

Chapter 2

Concluded matters

2.1 This chapter considers responses to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is available on the committee's website.¹

Legislative instruments

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 [F2021L00533]²

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

2.3 The committee requested a response from the minister in relation to this legislative instrument in [Report 6 of 2021](#).³

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 [F2021I00533], *Report 8 of 2021*; [2021] AUPJCHR 78.

3 Parliamentary Joint Committee on Human Rights, *Report 6 of 2020* (13 May 2021), pp. 2-7.

Ban on passengers from India entering Australia

2.4 This determination makes it a requirement for a person who is an international air passenger not to enter Australia if they have been in India within 14 days before the day the flight was scheduled to commence. The following persons are exempt from this requirement: aircraft crew; aircraft maintenance crew; freight workers; those travelling on an Australian official or diplomatic passport (and their immediate family members); and members of an Australian Medical Assistance Team.⁴ This requirement commenced on 3 May 2021 and the determination was repealed at the start of 15 May 2021.

2.5 The determination is made under section 477(1) of the *Biosecurity Act 2015*, which provides that during a human biosecurity emergency period, the Minister for Health may determine emergency requirements, or give directions, that they are satisfied are necessary to prevent or control the entry, emergence, establishment or spread of disease in Australian territory. Failure to comply with such a direction is a criminal offence punishable by up to five years' imprisonment, or 300 penalty units (\$66,600).⁵

Summary of initial assessment

Preliminary international human rights legal advice

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

2.6 The explanatory statement states that the determination reflects the latest health advice that there is a high likelihood of COVID-19 cases arriving in Australia via a person travelling from India, and this measure is designed to maintain the integrity of Australia's quarantine system and allow the system to recover capacity, which is critical to prevent and manage the spread of COVID-19.⁶ As such, if the determination assists in preventing and managing the spread of COVID-19 it is likely to promote and protect the rights to life and health for persons in Australia. The right to life requires the State to take positive measures to protect life.⁷ The United Nations (UN) Human Rights Committee has stated that the duty to protect life implies that States parties should take appropriate measures to address the conditions in society that may give rise to direct threats to life, including life threatening diseases.⁸

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

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

6 Explanatory statement, p. 1.

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

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

2.7 The right to health is the right to enjoy the highest attainable standard of physical and mental health.⁹ Article 12(2) of the International Covenant on Economic, Social and Cultural Rights requires that States parties shall take steps to prevent, treat and control epidemic diseases.¹⁰ The UN Committee on Economic, Social and Cultural Rights has stated that the control of diseases refers to efforts to:

make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.¹¹

2.8 While the measure may promote the rights to life and health for persons in Australia, banning persons from entering Australia, including Australian citizens and permanent residents, also engages and may limit a number of other human rights, particularly the rights to freedom of movement and equality and non-discrimination. The right to freedom of movement includes the right to enter, remain in, or return to one's own country.¹² The UN Human Rights Committee has stated that the right of a person to enter his or her own country 'recognizes the special relationship of a person to that country'.¹³ The reference to a person's 'own country' is not restricted to countries with which the person has the formal status of citizenship. It includes a country to which a person has very strong ties, such as long-standing residence and close personal and family ties.¹⁴ The right to freedom of movement is not absolute: limitations can be placed on the right provided certain standards are met. However, the UN Human Rights Committee has stated in relation to the right to enter one's own country:

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

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

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

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

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

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

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

any, circumstances in which deprivation of the right to enter one's own country could be reasonable.¹⁵

2.9 In addition, the measure also appears to engage the right to equality and non-discrimination.¹⁶ This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.¹⁷ The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).¹⁸ Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute, such as race or nationality.¹⁹ In this case it appears that banning persons from entering Australia if they have been in India in the past 14 days is likely to disproportionately affect persons of Indian descent. Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination.²⁰ Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.²¹

2.10 Noting the UN Human Rights Committee's comment that there are few, if any, circumstances in which the deprivation of the right to enter one's own country could

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

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

17 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

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

19 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

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

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

be reasonable, further information is required to assess the compatibility of this measure with the rights to freedom of movement and equality and non-discrimination, in particular:

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

Committee's initial view

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

2.12 However, the committee noted that this determination may also limit a number of other human rights, including the right to freedom of movement, which includes a right to enter one's own country, and the right to equality and non-discrimination, noting the potential disproportionate impact on Indian-Australians. As such, the committee sought the minister's advice as to the matters set out at paragraph [2.10].

2.13 The full initial analysis is set out in [Report 6 of 2021](#).

Minister's response²²

2.14 The minister advised:

Before making any such determination I, as Health Minister, must be satisfied of all of the following:

- (a) that the requirement is likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined
- (b) that the requirement is appropriate and adapted to achieve the purpose for which it is to be determined
- (c) that the requirement is no more restrictive or intrusive than is required in the circumstances
- (d) that the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances
- (e) that the period during which the requirement is to apply is only as long as is necessary.

In making such a determination I also take into account any public health advice that is provided to me from Chief Medical Officer and the Australian Health Protection Principal Committee.

