



Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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Committee information

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

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

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

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

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

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- 1 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).
 - 2 See the committee's *Short Guide to Human Rights* and *Guide to Human Rights*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

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

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

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

Chapter 1¹

New and continuing matters

1.1 In this chapter the committee has examined legislative instruments for compatibility with human rights which were registered on the Federal Register of Legislation between 22 March to 3 May 2021.²

1.2 The committee comments in this Chapter on three legislative instruments, and in some instances, seeks a response or further information from the relevant minister.

1.3 The committee has deferred its consideration of one legislative instrument from this period, namely the Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444].

1.4 The committee notes that this registration period includes the Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Ukraine) Amendment (No. 1) Instrument 2021, [F2021L00366]. The committee has considered the human rights compatibility of similar instruments on a number of occasions.³ As this legislative instrument does not appear to designate or declare any individuals who are likely to be currently within Australia's jurisdiction, the committee makes no comment in relation to this specific instrument at this time.

1.5 The committee has determined not to comment on the remaining legislative 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.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 6 of 2021*; [2021] AUPJCHR 54.

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 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.

Legislative Instruments

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 [F2021L00533]¹

Purpose	This legislative instrument requires passengers on a relevant international flight not to enter Australian territory at a landing place if the person has been in India within 14 days of the day the flight was scheduled to commence
Portfolio	Health
Authorising legislation	<i>Biosecurity Act 2015</i>
Last day to disallow	This legislative instrument is exempt from disallowance (see subsection 477(2) of the <i>Biosecurity Act 2015</i>)
Rights	Life; health; freedom of movement; equality and non-discrimination

Ban on passengers from India entering Australia

1.6 This determination makes it a requirement for a person who is an international air passenger not to enter Australia if they have been in India within 14 days before the day the flight was scheduled to commence. The following persons are exempt from this requirement: aircraft crew; aircraft maintenance crew; freight workers; those travelling on an Australian official or diplomatic passport (and their immediate family members); and members of an Australian Medical Assistance Team.² This requirement commenced on 3 May 2021 and the determination is repealed at the start of 15 May 2021.

1.7 The determination is made under section 477(1) of the *Biosecurity Act 2015*, which provides that during a human biosecurity emergency period, the Minister for Health may determine emergency requirements, or give directions, that they are satisfied are necessary to prevent or control the entry, emergence, establishment or

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 [F2021I00533], *Report 6 of 2021*; [2021] AUPJCHR 55.

2 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021, section 7.

spread of disease in Australian territory. Failure to comply with such a direction is a criminal offence punishable by up to five years' imprisonment, or 300 penalty units (\$66,600).³

Preliminary international human rights legal advice

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

1.8 The explanatory statement states that the determination reflects the latest health advice that there is a high likelihood of COVID-19 cases arriving in Australia via a person travelling from India, and this measure is designed to maintain the integrity of Australia's quarantine system and allow the system to recover capacity, which is critical to prevent and manage the spread of COVID-19.⁴ As such, if the determination assists in preventing and managing the spread of COVID-19 it is likely to promote and protect the rights to life and health for persons in Australia. The right to life requires the State to take positive measures to protect life.⁵ The United Nations (UN) Human Rights Committee has stated that the duty to protect life implies that States parties should take appropriate measures to address the conditions in society that may give rise to direct threats to life, including life threatening diseases.⁶

1.9 The right to health is the right to enjoy the highest attainable standard of physical and mental health.⁷ Article 12(2) of the International Covenant on Economic, Social and Cultural Rights requires that States parties shall take steps to prevent, treat and control epidemic diseases.⁸ The UN Committee on Economic, Social and Cultural Rights has stated that the control of diseases refers to efforts to:

make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.⁹

1.10 While the measure may promote the rights to life and health for persons in Australia, banning persons from entering Australia, including Australian citizens and permanent residents, also engages and may limit a number of other human rights,

3 *Biosecurity Act 2015*, section 479. Note, penalty units are \$222, see *Crimes Act 1914*, section 4AA.

