

Chapter 1¹

New and continuing matters

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

- bills introduced into the Parliament between 15 to 17 June 2021;
- legislative instruments registered on the Federal Register of Legislation between 4 May to 10 June 2021.²

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 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 8 of 2021*; [2021] AUPJCHR 72.

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>.

Legislative Instruments

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 [F2021L00727]¹

Purpose	This legislative instrument extends the human biosecurity emergency period for a further three months until 17 September 2021
Portfolio	Health and Aged Care
Authorising legislation	<i>Biosecurity Act 2015</i>
Last day to disallow	This instrument is exempt from disallowance (see subsections 475(2) and 477(2) of the <i>Biosecurity Act 2015</i>)
Rights	Life; health; freedom of movement; equality and non-discrimination; privacy

Extension of the human biosecurity emergency period

1.4 On 18 March 2020 the Governor-General declared that a human biosecurity emergency exists regarding the listed human disease 'human coronavirus with pandemic potential', namely COVID-19.² Sections 475 and 476 of the *Biosecurity Act 2015* (Biosecurity Act) allow the Governor-General to make, and extend, the human biosecurity emergency period for a period of up to three months if the Minister for Health is satisfied of certain criteria. During a human biosecurity emergency period, sections 477 and 478 of the Biosecurity Act allow the Minister for Health to determine emergency requirements, or give directions, that he or she is satisfied are necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australian territory or part of Australian territory. A person who fails to comply with an emergency requirement or direction may commit a criminal offence, punishable by imprisonment for a maximum of five years, or 300 penalty units, or both.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 [F2021L00727], *Report 8 of 2021*; [2021] AUPJCHR 73.

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

1.5 This instrument extends the human biosecurity emergency period for a further three months until 17 September 2021, unless further extended by the Governor-General. The effect of this instrument is that any determinations made under section 477 of the Biosecurity Act that are still in effect will continue to apply for the duration of the human biosecurity emergency period (unless revoked earlier).³ These include:

- mandatory pre-departure COVID-19 testing and mask wearing for passengers and aircrew travelling on an international flight to Australia;⁴
- restrictions on cruise ships entering Australian territory or ports;⁵
- a ban on Australian citizens or permanent residents from leaving Australia as a passenger on an outgoing aircraft or vessel unless otherwise exempted;⁶ and
- restrictions on the trade of retail outlets at international airports.⁷

Preliminary international human rights legal advice

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

1.6 The extension of the human biosecurity emergency period, and the consequent extension of the mandatory pre-departure testing and mask wearing, restrictions on cruise ships, overseas travel ban, and restrictions on the trade of retail outlets at international airports, for a further three months, engages a number of human rights. As the measures are intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, the instrument may promote the rights to life and health.⁸ The right to life requires States parties to take positive measures to protect life.⁹ The United Nations (UN) Human Rights Committee has stated that the duty to protect life implies that States parties should take

3 Explanatory statement, p. 3.

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

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

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

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

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

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

appropriate measures to address the conditions in society that may give rise to direct threats to life, including life threatening diseases.¹⁰ The right to health requires that States parties shall take steps to prevent, treat and control epidemic diseases.¹¹ With respect to the COVID-19 pandemic specifically, the UN Human Rights Committee has expressed the view that 'States parties must take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction'.¹²

1.7 However, extending the biosecurity emergency period, and thereby continuing to enliven the various powers under the Biosecurity Act and extending existing determinations, is likely to engage and limit a number of rights, including the rights to freedom of movement, equality and non-discrimination and the right to a private life. The right to freedom of movement encompasses the right to move freely within a country, including all parts of federal States, and the right to leave any country, including a person's own country.¹³ It encompasses both the legal right and practical ability to travel within and leave a country and includes the right to obtain the necessary travel documents to realise this right.¹⁴ The freedom to leave a country may not depend on any specific purpose or the period of time the individual chooses to stay outside the country, meaning that travelling abroad and permanent emigration are both protected.¹⁵ Insofar as the effect of the instrument is the continued prevention of Australian citizens and permanent residents from travelling outside Australia (unless an exemption applies) and cruise ships from entering Australian territory or Australian ports (unless an exemption applies), the right to move freely within a country and the right to leave the country, including for travelling abroad, is limited.

1.8 The application of the travel ban to Australian citizens and permanent residents may limit the right to equality and non-discrimination, as the measure treats some people differently from others on the basis of nationality. The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without

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

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

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

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

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

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

discrimination of any kind, including on the grounds of nationality.¹⁶ The measures may also limit the right to a private life as the restriction of movement and trade involves interference with a person's private life. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.¹⁷ This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.¹⁸

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

1.10 The explanatory statement states that the purpose of the instrument is to extend the human biosecurity emergency period for a further three months, which is necessary to ensure the minister can continue to exercise the emergency powers

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

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

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

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

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

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

under the Biosecurity Act.²² This extension is based on the minister's advice that COVID-19 continues to pose a severe and immediate threat to human health on a nationally significant scale, and the extension is necessary to prevent or control the entry or spread of COVID-19 in Australia.²³

1.11 The control and prevention of the entry and spread of COVID-19, an infectious disease that has caused and has the ability to continue causing high levels of morbidity and mortality, is likely a legitimate objective for the purposes of international human rights law. Noting that this instrument seeks to protect public health and the rights and freedoms of others – in particular, protect the general Australian population from exposure to COVID-19 – and given that there continue to be cases of people contracting COVID-19 at sea and overseas, these measures would appear to be rationally connected to that objective.²⁴ However, as the extension of the human biosecurity emergency period has the effect of extending the determinations made pursuant to section 477 of the Biosecurity Act, it is also important to identify the specific objective being pursued by each extended determination (for example, what the objective is for continuing to ban overseas travel) and assess whether this objective is legitimate and how the determinations are rationally connected to that objective. The explanatory statement notes that the effect of the instrument is the continued application of the emergency determinations, but it does not identify the specific objective being pursued by each determination.²⁵

