance by employers with workplace laws, the bill appears to promote the rights to work and just and favourable conditions of work. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.[6] The right to just and favourable conditions of work includes the right of all workers to adequate and fair remuneration and safe working conditions.[7] The United Nations (UN) Committee on Economic, Social and Cultural Rights has noted that '[f]or the clear majority of workers, fair wages are above the minimum wage' and 'should be paid in a regular, timely fashion and in full'.[8] It has recognised the importance of enforcement of labour legislation for the realisation and protection of the right to just and favourable conditions of work.[9] It has noted that the 'failure of employers to respect the minimum wage should be subject to penal or other sanctions' and

4 Schedule 5, Part 7, item 46, proposed section 324B. The penalty for an offence relating to underpayments is 4 years or 5,000 penalty units for individuals. A person convicted of this dishonesty offence would be automatically disqualified from managing corporations: *Corporations Act 2001*, section 206B(1)(b)(ii).

5 Schedule 3, Part 5, item 39. A sham contracting arrangement refers to a situation where an employer misrepresents an employment relationship as an independent contracting arrangement, often for the purpose of avoiding responsibility for employee entitlements. See *Fair Work Act 2009*, sections 357–359.

6 International Covenant on Economic, Social and Cultural Rights, articles 6–7; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016).

7 See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [2].

8 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [10].

9 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [2].

appropriate measures are 'necessary to ensure the application of minimum wage provisions in practice'.[10]

1.42 The statement of compatibility states that the compliance and enforcement measures promote the right to work by increasing the likelihood that employees receive their full entitlements and increasing penalties for employers that do not comply with their workplace obligations. By prohibiting employers advertising jobs with pay rates below the relevant minimum wage, increasing the penalty for sham contracts and criminalising systematic underpayment of employees, the measures would appear to promote the rights to work and just and favourable conditions of work, particularly the right to fair renumeration.

Committee view

1.43 The committee notes that the bill seeks to introduce a number of compliance and enforcement measures, such as criminalising systematic underpayment of employees. The committee considers that the measures are important to more effectively deter non-compliance with workplace laws by employers.

1.44 To the extent that these measures are effective in reducing underpayment of employees and incentivising greater compliance with workplace laws, the committee considers that these measures promote the rights to work and just and favourable conditions of work.

Simplified additional hours agreements

1.45 The bill seeks to include provisions relating to simplified additional hours agreements as terms of 12 identified modern awards in the accommodation and food services and retail trade industries, as well as any other awards prescribed by regulations.[11] This measure would allow for the making of a simplified additional hours agreement between an employer and part-time employee for the employee to work additional hours.[12] Additional agreed hours would be paid without overtime (namely, paid at the ordinary rate instead of the overtime rate) and would be treated as ordinary hours for certain purposes, including penalty rates, annual leave and

10 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [24]. Additionally, article 4 of the International Labour Organization (ILO) Convention No. 26 requires States to take the necessary measures 'to ensure that the employers and workers concerned are informed of the minimum rates of wages in force'. States also have an obligation under article 5 of the ILO Convention No. 131 to take appropriate measure to protect the minimum wage.

11 Schedule 2, Part 1, item 5, proposed subsections 168M(3) and (4).

12 Schedule 2, Part 1, item 5, proposed section 168M.

superannuation.[13] A simplified additional hours agreement can be entered into if an identified modern award applies; the employee is a part-time employee; and the employee's ordinary hours of work are at least 16 hours per week.[14] An employer would be prohibited from requiring an employee to enter into a simplified additional hours agreement.[15] If an employee and employer entered into an agreement under the proposed provisions, the bill provides that to the extent of any inconsistency between a simplified additional hours agreement provision and a provision in the relevant identified modern award, the former prevails, except in specified circumstances.[16]

Preliminary international human rights legal advice

Rights to work and just and favourable conditions of work, and equality and non-discrimination

1.46 The statement of compatibility states that the simplified additional hours agreements are aimed at realising article 1(1) of International Labour Organization (ILO) Convention No. 122, namely stimulating economic growth and development, raising standards of living, meeting workforce demands, overcoming unemployment and underemployment, and promoting full, productive and freely chosen employment.[17] The statement of compatibility states that the measure is directed to this objective because it is intended to remove barriers to part-time employment by providing more flexibility around the deployment of part-time employees in response to changing business needs. The statement of compatibility states that this thereby promotes the right to work.[18] To the extent that the measure, if the simplified additional hours agreements were voluntarily entered into, may overcome

13 Schedule 2, Part 1, item 5, proposed subsections 168Q(2)–(4). Proposed subsection 168Q(3) specifies the circumstances where overtime is still payable in respect of additional hours worked.

14 Schedule 2, Part 1, item 5, proposed subsection 168M(1). Proposed sections 168N and 168P sets out the conditions that must be met for the simplified additional hours agreement to have effect.

15 Schedule 2, Part 1, item 5, proposed subsection 168M(2). Section 344 of the *Fair Work Act 2009* also prohibits an employer from exerting undue influence or pressure on the employee in relation to a decision to enter into, or not enter into, an agreement, including an additional hours agreement (proposed section 168T).

16 Schedule 2, Part 1, item 5, proposed subsection 168M(6). Proposed subsection 168P(3) states that a simplified additional hours agreement has no effect to the extent that it is inconsistent with a provision of the relevant identified modern award that (a) limits the maximum number of consecutive days that the employee may be required to work or that requires the employee not to work on a day; and (b) that cannot be varied or avoided by any agreement or arrangement between the employer and employee.

17 Statement of compatibility, p. cviii; ILO Convention No. 122, article 1(1).

18 Statement of compatibility, p. cviii.

underemployment and unemployment as well as promote full, productive and freely chosen employment, this may promote the rights to work and just and favourable conditions of work.

1.47 However, insofar as the measure would allow employers to not pay overtime for additional agreed hours performed by an employee, thereby having the effect of reducing an employee's wages and adversely altering their working conditions, the bill may limit the rights to work and just and favourable conditions of work. The right to work provides that everyone must be able to freely accept or choose their work, and must not be unfairly deprived of work.[19] The right to just and favourable conditions of work includes the right to fair wages and equal renumeration, a decent living for the worker and their families, and safe and healthy working conditions.[20] Regarding fair wages, the UN Committee on Economic, Social and Cultural Rights has stated that '[w]orkers should receive additional pay for overtime hours above the maximum permitted hours worked in any given week'.[21] It has previously criticised additional work without overtime pay and observed that a lack of compulsory overtime pay hinders the enjoyment of the right to just and favourable conditions of work.[22] Australia has obligations to progressively realise economic, social and cultural rights, including the rights to work and just and favourable conditions of work, using the maximum of resources available,[23] and has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, with respect to their realisation.[24] The measure may be characterised as retrogressive to the extent that it has the effect of reducing the rates of pay for employees who agree to work additional hours. 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.

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19 International Covenant on Economic, Social and Cultural Rights, article 6. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

20 International Covenant on Economic, Social and Cultural Rights, article 7.

21 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [37].

22 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the second and third periodic reports of Paraguay,* E/C.12/PRY/CO/3 (2008) [15]; UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the third periodic report of the United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, E/C.12/1/Add.10 6 (1996) [21].

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

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

1.48 Additionally, as it appears that women comprise a majority of part-time employees in Australia,[25] the measure may engage and limit the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[26] 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).[27] Indirect discrimination occurs where a 'measure that is neutral at face value or without intent to discriminate', disproportionately affects people with a particular protected attribute.[28] In the context of gender equality and the rights to work and just and favourable conditions of work, the UN Committee on Economic, Social and Cultural Rights has, in another context, expressed concern at the overrepresentation of women in part-time employment and the persistent wage gap between men and women, with women being concentrated in lower paying and part-time working arrangements.[29] In order to realise the right to fair wages and equal renumeration, in particular the right of women to be guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work, the UN Committee on Economic, Social and Cultural Rights has encouraged States to adopt proactive measures to address structural gender inequalities, including temporary special

25 Workplace Gender Equality Agency, *Gender workplace statistics at a glance 2020*, 17 August 2020, https://www.wgea.gov.au/publications/gender-workplace-statistics-at-a-glance-2020#:~:text=References-,Workforce%20participation,%2Dtime%20employees%20%5B2%5D. (accessed 10 February 2021). Women constitute 67.9% of all part-time employees.

26 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 States parties are required to take into account to ensure the rights to equality for women.

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

28 *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'.

29 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Sweden*, E/C.12/SWE/CO/5 (2008) [18]; UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Sweden*, E/C.12/SWE/CO/6 (2016) [25]–[26].

measures to strengthen the right to full-time work for women.[30] As women comprise nearly 68 per cent of all part-time employees in Australia, the measure, which only applies to part-time employees, may have a disproportionate impact on women.[31] Where a measure has a disproportionate impact on a group with a protected attribute, including sex, it establishes that there may be indirect discrimination.[32] Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[33]

1.49 In relation to the objective of the measure, as noted above, the statement of compatibility states that the simplified additional hours agreements are aimed at stimulating economic growth and development, raising standards of living, meeting workforce demands, overcoming unemployment and underemployment, and promoting full, productive and freely chosen employment.[34] The statement of compatibility states that the measure is directed to this objective because it is intended to remove barriers to part-time employment by providing more flexibility around the deployment of part-time employees in response to changing business needs. The explanatory memorandum notes that the current law requires employers to pay overtime rates for additional hours worked by employees on an *ad hoc* basis and this arrangement operates as a disincentive for employers to offer additional work to part-time employees.[35] It states that the measure is intended to incentivise employers to engage part-time rather than casual employees and encourage more

30 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Sweden*, E/C.12/SWE/CO/5 (2008) [18]; UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Sweden*, E/C.12/SWE/CO/6 (2016) [25]–[26].

31 Workplace Gender Equality Agency, *Gender workplace statistics at a glance 2020*, 17 August 2020, https://www.wgea.gov.au/publications/gender-workplace-statistics-at-a-glance-2020#:~:text=References-,Workforce%20participation,%2Dtime%20employees%20%5B2%5D. (accessed 10 February 2021). Additionally, the gender pay gap persists in Australia, with the full-time average weekly ordinary earnings for women being 14 per cent less than men.

32 *D.H. and Others v the Czech Republic,* European Court of Human Rights (Grand Chamber), Application no. 57325/00 (2007) [49]; *Hoogendijk v the Netherlands*, European Court of Human Rights, Application no. 58641/00 (2005).

33 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].