4 Explanatory statement, p. 1.

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

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

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

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

9 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (2000) [16].

particularly the rights to freedom of movement and equality and non-discrimination. The right to freedom of movement includes the right to enter, remain in, or return to one's own country.¹⁰ The UN Human Rights Committee has stated that the right of a person to enter his or her own country 'recognizes the special relationship of a person to that country'.¹¹ The reference to a person's 'own country' is not restricted to countries with which the person has the formal status of citizenship. It includes a country to which a person has very strong ties, such as long-standing residence and close personal and family ties.¹² The right to freedom of movement is not absolute: limitations can be placed on the right provided certain standards are met. However, the UN Human Rights Committee has stated in relation to the right to enter one's own country:

In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.¹³

1.11 In addition, the measure also appears to engage the right to equality and non-discrimination.¹⁴ 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.¹⁵ 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).¹⁶ 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,

10 International Covenant on Civil and Political Rights, article 12(4).

11 UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of movement)* (1999) [19].

12 *Nystrom v Australia*, UN Human Rights Committee Communication No.1557/2007 (2011).

13 UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of movement)* (1999) [21].

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

15 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.

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

such as race or nationality.¹⁷ In this case it appears that banning persons from entering Australia if they have been in India in the past 14 days is likely to disproportionately affect persons of Indian descent. Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination.¹⁸ 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.¹⁹

1.12 As this determination is exempt from disallowance by the Parliament, it is not required to be accompanied by a statement of compatibility with human rights.²⁰ As such, no assessment of the compatibility of this measure with the rights to freedom of movement or equality and non-discrimination has been provided.

1.13 It is apparent from the explanatory statement that the measure seeks to achieve a legitimate objective, namely that of protecting the quarantine and health resources needed to prevent and control the entry, and the emergence, establishment or spread of COVID-19 in Australia.²¹ It would also appear that banning travellers from a country identified to be of high risk because of the high number of COVID-19 positive case numbers is likely to be rationally connected (that is, effective to achieve) the stated objective.

1.14 The key question is whether the measure is proportionate to the objective sought to be achieved. In this respect, it is necessary to consider whether the measure: is sufficiently circumscribed; whether the measure is accompanied by sufficient safeguards; whether there is sufficient flexibility to treat different cases differently; and whether any less rights restrictive alternatives could achieve the same stated objective. The time limited nature of the measure (noting it is repealed 12 days after its entry into force), assists with its proportionality. However, it is noted that it is not

17 *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'.

18 *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).

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

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

21 Explanatory statement, p. 1.

clear whether additional determinations extending this timeframe will be made. In addition, although it may be time-limited, it is noted that there are extremely limited exceptions to the application of this direction (namely, for flight or ground aircraft crew and official travellers). The imposition of such a blanket policy without regard to individual circumstances may not be a proportionate means to achieve the stated aims. In addition, it is not clear that there is no less rights restrictive alternatives available, noting the existing methods designed to prevent and control the entry of COVID-19 in Australia, namely hotel quarantine arrangements.

1.15 Noting the UN Human Rights Committee's comment that there are few, if any, circumstances in which the deprivation of the right to enter one's own country could be reasonable, further information is required to assess the compatibility of this measure with the rights to freedom of movement and equality and non-discrimination, in particular:

- (a) whether banning travellers from India is reasonable and proportionate to the objective sought to be achieved;
- (b) whether persons of Indian descent will be disproportionately affected by this ban, and if so, is this differential treatment based on reasonable and objective criteria;
- (c) whether there is any less rights restrictive way to achieve the stated aims of preventing and controlling the entry, emergence, establishment or spread of COVID-19 into Australia. In particular, whether there are quarantine facilities available that could effectively manage any risk posed by travellers returning from high risk countries; and
- (d) why there does not appear to be any procedure whereby an individual can apply for an exemption from the direction (such as, for example, where pre-existing health conditions may mean that remaining in India during this time might pose a threat to a person's rights to health or life).

Committee view

1.16 The committee notes that this determination makes it a temporary requirement for a person who is an international air passenger not to enter Australia if they have been in India within 14 days before the day the flight was scheduled to commence.

1.17 The committee considers this determination, which is designed to prevent the entry and spread of COVID-19, promotes the rights to life and health for persons in Australia, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires that Australia takes steps to prevent, treat and control epidemic diseases.

1.18 However, the committee notes that this determination may also limit a number of other human rights, including the right to freedom of movement, which

includes a right to enter one's own country, and the right to equality and non-discrimination, noting the potential disproportionate impact on Indian-Australians.