In the case of this particular determination, the medical advice noted that COVID-19, and variants of COVID-19, continues to represent a severe and immediate threat to human health in Australia and has the ability to cause high levels of morbidity and mortality. It also noted that India had been identified as a high-risk country due to the significant increase in volume and proportion of COVID-19 cases in returned travellers from India, and that each new case identified in quarantine increases the risk of leakage into the Australian community through transmission to quarantine workers or other quarantine returnees and subsequently into the Australian community more broadly. This advice was tabled in Parliament on 3 May 2021.

In relation to your discussion of alternative measures, I would note that I did assess whether the requirement would be no more restrictive or intrusive than is required in the circumstances, and further note that existing mitigations, including a requirement for a negative pre-departure COVID-19 test, had already been implemented. This included an assessment of other options such as hotel quarantine, and in this respect the stress that travellers from India were placing on the quarantine system was something that I was acutely conscious of in making the Determination.

22 The minister's response to the committee's inquiries was received on 15 June 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Last, I note that the validity of the Determination was upheld by the Federal Court in the matter of *Newman v Minister for Health and Aged Care* [2021] FCA 517 on 10 May 2021. That challenge considered a number of grounds but in particular, whether I had properly considered each of the requirements under the Biosecurity Act in making the Determination.

Concluding comments

International human rights legal advice

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

2.15 The minister advised that India had been identified as a high-risk country due to the significant increase in COVID-19 cases in returned travellers from India, and each new case increases the risk of leakage from quarantine into the Australian community. The minister advised that he assessed whether the travel ban would be no more restrictive or intrusive than required, and that existing mitigation measures had been implemented.

2.16 As was stated in the initial analysis, the measure sought to achieve a legitimate objective, namely that of protecting the quarantine and health resources needed to prevent and control the entry, and the emergence, establishment or spread of COVID-19 in Australia.²³ It also appears that banning travellers from a country identified to be of high risk because of the high number of COVID-19 positive case numbers was likely to be rationally connected to (that is, effective to achieve) the stated objective.

2.17 The key question that remains is whether the measure was proportionate to the objective sought to be achieved. In this respect, it is necessary to consider whether the measure: was sufficiently circumscribed and accompanied by sufficient safeguards; whether there was sufficient flexibility to treat different cases differently; and whether any less rights restrictive alternatives could have achieved the same stated objective.

2.18 The time limited nature of the measure (noting it was repealed 12 days after its entry into force) assists with its proportionality. However, although it was time-limited, it is noted that there were extremely limited exceptions to the application of the direction (namely, for flight or ground aircraft crew and official travellers). The response did not address the question as to why there was no procedure whereby an individual could apply for an exemption from the direction (such as, for example, where pre-existing health conditions may mean that remaining in India during this time might pose a threat to a person's rights to health or life). The imposition of a blanket policy without regard to individual circumstances may not be a proportionate means to achieve the stated aims.

2.19 In addition, noting that it was not considered necessary to continue the determination after 12 days, and without any apparent material change to the

23 Explanatory statement, p. 1.

quarantining facilities available after that time, it is not clear that there were no less rights restrictive alternatives available.

2.20 Further, the minister's response did not address the question of whether persons of Indian descent were disproportionately affected by this ban, and if so, whether this differential treatment was based on reasonable and objective criteria.

2.21 On the basis of the information provided by the minister, there is insufficient information to conclude that the temporary travel ban on persons coming to Australia from India was a proportionate limitation on the right to freedom of movement (including the right to return to one's own country) and the right to equality and non-discrimination.

Committee view

2.22 The committee thanks the minister for this response. The committee notes that this determination made it a temporary requirement for a person who is an international air passenger not to enter Australia if they had been in India within 14 days before the day the flight was scheduled to commence. The committee notes this determination was repealed on 15 May 2021.

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

2.24 However, the committee notes that this determination also limited a number of other human rights, including the right to freedom of movement, which includes a right to enter one's own country, and the right to equality and non-discrimination, noting the potential disproportionate impact on Indian-Australians.

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

2.26 The committee considers the measure sought to achieve a legitimate objective, namely that of protecting the quarantine and health resources needed to prevent and control the entry, and the emergence, establishment or spread of COVID-19 in Australia. Banning travellers from a country identified to be of high risk because of the high number of COVID-19 positive case numbers was likely to be rationally connected (that is, effective to achieve) the stated objective. The committee considers the time limited nature of the measure (noting it was repealed 12 days after its entry into force), assists with its proportionality. However, the committee considers questions remain as to whether the measure was

proportionate to the objective sought to be achieved, noting there were extremely limited exceptions to the application of the direction, no procedure whereby an individual could apply for an exemption, and no information provided as to whether persons of Indian descent were disproportionately affected.

2.27 The committee reiterates²⁴ that given the potential impact on human rights of legislative instruments dealing with the COVID-19 pandemic, it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility (regardless of whether this is required as a matter of law).²⁵

2.28 Noting that the determination is no longer in force, the committee makes no further comment.

Dr Anne Webster MP

Chair

24 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](#)).

25 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.