1.12 Regarding the proportionality of the instrument, it is necessary to consider whether the proposed limitations are sufficiently circumscribed; accompanied by sufficient safeguards, including the possibility of oversight and the availability of review; and whether any less rights restrictive alternatives could achieve the same stated objective.²⁶ The temporary nature of these measures is an important consideration when assessing proportionality.²⁷ The Governor-General may extend a

22 Explanatory statement, pp. 1–2.

23 Explanatory statement, p. 1.

24 See, Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020) pp. 7–10; *Report 12 of 2020* (15 October 2020) pp. 6–13; *Report 14 of 2020* (26 November 2020) pp. 71–81.

25 Explanatory statement, p. 3.

26 United Nations Human Rights Committee, *General Comment 27: Article 12 (Freedom of movement)* (1999) [14]-[15].

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

human biosecurity emergency period more than once, with each extension lasting for a period of three months.²⁸ The period can only be extended if the minister is satisfied that the disease is continuing to pose a severe and immediate threat, or continuing to cause harm to human health on a nationally significant scale and the extension is necessary.²⁹ The committee has previously noted that if the temporary measures were to be extended multiple times, the cumulative time period in which the measures could be in effect could be significant.³⁰ In this case, the human biosecurity emergency period was first declared on 18 March 2020 and has subsequently been extended multiple times, most recently until 17 September 2021. There is a risk that the longer the human biosecurity emergency period is extended, the less likely it is to be considered a temporary measure and the more likely it is to constitute a significant interference with rights.

1.13 Before making an emergency determination, the Biosecurity Act requires the minister to be satisfied that the requirement will likely be effective, and appropriate and adapted, to achieve its purpose; the requirement and the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances; and the period during which the requirement is to apply is only as long as is necessary.³¹ If circumstances change such that the determination is no longer necessary, the minister may revoke it prior to the end of the human biosecurity emergency period. This provision would likely assist with the proportionality of this measure. In particular, it may help to ensure that the emergency determinations are the least rights restrictive way of achieving the objective.

1.14 Regarding the ban on Australian citizens and permanent residents from leaving Australia, an exemption applies to certain persons, such as a person who is ordinarily resident in another country, or aircraft or vessel crew members, and may apply in exceptional circumstances, such as where an Australian citizen or permanent resident provides a compelling reason for needing to leave Australia.³² In relation to exemptions in exceptional circumstances, in practice, if the exemption is not granted by the Australian Border Force Commissioner the person may reapply for an exemption, noting that there does not appear to be any formal review process of any

28 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020, explanatory statement, p. 1.

29 *Biosecurity Act 2015*, section 476.

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

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

32 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2021C00358], sections 6 and 7.

exemption decision.³³ The extent to which the exemption process operates as an effective safeguard will depend on how the exemptions are applied in practice. The Outward Travel Restrictions Operation Directive (the directive) provides some guidance as to how the exemption process may operate in practice.³⁴ It sets out when individual exemptions from the travel ban might be granted, including when an applicant:

- is attending the funeral of a close family member, including parent, sibling, partner, child or grandparent;
- is travelling due to critical or serious illness of a close family member;
- is travelling for necessary medical treatment not available in Australia;
- needs to pick up a minor child (adoption, surrogacy, court order etc) and return to Australia with that child;
- intends to complete an existing work contract overseas or is travelling on business;
- is travelling to an Australian territory (e.g. Christmas Island) which is outside the migration zone;
- has a compelling reason for travel;
- is travelling in the national interest or in response to the COVID-19 outbreak; and
- has had a previous request approved and the reasons for travel have not changed.³⁵

1.15 The 'exceptional circumstances' individual exemption criteria outlined above do not, however, apply to individuals seeking to travel to Papua New Guinea (PNG) or India.³⁶ The directive states that based on current health advice, 'individuals seeking an "exceptional circumstances" exemption to travel from Australia to PNG will not be

33 Parliamentary Joint Committee on Human Rights, *Report 14 of 2020* (26 November 2020) p. 79.

34 Department of Home Affairs, Outward Travel Restrictions Operation Directive, V.8, <https://www.homeaffairs.gov.au/covid-19/Documents/outward-travel-restrictions-operation-directive.pdf> (accessed 18 June 2021). See also Department of Home Affairs, *Travel restrictions and exemptions* (16 June 2021), <https://covid19.homeaffairs.gov.au/travel-restrictions> (accessed 18 June 2021).

35 Department of Home Affairs, Outward Travel Restrictions Operation Directive, V.8, [9]–[10] <https://www.homeaffairs.gov.au/covid-19/Documents/outward-travel-restrictions-operation-directive.pdf> (accessed 18 June 2021).

36 Department of Home Affairs, Outward Travel Restrictions Operation Directive, V.8, [7]–[8] <https://www.homeaffairs.gov.au/covid-19/Documents/outward-travel-restrictions-operation-directive.pdf> (accessed 18 June 2021).

approved until further notice, except in extremely limited circumstances¹, such as for the provision of assistance to PNG's COVID-19 response or fly-in-fly-out workers undertaking critical operations and projects.³⁷ In relation to travel to India, the directive states that exemptions will only be approved in limited circumstances, including persons traveling due to the death or funeral of a close family member, persons visiting a close family member who is critically ill or persons traveling to India to escort an Australian citizen or permanent resident minor back to Australia.³⁸ It would appear that the country an individual is seeking to travel to is therefore a relevant consideration in the decision to grant an exemption, although this is not specified in the legislative instrument.