1.19 In light of the unprecedented nature of the COVID-19 pandemic and the necessity for States to confront the threat of widespread contagion with emergency and temporary measures, the committee acknowledges that such measures may, in certain circumstances, restrict human rights. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.20 The committee notes that this determination was not accompanied by a statement of compatibility (as this is not required as a matter of law).²² As such, there has been no assessment of the impact of the determination on human rights, and in particular whether the travel ban is proportionate to achieve the stated aims. The committee reiterates²³ that given the potential impact on human rights of legislative instruments dealing with the COVID-19 pandemic, the committee considers it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility.

1.21 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 determination, and as such seeks the minister's advice as to the matters set out at paragraph [1.15].

22 The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9, provides that only legislative instruments subject to disallowance under the *Legislation Act 2003* require a statement of compatibility. This determination is not subject to disallowance, and as such, there is no legal requirement for a statement of compatibility.

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

Migration (Granting of contributory parent visas, parent visas and other family visas in the 2020/2021 financial year) Instrument (LIN 21/025) 2021 [F2021L00511]¹

Purpose	This instrument determines the maximum number of visas that may be granted for certain classes of visas in the financial year from 1 July 2020 to 30 June 2021
Portfolio	Home Affairs
Authorising legislation	<i>Migration Act 1958</i>
Last day to disallow	Exempt
Right[s]	Protection of the family; rights of the child

Capping numbers of parent visas

1.22 This legislative instrument sets out the maximum number of visas that can be granted in the 2020–2021 financial year for contributory parent visas; parent visas; and other family visas. The cap set by the instrument is 4,500 for parent visas and 500 for other family visas. This is in comparison to the cap set for the previous financial year of 7,371 for parent visas and 562 for other family visas.²

Preliminary international human rights legal advice

Right to protection of the family and rights of the child

- Capping the number of parent visas and other family visas, which it appears may limit the ability of certain family members (including parents of children aged under 18) to join others in Australia, engages and may limit the right to protection of the family and the rights of the child.³ An important element of

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Granting of contributory parent visas, parent visas and other family visas in the 2020/2021 financial year) Instrument (LIN 21/025) 2021 [F2021L00511], *Report 6 of 2021*; [2021] AUPJCHR 56

2 See Migration (LIN 19/131: Granting of Contributory Parent Visas, Parent Visas and Other Family Visas in the 2019/2020 Financial Year) Instrument 2019 (F2019L01496).

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

protection of the family⁴ is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together will engage this right. Additionally, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration, and to treat applications by minors for family reunification in a positive, humane and expeditious manner.⁵

1.23 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.

1.24 As this legislative instrument is exempt from disallowance by the Parliament, it is not required to be accompanied by a statement of compatibility with human rights.⁶ As such, no assessment of the compatibility of this measure with the rights to protection of the family or the rights of the child has been provided. It is therefore not clear what is the legitimate objective of this measure, nor whether the measure is proportionate to that objective.

1.25 As such, further information is required to assess the compatibility of this measure with the right to protection of the family and the rights of the child, in particular:

- (a) whether setting a cap on the number of parent and other family visas seeks to achieve a legitimate objective for the purposes of international human rights law;
- (b) whether the cap on the number of visas is a reasonable and proportionate measure to achieve the stated objective;
- (c) why the cap on numbers in this financial year is lower than that in the previous financial year;
- (d) whether any children under 18 years would be likely to be separated from their parents as a result of caps imposed on the numbers of parent visas granted;
- (e) whether there is any discretion to ensure family members are not involuntarily separated as a result of the cap of the number of parent and other family visas; and
- (f) whether the right to the protection of the family and the rights of the child were considered when these capped numbers were determined.

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

5 Convention on the Rights of the Child, articles 3(1) and 10.

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

Committee view

1.26 The committee notes this legislative instrument sets a cap on the number of parent visas and other family visas for the 2020–2021 financial year (which is lower than the cap set in the previous financial year). Once the cap is reached no further visas of this kind may be granted.

1.27 The committee considers that capping the number of parent and other family visas engages and may limit the right to protection of the family and the rights of the child. The committee notes that this instrument was not accompanied by a statement of compatibility (as this is not required as a matter of law).⁷ As such, there has been no assessment of the impact of this instrument on human rights.

1.28 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 instrument, and as such seeks the minister's advice as to the matters set out at paragraph [1.25].

⁷ The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9, provides that only legislative instruments subject to disallowance under the *Legislation Act 2003* require a statement of compatibility. This determination is not subject to disallowance, and as such, there is no legal requirement for a statement of compatibility.

