



Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 4 of 2023

29 March 2023

© Commonwealth of Australia 2023

ISSN 2204-6356 (Print)

ISSN 2204-6364 (Online)

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823

Fax: 02 6277 5767

Email: human.rights@aph.gov.au

Website: http://www.aph.gov.au/joint_humanrights/

This report can be cited as: Parliamentary Joint Committee on Human Rights, *Report 4 of 2023*; [2023] AUPJCHR 28.

This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Members

Mr Josh Burns MP, Chair	Macnamara, Victoria, ALP
Mr Russell Broadbent MP, Deputy Chair	Monash, Victoria, LP
Senator Karen Grogan	South Australia, ALP
Ms Peta Murphy MP	Dunkley, Victoria, ALP
Senator Jacinta Nampijinpa-Price	Northern Territory, CLP
Senator Matthew O'Sullivan	Western Australia, LP
Mr Graham Perrett MP	Moreton, Queensland, ALP
Senator Jana Stewart	Victoria, ALP
Ms Kylea Tink MP	North Sydney, New South Wales, IND
Senator Lidia Thorpe	Victoria, IND

Secretariat

Anita Coles, Committee Secretary
Charlotte Fletcher, Principal Research Officer
Rebecca Preston, Principal Research Officer
Charlotte Lim, Legislative Research Officer

External legal adviser

Associate Professor Jacqueline Mowbray

Table of contents

Membership of the committee	iii
Committee information	vii
Report snapshot	1
Chapter 1—New and continuing matters	9
Bills	
Social Security (Administration) Amendment (Income Management Reform) Bill 2023 and related instruments	9
Legislative instruments	
Migration (Regional Processing Country—Republic of Nauru) Designation (LIN 23/017) 2023 [F2023L00093]	26
Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2023 [F2023L00188]	35
Chapter 2—Concluded matters	43
Legislative instruments	
Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2023 [F2023L00009]	43
Fair Entitlements Guarantee Regulations 2022 [F2022L01529]	54
Federal Court Legislation Amendment Rules 2022 [F2023L00033]	64

Committee information

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

The committee assesses legislation for compatibility with the human rights set out in seven international treaties to which Australia is a party.¹ The committee's *Guide to Human Rights* provides a short and accessible overview of the key rights contained in these treaties which the committee commonly applies when assessing legislation.²

The establishment of the committee builds on Parliament's tradition of legislative scrutiny. The committee's scrutiny of legislation seeks to enhance understanding of, and respect for, human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, most rights may be limited as long as it meets certain standards. Accordingly, a focus of the committee's reports is to determine whether any limitation on rights is permissible. In general, any measure that limits a human right must comply with the following limitation criteria: be prescribed by law; be in pursuit of a legitimate objective; be rationally connected to (that is, effective to achieve) its stated objective; and be a proportionate way of achieving that objective.

Chapter 1 of the reports include new and continuing matters. Where the committee considers it requires further information to complete its human rights assessment it will seek a response from the relevant minister, or otherwise draw any human rights concerns to the attention of the relevant minister and the Parliament. Chapter 2 of the committee's reports examine responses received in relation to the committee's requests for information, on the basis of which the committee has concluded its examination of the legislation.

1 International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

2 See the committee's [Guide to Human Rights](#). See also the committee's guidance notes, in particular [Guidance Note 1 – Drafting Statements of Compatibility](#).

Report snapshot¹

In this report the committee has examined the following bills and legislative instruments for compatibility with human rights. The committee's full consideration of legislation commented on in the report is set out at the page numbers indicated.

Bills

Chapter 1: New and continuing matters

Bills introduced 6 to 17 March 2023	13
-------------------------------------	----

Bills commented on in report ²	1
---	---

Chapter 2: Concluded

Bills committee has concluded its examination of following receipt of ministerial response	0
--	---

Education Legislation Amendment (Startup Year and Other Measures) Bill 2023

No comment

Ending Native Forest Logging Bill 2023

No comment

Financial Accountability Regime Bill 2023

No comment

Financial Accountability Regime (Consequential Amendments) Bill 2023

No comment

- 1 This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 4 of 2023*; [2023] AUPJCHR 29.
- 2 The committee makes no comment on the remaining bills on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This 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.