34 Statement of compatibility, p. cviii; ILO Convention No. 122, article 1(1).

35 Explanatory memorandum, p. ii.

employment in recovering businesses.[36] The statement of compatibility acknowledges that the measure may limit the right to just and favourable conditions of work but states that it is reasonable, necessary and proportionate in the context of overcoming unemployment and underemployment.[37]

1.50 The general objectives of raising living standards, overcoming underemployment and unemployment, and promoting more permanent employment opportunities are capable of constituting legitimate objectives for the purposes of international human rights law. However, in order to assess whether these are legitimate objectives in the context of this measure, further information is required as to whether there is a pressing and substantial concern which gives rise to the need for this specific measure. While the statement of compatibility provides some information regarding the need to enhance flexibility around the deployment of part-time employees, it does not fully address why it is necessary to require that additional agreed hours are to be paid without overtime and why the existing modern award terms, which contain provisions to vary ordinary hours so as to enable part-time employees to work additional hours, are insufficient to achieve the stated objectives, particularly raising living standards.[38] In order to demonstrate that the measure pursues a legitimate objective for the purpose of international human rights law and is rationally connected to that objective, further information is required as to the substantial and pressing concern that is sought to be addressed by the measure and how the measure is likely to be effective in achieving that objective.

1.51 In assessing the proportionality of the measure, it is necessary to consider whether the measure is accompanied by sufficient safeguards; sufficiently circumscribed; and whether any less rights restrictive alternatives could achieve the same stated objective. The statement of compatibility states that simplified additional hours agreements will be subject to a range of protections, including:

- employees will not be required to enter an agreement and cannot be subject to undue pressure by an employer to enter an agreement;[39]
- the regular hours of the part-time employee must be at least 16 ordinary hours and additional hours worked must be part of a period of continuous work of at least 3 hours;[40]

36 Explanatory memorandum, p. ii. See also Attorney-General and Minister for Industrial Relations, the Hon Christian Porter MP, Second Reading Speech on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, 9 December 2020, p. 5.

37 Statement of compatibility, p. cviii.

38 Section 144 of the *Fair Work Act 2009* requires that modern awards contain a flexibility term which allows an employer and employee to agree to vary the application of modern award terms with respect to overtime and ordinary hours in order to meet the genuine needs of the employee and employer via an individual flexibility agreement.

39 Schedule 2, Part 2, item 8, proposed subsection 168M(2).

- the general protections provisions in the Fair Work Act and dispute settlement terms of identified modern awards will apply to disputes about agreements;[41]
- overtime will continue to be payable for work performed outside the relevant span of ordinary hours or daily/weekly maximum ordinary hours;[42] and
- modern award terms that limit the maximum number of consecutive days that the employee may be required to work or not work would prevail over an agreement.[43]

1.52 Some of these protections may operate to safeguard certain minimum modern award terms and conditions of employment, such as the limit on the maximum number of consecutive days that an employee may work and the requirement to still pay overtime in certain circumstances. However, there are questions as to whether these protections are adequate in all circumstances.

1.53 The bill would provide that an employer cannot 'require' an employee to enter into a simplified additional hours agreement,[44] and the bill notes that section 344 of the Fair Work Act prohibits the exertion of 'undue influence' or 'undue pressure' on an employee in relation to such a decision. Australian courts have determined that 'influence' here means 'to move or impel to, or to do, something', whereas 'pressure' refers to harassment or oppression.[45] They have further stated that such pressure or influence will be 'undue' in this context where it is: 'unwarranted; excessive; too great' or 'not proper, fitting or right; unjustified'.[46] This appears to indicate that some forms of influence or pressure will not meet the threshold of being 'undue', and so not be prohibited. That is, while an employer may not require (or order) an employee to enter into a simplified additional hours agreement, it is unclear if they may apply a permissible degree of pressure or influence in order to *cause* the employee to consent to an agreement. This raises questions about the conditions under which consent may be validly provided for the purposes of entering into a simplified additional hours agreement. This is a particular concern noting that the employment relationship may be said to be characterised by

40 Schedule 2, Part 2, item 8, proposed subsection 168M(1)(c).

41 Schedule 2, Part 2, item 8, proposed section 168T; Statement of compatibility, p. cvii.

42 Schedule 2, Part 2, item 8, proposed subsection 168Q(3).

43 Schedule 2, Part 2, item 8, proposed subsection 168P(3).

44 Schedule 2, Part 1, item 5, proposed subsection 168M(2).

45 See, *Wintle v RUC Cementation Mining Contractors Pty Ltd* (No. 2) [2012] FMCA 459 [37].

46 See, *Stuart v Construction, Forestry, Mining and Energy Union* (2009) 190 IR 82 [18].

an overall and innate power imbalance (though noting that this may vary in specific contexts).[47]

1.54 In addition, the second reading speech notes that the measure applies to 12 identified modern awards in industries that have been hard hit by COVID-19.[48] However, while the bill sets out 12 specific awards to which this measure applies,[49] the specified awards would cover a broad range of industries and the bill also provides that regulations can prescribe other modern awards as an identified modern award for the purposes of this measure.[50] The explanatory memorandum states that this is 'necessary to effectively adapt this framework to changing circumstances, which may warrant the inclusion or exclusion of a particular award'.[51] It is therefore not clear what other awards this measure may apply to. There is also no requirement that the employer be financially distressed as a result of the COVID-19 pandemic—and thus unable to pay overtime rates—in order to make use of simplified additional hours agreements. Without such a requirement, there appears to be a risk that employers may use simplified additional hours agreements in the first instance in order to pay part-time employees at a reduced rate, irrespective of whether they have the financial capacity to pay employees at the overtime rate. This may result in employers only offering additional hours to those employees who can afford to work at the reduced rate. The potentially broad scope of this measure raises concerns as to whether it is sufficiently circumscribed.

1.55 Furthermore, it is not clear that a measure which authorises employers to effectively contract out of minimum employment terms and conditions is the least rights restrictive way of achieving the stated objectives. In the context of retrogressive measures, a type of limitation, the UN Committee on Economic, Social and Cultural Rights has stated that:

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47 This issue was considered by the Victorian Law Reform Commission. See, *Workplace Privacy: Final Report (October 2005)*, chapter 3. The bargaining relationship between employer and employee has also been considered extensively in academic and legal scholarship. See, for example, Aditi Bagchi, 'The Myth of Equality in the Employment Relation', *Michigan State Law Review* (2009), pp. 579–628; and Australian Institute of Employment Rights, *Collective Bargaining: Delivering for the public interest?* (2018), p. 9.

48 Attorney-General and Minister for Industrial Relations, the Hon Christian Porter MP, Second Reading Speech on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, 9 December 2020, p. 4.

49 The specified awards being: the Business Equipment Award 2020; the Commercial Sales Award 2020; the Fast Food Industry Award 2010; the General Retail Industry Award 2020; the Hospitality Industry (General) Award 2020; the Meat Industry Award 2020; the Nursery Award 2020; the Pharmacy Industry Award 2020; the Restaurant Industry Award 2020; the Registered and Licensed Clubs Award 2010; the Seafood Processing Award 2020; and the Vehicle Repair, Services and Retail Award 2020.

50 Schedule 2, Part 1, item 5, proposed subsection 168M(3)(m).

51 Explanatory memorandum, p. 28.

> 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 [all Covenant rights]…and in the context of the full use of the State party's maximum available resources.[52]

1.56 In order to assess the compatibility of this measure with the rights to work and just and favourable conditions of work, and equality and non-discrimination, further information is required as to:

(a) whether the measure is likely to have a disproportionate impact on women, noting that women appear to constitute the majority of part-time employees in Australia, and if so, what safeguards, if any, exist to ensure that the measure does not indirectly discriminate against women;

(b) what is the pressing and substantial public or social concern that the measure is seeking to address;

(c) how the measure is rationally connected to that pressing and substantial concern and, in particular, how reducing the rate of pay for additional agreed hours is likely to be effective in achieving the objectives set out in article 1(1) of ILO Convention No. 122;

(d) why the current laws, in particular, the flexibility terms of modern awards as provided for by section 144 of the Fair Work Act, are insufficient to achieve the stated objectives;

(e) why there is no requirement that employers must demonstrate that their enterprise has been adversely affected by the COVID-19 pandemic to such an extent that they do not have the financial capacity to pay overtime rates; and

(f) whether awards applicable to other industries that have not been adversely affected by the COVID-19 pandemic are likely to be prescribed by regulations as an identified modern award for the purposes of the simplified additional hours agreement provisions.

Committee view

1.57 The committee notes that the measure would allow for the making of a simplified additional hours agreement between an employer and part-time employee for the employee to work additional hours at the ordinary rather than overtime rate of pay. The measure would apply to 12 identified modern awards in the accommodation and food services and retail trade industries, as well as any other awards prescribed by regulations.

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

1.58 To the extent that the measure may overcome underemployment and unemployment, and promote full, productive and freely chosen employment, the committee considers this measure may promote the rights to work and just and favourable conditions of work.

1.59 Insofar as the measure allows employers, albeit with the agreement of the employee, to not pay overtime for additional agreed hours worked by part-time employees and may have the effect of reducing employees' rate of pay, the rights to work and just and favourable conditions of work may be engaged and limited. Noting that the measure only applies to part-time employees and that women constitute the majority of part-time employees, the right to equality and non-discrimination may also be engaged and limited. The committee notes that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.60 The committee notes that the measure is intended to introduce more flexible provisions for the deployment of part-time employees in response to changing business needs and encourage employers to engage part-time rather than casual employees. The committee considers the general objectives of raising living standards, overcoming underemployment and unemployment, and promoting more permanent employment opportunities are capable of constituting legitimate objectives, but some questions remain as to whether these are legitimate objectives in the context of this measure. As regards proportionality, the committee notes that there are protections in place to safeguard minimum terms and conditions of employment, however, further information is required to fully assess the proportionality of the measure.

1.61 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this measure, and as such seeks the minister's advice as to the matters set out at paragraph [1.56].

Flexible work directions

1.62 The bill seeks to introduce provisions to allow employers to issue flexible work directions to employees about their functions and duties (a flexible work duties direction), and the location of their work (a flexible work location direction). A flexible work duties direction could require an employee to perform any duties during a period that are within the employee's skill and competency so long as the duties are safe, the employee has the requisite licence or qualification, and the duties are reasonably within the scope of the employer's business operations.[53] A flexible work location direction could require an employee to perform duties during a

53 Schedule 2, Part 2, item 8, proposed section 789GZG.

period at an alternative location, including the employee's home. The alternative location must be suitable having regard to the employee's duties; must not require the employee to travel a distance that is unreasonable in all circumstances, including the COVID-19 pandemic; and must be safe and reasonably within the employer's business operations.[54] To have effect, flexible work directions must not be unreasonable in all the circumstances and the employer must reasonably believe that the direction is a necessary part of a reasonable strategy to assist in the revival of the employer's enterprise.[55] The employer is also required to consult with the employee about the direction, although the employee is not required to consent to the direction for it to have effect.[56] The flexible work direction measure applies to employees and employers covered by an identified modern award and to the extent of any inconsistency between this measure and an identified modern award provision, the flexible work direction provision would prevail.[57] Additionally, this measure would cease to have effect after two years from the day the proposed sections would commence.[58]

Preliminary international human rights legal advice

Rights to work and just and favourable conditions of work

1.63 To the extent that the measure may have the effect of adversely altering an employee's working conditions, including directing an employee to work in potentially less favourable conditions, without their consent, the bill may limit the rights to work and just and favourable conditions of work, including the right to freely accept or choose their work.[59] These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.64 The statement of compatibility states that this measure is directed towards achieving the objective of facilitating ongoing employment, maximising employee

54 Schedule 2, Part 2, item 8, proposed section 789GZH.

55 Schedule 2, Part 2, item 8, proposed sections 789GZJ and 789GZK.

56 Schedule 2, Part 2, item 8, proposed section 789GZL. Subsection 789GZL(2) provides that the employer is not required to consult with the employee in relation to a subsequent direction if consultation occurred in relation to the first direction and during that consultation, the employee expressed their views and the employer considered the employee's views.