Telecommunications Regulations 2021 [F2021L00289]¹

Purpose	<p>This legislative instrument repeals and remakes the <i>Telecommunications Regulations 2001</i>. In particular it:</p> <ul style="list-style-type: none"> • specifies a range of matters in relation to which the Australian Communications and Media Authority (ACMA) may make a service provider determination, covering prepaid mobile carriage services; premium services; fixed or mobile voice or data carriage services; and information relating to the telecommunications industry; • provides for exceptions to a rule precluding industry codes and standards from dealing with certain design features and performance requirements; • sets out exceptions to existing use and disclosure offences; • specifies additional kinds of carriage services, ancillary goods and services for which standard agreements are required; and • deals with several matters related to the carrier powers and immunities regime.
Portfolio	Infrastructure, Transport, Regional Development and Communications
Authorising legislation	<i>Telecommunications Act 1997</i>
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives on 23 March 2021 and in the Senate on 11 May 2021). Notice of motion to disallow must be given by 17 June 2021 in the House of Representatives and in the Senate by 11 August 2021 ²
Rights	Privacy; freedom of expression; equality and non-discrimination

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, *Telecommunications Regulations 2021 [F2021L00289]*, *Report 6 of 2021*; [2021] AUPJCHR 57.

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

Prepaid mobile carriage services

1.29 Under the *Telecommunications Act 1997*, the Australian Communications and Media Authority (ACMA) and the minister may make a service provider determination.³ The service provider determination must relate to a matter specified in the regulations.⁴ Part 2 of the regulations specifies the matters in relation to which the ACMA may make a service provider determination, including in relation to the supply of prepaid mobile carriage services.⁵ These matters include:

- verifying the identity of a customer of a prepaid mobile carriage service;
- obtaining information about the customer's proposed use of the prepaid mobile carriage service, such as personal, business, government or charity;
- recording and keeping information that is obtained for the purposes of verifying a customer's identity and their proposed use as well as information possessed by the carriage service provider about the supply of the prepaid mobile carriage service;
- destroying personal information if the destruction is reasonable;
- preventing the use of a prepaid mobile carriage service if the customer fails to verify their identity, including by giving false or misleading information; or an authorised law enforcement officer requests the service provider to prevent a person from using a prepaid mobile carriage service;⁶ and
- advising customers of the effect of the service provider determination.⁷

1.30 To verify the identity of a customer, the service carriage provider may do any of the following:

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- 3 *Telecommunications Act 1997*, subsections 99(1) and (1A). A service provider determination sets out the rules that apply to service providers in relation to the supply of either or both specified carriage services or specified content services.
- 4 *Telecommunications Act 1997*, subsection 99(3).
- 5 Part 2, section 7. A prepaid mobile carriage service is a public mobile telecommunications service used in connection with a number specified in the numbering plan for use in connection with the supply of carriage services to the public in Australia; and payment for the supply of the service must be made before the service is used, unless payment is not required for the initial supply of the service; and it is not a post-paid carriage service: Part 2, subsection 8(2).
- 6 *Telecommunications Act 1997*, subsections 313(3) and (4): A law enforcement officer may make a written request to prevent a person from using a prepaid mobile carriage service if that action is necessary for the purposes of enforcing criminal law, imposing pecuniary penalties, assisting the enforcement of criminal laws in a foreign country, protecting public revenue or safeguarding national security. A service carriage provider must help police as is reasonably necessary for these specified purposes.
- 7 Part 2, subsection 8(1).

- obtain from the customer the minimum amount of information that is reasonably necessary to identify the customer;
- use the national Document Verification Service, or a similar service, to check whether the customer's identity documents are authentic, accurate and up-to-date; and
- find out what other carriage services (if any) are supplied to the customer.⁸

1.31 It is noted that a service provider determination in relation to identity checks for prepaid mobile carriage services was made in 2017 and remains in force.⁹ This determination sets out the rules that apply to carriage service providers in relation to the supply of prepaid mobile carriage services, including rules and alternative methods for obtaining information and verifying the identity of customers, record keeping requirements and approved methods for verification of the identity of a customer who is a service activator.