Financial Services Compensation Scheme of Last Resort Levy Bill 2023

No comment

Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2023

No comment

Governor-General Amendment (Cessation of Allowances in the Public Interest) Bill 2023

No comment

Improving Access to Medicinal Cannabis Bill 2023

No comment

National Health Amendment (Effect of Prosecution – Approved Pharmacist Corporations) Bill 2023

No comment

National Vocational Education and Training Regulator (Data Streamlining) Amendment Bill 2023

No comment

Social Security (Administration) Amendment (Income Management Reform) Bill 2023 and related instruments³

Seeking information

[pp. 9-25](#)

The enhanced income management regime

Rights to social security, privacy, adequate standard of living, equality and non-discrimination, and rights of the child

This bill seeks to expand access to the enhanced income management regime under Part 3AA of the *Social Security (Administration) Act 1999* (the Act), including by introducing eligibility criteria for both compulsory and voluntary participation in the new regime. The bill would also specify portions of welfare payments that are to be 'qualified' and 'unqualified' as well as authorise the disclosure of personal information between relevant authorities for the purposes of the operation of the enhanced income management regime.

The related legislative instruments firstly set out the terms and conditions relating to the establishment, ongoing maintenance and closure of BasicsCard bank accounts, including the limitations on the use of the qualified portion of a person's welfare payment, and secondly specify the Ngaanyatjarra Lands as an area for the purposes of the eligibility criteria relating to vulnerable welfare payment

3 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189] and Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 [F2023L00190].

recipients.

By compulsorily subjecting an individual to the enhanced income management regime and restricting how they may spend a portion of their social security payment, the measures limit the rights to social security, privacy and possibly an adequate standard of living as well as the rights of the child (to the extent that the measures apply to children). The measures also engage and limit the right to equality and non-discrimination insofar as they have a disproportionate adverse impact on certain groups of people, including Aboriginal and Torres Strait Islander persons.

The committee is seeking further information from the Minister for Social Services to assess the compatibility of these measures with multiple human rights.

Transparent and Quality Public Appointments Bill 2023

No comment

Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Bill 2023

No comment

Legislative instruments

Chapter 1: New and continuing matters

Legislative instruments registered on the [Federal Register of Legislation](#) between 7 February and 2 March 2023⁴ 102

Legislative instruments commented on in report⁵ 7⁶

Chapter 2: Concluded

Legislative instruments committee has concluded its examination of following receipt of ministerial response 3

Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 2) Instrument 2023 [[F2023L00139](#)]

This legislative instrument imposes sanctions on individuals. The committee has considered the human rights compatibility of similar instruments on a number of occasions, and retains scrutiny concerns about the compatibility of the sanctions regime with human rights.⁷ However, as this legislative instrument does not appear to designate or declare any individuals who are currently within Australia's jurisdiction, the committee makes no comment in relation to this instrument at this stage.

-
- 4 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](#).
 - 5 The committee makes no comment on the remaining legislative instruments on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the instrument and relevant information provided in the statement of compatibility (where applicable). The committee may have determined not to comment on an instrument notwithstanding that the statement of compatibility accompanying the instrument may be inadequate.
 - 6 Note that two of these instruments are considered in the above bill entry relating to the Social Security (Administration) Amendment (Income Management Reform) Bill 2023.
 - 7 See, most recently, Parliamentary Joint Committee on Human Rights, [Report 15 of 2021](#) (8 December 2021), pp. 2-11.

Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2023 [[F2023L00009](#)]

Advice to
Parliament

[pp. 43-53](#)

Restriction of passengers entering Australia

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

This legislative instrument imposed entry requirements on passengers to provide proof of a negative test for COVID-19 taken within a 48-hour period prior to boarding a flight that has commenced from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau and ends in Australian territory. The measure was not time limited but has since been repealed.

The committee considers that as the determination was designed to prevent the spread of new Covid-19 variants, it likely promoted and protected the rights to life and health. The minister advised that this determination was repealed shortly after the committee previously reported. As such, noting the determination sought to achieve the legitimate objective of seeking to prevent potential new variants of concern emerging and circulating in Australia, and as the determination was strictly time-limited and had exemptions available for individual circumstances, the committee considers any limit on human rights by this determination was likely reasonable and proportionate.