57 Schedule 2, Part 2, item 8, proposed sections 789GZD and 789GZF. The identified modern awards are those specified in proposed subsection 168M(3), including 12 identified modern awards in the accommodation and food services and retail trade industries, as well as any other awards prescribed by regulations.

58 Schedule 2, Part 2, item 8, proposed subsection 789GZI(3) and Part 3, item 10.

59 International Covenant on Economic, Social and Cultural Rights, articles 6 and 7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

retention rates and supporting employers during the COVID-19 pandemic.[60] The statement of compatibility acknowledges that the measure may limit the right to just and favourable conditions of work but states that it is reasonable, necessary and proportionate in the context of responding to the extreme economic impacts of the COVID-19 pandemic.[61] Promoting ongoing employment and stimulating economic recovery during the COVID-19 pandemic would likely be legitimate objectives for the purpose of international human rights law. By providing employers with greater flexibility to respond to changing business needs during the COVID-19 pandemic and the power to direct employees to perform different duties as part of a strategy to revive their enterprise, the measure would appear to be rationally connected to these objectives.

1.65 In assessing whether the measure is proportionate to achieving the stated objectives, it is necessary to consider whether the proposed limitation is sufficiently circumscribed. The statement of compatibility notes that the measure applies to distressed industries that have been negatively affected by the extreme economic impacts of the COVID-19 pandemic.[62] However, as noted above at paragraph [1.54], the specified awards would cover a broad range of industries and the bill provides that regulations can prescribe other modern awards for the purposes of this measure.[63] As such, the measure would not necessarily be limited to distressed industries. The threshold that employers must meet in order to give effect to a flexible work direction—namely, that an employer has information that leads them to reasonably believe that the direction is a necessary part of a reasonable strategy to assist in the revival of their enterprise—would appear to be relatively low. It would seem that any employer to which an identified modern award applies could utilise this measure, irrespective of whether they have experienced or are experiencing economic downturn due to the COVID-19 pandemic, if they reasonably believed that it would revive their business. This would mean for example, that unlike the JobKeeper scheme, there would be no need for the employer to actively meet a decline in turnover test before issuing any such direction.[64] It is noteworthy

60 Statement of compatibility, pp. cviii.

61 Statement of compatibility, p. cviii.

62 Statement of compatibility, p. cvii. See also Explanatory memorandum, p. ii and Attorney-General and Minister for Industrial Relations, the Hon Christian Porter MP, Second Reading Speech on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, 9 December 2020, p. 4.

63 Schedule 2, Part 1, item 5, proposed subsection 168M(3)(m).

64 The second reading speech notes that this measure adapts specific elements of the COVID-19 JobKeeper flexibilities: Attorney-General and Minister for Industrial Relations, the Hon Christian Porter MP, Second Reading Speech on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, 9 December 2020, pp. 4–5. However, unlike the JobKeeper directions, the employer does not have to meet a 'decline in turnover' test in order to issue a flexible working direction: see *Fair Work Act 2009*, Part 6–4C.

that there is no definition of 'revival' in the bill, raising questions as to whether the term may be open to disputation due to its ambiguity. As drafted, it is not clear if the measure could have a broader scope of application than perhaps is intended. This raises questions as to whether the measure is sufficiently circumscribed.

1.66 Other relevant factors in assessing the proportionality of the measure include whether it is accompanied by sufficient safeguards and whether any less rights restrictive alternatives could achieve the same stated objective. The statement of compatibility notes that the measure is subject to a range of safeguards, including:

- the requirement that flexible work directions must be safe, having regard to the COVID-19 pandemic, and reasonably within the scope of the employer's business operations;[65]
- an employee can only be directed to perform duties that are within their skill and competency;[66]
- an employee cannot be required to travel a distance that is unreasonable in all of the circumstances;[67]
- the requirement that a flexible work direction must not be unreasonable in all of the circumstances;[68]
- provisions regarding consultation of employees, although an employee does not have to consent to the direction;[69]
- minimum rates of pay apply to duties performed in accordance with a flexible work duties direction (noting that a flexible work direction cannot reduce an employee's rate of pay);[70]
- disputes regarding flexible work directions may be settled in accordance with the modern award dispute settlement procedure;[71] and
- the temporary nature of the measure insofar as it will cease to operate two years after the commencement of the provisions.[72]

65 Schedule 2, Part 2, item 8, proposed sections 789GZG and 789GZH.

66 Schedule 2, Part 2, item 8, proposed section 789GZG.

67 Schedule 2, Part 2, item 8, proposed subsection 789GZH(b).

68 Schedule 2, Part 2, item 8, proposed section 789GZJ.

69 Schedule 2, Part 2, item 8, proposed section 789GZL.

70 Schedule 2, Part 2, item 8, proposed section 789GZN.

71 Statement of compatibility, p. cviii.

72 Statement of compatibility, p. cviii.

1.67 Some of these protections may operate as important safeguards, such as the requirement that flexible work directions are safe and not unreasonable in all of the circumstances and the protection of an employee's hourly base rate of pay. However, noting that many of the protections are drafted in broad terms, their value as a safeguard will likely depend on how they are interpreted and applied in practice. For instance, duties that are reasonably within the scope of the employer's business operations could be quite broad, depending on the nature of the business. Likewise, duties within an employee's skill and competency could encompass a wide range of duties, particularly if those duties do not require specific licences or qualifications. The reasonableness criterion could also be interpreted quite broadly, noting that the bill contains limited guidance as to how the term 'unreasonable in all of the circumstances' should be interpreted and applied in practice.[73] For example, it is unclear what factors will be considered, and what weight will be given to those factors, by the employer in determining whether a direction is reasonable. As regards the consultation provisions, it is not clear that they would substantially assist with the proportionality of the measure, noting that an employee does not have to consent to the direction for it to have effect and the notice period is only three days, raising questions as to whether this is sufficient time to facilitate meaningful consultation between an employee and employer. Additionally, while the measure is characterised as temporary, depending on the extent of any interference with an employee's rights to work and just and favourable conditions of work, two years could be a substantial amount of time. Furthermore, it is not evident from the statement of compatibility that careful consideration has been given to all alternatives so as to ensure that the measure is the least rights restrictive way of achieving the stated objectives.[74]

1.68 In order to assess the compatibility of this measure with human rights, particularly the proportionality of the measure, further information is required as to:

(a) why there is no requirement that, before issuing a flexible work direction, employers must demonstrate that their enterprise has been adversely affected by the COVID-19 pandemic, such as satisfying a decline in turnover test;

(b) what awards applicable to other industries are likely to be prescribed by regulations as an identified modern award for the purposes of the flexible work directions provisions (and will it be limited to industries adversely affected by the COVID-19 pandemic);

73 Schedule 2, Part 2, item 8, proposed section 789GZJ: the note in this proposed section states that a 'direction may be unreasonable depending on the impact of the direction on any caring responsibilities the employee may have'.

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

(c) whether there are any guidelines to assist employers in interpreting the requirement that the flexible work direction must assist in the revival of the employer's enterprise;

(d) why the bill does not include a non-exhaustive list of factors that must be considered by the employer in determining whether a direction is unreasonable in all of the circumstances;

(e) why it is appropriate to only require an employer to provide at least three days' notice to an employee of their intention to give the direction, and whether this notice period is sufficient to facilitate meaningful consultation between an employee and employer; and

(f) whether careful consideration has been given to alternative, less rights restrictive ways of achieving the stated objective.

Committee view

1.69 The committee notes the measure would allow an employer to issue a flexible work direction, which may require an employee to perform different functions and duties and work at an alternative location, including at the employee's home. To the extent that the measure may result in less favourable working conditions for an employee subject to a flexible work direction, the measure may engage and limit the rights to work and just and favourable conditions of work. The committee notes that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.70 The committee notes that the measure pursues the legitimate objectives of facilitating ongoing employment, maximising employee retention rates and supporting employers during the COVID-19 pandemic, and that the measure would appear to be rationally connected to these objectives. As regards proportionality, the committee notes that the measure includes a number of safeguards, but questions remain as to the adequacy of these safeguards in practice.

1.71 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this measure, and as such seeks the minister's advice as to the matters set out at paragraph [1.68].

Enterprise agreements

1.72 The bill proposes a number of amendments to processes relating to the making and approval of enterprise agreements as well as the Fair Work Commission's (FWC) power to vary or revoke decisions relating to enterprise agreements and workplace determinations. The bill would permit the FWC to approve enterprise agreements that may not satisfy or pass the better off overall test (BOOT) in certain

circumstances.[75] In order to approve an agreement, the FWC would need to be satisfied that it is appropriate to do so taking into account all the circumstances and because of those circumstances, the approval of the agreement would not be contrary to the public interest.[76] Proposed subsection 189(1A)(a) sets out a non-exhaustive list of circumstances that the FWC must take into account, including the views and circumstances of the employees and employers, the impact of COVID-19 on the agreement, and the extent of employee support for the agreement as expressed in the outcome of the voting process. An agreement approved under this proposed provision would have a nominal expiry date not longer than two years after the day on which it is approved by the FWC and the measure will automatically be repealed two years after it commences.[77]

1.73 The bill also seeks to amend how the FWC may inform itself in relation to approving and varying an enterprise agreement.[78] In considering an agreement, the FWC would be permitted to inform itself only on the basis of an exhaustive list of matters prescribed in proposed subsection 254AA(2), unless exceptional circumstances exist. The effect of the amendment would be to limit the FWC's ability to inform itself on the basis of submissions, evidence or other information provided by or requested from persons or organisations that are not bargaining representatives, including trade unions that are not bargaining representatives.

1.74 Further, the bill would authorise the FWC to vary or revoke decisions that deal with enterprise agreements or workplace determinations.[79] The FWC could vary or revoke such a decision on its own initiative or on application by a person who is affected by the decision or a person prescribed in the regulations.[80] For example, the FWC could revoke or vary its decision to approve an agreement where the agreement lodged contained an error.[81]

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75 See *Fair Work Act 2009*, section 193. In applying the BOOT, the FWC currently considers the proposed terms of the agreement and the terms of the relevant modern award and makes an assessment as to whether employees would be better off overall under the agreement than the relevant award. An agreement passes the BOOT if the FWC is satisfied that employees would be better off overall under the agreement than the relevant award.