Preliminary international human rights legal advice

Rights to privacy, freedom of expression and equality and non-discrimination

1.32 By authorising the collection, storage and use of personal information by service providers in relation to customers of prepaid mobile carriage services this measure engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.¹⁰

1.33 By preventing a customer from using a prepaid mobile carriage service in certain circumstances, including where a customer fails to verify their identity, the measure also engages and limits the right to freedom of expression. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, including orally, in writing or through any other media of an individual's choice.¹¹ The right protects all forms of expression and the means of their dissemination, including electronic and internet-based modes of expression.¹² The

8 Part 2, subsection 8(1)(a)(i)–(iii).

9 Telecommunications (Service Provider – Identity Checks for Prepaid Mobile Carriage Services) Determination 2017 [F2017L00399].

10 International Covenant on Civil and Political Rights, article 17. Every person should be able to ascertain which public authorities or private individuals or bodies control or may control their files and, if such files contain incorrect personal data or have been processed contrary to legal provisions, every person should be able to request rectification or elimination: UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]. See also, UN Human Rights Committee, *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

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

12 UN Human Rights Committee, *General Comment No. 34 (Freedom of opinion and expression)* (2011) [12].

United Nations (UN) Human Rights Committee has observed that internet and mobile based electronic information dissemination systems have substantially changed communication practices around the world.¹³ Noting that there is greater reliance on internet and mobile based electronic information dissemination systems, preventing certain customers from using a prepaid mobile carriage service would appear to have the effect of restricting access to a primary information dissemination system.

1.34 In addition, the measure may engage and limit the right to equality and non-discrimination to the extent that it may have a disproportionate impact on certain persons or groups with protected attributes who experience difficulties in verifying their identity due to a lack of access to identity documents. Such persons may include Aboriginal and Torres Strait Islander peoples, particularly those who do not have a birth certificate and those living in remote communities; victims/survivors of domestic or family violence; people experiencing homelessness; recently released prisoners; people with disability; undocumented migrant workers; and refugees and asylum seekers.¹⁴ The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.¹⁵ 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).¹⁶ The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', which exclusively or disproportionately affects people with a particular protected attribute,

13 UN Human Rights Committee, *General Comment No. 34 (Freedom of opinion and expression)* (2011) [15].

14 See Department of Social Services, *Social Security Guide (Version 1.281)*, April 2021, [2.2.1.40] <https://guides.dss.gov.au/guide-social-security-law/2/2/1/40> (accessed 4 May 2021).

15 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. The Convention on the Rights of Persons with Disabilities and the Convention on the Elimination of All Forms of Racial Discrimination further describes the content of these obligations, including the specific elements that States parties are required to take into account to ensure the right to equality before the law for people with disability on an equal basis with others, and the elimination of discrimination on the basis of race, colour, descent, national or ethnic origin.

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

for example race, national origin or disability.¹⁷ Noting that those persons who may experience difficulties in verifying their identity are likely to be persons with a particular protected attribute, such as race, national origin and/or disability, the measure could have a disproportionate impact on persons or groups with certain protected attributes. Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination.¹⁸ While the statement of compatibility acknowledges that the measure engages and limits the rights to privacy and freedom of expression, it does not address the possible implications of this measure for the right to equality and non-discrimination. Accordingly, no assessment is provided as to the compatibility of the measure with this right.

1.35 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.

Legitimate objective and rational connection

1.36 The statement of compatibility states that this measure, as well as the existing regulatory arrangements for prepaid mobile carriage services,¹⁹ seeks to inhibit the use of anonymous prepaid mobile services so that law enforcement and national security agencies can gain accurate information and evidence about customers of prepaid mobile services, should they need to do so for the purposes of their investigation.²⁰ The statement of compatibility notes that the information that is required to be collected by service providers is the minimum amount of personal information that is reasonably necessary to assist with the objectives of law enforcement and national security.²¹ Regarding the requirement for customers to verify their identity to use prepaid mobile carriage services, the statement of compatibility states that this requirement is to assist law enforcement agencies to identify and apprehend individuals who do use, or attempt to use, telecommunications networks and facilities in, or in relation to, the commission of

17 *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'.

18 *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).

19 See, e.g., Telecommunications (Service Provider – Identity Checks for Prepaid Mobile Carriage Services) Determination 2017 [F2017L00399].

20 Statement of compatibility, p. 38.

21 Statement of compatibility, p. 40.

offences.²² The objectives of law enforcement and national security would likely constitute legitimate objectives for the purposes of international human rights law. Making the use of prepaid mobile carriage services conditional on a customer providing personal information to verify their identity and collecting a customer's personal information for that purpose would also appear to be rationally connected (that is, effective to achieve) to these objectives.