1.16 To the extent that the directive provides the Commissioner with capacity to apply the travel ban flexibly, having regard to the merits of an individual case, it may assist with the proportionality of the measure. However, the strength of this safeguard will depend on how the directive is applied in practice, noting that it is unknown what proportion of travel exemption applications are denied and whether there is certainty and consistency in the exemption application and approval process. While the measure contains some flexibility, the breadth of discretion conferred on authorised officers of the Australian Border Force and the Department of Home Affairs raises questions as to whether this discretion is sufficiently circumscribed and exercised in a manner that is compatible with human rights. International human rights law jurisprudence states that laws conferring discretionary powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.³⁹ This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. Noting that decisions to grant an exemption can be made by APS3 officers and above, and that there is no external review process, there are questions as to whether there are sufficient controls over the measure, including the possibility of monitoring and oversight. There may be a risk that given the breadth of discretion conferred on authorised officers and in the absence of sufficient controls and oversight over the measure, the exemption application and approval process may

37 Department of Home Affairs, Outward Travel Restrictions Operation Directive, V.8, [7] <https://www.homeaffairs.gov.au/covid-19/Documents/outward-travel-restrictions-operation-directive.pdf> (accessed 18 June 2021).

38 Department of Home Affairs, Outward Travel Restrictions Operation Directive, V.8, [8] <https://www.homeaffairs.gov.au/covid-19/Documents/outward-travel-restrictions-operation-directive.pdf> (accessed 18 June 2021).

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

be inconsistently applied.⁴⁰ For example, it is up to the decision maker to determine the appropriate level of evidence required, raising concerns that different evidentiary standards may be applied in different cases.

1.17 As there is no statement of compatibility accompanying this instrument, it is difficult to assess the compatibility of these measures with international human rights law, particularly with respect to the proportionality of these measures,⁴¹ noting it is unclear whether there are other less rights restrictive ways to achieve the objective being pursued.⁴²

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

- (a) whether there are effective safeguards or controls over each of these measures, including the possibility of monitoring and access to review;
- (b) in relation to the exemption process under the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020, since the outward travel ban was imposed:
 - (i) how many applications for exemptions have been made and of those, how many have been granted or denied;
 - (ii) what are the main reasons why exemption applications have been granted and the main reasons why exemptions have been denied;

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

41 The United Nations Human Rights Committee has reiterated that restrictions on the right to freedom of movement cannot merely serve permissible purposes. They must also be necessary to protect them and 'conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected': *General Comment 27: Article 12 (Freedom of movement)* (1999) [14].

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

- (iii) what are the top 20 countries where exemptions have been granted for travel, and what are the top 20 countries where exemptions have been denied for travel;
 - (iv) what is the basis for not applying the 'exceptional circumstances' individual exemption criteria to Papua New Guinea and India, and has any assessment been made as to whether this will have a disproportionate effect on persons on the basis of nationality;
 - (v) what controls are there over the decisions made by departmental officers to grant or not grant exemptions, and are there any internal review processes over such decisions; and
- (c) whether there are any other less rights restrictive ways to achieve the stated objectives.

Committee view

1.19 The committee notes that this instrument extends the human biosecurity emergency period for a further three months until 17 September 2021, which has the effect that the following determinations will continue in operation until the end of the human biosecurity emergency period:

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

1.20 As the committee has previously stated when these determinations were originally introduced, these measures, which are designed to prevent the spread of COVID-19, promote the rights to life and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires Australia takes steps to prevent, treat and control epidemic diseases.

1.21 The committee notes that these measures may also limit the right to freedom of movement, equality and non-discrimination and the right to a private life. In light of the unprecedented nature of the COVID-19 pandemic and the necessity for States to confront the threat of widespread contagion with emergency and temporary measures, the committee acknowledges that such measures may, in certain circumstances, restrict human rights. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.22 However, as there is no statement of compatibility accompanying this instrument, which we note is not required in relation to this instrument,⁴³ questions remain as to whether all of the measures are reasonable, necessary and proportionate. Given the human rights implications of legislative instruments dealing with the COVID-19 pandemic, the committee reiterates⁴⁴ that it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility.

1.23 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 [1.18].

43 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.

44 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](#)).

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

Purpose	This legislative instrument allows the Official Trustee in Bankruptcy to recoup costs, charges, expenses and remuneration incurred in exercising its statutory functions, duties and powers. It also updates definitions, repeals duplicate sections and specifies certain offences as serious offences for the purposes of the <i>Proceeds of Crime Act 2002</i>
Portfolio	Home Affairs
Authorising legislation	<i>Crimes Act 1914</i> and <i>Proceeds of Crime Act 2002</i>
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 11 May 2021). Notice of motion to disallow must be given by 23 June 2021 in the House of Representatives and 11 August 2021 in the Senate ²
Rights	Fair trial and fair hearing; privacy

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

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

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Economic Disruption) Regulations 2021 [F2021L00541], *Report 8 of 2021*; [2021] AUPJCHR 74.

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

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

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

Preliminary international human rights legal advice

Rights to a fair trial and fair hearing and privacy

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

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

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

6 Schedule 1, items 10–18.

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

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

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

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

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

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

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

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

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

- (a) the domestic classification of the offence;
- (b) the nature of the offence; and
- (c) the severity of the penalty.¹⁷

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.34 The rights to a fair trial and fair hearing and privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. The statement of compatibility acknowledges that the regulations limit the right to privacy insofar as they expand the definition of 'serious offences', thereby enhancing restraint and confiscation action under the Proceeds of Crime Act.²⁴ However, it does not address the implications of the measure on the right to a fair trial and fair hearing.