76 Schedule 3, Part 5, item 19, proposed subsection 189(1A).

77 Schedule 3, Part 5, items 27–31; Explanatory memorandum, p. 44; *Fair Work Act 2009*, section 189(4).

78 Schedule 3, Part 9, item 54, proposed section 254AA.

79 Schedule 6, item 2. Under the current law, the FWC must not vary or revoke decisions that deal with enterprise agreements or workplace determinations: *Fair Work Act 2009*, subsection 603(3)(b) and (c).

80 *Fair Work Act 2009*, subsections 603(1)–(2).

81 Explanatory memorandum, p. 89.

Preliminary international human rights legal advice

Rights to just and favourable conditions of work and freedom of association

1.75 The rights to just and favourable conditions of work and freedom of association may be limited insofar as the measures may result in employees being subject to agreements that contain less favourable conditions and leave them worse off overall; the ability of trade unions to intervene in applications to approve or vary agreements would be restricted, thereby limiting the right of trade unions to function freely; and the terms and conditions of agreements that were collectively bargained for may be varied or revoked by the FWC. The statement of compatibility acknowledges that the measures limit these rights.[82] The right to just and favourable conditions of work includes the right of all workers to adequate and fair remuneration, safe working conditions, and the right to join trade unions.[83] 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.[84] It explicitly guarantees everyone 'the right to form trade unions for the protection of [their] interests',[85] and 'the right of trade unions to function freely'.[86] The right to freedom of association includes the right to collectively bargain without unreasonable and disproportionate interference from the state.

1.76 The interpretation of these rights is informed by International Labour Organization (ILO) treaties, including the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) and the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment.[87] The *Human Rights (Parliamentary Scrutiny) Act 2011* does not include the International Labour Organization (ILO) Constitution or ILO conventions on freedom of association and the right to bargain collectively in the list of treaties against which the human rights compatibility of legislation is to be assessed. Nonetheless, these ILO standards and jurisprudence are relevant to the mandate of the committee as they are the practice

82 Statement of compatibility, pp. cviii, cx, cxii.

83 International Covenant on Economic, Social and Cultural Rights, article 7. See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [2].

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

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

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

87 The Convention concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in article 22(3) of the International Covenant on Civil and Political Rights and article 8(3) of the International Covenant on Economic, Social and Cultural Rights.

of the international organisation with recognised and long-established expertise in the interpretation and implementation of these rights. It is a specialised body of law which can inform the general guarantees set out in the human rights treaties, which the committee is required to consider under the *Human Rights (Parliamentary Scrutiny) Act 2011*. In the current case, ILO Convention No. 87 is directly relevant, in that both article 22(3) of the International Covenant on Civil and Political Rights and article 8(3) of the International Covenant on Economic, Social and Cultural Rights expressly state that measures which are inconsistent with the guarantees provided for in ILO Convention No. 87 will not be consistent with the right to freedom of association, the right to form and join trade unions and the right to strike.[88] The UN Committee on Economic, Social and Cultural Rights has also considered ILO Conventions No.87 and 89 when assessing Australia's compliance with article 8 of the International Covenant on Economic, Social and Cultural Rights.[89]

1.77 The rights to just and favourable conditions of work and freedom of association 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. However, no limitations are permissible on the right to freedom of association if the measures taken would prejudice the guarantees of freedom of association and the right to collectively organise contained in the ILO Convention No. 87.[90]

1.78 Regarding the general objectives being pursued by these measures, the explanatory memorandum notes that the measures seek to make enterprise agreement making and approval processes easier and faster, balancing flexibility and fairness.[91] With respect to the measure that would allow the FWC to approve agreements that do not pass the BOOT, the statement of compatibility states that it pursues the objective of preserving employment impacted by the COVID-19

88 Regarding the rights of freedom of association and of trade unions to freely function, the ILO Freedom of Association Committee has noted: in the context of 'ban[s] on third party intervention in the settlement of disputes…that such an exclusion constitutes a serious restriction on the free functioning of trade unions, since it deprives them of assistance from advisers': *Freedom of Association: Compilation of decisions of the Committee of Freedom of Association* (6th ed, 2018) [1403].

89 See, UN Committee on Economic Social and Cultural Rights (UNCESCR), *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (2017) [29]-[30]. The Committee has raised concerns 'about the existence of legal restrictions to the exercise of trade union rights, including in the Fair Work Amendment Act of 2015, the Code for the Tendering and Performance of Building Work 2016, and The Building and Construction Industry (Improving Productivity) Act 2016'.

90 International Covenant on Civil and Political Rights, article 22(3); and International Covenant on Economic, Social and Cultural Rights, article 8(3).

91 Explanatory memorandum, pp. ii–iii.

pandemic and supporting the recovery of Australian jobs.[92] The second reading speech notes that the measure is intended to provide greater flexibility for businesses and employees in the COVID-19 recovery period.[93] With respect to restrictions on third-party intervention, the statement of compatibility states that the measure is aimed at avoiding unnecessary delays in the agreement approval process by ensuring that only those parties involved in bargaining can be heard.[94] With respect to the FWC's discretion to vary or revoke decisions about agreements, the statement of compatibility states that the objective of the measure is to improve the efficiency of the FWC by ensuring that applications can be dealt with in a timely, practical and transparent manner.[95]

1.79 In general terms, the objectives of preserving employment and supporting employers during the COVID-19 pandemic and recovery period may be capable of constituting legitimate objectives for the purposes of international human rights law. However, it is unclear whether improving the efficiency and expediency of agreement making and approval processes would also constitute a legitimate objective. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Administrative convenience, in and of itself, is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights law. The statement of compatibility does not fully address why current laws are insufficient to achieve the stated objectives and why the measures are necessary. For instance, noting that the FWC already has the power to approve agreements that do not pass the BOOT in exceptional circumstances, such as to respond to a short-term crisis or assist in the revival of an employer's enterprise, it is unclear why this current exception to the requirement for agreements to pass the BOOT is not sufficient to cover circumstances arising in the context of the COVID-19 pandemic.[96] Without further information, questions remain as to whether the measures address an issue of public or social concern that is pressing and substantial enough to warrant limiting rights.

92 Statement of compatibility, cviii.

93 Attorney-General and Minister for Industrial Relations, the Hon Christian Porter MP, Second Reading Speech on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, 9 December 2020, p. 7.

94 Statement of compatibility, p. cxii.

95 Statement of compatibility, p. cx.

96 *Fair Work Act 2009*, subsection 189(2). Subsection 189(3) provides that 'an example of a case in which the FWC may be satisfied of the matter referred to in subsection (2) is where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement'.

1.80 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measures are likely to be effective in achieving the objectives being sought. Restricting the intervention of non-bargaining representatives in applications to approve or vary agreements and broadening the FWC's discretion to vary or revoke decisions relating to agreements may be effective to achieve the objectives of reducing delays in the agreement approval process and facilitating the timely and practical resolution of issues relating to agreements, such as correcting administrative errors.[97] However, it is unclear that the measures would likely be effective in achieving the other stated objectives. For instance, it is not clear that allowing the FWC to approve agreements that do not pass the BOOT is rationally connected to the objective of preserving employment. In order to demonstrate that the measures are rationally connected to all stated objectives, a reasoned and evidence-based explanation of how each measure is likely to be effective in achieving the stated objectives is required.

1.81 In assessing the proportionality of the measures, it is necessary to consider whether they are accompanied by sufficient safeguards and whether any less rights restrictive alternatives could achieve the same stated objectives. A further consideration is the extent of any interference with human rights. The greater the interference, the less likely the measure is to be considered proportionate.

1.82 The statement of compatibility identifies some safeguards with respect to each measure. Regarding the measure amending the BOOT, the primary safeguard identified in the statement of compatibility is the requirement for the FWC to take into account: the views of employees; the circumstances of those employees and any employee organisation, including the likely effect on employees of approving the agreement; the extent of employee support for the agreement; and whether the agreement is contrary to the public interest.[98] The extent to which consideration of the employees' views, circumstances and support for the agreement would operate

97 Explanatory memorandum, p. 89.

98 Statement of compatibility, p. cviii. Fair Work Commission (previously Fair Work Australia) jurisprudence on the concept 'contrary to the public interest' (under current subsection 189(2) of the *Fair Work Act* 2009) may offer some guidance as to how proposed subsection 189(1A)(b) may be interpreted in practice. Fair Work Australia has held that the expression 'in the public interest' 'is to be determined by making a discretionary value judgement on the relevant facts, constrained only by the subject matter and the scope and purpose of the legislation...The public interest is distinct from the views of persons directly affected and refers to matters that might affect the public as a whole': *Re Top End Consulting Pty Ltd* [2010] FWA 6442 (24 August 2010) [44]–[46]. See also *Re Kellogg Brown and Root Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement 2000* (2005) 139 IR 34 [23]: Public interest considerations include 'matters that might affect the public as a whole such as the achievement or otherwise of various objects of the Act, employment levels, inflation, and the maintenance of proper industrial standards', and *Re Agnew Legal Pty Ltd* [2012] FWA 10861 (24 December 2012) [12].

as a safeguard to protect employees' rights will depend on how much weight is attributed to these factors in practice, noting that the bill contains limited guidance as to what weight the FWC should give to the circumstances set out in proposed subsection 189(1A)(a). This is of relevance because the FWC is required to also take into account other circumstances that may be contrary to the interests and rights of employees, including the views and circumstances of employers, and the impact of COVID-19 on enterprises. Additionally, as the circumstances set out in proposed subsection 189(1A)(a) are non-exhaustive, it is not clear what other circumstances may be considered by the FWC in assessing whether it is appropriate to approve an agreement that does not pass the BOOT.

1.83 As regards the extent of interference with human rights, the statement of compatibility notes that agreements approved that do not meet the BOOT will nominally expire in two years after FWC approval and the measure to allow approval of agreements that do not pass the BOOT will sunset after two years.[99] It is relevant to the proportionality of this measure that it is time-limited. However, depending on the extent to which employees' rights are limited, two years may constitute a substantial amount of time.

1.84 Regarding the proportionality of the measure to restrict third-party intervention in applications to approve or vary agreements, the statement of compatibility notes that trade unions and other third parties that are not bargaining representatives may intervene where exceptional circumstances exist.[100] Ensuring some difference of treatment in exceptional circumstances may assist with the proportionality of the measure insofar as it provides some flexibility to treat different cases differently, although it is noted that 'exceptional circumstances' would appear a high bar to reach.