Proportionality

1.37 The key question is whether the limitation on rights is proportionate to the objectives being sought. In this respect, it is necessary to consider whether a proposed limitation is sufficiently circumscribed and accompanied by sufficient safeguards. Regarding the limitation on the right to privacy, the statement of compatibility notes that the information that may be required to be obtained from a customer is limited to the minimum amount of information that is reasonably necessary to identify a customer; information about the customer's existing carriage services; and information about the customer's proposed use of the prepaid mobile carriage service, for example, residential, business, government or charitable use.²³ By specifying in the legislation the type of personal information that is authorised to be collected, used and stored, the precise circumstances in which interferences with privacy are permitted may be ascertained.²⁴ This assists with the proportionality of the measure. The fact that only the minimum amount of information that is reasonably necessary to verify a customer's identity is required to be obtained by a service provider also assists with the proportionality of the measure as it ensures that any limitation on the right to privacy is only as extensive as is strictly necessary.

1.38 The statement of compatibility identifies a number of safeguards with respect to the right to privacy. It notes that service providers are required to destroy the information that is recorded if destruction is reasonable, including destruction when the information is no longer required by the service provider.²⁵ The statement of compatibility states that this provision is to ensure that information is not retained when it is no longer required.²⁶ It also identifies Australian Privacy Principle 4.2 as a safeguard, which requires organisations to take reasonable steps to destroy or permanently de-identify personal information if it is no longer needed.²⁷ In addition, the statement of compatibility notes that Part 13 of the *Telecommunications Act 1997*

22 Statement of compatibility, p. 45.

23 Statement of compatibility, p. 40.

24 The UN Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted: *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

25 Statement of compatibility, p. 41; Part 2, subsection 8(1)(d).

26 Statement of compatibility, p. 41.

27 *Privacy Act 1988*, schedule 3, principle 4.2.

contains safeguards to protect personal information held by service providers, including certain record-keeping requirements and authorising use or disclosure of protected information only in limited circumstances, such as for the purposes of enforcement of the criminal law or assisting the ACMA to carry out its functions or powers.²⁸

1.39 These provisions, particularly the record keeping requirements and restrictions on the use and disclosure of protected information, appear to provide some protection of customers' right to privacy and assist with the proportionality of this measure.²⁹ As such the limitation on the right to privacy would appear to be permissible for the purposes of international human rights law.

1.40 Regarding the limitation on the right to freedom of expression, the statement of compatibility states that preventing customers who do not verify their identity from using prepaid mobile carriage services is reasonable, necessary and proportionate to give effect to the law enforcement and national security objectives of the regulations.³⁰ The statement of compatibility does not, however, identify any specific safeguards that accompany the measure to ensure that the limitation on the right to freedom of expression is proportionate.

1.41 The breadth and flexibility of the measure are relevant factors in assessing whether the limitation on the right to freedom of expression is proportionate. In this regard, the UN Human Rights Committee has noted that restrictions on the right to freedom of expression must not be overly broad.³¹ The provision that sets out the ways in which a service provider determination may specify how a customer's identity may be varied is drafted in relatively broad and non-exhaustive terms.³² This allows the determination to be made in a way that could provide the service provider with some flexibility as to how it verifies a customer's identity, for example, by collecting personal information from the customer or using the national Document Verification Service. In this regard, the measure would appear to contain some flexibility to allow the determination to treat different cases differently. For instance, if a customer did not have access to official identity documents, as a matter of statutory interpretation,

28 Statement of compatibility, p. 41.

29 Although it is noted that the Australian Privacy Principles contain a number of exceptions to the prohibition on use or disclosure of personal information for a secondary purpose, as does the *Telecommunications Act 1997*.

30 Statement of compatibility, p. 45.

31 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34]. At [35], the Committee observed: 'When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat'.

32 Part 2, subsection 8(1)(a).

it appears open for the determination to provide that the service provider may verify the customer's identity in an alternative way, such as by obtaining the minimum reasonably necessary information from the customer. Noting that certain customers with protected attributes may not have ready access to identity documents, this flexibility would likely assist with the proportionality of the measure. If the determination therefore allowed service providers to interpret and apply the measure in a broad and flexible manner, having regard to the individual circumstances of customers and the potential difficulties they may experience in obtaining evidence to verify their identity, the risk that the measure may impermissibly limit the rights to freedom of expression and equality and non-discrimination would be minimised.