Legitimate objective and rational connection

1.35 Any limitation on a right must be shown to be aimed at achieving a legitimate objective. 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. Regarding prescribing child sexual abuse offences as 'serious offences', the statement of compatibility states that this amendment is necessary to provide law enforcement with the tools to undermine the business model of child abuse networks and to prevent funds from being reinvested in these networks.²⁵ It states that strong asset restraint and confiscation powers are necessary to target the criminal networks that perpetuate child sexual abuse offences, as such networks rely on reinvesting the profits obtained from the sale of child abuse material into perpetuating further offending.²⁶ The statement of compatibility states that child sexual abuse offences represent a growing crime type in Australia, exacerbated by the effects of the COVID-19 pandemic, with the AFP receiving a growing number of reports.²⁷ It explains that child sexual abuse has clear links to transnational serious and organised crime groups and by confiscating the assets of these groups and the proceeds obtained from their offending, law enforcement is able to reduce their capacity and their ability to perpetuate further offending.²⁸

24 Statement of compatibility, pp. 18–25.

25 Statement of compatibility, p. 20.

26 Statement of compatibility, pp. 20–21.

27 Statement of compatibility, p. 20. For example, the statement of compatibility states that in 2020, the Australian Border Force seized 212 child-like sex dolls and/or parts that individuals were attempting to import from overseas manufacturers. This is compared to a total of 133 dolls detected over the five years between July 2013 and June 2018: p. 22.

28 Statement of compatibility, p. 20.

1.36 The stated objective of protecting public order and the rights and freedoms of others, particularly children, by ensuring that property that can be linked to criminal conduct can be restrained and confiscated in appropriate circumstances, would appear to constitute a legitimate objective for the purposes of international human rights law.²⁹ Noting the escalation of child sexual abuse offences in recent years, the measure appears to be necessary and address a pressing and substantial issue of public concern. The measure would also appear to be rationally connected to, that is effective to achieve, the stated objective.

Proportionality

1.37 The key question is whether the limitation on rights is proportionate to the objective being sought. Regarding the limit on the right to privacy, the statement of compatibility states that the Proceeds of Crime Act contains a number of safeguards that provide protections to individuals whose property may be subject to restraint or forfeiture orders, including:³⁰

- the court's power to make allowances for expenses (such as living expenses) to be met out of property covered by the restraining order; exclude property from the scope of the order or revoke the order; refuse to make the order where it is not in the public interest to do so (in relation to an indictable offence that is not a serious offence); or make a buy back order;³¹
- the court's power to make a forfeiture order excluding a specified interest in the property if satisfied the interest is neither the proceeds of unlawful activity or an instrument of any serious offence;³²
- the court's power to refuse to make an order in relation to an instrument of an offence in certain circumstances;³³
- the ability of the individual to seek compensation for the proportion of the value of the property forfeited that they did not derive from the commission of an offence;³⁴ and
- allowing for 'proceeds' or an 'instrument' to cease being proceeds or an instrument for the purposes of the Proceeds of Crime Act regime in certain circumstances.³⁵

29 Statement of compatibility, p. 25.

30 Statement of compatibility, p. 24.

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

32 *Proceeds of Crime Act 2002*, sections 73, 94 and 102.

33 *Proceeds of Crime Act 2002*, subsections 47(4) and 49(4).

34 *Proceeds of Crime Act 2002*, sections 77 and 94A

35 *Proceeds of Crime Act 2002*, subsection 330(4).

1.38 These provisions may operate as safeguards and would appear to provide the court with some flexibility to treat different cases differently, having regard to the merits of each individual case. Under the Proceeds of Crime Act, the person against whom a confiscation order, forfeiture order, pecuniary penalty order or literary proceeds order is made also has the right to appeal against the order in the manner set out in the Act.³⁶ The availability of review may assist with the proportionality of this measure.

1.39 However, as noted above, without undertaking a full review of the Proceeds of Crime Act and in the absence of a foundational human rights compatibility assessment of the proceeds of crime regime, it is difficult to assess whether these safeguards alone are sufficient for the purposes of ensuring that any limitation on rights is proportionate under international human rights law. Noting that the safeguards outlined in the statement of compatibility relate to the limit on the right to privacy, it does not appear that these provisions would also serve as a safeguard in relation to the limit on the right to a fair trial and fair hearing. It is also not clear that confiscating, forfeiting and selling assets, without any conviction of criminal guilt, would necessarily be the least rights restrictive option to achieve the stated objective. In particular, there are concerns that a forfeiture order in circumstances where a person has been acquitted of an offence or their conviction quashed may not be the least rights restrictive alternative.³⁷ In addition, depending on the property forfeited and sold and whether the individual was convicted of the offence, the regime may result in a significant interference with an individual's rights. The greater the interference with human rights, the less likely the measure is to be considered proportionate.

Concluding remarks

1.40 In light of the existing human rights concerns with the Proceeds of Crime Act regime, there is a risk that the amendments to this regime by these regulations raise similar human rights concerns. In particular, by expanding the application of the regime to additional conduct and offences without a finding of guilt against the individual, the measure engages and limits the rights to a fair trial and fair hearing and privacy. While the measure likely pursues a legitimate objective and would appear to be rationally connected to that objective, questions remain as to whether it is proportionate. The statement of compatibility identified some safeguards contained in the Proceeds of Crime Act. However, without a full review of the Proceeds of Crime

36 *Proceeds of Crime Act 2002*, section 322.

37 *Proceeds of Crime Act 2002*, section 80. The Parliamentary Joint Committee on Human Rights has previously raised concerns about the compatibility of non-conviction based forfeiture orders (where the person has been acquitted or their conviction quashed) with the right to privacy, in particular, the right not to be arbitrarily subjected to interferences with a person's home. See Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 112–120.