The minister advised that such determinations will be in force for as long as is required to achieve its purpose and in general such determinations will sunset after 10 years. The committee remains concerned that there is no legislative requirement to regularly review such determinations. The committee considers there is some risk, without a legislative requirement to regularly review the continued necessity for such measures, that these could continue beyond that which is strictly necessary.

The committee has [recommended](#) that the *Biosecurity Act 2015* be amended to provide that a determination made under these provisions must not be in force longer than the period that the Health Minister considers necessary and in any case, must not be longer than 3 months. The committee considers that its concerns have been addressed by the repeal of this instrument and makes no further comment in relation to this legislative instrument.

Fair Entitlements Guarantee Regulations 2022 [[F2022L01529](#)]

Advice to
Parliament

[pp. 54-63](#)

Financial assistance scheme for textile, clothing and footwear industry contract outworkers

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

This legislative instrument continues the scheme of financial assistance for textile, clothing and footwear (TCF) industry contract outworkers in situations where their employer has become insolvent. It provides that an individual must be an Australian citizen or a holder of a permanent visa or a special category visa to be eligible for financial assistance.

Providing financial assistance for eligible TCF contract outworkers during an insolvency event promotes the right to just and favourable conditions of work, but by excluding workers on the basis of their visa status this measure may also limit

this right and the right to equality and non-discrimination.

The committee considers that the overall objective of the scheme, that providing financial support to vulnerable workers during an insolvency event, is a legitimate objective. However, it considers that the specific objective sought to be achieved by excluding certain workers on the basis of their migration status – that is, to achieve legislative consistency – is not sufficient to constitute a legitimate objective for the purposes of international human rights law. Regarding proportionality, the committee notes that the only safeguard identified appears unlikely to be effective in practice and the measure offers no flexibility to consider individual circumstances. As such, the committee considers there to be a risk that limiting eligibility on the basis of migration status may not constitute a proportionate limitation on rights.

The committee has [recommended](#) some amendments to assist with the proportionality of the measure and otherwise draws these human rights concerns to the attention of the Minister for Employment and Workplace Relations and the Parliament.

Federal Court Legislation Amendment Rules 2022 [\[F2023L00033\]](#)

*Advice to
Parliament*

Access to court documents
Right to freedom of expression

[pp. 64-72](#)

These rules provide that a person who is not a party to a Federal Court proceeding cannot inspect certain court documents in a proceeding until after the first directions hearing or the hearing (whichever is earlier).

Restricting access to court documents, which journalists may use to help them accurately report on cases before the Federal Court, engages and limits the right to freedom of expression. The statement of compatibility accompanying the instrument does not identify that this right is engaged, and the explanatory statement provides no information as to why this amendment was considered necessary.

The committee considers that, based on the additional information provided by the Chief Justice regarding the ability to access such documents by making an application to the court, its concerns have been addressed. The committee has [recommended](#) that the statement of compatibility be updated.

Migration (Regional Processing Country—Republic of Nauru) Designation (LIN 23/017) 2023 [\[F2023L00093\]](#)

*Seeking
information*

Designation of Nauru as a regional processing country
Multiple rights

[pp. 26-34](#)

This legislative instrument designates Nauru as a regional processing country, the effect of which is to enable the operation of section 198AD of the *Migration Act 1958*, which requires that an officer must, as soon as reasonably practicable, remove an unauthorised maritime arrival from Australia and take them to a regional processing country.

By designating Nauru, this measure has the effect of requiring the removal of any future unauthorised maritime arrivals from Australia to Nauru, which engages and limits multiple human rights.

The committee is seeking further information from the Minister for Home Affairs to assess the compatibility of this instrument with multiple human rights.

Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2023 [F2023L00188]

*Seeking
information*

[pp. 35-42](#)

Eligibility for the Disability Support Pension

Rights to social security, adequate standard of living, equality and non-discrimination and rights of persons with disability

This legislative instrument sets out the rules that must be used when assessing whether a person meets the work-related impairment level for the purposes of assessing eligibility for the Disability Support Pension (DSP).