1.42 However, based on the current service provider determination in relation to identity verification for customers of prepaid mobile carriage services,³³ it appears that the measure will not necessarily be applied in a broad and flexible manner. Indeed, the current service provider determination requires service providers to verify the identity of a customer who is a purchaser by seeing specified documents, such as a licence, passport, birth certificate, Medicare card or credit or debit card; and to verify the identity of a customer who is a service activator by using an approved method of identity verification, including a government online verification service, an existing post-paid account or a visual identity document check.³⁴ Vulnerable customers who do not have access to official identity documents, such as a licence, bank card or birth certificate, may experience difficulties in verifying their identity in accordance with the current approved methods for identity verification. As such, there appears to be some risk that, in practice, the measure may be applied in a prescriptive manner and could result in certain customers being prevented from using a prepaid mobile carriage service. Noting the greater reliance on internet and mobile based electronic information dissemination systems, if a customer were effectively prevented from accessing prepaid mobile carriage services, this may constitute a significant interference with a customer's right to freedom of expression. As such, there is a risk that the limitation on the rights to freedom of expression and equality and non-discrimination (to the extent that the measure may disproportionately impact persons

33 Telecommunications (Service Provider – Identity Checks for Prepaid Mobile Carriage Services) Determination 2017 [F2017L00399].

34 Telecommunications (Service Provider – Identity Checks for Prepaid Mobile Carriage Services) Determination 2017 [F2017L00399], sections 4.4 and 4.5. Section 4.4 specifies that where activation of the prepaid mobile carriage service will not result in the purchaser having five or more activated prepaid mobile carriage services and the purchaser offers to pay for the service otherwise than by credit or debit card, then the service provider must verify the identity of the purchaser by seeing one category A document (including a license, passport or birth certificate) or two category B documents (including credit or debit card, Medicare card or a rates statement issued in the previous 12 months). The service provider is not required to take any further steps in relation to a purchaser if they offer to pay for the service using a credit or debit card. Section 4.5 provides that approved methods of identity verification are specified in column B of Schedule 1.

with certain protected attributes), may not be proportionate. It is noted that the current service provider determination contains limited exceptions to the rules for identity verification for emergency and family violence-affected individuals.³⁵ The proportionality of the measure may be assisted if these exceptions were extended to other vulnerable individuals who may have difficulty accessing identity documents, such as people experiencing homelessness or undocumented migrant workers.

Committee view

1.43 The committee notes that this measure sets out the matters in relation to which a service provider determination may be made with respect to a prepaid mobile carriage service. These matters include verifying a customer's identity; obtaining, recording and keeping personal information in relation to a customer; and preventing a customer using a prepaid mobile carriage service in certain circumstances, including failing to verify their identity.

1.44 The committee notes that the measure engages and limits the rights to privacy and freedom of expression by authorising the collection, use and storage of personal information and preventing a customer from using a mobile carriage service in certain circumstances. The committee notes that the measure may also engage and limit the right to equality and non-discrimination to the extent that the measure may have a disproportionate impact on persons or groups with certain protected attributes, such as race, national origin or disability, who may have difficulty in providing evidence to verify their identity. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.45 The committee considers that the measure pursues the legitimate objectives of law enforcement and national security. In relation to the right to privacy, the committee considers there are sufficient safeguards to adequately protect a customer's right to privacy. In relation to the rights to freedom of expression and equality and non-discrimination, the committee notes its concern that requiring all customers to provide documentary evidence verifying their identity may disproportionately impact on certain groups, such as those who may be homeless, experiencing domestic violence, Aboriginal or Torres Strait Islander peoples, undocumented migrant workers and refugees and asylum seekers. The committee notes that access to mobile phones is an essential requirement to accessing many services, including government services (and COVID-19 contact tracing). The committee notes its concern that if this requirement is applied inflexibly this may indirectly discriminate against certain customers with protected attributes and significantly interfere with their right to freedom of expression (if they are then unable to access a mobile phone).

35 Telecommunications (Service Provider – Identity Checks for Prepaid Mobile Carriage Services) Determination 2017 [F2017L00399], sections 3.1 and 3.2.

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

Dr Anne Webster MP

Chair