Act and a foundational human rights assessment, it is difficult to assess the adequacy of these safeguards and whether there are other less rights restrictive alternatives to achieving the stated objective. As such, it is difficult to reach a concluded view as to the proportionality of this measure.

Committee view

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

1.42 The committee notes that in light of its previous concerns regarding the compatibility of the Proceeds of Crime Act with the rights to a fair trial and fair hearing and privacy, there is a risk that the amendments to this regime by these regulations raise similar human rights concerns. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.43 The committee considers that the proceeds of crime legislation provides law enforcement agencies with important and necessary tools in the fight against crime. In this regard, the committee considers that the measure likely pursues a legitimate objective and would appear to be rationally connected to this objective. However, in the absence of a foundational human rights assessment of the Proceeds of Crime Act, the committee notes that it is difficult to assess the adequacy of the safeguards identified in the statement of compatibility. As such, the committee seeks the minister's advice as to whether the measure is proportionate.

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

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

Purpose	The Health Insurance (General Medical Services Table) Regulations 2021 implements annual Medicare indexation and recommendations from the MBS Review Taskforce relating to general surgery and orthopaedic services (the first instrument) The Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021 amends cardiac services and indexes diagnostic imaging services and two items for the management of bulk-billing pathology services (the second instrument)
Portfolio	Health and Aged Care
Authorising legislation	<i>Health Insurance Act 1973</i>
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives on 3 June 2021 and the Senate 15 June 2021). Notice of motion to disallow must be given by 23 August 2021 in the House of Representatives and 24 August 2021 in the Senate ²
Rights	Health; social security

Amendments to the Medicare Benefits Schedule

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

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Health Insurance (General Medical Services Table) Regulations 2021 [F2021L00678] and Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021 [F2021L00681], *Report 8 of 2021*; [2021] AUPJCHR 75.

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

and deleting 216 items. The second instrument makes several amendments, including consolidating and removing some procedures related to cardiac services on the MBS.

Preliminary international human rights legal advice

Rights to health and social security

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

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

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

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

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

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

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

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

Retrogressive measures

1.48 Australia has obligations to progressively realise economic, social and cultural rights using the maximum of resources available,⁹ and has a corresponding duty to refrain from taking retrogressive measures, or backwards steps with respect to their realisation.¹⁰ Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

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

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

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

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

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

12 Article 4.

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

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

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

- (a) whether these instruments reduce the quantum of benefits available for any specific MBS items, that could adversely affect the rebate payable to patients;
- (b) where these instruments remove MBS items entirely, whether any of those items are not covered by, or replaced with, alternative MBS items;
- (c) whether these instruments have the effect of reducing the quantum of benefit for specific medical procedures, including those procedures which are currently covered by multiple MBS items and will now be covered by one item;
- (d) what is the objective sought to be achieved by the instruments, and whether this constitutes a legitimate objective (being one which is solely for the purpose of promoting general welfare);

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

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

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

Committee view

1.52 The committee notes that these two legislative instruments make a significant number of amendments to the Medicare Benefits Schedule (MBS) in relation to general surgery, orthopaedic services and cardiac services, and apply an indexation of 0.9 per cent to those services.

1.53 The committee considers that by subsidising a range of medical services and applying increased indexation for these services these instruments promote the rights to health and social security. The right to health refers to the highest attainable standard of health, and requires that health facilities, goods and services must be affordable for all. The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.

1.54 However, the committee also notes that having regard to the significant number of detailed changes to the MBS, and the complex nature of the surgeries and services involved, it is not clear whether these instruments may also have the effect of either reducing access to subsidised surgical services, or reducing the rebate provided to patients receiving some services. If this were the case, this may constitute a retrogressive measure, a type of limitation under international human rights law. A retrogressive measure may be permissible where it seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) the objective, and constitutes a proportionate means by which to achieve the objective. The committee notes that the statements of compatibility accompanying both instruments are very brief and provide no detailed analysis of the effects of both instruments.

1.55 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 the instruments, and as such seeks the minister's advice as to the matters set out at paragraph [1.51].¹⁵

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

Instruments made under the *Charter of the United Nations Act 1945*¹

Purpose	These 12 legislative instruments ² impose sanctions on individuals and entities under the <i>Charter of the United Nations Act 1945</i>
Portfolio	Foreign Affairs and Trade
Authorising legislation	<i>Charter of the United Nations Act 1945</i>
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives on 27 May 2021 and the Senate on 15 June 2021). Notice of motion to disallow must be given by 10 August 2021 in the House of Representatives and 24 August 2021 in the Senate ³
Rights	Privacy; fair hearing

- 1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Instruments made under the *Charter of the United Nations Act 1945*, Report 8 of 2021; [2021] AUPJCHR 76.
- 2 The 12 legislative instruments, all made under the *Charter of the United Nations Act 1945*, have the following registration numbers: [\[F2021L00626\]](#); [\[F2021L00627\]](#); [\[F2021L00628\]](#); [\[F2021L00631\]](#); [\[F2021L00636\]](#); [\[F2021L00638\]](#); [\[F2021L00639\]](#); [\[F2021L00641\]](#); [\[F2021L00644\]](#); [\[F2021L00647\]](#); [\[F2021L00648\]](#); [\[F2021L00649\]](#) (collectively known as 'the legislative instruments'). Note that there were a further nine legislative instruments registered on the same date made under the *Charter of the United Nations Act 1945*, however, as these related solely to organisations, and not individuals, the committee makes no comment on these: see [\[F2021L00632\]](#); [\[F2021L00633\]](#); [\[F2021L00634\]](#); [\[F2021L00635\]](#); [\[F2021L00637\]](#); [\[F2021L00640\]](#); [\[F2021L00642\]](#); [\[F2021L00643\]](#); [\[F2021L00645\]](#).
- 3 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly. Note that the legislative instruments appear to be incorrectly classified as exempt from disallowance. The explanatory statements for each instrument state they are exempt under section 44(1) of the *Legislation Act 2003* – however, this states that the usual disallowance provisions do not apply if the enabling legislation facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States or Territories. However, this is not an intergovernmental scheme of this nature. It is also noted that previous sanctions instruments have been subject to disallowance, see for example [\[F2016L01208\]](#). In addition, while the Legislation (Exemptions and Other Matters) Regulation 2015 exempts from sunseting instruments which give effect to an international obligation, it does not exempt such instruments from disallowance (see sections 9 and 11).