1.85 Regarding the measure to allow the FWC to vary or revoke decisions relating to agreements, the statement of compatibility notes that the FWC must exercise its discretion in a manner that is fair and just, open and transparent, and promotes harmonious and cooperative workplace relations, as well as in accordance with the objects of the Fair Work Act.[101] Noting that the objects of the Fair Work Act recognise the right to freedom of association and collective bargaining, and promote

99 Statement of compatibility, p. cix.

100 Statement of compatibility, p. cxii.

101 Statement of compatibility, p. cx. Section 577 of the *Fair Work Act 2009* provides that the FWC must perform its functions and exercise its powers in a manner that: is fair and just; quick, informal and avoids unnecessary technicalities; is open and transparent; and promotes harmonious and cooperative workplace relations. Section 578 of the *Fair Work Act 2009* specifies matters that the FWC must take into account in performing its functions or exercising powers, including: the objects of the Act; equity, good conscience and the merits of the matter; and the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of various protected attributes.

fair, relevant and enforceable minimum terms and conditions of employment, this may assist with the proportionality of this measure.[102] However, it is unclear whether these safeguards alone are sufficient, noting that the statement of compatibility does not identify any other safeguards with respect to these measures or address whether there are less rights restrictive ways of achieving the stated objectives.

1.86 In order to assess the compatibility of these measures with human rights further information is required as to:

(a) how often non-bargaining representatives are involved in applications to approve or vary agreements;

(b) whether the measures address an issue of public or social concern that is pressing and substantial enough to warrant limiting rights;

(c) whether the measures would likely be effective in achieving all the stated objectives; and

(d) whether consideration has been given to less rights restrictive ways of achieving the stated objectives.

1.87 Additionally, it is not possible to conclude on the compatibility of the measure to amend the BOOT provisions (as originally proposed, noting that amendments have been agreed to in the House of Representatives to withdraw this measure)[103] without further information as to:

(a) why the current laws were insufficient to achieve the stated objectives, noting that the FWC already had the power to approve agreements that did not pass the BOOT in exceptional circumstances; and

(b) whether there were any guidelines to assist the FWC in assessing the circumstances set out in proposed subsection 189(1A)(a), particularly what weight should have been given to each circumstance.

Committee view

1.88 The committee notes that the bill seeks to amend the Fair Work Act to enable the Fair Work Commission (FWC) to approve enterprise agreements that do not pass the better off overall test (BOOT) in certain circumstances; restrict intervention of non-bargaining representatives in applications to approve or vary agreements; and expand the FWC's power to vary or revoke decisions relating to enterprise agreements and workplace determinations. By permitting the FWC to approve agreements that do not pass the BOOT, restricting the rights of trade

102 *Fair Work Act 2009*, section 3.

103 On 23 February 2021, the House of Representatives agreed to various amendments to the bill in order to remove the proposed amendments to the BOOT provisions. In particular, the subsequent amendments proposed to omit Schedule 3, items 17–23 and 27–31 and Schedule 7, item 1.

unions that are not bargaining representatives, and allowing the FWC to vary or revoke agreements that were collectively bargained for and determine terms and conditions of employment, the measures engage and may limit the rights to just and favourable conditions of work as well as freedom of association. The committee notes that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.89 The committee notes that the general objectives of preserving employment and supporting employers during the COVID-19 pandemic and recovery period may be capable of constituting legitimate objectives for the purposes of international human rights law. However, questions remain as to whether the measures address a pressing and substantial concern for the purposes of international human rights law and are rationally connected to those objectives. The committee notes that the bill contains some safeguards that may assist with the proportionality of the measures. However, further information is required to assess whether these safeguards are likely to be sufficient and whether there are less rights restrictive ways of achieving the stated objectives.

1.90 The committee has not yet formed a concluded view in relation to the amendments restricting the intervention of non-bargaining representatives in applications to approve or vary agreements and the expansion of the FWC's power to vary or revoke certain decisions. It considers further information is required to assess the human rights implications of these measures, and as such seeks the minister's advice as to the matters set out at paragraph [1.86].

1.91 Noting that the House of Representatives have agreed to amendments to withdraw the proposed measure that would have amended the BOOT provisions, the committee makes no further comment in relation to this measure.

Extending the nominal expiry of greenfields agreements

1.92 A greenfields agreement is an enterprise agreement relating to a genuinely new enterprise which is made at a time when the employer has not yet employed any workers for the business. Currently, such an agreement expires four years after it is made. The bill seeks to double the maximum nominal expiry date from four years to eight years for greenfields agreements made in relation to construction of major projects, such as new mining ventures.[104] If the FWC is satisfied that the nominal expiry date should be extended beyond four years, it must also be satisfied that the agreement includes a term that provides for at least an annual increase of the base rate of pay payable to each employee who will be covered by the agreement.[105]

104 Schedule 4, item 3, substituted subsection 186(5)(b). Explanatory memorandum, p. 60.

105 Schedule 4, item 4, proposed subsection 187(7).

Preliminary international human rights legal advice

Rights to just and favourable conditions of work and freedom of association

1.93 To the extent that the measure requires greenfields agreements that have a nominal expiry date of more than four years to include a term that provides for at least an annual wage increase for employees covered by the agreement, the measure may engage and promote the right to just and favourable conditions of work. The right to just and favourable conditions of work includes the right of all workers to adequate and fair remuneration, and decent work providing an income that allows the worker to support themselves and their family.[106] The statement of compatibility states that the measure promotes this right by ensuring that employees receive annual pay increases.[107] While requiring annual wage increases may promote the right to fair remuneration, it is unclear whether other conditions of work would also be promoted by this measure. This is because the effect of the measure would be to extend the timing for renegotiating a new enterprise agreement and this may limit the ability of employees to bargain for more favourable conditions of work, noting that the employees were not employed at the time the enterprise agreement was entered into.

1.94 In addition, section 417 of the Fair Work Act currently prohibits employees or employee organisations organising or engaging in industrial action before the nominal expiry date of an enterprise agreement.[108] Thus, by extending the nominal expiry date of greenfields agreements, employees covered by that agreement would be prohibited from organising or engaging in industrial action for up to eight years, which engages and limits the rights to strike and freedom of association. The right to strike is protected as an aspect of the right to freedom of association and the right to form and join trade unions under article 8 of the International Covenant on Economic, Social and Cultural Rights. The UN Committee on Economic, Social and Cultural Rights has noted that the right to 'freedom of association and the right to strike are crucial means of introducing, maintaining and defending just and favourable conditions of work'.[109] The existing restrictions on taking industrial action

106 International Covenant on Economic, Social and Cultural Rights, article 7. See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [2].

107 Statement of compatibility, p. cx.

108 See *Fair Work Act 2009*, sections 417–421.

109 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [1].

under Australian domestic law have been consistently found by international supervisory mechanisms to go beyond what is permissible under international law.[110]

1.95 The right to strike is not absolute and may be limited in certain circumstances. Generally, to be capable of justifying a limitation on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective. Further, article 8 of the International Covenant on Economic, Social and Cultural Rights expressly provides that no limitations are permissible on this right if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in the ILO Convention No. 87.

1.96 The statement of compatibility states that the measure pursues the objective of encouraging investment to promote conditions for productive and increased employment and the realisation of the right to work, thereby supporting ILO Convention No. 122.[111] By extending the nominal expiry date and consequently reducing the frequency of renegotiation of enterprise agreements, the statement of compatibility states that the measure will make major projects more attractive to investors by providing greater certainty of construction costs and delivery timeframes, and minimising delays caused by negotiations. The statement of compatibility notes that increased investment in major projects will create more jobs.[112] The second reading speech further notes that the risk that agreements will expire during the construction of a major project has contributed to uncertainty, including over unexpected delays and protracted negotiations. The second reading

110 UN Committee on Economic Social and Cultural Rights, *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (2017) [29]-[30]: 'The Committee is also concerned that the right to strike remains constrained in the State party (art. 8). The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action'. See, also, UN Committee on Economic Social and Cultural Rights, *Concluding Observations on Australia*, E/C.12/AUS/CO/4 (2009) 5; *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Australia*, ILO Committee of Experts on the Adoption of Conventions and Recommendations (CEACR), adopted 2013,published 103rd ILC session (2014); *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia,* ILO CEACR, adopted 2011, published 101st ILC session (2012); *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia*, ILO CEACR, adopted 2009, published 99th ILC session (2010*); Observation Concerning the Right to Organise and Collective Bargain Convention, 1949, (No.98) – Australia*, ILO CEACR, adopted 2009, published 99th ILC session (2010).

111 Statement of compatibility, pp. cxii and cxiv.

112 Statement of compatibility, p. cxiv.

speech states that this uncertainty can impact investment and job creation, which are relevant to economic recovery.[113]

1.97 While attracting investment in major projects to promote employment opportunities may be capable of constituting a legitimate objective, questions remain as to whether the measure address a pressing and substantial concern for the purposes of international human rights law. In particular, it is not clear why the current nominal expiry date of greenfields agreements is insufficient to achieve the stated objectives. The second reading speech notes that there is a risk that agreements may expire during the construction of a major project and this may contribute to uncertainty, thereby impacting investment. However, the likelihood of whether and how often this risk will eventuate is unclear, raising questions as to whether this concern would be pressing and substantial enough to warrant limiting the right to strike. In order to assess this, further information is required as to why the measure is necessary and how the measure will address a substantial and pressing concern.

1.98 In assessing the proportionality of this measure, it is necessary to consider whether the measure is accompanied by sufficient safeguards and whether any less rights restrictive alternatives could achieve the same stated objective. As regards proportionality, the statement of compatibility states that an agreement would provide for annual pay increases for employees and that on commencement of employment, employees have access to representation and can agree with employers to vary the terms of the agreement, including the nominal expiry date.[114] While providing for annual wage increases may promote the right to fair renumeration, it may not necessarily operate as a safeguard with respect to the right to strike. Additionally, access to representation and the right to negotiate with the employer to vary the terms of the agreement may have limited safeguard value where negotiations are ineffective and employees are of the view that taking particular forms of industrial action, including unprotected industrial action, may be a necessary means of 'introducing, maintaining and defending just and favourable conditions of work'.[115] Further, the statement of compatibility does not address whether there are less rights restrictive ways of achieving the stated objectives. As such, it appears that the proposed safeguards may be insufficient to ensure that the measure constitutes a proportionate limitation on the right to strike.

113 Attorney-General and Minister for Industrial Relations, the Hon Christian Porter MP, Second Reading Speech on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, 9 December 2020, p. 8.

114 Statement of compatibility, p. cxii.

115 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work* (2016) [1].

1.99 A further consideration with respect to proportionality is the extent of any interference with human rights. The greater the interference, the less likely the measure is to be considered proportionate. In this case, the measure would double the nominal expiry date of greenfields agreements and have the effect of prohibiting employees from exercising their right to strike for up to eight years. This is a substantial amount of time and would appear to constitute a significant interference with employees' right to strike and associated rights to just and favourable conditions of work. This is particularly the case where a greenfields agreement is made without the consent or agreement of an employee organisation. Section 182(4) of the Fair Work Act provides that notwithstanding that the employee organisation has not agreed to a greenfields agreement, an agreement is taken to have been made between an employer and employee organisation where certain criteria are met.[116] In these circumstances, there is a risk that employees could be subject to an agreement that governs the terms and conditions of their employment for a period of eight years, without their consent or the consent of a representative trade union.