By supporting the provision of a social security payment specifically to support persons with disability, this measure promotes the rights to social security, an adequate standard of living, equality and non-discrimination and the rights of persons with disability for those who are eligible for the DSP. However, in restricting which persons may be eligible for the DSP according to the work-related impairment tables set out in the instrument, the measure also limits these human rights.

The committee is seeking further information from the Minister for Social Services to assess the compatibility of this instrument with these rights.

Chapter 1

New and continuing matters

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

Bill

Social Security (Administration) Amendment (Income Management Reform) Bill 2023 and related instruments¹

Purpose	<p>This bill seeks to make amendments to the enhanced income management regime under Part 3AA of the <i>Social Security (Administration) Act 1999</i>, including by directing all new participants to the Part 3AA regime and closing entry to the income management regime under part 3B; and offering participants subject to the income management regime under Part 3B the choice to transition to the Part 3AA regime.</p> <p>The related instruments firstly set out the terms and conditions relating to the establishment, ongoing maintenance and closure of BasicsCard bank accounts and specifies the kinds of businesses in relation to which transactions involving BasicsCard bank accounts may be declined, and secondly specify the Ngaanyatjarra Lands as an area for the purposes of the eligibility criteria relating to vulnerable welfare payment recipients and as a declared voluntary income management area²</p>
Portfolio	Social services
Introduced	House of Representatives, 9 March 2023
Rights	Social security; private life; adequate standard of living equality and non-discrimination; rights of the child

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Income Management Reform) Bill 2023, *Report 4 of 2023*; [2023] AUPJCHR 30.

2 The related instruments are Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189] and Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 [F2023L00190].

The enhanced income management regime

1.2 By way of background, the *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Act 2022* introduced the enhanced income management regime under Part 3AA of the *Social Security (Administration) Act 1999* (the Act). This Act also compulsorily transitioned former Cashless Debit Card (CDC) participants in the Northern Territory and Cape York region to this new enhanced income management regime (which took effect on 6 March 2023).³ The enhanced income management regime provides participants with access to a BasicsCard bank account, which is accompanied by a debit card (known as a SmartCard).⁴ A SmartCard will operate like a standard Visa debit card and participants will be able to purchase goods and services online and use mainstream banking functions including BPAY, and is said to be a 'superior banking product' to the existing BasicsCard.⁵

1.3 This bill seeks to expand access to the enhanced income management regime by introducing eligibility criteria for both compulsory and voluntary participation in the regime. These criteria largely mirror the existing eligibility criteria under Part 3B of the Act (which sets up the original income management regime), meaning that persons who may become subject to the enhanced income management regime are the same as those who are, or would be, subject to income management under Part 3B of the Act.⁶ This bill also seeks to introduce additional eligibility criteria in relation to disengaged youth and long-term welfare payment recipients who reside within a state, a territory or an area other than the Northern Territory as specified by the minister by legislative instrument.⁷ In particular, a

3 See Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 3 of 2022](#) (7 September 2022) pp. 15–26 and [Report 5 of 2022](#) (20 October 2022) pp. 39–55.

4 Section 123SU of the *Social Security (Administration) Act 1999* provides that the Secretary may, by legislative instrument, determine a kind of bank account to be maintained by a person who is subject to the enhanced income management regime. Section 7 of the *Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023* [F2023L00189] provides that a BasicsCard bank account established with Indue or Traditional Credit Union is the kind of bank account to be maintained by a person subject to the enhanced income management regime. The terms and conditions relating to the use of the BasicsCard bank account are set out in Schedule 4 of the Determination.

5 Explanatory statement, pp. 1, 4–5.

6 Schedule 1, item 17 remakes the eligibility criteria in relation to child protection, referrals by recognised state and territory authorities and vulnerable welfare payment recipients. Item 1 sets out all persons who may become subject to the enhanced income management regime.