Freezing of individuals' assets

1.56 The *Charter of the United Nations Act 1945* (Charter of the UN Act), in conjunction with various instruments made under that Act,⁴ gives the Australian government the power to apply sanctions to give effect to decisions of the United Nations (UN) Security Council. Australia is bound by the *Charter of the United Nations 1945* (UN Charter) to implement UN Security Council decisions.⁵ Obligations under the UN Charter may override Australia's obligations under international human rights treaties.⁶ However, the European Court of Human Rights has stated there is a presumption that UN Security Council Resolutions are to be interpreted on the basis that they are compatible with human rights, and that domestic courts should have the ability to exercise scrutiny of sanctions so that arbitrariness can be avoided.⁷

1.57 These 12 legislative instruments list almost 300 individuals as subject to sanctions, the effect of which is that their existing money and assets are frozen and it is an offence for a person to provide any future assets to these persons. The legislative instruments are stated as giving effect to UN Security Council resolution 1373, which requires Australia, as a UN Member State, to freeze the assets of persons 'who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts'.⁸ The legislative instruments were made between 2001 and 2020 but were only registered on the Federal Register of Legislation on 26 May 2021. They were previously gazetted, but not registered – the effect of which appears to be that before they were registered the instruments did not apply to a person to the extent that they disadvantaged or imposed liabilities on the person.⁹

4 See, in particular, the Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2019C00308].

5 *Charter of the United Nations 1945*, articles 2 and 41.

6 *Charter of the United Nations 1945*, section 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

7 *Al-Dulimi and Montana Management Inc. v Switzerland*, European Court of Human Rights (Grand Chamber) Application No.5809/08 (2016) [140] and [146].

8 United Nations Security Council, [Resolution 1373](#)(1)(c), S/RES/1373 (2001), made on 28 September 2001.

9 See *Legislation Act 2003*, subsection 12(2) and the explanatory statements accompanying the legislative instruments.

Preliminary international human rights legal advice

Rights to privacy and fair hearing

1.58 As the committee has previously set out,¹⁰ sanctions may operate variously to both limit and promote human rights. For example, sanctions prohibiting the proliferation of weapons of mass destruction will promote the right to life. Sanctions could also promote human rights globally. However, the committee's examination of Australia's sanctions regimes has been, and is, focused solely on measures that impose restrictions on individuals that may be located in Australia. It is not clear whether any of the listings in these legislative instruments has affected individuals in Australia, but it is clear that some of the listings apply in relation to Australian citizens (or former citizens).¹¹

1.59 The effect of a listing is that it is an offence for a person to make an asset directly or indirectly available to, or for the benefit of, a listed person.¹² A person's assets are therefore effectively 'frozen' as a result of being listed. For example, a financial institution is prohibited from allowing a listed person to access their bank account. This can apply to persons living in Australia or could apply to persons outside Australia. A listing by the minister is not subject to merits review, and there is no requirement that an affected person be given any reasons for why a decision to list a person has been made.

1.60 The scheme provides that the minister may grant a permit authorising the making available of certain assets to a listed person.¹³ An application for a permit can only be made for basic expenses; a legally required dealing; where a payment is contractually required; or an extraordinary expense dealing.¹⁴ A basic expense includes foodstuffs; rent or mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.¹⁵

10 This includes consideration of sanctions imposed under the *Autonomous Sanctions Act 2011*. See, most recently, Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 112–122; See also *Report 6 of 2018* (26 June 2018) pp. 104–131; *Report 4 of 2018* (8 May 2018) pp. 64–83; *Report 3 of 2018* (26 March 2018) pp. 82–96; *Report 9 of 2016* (22 November 2016) pp. 41–55; *Thirty-third Report of the 44th Parliament* (2 February 2016) pp. 17–25; *Twenty-eighth Report of the 44th Parliament* (17 September 2015) pp. 15–38; *Tenth Report of 2013* (26 June 2013) pp. 13–19; *Sixth Report of 2013* (15 May 2013) pp. 135–137.

11 See for example Charter of the United Nations Act 1945 Listing 2018 (No. 2) [F2021L00639]; Charter of the United Nations Act 1945 Listing 2015 (No. 3) F2021L00648; and Charter of the United Nations Act 1945 Listing 2019 (No. 1) F2021L00649.

12 *Charter of the United Nations Act 1945*, section 21.

13 *Charter of the United Nations Act 1945*, section 22.

14 Charter of the United Nations (Dealing with Assets) Regulations 2008, section 5.

15 Charter of the United Nations (Dealing with Assets) Regulations 2008, subsection 5(3).

1.61 The listing of a person under the sanctions regime may therefore limit a range of human rights, in particular the right to a private life; right to an adequate standard of living; and right to a fair hearing. The explanatory statements accompanying the legislative instruments do not contain stand-alone statements of compatibility. The explanatory statements state that the instrument advances human rights by preventing and suppressing terrorist acts. It states that Australia complies with its obligations under international human rights laws, including the right to an adequate standard of living, as in implementing UN Security Council sanctions, the minister can authorise the making available of assets to listed persons or entities, or the use or dealing with their assets. There is no further acknowledgement that human rights are engaged or limited.