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

(a) evidence as to why the existing nominal expiry date of greenfields agreements is insufficient to achieve the stated objectives, including how many agreements have expired before the construction of a major project has been completed;

(b) why is it necessary to double the nominal expiry date of greenfields agreements, rather than choose a shorter extension;

(c) whether there are any other safeguards to ensure the limitation is proportionate; and

(d) whether consideration has been given to less rights restrictive ways of achieving the stated objectives.

Committee view

1.101 The committee notes that the measure seeks to extend the nominal expiry date of greenfields agreements relating to the construction of a major project from four years to eight years. To the extent that the measure provides for an annual wage increase for employees covered by a greenfields agreement, the measure may promote the right to just and favourable conditions of work. However, insofar as the measure has the effect of extending the existing limit on the right to strike,

116 *Fair Work Act 2009,* section 182(4): The agreement is taken to have been made if there has been a notified negotiation period for the agreement; that period has ended; the employer gave each employee organisation that was a bargaining representative a reasonable opportunity to sign the agreement; and the employer applied to the FWC for approval of the agreement.

the measure may also engage and limit the right to freedom of association. The committee notes that this right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.102 The committee notes that attracting investment in major projects to promote employment opportunities may be capable of constituting a legitimate objective for the purposes of international human rights law. However, the committee notes that questions remain as to whether the measure addresses a pressing and substantial concern and is rationally connected to those objectives. As regards proportionality, the committee notes that further information is required to assess whether there are sufficient safeguards and less rights restrictive ways of achieving the stated objective.

1.103 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this measure, and as such seeks the minister's advice as to the matters set out at paragraph [1.100].

Fair Work Commission appeal or review without a hearing

1.104 The bill would enable the FWC to hear an appeal without a hearing where the FWC considers a matter can be adequately determined without oral evidence and submissions, provided it has taken into account the view of the persons who would otherwise make submissions as to whether the appeal should be heard on that basis.[117] The Fair Work Act currently provides that an appeal may be conducted without holding a hearing only with the consent of the person who would otherwise be making oral or written submissions for consideration.[118]

Preliminary international human rights legal advice

Right to a fair hearing

1.105 In providing for an appeals process which may deny an individual the ability to have a hearing involving oral evidence and submissions, this measure engages and may limit the right to a fair hearing. 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. In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all

117 Schedule 6, item 3, substituted subsection 607(1)(b). See also *Fair Work Act 209*, subsection 607(1)(a).

118 *Fair Work Act 209*, subsection 607(1)(b).

parties are equal, and have a reasonable opportunity to present their case.[119] Ordinarily, the hearing must be held in public, but in certain circumstances, a fair hearing may be conducted in private. The right to a fair hearing may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.106 The statement of compatibility briefly states that this measure does not limit the right to a fair hearing on the basis that an appeal is a way of re-hearing, and the material on which the FWC will base its appeal decision will be publicly available, as will the decision itself.[120] Comparable jurisprudence from the European Court of Human Rights supports this view and states that in order to establish whether a trial complies with the requirement of publicity, it is necessary to consider the proceedings as a whole.[121] The Court has further stated that if a public hearing has been held at first instance, a less strict standard applies to the appellate level, noting that appeals in superior courts involving only questions of law—as opposed to questions of fact—may not require hearings in order to comply with the right to a fair hearing.[122]

1.107 However, the statement of compatibility does not explain why it is proposed that the existing requirement to seek the consent of the affected person in an appeal justifies amendment. It also does not address the extent to which first instance proceedings meet the components of a fair hearing in all circumstances, noting that this right includes the right to a public and oral hearing—a principle central to the open and transparent administration of justice. Consequently, some questions remain as to whether proceedings before the FWC would in fact meet the standard required under human rights law, and permissibly justify the absence of a public hearing.

1.108 In order to assess the compatibility of this measure with the right to a fair hearing, further information is required as to:

(a) why the existing legislative requirement that an affected person must consent to an appeal from, or review of, a decision without a hearing requires amendment;

119 See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [18].

120 Statement of compatibility, pp. cxv–cxvii.

121 See, *Axen v Germany,* European Court of Human Rights, Application No. 8273/78 (1984) [29]–[32], relating to article 6 of the European Convention on Human Rights.

122 See, *Miller v Sweden,* European Court of Human Rights, Application No. 55853/00 (2005) [30].

(b) whether (and to what extent) appeals from, or reviews of, a decision of the FWC, as provided for under section 607 of the Fair Work Act, involve determinations involving questions of fact; and

(c) what opportunity there is for a public hearing in relation to the initial decision and whether all relevant documents relating to the initial decision and the appeal (including the final decision) will be made public.

Committee view

1.109 The committee notes that the bill would enable the Fair Work Commission (FWC) to hear an appeal without a hearing where the FWC considers a matter can be adequately determined without oral evidence and submissions, provided it has taken into account the view of the persons who would otherwise make submissions as to whether the appeal should be heard on that basis.

1.110 The committee notes that this engages and may limit the right to a fair hearing and considers that it is not clear whether this proposed amendment would unduly limit the right of an individual to a public hearing in the determination of their rights in a suit at law.

1.111 In order to form a concluded view of the human rights implications of this measure, the committee seeks the minister's advice as to the matters set out at paragraph [1.108].

Legislative Instruments

Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020 [F2020L01714][1]

Purpose	This instrument sets out procedures to be followed relating to questioning and apprehension of persons under Part III of the *Australian Security Intelligence Organisation Act 1979* warrant
Portfolio	Attorney-General
Authorising legislation	*Australian Security Intelligence Organisation Act 1979*
Last day to disallow	Exempt from disallowance pursuant to subsection 34AF(5) of the *Australian Security Intelligence Organisation Act 1979*
Rights	Multiple rights

ASIO compulsory questioning framework

1.112 This instrument sets out the procedures to be followed in the exercise of authority under an Australian Security Intelligence Organisation (ASIO) compulsory questioning warrant.[2] This includes requirements relating to: the types of information which ASIO must provide to the Attorney-General when requesting a warrant (including information relating to any known vulnerabilities or sensitivities of a warrant subject to the extent that they are relevant to the questioning);[3] the conduct of questioning (including the provision of healthcare, food, breaks, the ability for a warrant subject to leave the place of questioning during a break);[4] the conduct of searches and any use of force;[5] and rules relating to video recording of questioning, and complaints mechanisms.[6]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020 [F2020L01714], *Report 2 of 2021*; [2021] AUPJCHR 21.

2 The instrument is made pursuant to section 34AF of the *Australian Security Intelligence Organisation Act 1979.*

3 Section 6.

4 Sections 9 and 13.

5 Sections 11–12.

6 Sections 14–15.

International human rights legal advice

Multiple rights

1.113 The procedures outlined in this instrument, which are required to be followed in the exercise of authority under an ASIO compulsory questioning warrant, have safeguard value for warrant subjects who are required to comply with compulsory questioning. For example, it is important that questioning may only be conducted where a warrant subject has access to fresh water, clean sanitary facilities, and appropriate food. It also helps to safeguard rights that a warrant subject must be provided with eight hours of continuous and undisturbed sleep (or 10 hours in the case of a minor) and may leave the questioning place during a break. Further, requiring that a statement of any known vulnerabilities about a warrant subject (including a physical, sensory, intellectual or psychiatric disability) that are relevant to questioning be provided when requesting a warrant, may help to safeguard the human rights of such warrant subjects.

1.114 However, the compulsory questioning warrant scheme itself raises numerous other complex human rights concerns. These issues were considered in detail in relation to the bill that became the *Australian Security Intelligence Organisation Amendment Act 2020*.[7] As such, the advice provided in relation to that bill in *Report 7 of 2020*[8] and *Report 9 of 2020*[9] is reiterated in relation to this instrument.

Committee view

1.115 The committee notes this instrument sets out the procedures to be followed in the exercise of authority under an Australian Security Intelligence Organisation (ASIO) compulsory questioning warrant.

1.116 The committee notes that many of these compulsory questioning warrant procedures in this instrument address specific concerns raised by the committee in its earlier consideration of the bill that became the *Australian Security Intelligence Organisation Amendment Act 2020*, including in relation to questioning conditions, and additional safeguards for warrant subjects with disability. The committee considers, therefore, that this instrument will likely assist the human rights compatibility of the compulsory questioning scheme in those areas.

1.117 However, the committee notes that the compulsory questioning warrant scheme overall raises numerous other complex human rights concerns, which were

7 The bill passed both houses of Parliament on 10 December 2020.

8 Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020), pp. 32–68.

9 Parliamentary Joint Committee on Human Rights, *Report 9 of 2020* (18 August 2020), pp. 1–114.

considered in detail in relation to the bill that became the *Australian Security Intelligence Organisation Amendment Act 2020*.[10] The committee assessed the human rights compatibility of that bill in *Report 9 of 2020*.[11]

1.118 As such, the committee refers the minister and the Parliament to that report in relation to the assessment of the human rights compatibility of this instrument.

10 The bill passed both houses of Parliament on 10 December 2020.

11 Parliamentary Joint Committee on Human Rights, *Report 9 of 2020* (18 August 2020), pp. 1–114.

Social Security (Coronavirus Economic Response–2020 Measures No. 16 Determination 2020 [F2020L01671][1]

Purpose	This legislative instrument continues the payment of the COVID-19 supplement to 31 March 2021 for recipients of JobSeeker Payment, Youth Allowance, Austudy Payment, Special Benefit, Partner Allowance and Widow Allowance
Portfolio	Families and Social Services
Authorising legislation	*Social Security Act 1991*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 2 February 2021). Notice of motion to disallow must be given by 22 March 2021 in the House of Representatives and 11 May 2021 in the Senate[2]
Rights	Social security; adequate standard of living

Rate of COVID-19 supplement payment

1.119 This legislative instrument provides for the payment of the COVID-19 supplement for recipients of JobSeeker Payment, Parenting Payment, Youth Allowance, Austudy Payment, Special Benefit, Partner Allowance and Widow Allowance, at a rate of $150 per fortnight from 1 January to 31 March 2021.[3] It has been made following the expiration of the previous legislative provisions providing for the COVID-19 supplement. The supplement was originally introduced at a rate of

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Coronavirus Economic Response–2020 Measures No. 16 Determination 2020 [F2020L01671], *Report 2 of 2021*; [2021] AUPJCHR 22.

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 The *Social Services and Other Legislation Amendment (Extension of Coronavirus Support) Act 2020* provided the minister with the power to determine, generally from 1 January to 31 March 2021, by disallowable legislative instrument, to make temporary modifications of the social security law in response to circumstances relating to COVID-19. The specific authority for the minister to set these rates of payment by legislative instrument is contained in the following sections of the *Social Security Act 1991* (as amended by the 2020 Act): section 504 (COVID-19 supplement with respect to recipients of parenting payment); section 557 (COVID-19 supplement with respect to recipients of Youth Allowance); 646 (COVID-19 supplement with respect to recipients of Jobseeker); 1210B (COVID-19 supplement with respect to recipients of social security payments other than parenting payment, Youth Allowance, Jobseeker or sickness allowance); and section 1262 (authority for the minister to, by legislative instrument, determine modifications to social security law).

$550 per fortnight for recipients of these social security payments from 27 April to 24 September 2020.[4] The supplement was subsequently extended for a further three months at $250 per fortnight, expiring on 31 December 2020.[5]

Preliminary international human rights legal advice

Rights to social security and an adequate standard of living

1.120 By providing for a monetary supplement to be made available to recipients of certain social security payments for three months, this measure, taken alone, engages and promotes the right to social security and the right to an adequate standard of living. 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.[6] The right to an adequate standard of living requires States Parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.[7] The statement of compatibility identifies this, and notes that the instrument also extends several other temporary measures relating to eligibility for, and the provision of, several social security payments.[8]

1.121 As a party to the International Covenant on Economic, Social and Cultural Rights, Australia has an obligation to take steps towards achieving the progressive realisation of economic, social and cultural rights. It also has a corresponding duty to refrain from taking unjustified retrogressive measures, or backwards steps with respect to their realisation.[9] As a matter of law, this legislative instrument provides

4 *Coronavirus Economic Response Package Omnibus Act 2020*.

5 Pursuant to the Social Security (Coronavirus Economic Response—2020 Measures No. 14) Determination 2020.

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

8 Statement of compatibility, pp. 17–19. Note, however, the views of the UN Special Rapporteur on extreme poverty and human rights and the UN Economic, Social and Cultural Rights Committee in relation to short-term responses to the COVID-19 pandemic: UN Special Rapporteur for extreme poverty, *Looking back to look ahead: A rights-based approach to social protection in the post-COVID-19 economic recovery* (11 September 2020) at [6] and [26] and UN Economic, Social and Cultural Rights Committee, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights* (2020) at [10] and [25].

9 International Covenant on Economic, Social and Cultural Rights, article 2. UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)* (1990) [9].

for the continued payment of a supplement that otherwise would have ceased to operate. However, in practice, those receiving the social security supplement are now receiving $100 less per fortnight than they previously received, which raises questions as to whether this may constitute a backwards step in the realisation of the rights to an adequate standard of living and social security. The United Nations (UN) High Commissioner for Human Rights has noted that a retrogressive measure may be one that indirectly 'leads to backward movement in the enjoyment of the rights recognized in the Covenant'.[10] Accordingly, in assessing whether a measure may be retrogressive, it is relevant to consider the context in which the relevant law is being implemented, the impact it will have on individuals, and the effect it will have on their human rights overall. In this case, while the supplement was always intended to be temporary, considering the cumulative effect of this measure in context, there is a risk that the reduction in the rate of this rights-enhancing supplement may constitute a retrogressive measure in relation to the realisation of the rights to social security and an adequate standard of living. Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

1.122 The UN Committee on Economic, Social and Cultural Rights has advised that if any deliberately retrogressive measures are taken with respect to a right, 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 duly justifiable by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party'.[11] It is not entirely clear if the continued operation of the supplement, but at a reduced rate, would constitute a retrogressive measure as a matter of international human rights law.

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10 See, UN High Commissioner for Human Rights, *Report on austerity measures and economic and social rights*, E/2013/82 (7 May 2013), p. 11.

11 UN Committee on Economic, Social and Cultural Rights, *General Comment 19: the right to social security* (2008) [42]: 'There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under 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 duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party. The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level'.

However, noting that there is a risk that it might, it would be necessary to consider whether the burden of proof referred to by the UN Committee on Economic, Social and Cultural Rights has been met. In light of this, it is difficult to assess the compatibility of the measure, because the statement of compatibility does not establish whether consideration was given to alternatives to this reduction and the effect of the reduction on social security recipients.[12]

Committee view

1.123 The committee notes that this instrument provides for the temporary payment of the COVID-19 supplement for recipients of JobSeeker Payment, Parenting Payment, Youth Allowance, Austudy Payment, Special Benefit, Partner Allowance and Widow Allowance, at a rate of $150 per fortnight from 1 January to 31 March 2021.

1.124 The committee notes that this legislative instrument provides for the continued payment of a supplement that otherwise would have ceased to operate, albeit at a lower rate than that which previously applied. The committee considers that the supplement, which is designed to provide additional financial assistance to Australians financially impacted by the COVID-19 pandemic, taken alone, promotes the rights to social security and an adequate standard of living.

1.125 The committee notes the advice that although the supplement was always intended to be temporary, considering the cumulative effect of this measure in context, there is a risk that the reduction in the rate of this rights-enhancing supplement may constitute a retrogressive measure (that is, a backwards step) in relation to the realisation of the rights to social security and an adequate standard of living. Retrogressive measures, a type of limitation, may be permissible under international human rights law if they are shown to be reasonable, necessary and proportionate. If this were found to constitute a retrogressive measure, the statement of compatibility would need to provide an analysis as to whether this measure would be permissible under international human rights law.

1.126 Noting that it is not entirely clear if the continued operation of the supplement, but at a reduced rate, would constitute a retrogressive measure as a matter of international human rights law, the committee makes no concluded view in relation to this but draws the above advice to the attention of the minister and the Parliament.

12 It is noted that this committee has previously questioned the adequacy of (what was then) Newstart (now Jobseeker) in meeting the minimum requirements of the right to an adequate standard of living, see Parliamentary Joint Committee on Human Rights, *Social Security Legislation Amendment (Fair Incentives to Work) Act 2012 – Final Report* (March 2013), pp. 28–30. While the committee's report dates from 2013, it is noted that the JobSeeker rate has not increased since 1994, aside from in line with the Consumer Price Index and these temporary COVID-19 supplements.

Social Security (Parenting payment participation requirements – class of persons) Instrument 2021 [F2021L00064][1]

Purpose	This legislative instrument specifies a class of persons, described as Compulsory Participants, for the purposes of paragraph 500(1)(ca) of the *Social Security Act 1991*, requiring them to participate in the ParentsNext program in order to be in continued receipt of the Parenting Payment
Portfolio	Education, Skills and Employment
Authorising legislation	*Social Security Act 1991*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 2 February 2021). Notice of motion to disallow must be given by 22 March 2021 in the House and 11 May 2021 in the Senate[2]
Rights	Social security; adequate standard of living; privacy; equality and non-discrimination; rights of the child; work; education

Suspension of parenting payment for mutual obligation failures

1.127 This legislative instrument provides that a specific class of persons receiving parenting payment may be required to participate in the ParentsNext pre-employment program in order to remain eligible for the payment.[3]

1.128 A person would fall within this class if, on or after 1 July 2021, they:

(a) reside in a 'jobactive employment region';[4]

(b) have been receiving parenting payment for a continuous period of at least six months prior to that day;

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Parenting payment participation requirements – class of persons) Instrument 2021 [F2021L00064], *Report 2 of 2021*; [2021] AUPJCHR 23.

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 This legislative instrument is made pursuant to subsection 500(1)(ca) of the *Social Security Act 1991*.

4 This term is defined in section 4 of the instrument to mean 'a geographical region in Australia in which employment services were delivered by one or more jobactive employment service providers on 1 December 2020'.

(c) have a young child who is between nine months and six years of age;

(d) have not engaged in work in the six month period immediately prior;

(e) are aged under 55 years; and

(f) are either

(i) an 'early school leaver' (that is, aged under 22 years and have not completed the final year of school);[5] or

(ii) are aged at least 22 years and have not completed their final year of school and have been receiving an income support payment for a continuous period of at least two years prior, or have completed their final year of school and have received an income support payment for a continuous period of at least four years immediately prior.[6]

1.129 Participation in the ParentsNext program may require that a person: attend playgroups or similar activities; complete further education and training (such as literacy and numeracy courses); or undertake referrals to services to address non-vocational barriers to employment like confidence building, health care or counselling.[7]

1.130 A person who is a compulsory participant would also be subject to the targeted compliance framework under the *Social Security (Administration) Act 1999*. Under this framework, where an individual fails to comply with their participation obligations their payment may be suspended, and where they are deemed to have persistently failed to meet their obligations without a reasonable excuse, their payment may be reduced by 50 to 100 per cent for a period, suspended, or cancelled.[8] An individual may also be exempted from participation requirements due to specified circumstances including domestic violence, temporary incapacity, and some caring responsibilities.[9]

Preliminary international human rights legal advice

Multiple rights

1.131 This measure provides access to a program which is intended to provide early support to young parents with a lower level of educational attainment to help

5 Section 4.

6 Subsection 6(1).

7 Statement of compatibility, p. 6.

8 The *Social Security (Administration) Act 1999* sets out the compliance framework associated with mutual obligations. See, Part 3, Division 3AA.

9 *Social Security Act 1991*, Chapter 2, Part 2.10, Division 3A.

them plan and prepare for employment before their youngest child starts school, including by participating in educational activities or activities with their children. In this respect, it may engage and promote the rights to work, education, and the rights of the child. The right to work requires that, for full realisation of that right, steps should be taken by a State including 'technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and productive employment'.[10] The right to education provides that education should be accessible to all.[11] In addition, as the measure is aimed at disrupting intergenerational disadvantage and reducing the risk of long-term welfare dependency for participating parents and their children, it may promote the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.[12] These rights are protected under a number of treaties, particularly the Convention on the Rights of the Child.

1.132 However, by making participation in the ParentsNext program compulsory, and providing that a person who fails to participate may have their parenting payment reduced, suspended or cancelled, this measure also engages and may limit several other human rights including the rights to: social security; an adequate standard of living; a private life; and equality and non-discrimination.[13]

1.133 In particular, reducing or cancelling a person's social security payments for non-compliance limits the right to social security. 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, particularly the right to an adequate standard of living and the right to health.[14] In addition, if the reduction or cancellation of parenting payments were to substantially reduce a person's ability to pay for housing and food this would limit the right to an adequate standard of living. This right requires States Parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.[15] The United Nations

10 International Covenant on Economic, Social and Cultural Rights, article 6(2).

11 International Covenant on Economic, Social and Cultural Rights, article 13.

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

13 If the right to an adequate standard of living is limited in this context, such that it restricts the capacity of a parent to provide for the basic needs for their child, this would also engage and limit the rights of the child.

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

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

Committee on Economic, Social and Cultural Rights has noted that social security benefits must be adequate in amount and duration having regard to the principle of human dignity, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.[16]

1.134 In addition, by requiring that parents (and their children) participate in the ParentsNext activities (such as counselling or by undertaking specified activities with their children) this measure engages and limits the right to privacy.[17] This includes a requirement that the State does not arbitrarily interfere with a person's private and home life.[18] 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. The statement of compatibility does not identify that this right may be engaged and limited by this measure.