Right to privacy

1.62 Article 17 of the International Covenant on Civil and Political Rights prohibits arbitrary or unlawful interference with an individual's privacy, family, correspondence or home. The freezing of a person's assets and the requirement for a listed person to seek the permission of the minister to access their funds for basic expenses imposes a limit on that person's right to a private life, free from interference by the State. The measures may also limit the right to privacy of close family members of a listed person. Once a person is listed under the sanctions regime, the effect of the listing is that it is an offence for a person to directly or indirectly make any asset available to, or for the benefit of, a listed person (unless it is authorised under a permit to do so). This could mean that close family members who live with a listed person will not be able to access their own funds without needing to account for all expenditure, on the basis that any of their funds may indirectly benefit a listed person (for example, if a spouse's funds are used to buy food or public utilities for the household that the listed person lives in).

1.63 In relation to a similar sanctions regime in the United Kingdom, the House of Lords held that the regime 'strike[s] at the very heart of the individual's basic right to live his own life as he chooses'.¹⁶ Lord Brown concluded:

The draconian nature of the regime imposed under these asset-freezing Orders can hardly be over-stated. Construe and apply them how one will...they are scarcely less restrictive of the day to day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing. Undoubtedly, therefore, these Orders provide for a regime which considerably interferes with the [right to privacy].¹⁷

1.64 The need to get permission from the minister to access money for basic expenses could, in practice, impact greatly on a person's private and family life. For

16 *HM Treasury v Ahmed* [2010] UKSC2 at [60] (*Ahmed*).

17 *Ahmed* at [192] per Lord Brown.

example, it could mean that a person whose assets are frozen would need to apply to the minister whenever they require funds to purchase medicines, travel or meet other basic expenses. The permit may also include a number of conditions. These conditions are not specified in the legislation and accordingly, there is wide discretion available to the minister when imposing conditions on the granting of a permit.

Right to a fair hearing

1.65 The right to a fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights. The right applies both to criminal and civil proceedings, to cases before both courts and tribunals. The right applies where rights and obligations, such as personal property and other private rights, are to be determined. In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal and have a reasonable opportunity to present their case. Ordinarily, the hearing must be public, but in certain circumstances, a fair hearing may be conducted in private. When a person is listed by the minister there is no requirement that the minister hear from the affected person before a listing is made or continued; no requirement for reasons to be provided to the affected person; no provision for merits review of the minister's decision; and no review of the minister's decision to grant, or not grant, a permit allowing access to funds, or review of any conditions imposed.

Limitations on human rights

1.66 The rights to a private life and a fair hearing may be subject to permissible limitations under international human rights law. In order to be permissible, the measure must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective. In the case of executive powers which seriously disrupt the lives of individuals subjected to them, the existence of safeguards is important to prevent arbitrariness and error, and ensure that the powers are exercised only in the appropriate circumstances.

1.67 The use of international sanctions regimes to apply pressure to governments and individuals in order to end the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law. However, there are concerns that the sanctions regime may not be regarded as proportionate, in particular because of a lack of effective safeguards to ensure that the regime, given its potential serious effects on those subject to it, is not applied in error or in a manner which is overly broad in the individual circumstances.

1.68 For example, the minister is required to list a person as subject to sanctions on the broad grounds that the minister is satisfied that the person has committed, or attempted to commit, terrorist acts or participated in or facilitated the commission of terrorist acts.¹⁸ The specific criteria as to how the minister determines these matters

18 Charter of the United Nations (Dealing with Assets) Regulations 2008, section 20.

is not set out in legislation. There is no requirement that there first be a judicial finding that the person has engaged in terrorist acts, and it would appear that the minister could list a person who had been acquitted of engaging in terrorist acts, as long as the minister is satisfied that the person had been involved.¹⁹

1.69 Of particular concern is that there is no provision for merits review before a court or tribunal of the minister's decision. While the minister's decision is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, the effectiveness of judicial review as a safeguard within the sanctions regime relies, in significant part, on the clarity and specificity with which legislation specifies powers conferred on the executive. The scope of the power to list someone is based on the minister's satisfaction in relation to certain matters which are stated in broad terms. This formulation limits the scope to challenge such a decision on the basis of there being an error of law (as opposed to an error on the merits) under the ADJR Act. Judicial review will generally be insufficient, in and of itself, to operate as a sufficient safeguard for human rights purposes in this context.

1.70 Further, the minister can make the listing without hearing from the affected person before the decision is made. While the initial listing may be necessary to ensure the effectiveness of the regime, as prior notice would effectively 'tip off' the person and could lead to assets being moved off-shore, there may be less rights-restrictive measures available, such as freezing assets on an interim basis until complete information is available including from the affected person.

1.71 Further, once the decision is made to list a person, the listing remains in force for three years and may be continued after that time.²⁰ The listing may be continued by the minister declaring in writing that it continues to have effect, but such a declaration is not a legislative instrument. As such, it is not clear how many of the almost 300 individuals listed by these legislative instruments, dating back to 2001, remain subject to listing. For example, some of those listed appear to have now died (such as Osama bin Laden), yet the legislative instruments listing such individuals were only recently registered.²¹ It is not clear if listings are regularly reviewed and updated. There also does not appear to be any requirement that if circumstances change or new evidence comes to light the listing will be reviewed before the three year period ends. Without an automatic requirement of reconsideration if circumstances change or new

19 See *Sayadi and Vinck v Belgium*, UN Human Rights Committee (Application No. 1472/2006) (22 October 2008) [10.8 and [10.12]], where the UN Human Rights Committee noted that as a criminal investigation against listed persons was dismissed, restrictions on those persons were not necessary and violated their right to freedom of movement and right to privacy.