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

1.136 In addition, as the statement of compatibility notes, the measure directly discriminates on the basis of age, as it applies to specified participants on the basis of their age.[19] The measure also appears to disproportionately affect several other groups, in particular young women, and potentially Indigenous persons, people with disability, and people from culturally and linguistically diverse backgrounds.[20] Consequently, the measure engages and limits the right to equality and non-discrimination. 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.[21] The right to equality encompasses both 'direct' discrimination (where

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

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

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

19 Statement of compatibility, p. 12.

20 Evidence to this effect has been previously considered in a Senate inquiry. See, Senate Standing Committee on Community Affairs (References), *ParentsNext, including its trial and subsequent broader rollout* (March 2019), pp. 29–34.

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.

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] Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[24]

Legitimate objective and rational connection

1.137 The statement of compatibility states that the objective of the ParentsNext program is to encourage and assist eligible parents who are in receipt of parenting payment and have young children to identify and make progress towards achieving their education and employment goals through participation in activities and connecting to local services.[25] This is likely to constitute a legitimate objective for the purposes of international human rights law.

1.138 As to whether the participation in the ParentsNext program is likely to be effective to achieve its stated objectives, the statement of compatibility notes that participants often come from families that are subject to intergenerational disadvantage and may suffer from complex circumstances that act as barriers to employment and education, meaning that they are unable to identify ways to improve their education and work prospects, and are discouraged from seeking, or unable to seek, support.[26] It states that if parents on income support are assisted to gain employment-related skills and education earlier (including through the ParentsNext program), as well as using the time when their children are young to stabilise their family life, they are more likely to gain ongoing employment and less likely to need to rely on income support on a continuing basis.[27] It would appear

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'.

24 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].

25 Statement of compatibility, p. 9.

26 Statement of compatibility, p. 9.

27 Statement of compatibility, p. 13.

therefore, that participation in the ParentsNext scheme may be capable to effectively address barriers to education and employment for young parents, although it is noted that the extent of its effectiveness may depend on the extent to which ParentsNext programs are personalised in practice.[28] It is, however, unclear how reducing, suspending or cancelling a person's parenting payment if they fail to participate in an activity as required under the ParentsNext program (in circumstances where that payment may be that person's primary source of income), would be effective to remove barriers to employment and education, and stabilise their family life.

Proportionality

1.139 There are also questions as to whether compulsory participation in the ParentsNext program is a proportionate means by which to achieve the stated objective. A key aspect of whether a limitation on a right is permissible is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider whether: the measure is accompanied by sufficient safeguards; it provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the circumstances of individual cases; and whether any less rights restrictive alternatives could achieve the same objective.

1.140 In relation to this, it is unclear why it is necessary for a person's receipt of parenting payment to be contingent on their compulsory participation in the ParentsNext program, with failure to participate leaving the person open to having their parenting payments suspended, reduced or cancelled. The statement of compatibility notes that when the program initially began as a voluntary trial, 66 per cent of appointments were attended, whereas since the program was rolled-out nationally and became compulsory, attendance rose to almost 80 per cent (a difference of less than 14 per cent).[29] This appears to indicate that engagement with the ParentsNext program was already comparatively high when the program was voluntary. This raises questions as to whether making participation compulsory is a proportionate means by which to achieve the stated objective. In addition, it is unclear whether other, less rights restrictive alternatives to compulsory participation would be ineffective to achieve the objectives of the scheme. For example, it is not clear whether the objective of the program could not be achieved by incentivising individuals to participate in the program voluntarily (for example, through the

28 It is noted that some concerns have previously been raised by participants and advocates that ParentsFirst providers were not taking into account the individual circumstances, responsibilities or pre-employment goals of participants in developing participation plans. See, Senate Standing Committee on Community Affairs (References), *ParentsNext, including its trial and subsequent broader rollout* (March 2019), p. 11.

29 Statement of compatibility, p. 2.

provision of an additional financial payment for participating) rather than through the imposition of sanctions for failure to participate.

1.141 As to whether the measure is sufficiently flexible to treat different cases differently, the statement of compatibility notes that people who may otherwise be subject to these participation requirements may be exempted for a range of reasons, including domestic violence, certain caring responsibilities, or sickness.[30] These may serve as a useful safeguard, providing some flexibility to address individual circumstances. However, it is noted that the safeguard value of these exemptions may also depend on the extent to which they are applied in practice.[31]

1.142 In addition, questions remain as to whether the targeted compliance framework (through which compliance with the ParentsNext program would be enforced) has sufficient flexibility to respond to individual circumstances. Under the framework, it appears that every mutual obligation failure—including failing to attend, or be punctual for, an appointment—will result in income support payments being suspended (how long they remain suspended and whether they result in a permanent loss depends on several factors),[32] and cause the individual to be subject to reconnection requirements. Further, it appears that while a series of failures to meet mutual obligation requirements may result in a capability assessment of the person by Services Australia (and a consideration of their individual circumstances), these procedures would appear to apply only after a person's payments have been suspended.[33] Consequently, it is not clear whether this measure is accompanied by sufficient safeguards, noting that it is unclear whether individuals who have their payments suspended (or cancelled) will be provided with additional support to ensure their basic needs for food and housing, and care for their children, are met during the time their payments are suspended or cancelled.

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30 Explanatory statement, p. 1.

31 It is noted that some concerns have previously been raised by participants and advocates about the process around how exemptions are applied. See, Senate Standing Committee on Community Affairs (References), *ParentsNext, including its trial and subsequent broader rollout* (March 2019), pp. 7–9.

32 The 'usual rule' is that where a person has committed a mutual obligation failure under section 42AC, the Secretary *must* determine that their payment is not payable for a period of time, and must take further action if satisfied that the person has engaged in persistent mutual obligation failures without a reasonable excuse. See, *Social Security (Administration) Act 1999,* section 42AF. See also, Department of Social Services, *Social Security Guide*, version 1.278 (released 8 February 2021), 3.11.11 ParentsNext, https://guides.dss.gov.au/guide-social-security-law/3/11/11 (accessed 16 February 2021).

33 See, Department of Employment, *Guideline–Targeted Compliance Framework: Mutual Obligation Failures* (version 3.0, published 18 September 2020) https://docs.employment.gov.au/system/files/doc/other/targeted_compliance_framework_1.pdf (accessed 16 February 2021).

1.143 Further information is required in order to assess the compatibility of this measure with the rights to social security, an adequate standard of living, privacy and equality and non-discrimination, in particular:

(a) what percentage of participants in the ParentsNext program are: Indigenous; from a culturally and linguistically diverse background; or identify as a person with disability;

(b) how reducing, suspending or cancelling a person's parenting payment where they fail to participate in the ParentsNext program would be effective to remove barriers to employment and education, and stabilise family life for those participants;

(c) how many compulsory participants in the ParentsNext program have had their payments suspended, reduced or cancelled, and what is the average duration in each case;

(d) how it is proportionate to the stated aim of this measure to reduce, suspend or cancel a participant's parenting payments for a failure to meet their engagement requirements under the ParentsNext program;

(e) whether other, less rights restrictive alternatives to compulsory participation have been considered, and why other, less rights restrictive alternatives (such as voluntary participation, or voluntary participation incentivised by an additional financial payment) would not be effective to achieve the stated aims of the measure; and

(f) what safeguards are in place to ensure that persons whose parenting payment is reduced, suspended or cancelled following a mutual obligation failure have funds available to meet their basic needs, and those of their children.

Committee view

1.144 The committee notes that this legislative instrument specifies a class of persons receiving parenting payment, who may be required to participate in the ParentsNext pre-employment program in order to remain eligible for the payment.

1.145 The committee notes that the ParentsNext program is intended to provide early support to young parents with a lower level of educational attainment to help them plan and prepare for employment before their youngest child starts school, and as such, this program would appear to engage and promote a number of human rights, including the rights to work, education, and the rights of the child.

1.146 However, the committee notes that making this participation compulsory, and causing a person's parenting payment to be reduced, suspended or cancelled should they fail to appropriately engage in the program, may engage and limit the rights to: social security, an adequate standard of living; a private life; and equality

and non-discrimination. The committee notes that these rights may be permissibly limited where a limitation is reasonable, proportionate and necessary.

1.147 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill, and as such seeks the minister's advice as to the matters set out at paragraph [1.143].

Bills and instruments with no committee comment[1]

1.148 The committee has no comment in relation to the following bills which were introduced into the Parliament between 2 to 4 and 15 to 18 February 2021. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:[2]

- Appropriation Bill (No. 3) 2020-2021;
- Appropriation Bill (No. 4) 2020-2021;
- Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2021;
- Education Legislation Amendment (2021 Measures No. 1) Bill 2021;
- Environment Protection and Biodiversity Conservation Amendment (Save the Koala) Bill 2021;
- Family Assistance Legislation Amendment (Early Childhood Education and Care Coronavirus Response and Other Measures) Bill 2021;
- Health Insurance Amendment (Prescribed Fees) Bill 2021;
- Industry Research and Development Amendment (Industry Innovation and Science Australia) Bill 2021;
- Migration Amendment (Common Sense for All Visas) Bill 2021;
- Narcotic Drugs Amendment (Medicinal Cannabis) Bill 2021;
- National Greenhouse and Energy Reporting Amendment (Transparency in Carbon Emissions Accounting) Bill 2021;
- Social Services and Other Legislation Amendment (Student Assistance and Other Measures) Bill 2021;
- Treasury Laws Amendment (2021 Measures No. 1) Bill 2021; and
- Treasury Laws Amendment (Your Future, Your Super) Bill 2021.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 2 of 2021*; [2021] AUPJCHR 24.

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

1.149 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 22 December 2020 and 27 January 2021.[3] This includes a number of instruments made under the Autonomous Sanctions Regulations 2011.[4] The committee has considered the human rights compatibility of similar instruments on a number of occasions.[5] As these legislative instruments do not appear to designate or declare any individuals who are currently within Australia's jurisdiction, the committee makes no comment in relation to these specific instruments at this time.

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

Dr Anne Webster MP
Chair

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

4 Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Syria and Proliferation of Weapons of Mass Destruction) Amendment (Continuation of Effect) Instrument 2020 [F2021L00066]; Autonomous Sanctions (Designated and Declared Persons—Former Federal Republic of Yugoslavia) Amendment (Continuation of Effect) Instrument 2020 [F2021L00059]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Amendment (Continuation of Effect) Instrument 2020 [F2021L00058]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Zimbabwe) Amendment (Continuation of Effect) Instrument 2020 [F2021L00051]; and Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Libya) Amendment (Continuation of Effect) Instrument 2020 [F2021L00050].

5 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 112-122; *Report 6 of 2018* (26 June 2018) pp. 104-131.See also *Report 4 of 2018* (8 May 2018) pp. 64-83; *Report 3 of 2018* (26 March 2018) pp. 82-96; *Report 9 of 2016* (22 November 2016) pp. 41-55; *Thirty-third Report of the 44th Parliament* (2 February 2016) pp. 17-25; *Twenty-eighth Report of the 44th Parliament* (17 September 2015) pp. 15-38; *Tenth Report of 2013* (26 June 2013) pp. 13-19; *Sixth Report of 2013* (15 May 2013) pp. 135-137.