20 *Charter of the United Nations Act 1945*, section 15A.

21 Charter of the United Nations (Anti-terrorism — Persons and Entities) List 2001 [F2021L00631].

evidence comes to light, a person may remain subject to sanctions notwithstanding that the listing may no longer be required.

1.72 There is also no requirement to consider whether applying the ordinary criminal law to a person would be more appropriate than freezing the person's assets on the decision of the minister. While the imposition of targeted financial sanctions may be considered, internationally, to be a preventive measure that operates in parallel to complement the criminal law, without further guidance (such as when and in what circumstances complementary targeted action would be needed) there appears to be a risk that such action for those in Australia may not be the least restrictive of human rights in every case.

1.73 There are also concerns relating to the minister's unrestricted power to impose conditions on a permit to allow access to funds to meet basic expenses. Giving the minister an unfettered power to impose conditions on access to money for basic expenses does not appear to be the least rights restrictive way of achieving the legitimate objective.

1.74 On the basis of the significant human rights concerns identified by the committee previously in relation to sanctions regimes that apply to individuals, the committee has previously recommended²² that consideration be given to the following measures, several of which have been implemented in relation to a comparable regime in the United Kingdom, to ensure the compatibility of the sanctions regimes with human rights:

- the provision of publicly available guidance in legislation setting out in detail the basis on which the minister decides to list a person;
- regular reports to Parliament in relation to the regimes including the basis on which persons have been listed and what assets, or the amount of assets, that have been frozen;
- provision for merits review before a court or tribunal of the minister's decision to list a person;
- provision of merits review before a court or tribunal of an automatic designation where an individual is specifically listed by the UN Security Council Committee;
- regular periodic reviews of listings;
- automatic reconsideration of a listing if new evidence or information comes to light;

22 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 53; *Report 6 of 2018* (26 June 2018) pp. 128–129; and *Report 2 of 2019* (2 April 2019) p. 122.

- limits on the power of the minister to impose conditions on a permit for access to funds to meet basic expenses;
- review of individual listings by the Independent National Security Legislation Monitor;
- provision that any prohibition on making funds available does not apply to social security payments to family members of a listed person (to protect those family members); and
- consultation with operational partners such as the police regarding other alternatives to the imposition of sanctions.

1.75 In order to assess the human rights compatibility of these legislative instruments, further information is required, in particular:

- (a) whether consideration has been given to, and any action taken to implement, the committee's previous recommendations as set out at paragraph [1.74];
- (b) whether any of the individuals subject to listing under these legislative instruments have been, at any time during their listing, in Australia, and if so, how many;
- (c) how many of the listings in these legislative instruments are currently valid; and
- (d) noting that these listings, some dating back almost 20 years, have only recently been registered, and noting that the *Legislation Act 2003* provides that a legislative instrument will not apply before the instrument is registered to the extent that a person's rights would be disadvantaged, what remedies, if any, does a person against whom action has been taken pursuant to these listings have.

Committee view

1.76 The committee notes that these 12 legislative instruments list almost 300 individuals as subject to sanctions, the effect of which is that their existing money and assets are frozen. The committee notes with some concern that while the legislative instruments were made over the last 20 years, they were only recently registered on the Federal Register of Legislation – the effect of which appears to be that before they were registered the instruments did not apply to persons to the extent that they disadvantaged or imposed liabilities on them.

1.77 The committee acknowledges that sanctions regimes operate as mechanisms for applying pressure to regimes and individuals with a view to ending the repression of human rights internationally. The committee notes the importance of Australia acting in concert with the international community to prevent egregious human rights abuses arising from situations of international concern.

1.78 However, the committee regards it as important to recognise that the sanctions regimes operate independently of the criminal justice system, and are used regardless of whether a listed person has been charged with or convicted of a criminal offence. For those in Australia who may be subject to sanctions, requiring ministerial permission to access money for basic expenses could, in practice, impact greatly on a person's private and family life. The committee also notes that the minister, in making a listing, is not required to hear from the affected person at any time; or provide reasons for the listing; and there is no provision for merits review of any of the minister's decisions (including any decision to grant, or not grant, a permit allowing access to funds). As such, the committee considers these listings engage and limit the right to a fair hearing for those in Australia. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.79 The committee notes it has previously made a number of recommendations to improve the proportionality of the sanctions regimes (as set out above at paragraph [1.74]). In relation to these legislative instruments, the committee has not yet formed a concluded view and considers further information is required to assess the human rights implications, and as such seeks the minister's advice as to the matters set out at paragraph [1.75].

Bills and instruments with no committee comment¹

1.80 The committee has no comment in relation to the following bills which were introduced into the Parliament between 15 to 17 June 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

- Australian Organ and Tissue Donation and Transplantation Authority Amendment (Governance and Other Measures) Bill 2021;
- COVID-19 Disaster Payment (Funding Arrangements) Bill 2021;
- Customs Tariff Amendment (Incorporation of Proposals) Bill 2021;
- Electric Vehicles Accountability Bill 2021;
- Major Sporting Events (Indicia and Images) Protection and Other Legislation Amendment Bill 2021;
- National Health Amendment (Decisions under the Continence Aids Payment Scheme) Bill 2021;
- Treasury Laws Amendment (COVID-19 Economic Response) Bill 2021.

1.81 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 4 May and 10 June 2021.³ The committee has reported on 16 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.

Senator's bill that may limit human rights

1.82 The committee notes that the following private senator's bill appears to engage and may limit human rights. Should the bill proceed to further stages of

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 8 of 2021*; [2021] AUPJCHR 77.

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

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

debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill:

- Ministerial Suitability Commission of Inquiry Bill 2021.