7 Schedule 1, item 32, new section 123SDA. Section 123SD of the *Social Security (Administration) Act 1999* sets out eligibility criteria relating to persons who are disengaged youth and long-term welfare payment recipients whose usual place of residence is within the Northern Territory.

person would be subject to the enhanced income management regime if, among other things, they meet the criteria relating to disengaged youth or long-term welfare payment recipient, they usually reside within a specified place and they are not subject to the enhanced income management regime under any other eligibility criteria, such as because they are a vulnerable welfare payment recipient or a child protection officer requires the person to be income managed.⁸ In addition, the bill would direct all new entrants to income management to the enhanced income management regime and close entry to the old income management regime under Part 3B of the Act; as well as offer participants subject to income management under Part 3B the choice to voluntarily transition to the enhanced income management regime.⁹

1.4 The bill would also specify the portions of welfare payments that are to be 'qualified' (the amount that may be spent on non-excluded goods and services) and 'unqualified' (the amount that may be spent at the person's discretion).¹⁰ The portions specified in this bill appear to mirror the 'deductible portions' set out under Part 3B of the Act.¹¹ The qualified portions for welfare payments vary between 100 per cent and 50 percent depending on the type of welfare payment, unless another percentage is determined by the minister.¹² Restrictions on the use of the qualified portion of a person's welfare payment are set out in a related instrument.¹³ In particular, the instrument declares the kinds of businesses in relation to which transactions involving a BasicsCard bank account (that is, a bank account subject to the enhanced income management regime) may be declined by a financial institution.¹⁴ The instrument also sets out the terms and conditions relating to the

8 Schedule 1, item 32, new section 123SDA. This eligibility criteria mirrors sections 123UCB and 123UCC, which sets out the eligibility criteria for disengaged youth and long-term welfare payment recipients in relation to the income management regime under Part 3B of the *Social Security (Administration) Act 1999*.

9 Schedule 1 expands access to the enhanced income management regime and schedule 2 closes the income management regime under Part 3B to new entrants.

10 Scheduled 1, items 49–51.

11 Division 5 of Part 3B of the *Social Security (Administration) Act 1999* specifies the 'deductible portion' of welfare payments, that is, the amount that must be deducted from the welfare payment to be credited to the person's income management account.

12 Each welfare payment attracts a different portioning and whether a welfare payment is paid by instalments or as a lump sum will change the percentage that is qualified and unqualified.

13 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189].

14 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], schedules 1–3. Schedule 1 declares the kinds of businesses by description, schedule 2 declares the kinds of businesses by merchant category and schedule 3 declares businesses by Australian and New Zealand Standard Industrial Classification codes.

establishment, ongoing maintenance and closure of BasicsCard bank accounts.¹⁵ For example, cash cannot be withdrawn from a BasicsCard bank account and money cannot be used to purchase excluded goods and services or cash-like products (such as gift cards or vouchers). Limitations may also be placed on amounts that a person can spend and transfer out of their account.

1.5 Further, the bill would allow for the disclosure of information, including personal information, between relevant authorities for the purposes of the operation of the enhanced income management regime.¹⁶ For example, new section 123STA would allow a child protection officer to give the secretary information about a person who is subject to the enhanced income management regime or about a person who the child protection officer is considering requiring to be income managed.¹⁷

1.6 In addition, the Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 continues the operation of voluntary income management arrangements under Part 3B of the Act and specifies the Ngaanyatjarra Lands as an area for the purposes of the eligibility criteria relating to vulnerable welfare payment recipients.¹⁸ This means that if a person's usual place of residence is the Ngaanyatjarra Lands and they meet the other eligibility criteria relating to vulnerable welfare payment recipients, then they will be subject to the income management regime under Part 3B of the Act. This bill would give such persons the choice to transition to the enhanced income management regime under Part 3AA of the Act.¹⁹

15 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], schedule 4.

16 Schedule 1, item 68.

17 Schedule 1, item 68, new section 123STA.

18 Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 [F2023L00190]

19 Schedule 1, item 17, new section 123SCL.

Preliminary international human rights legal advice

Rights to social security, private life, adequate standard of living and equality and non-discrimination and rights of the child

1.7 As the committee has previously reported, measures relating to mandatory income management engage numerous human rights.²⁰ The committee has found that, to the extent that income management ensures a portion of an individual's welfare payment is available to cover essential goods and services, the income management regime could have the potential to promote rights, including the right to an adequate standard of living and the rights of the child.²¹ However, the committee has also found that mandatory income management in Australia engages and limits a number of other human rights, including the rights to a private life,²² social security²³ and equality and non-discrimination.²⁴ Insofar as this bill and related instruments extend measures relating to income management under Part 3B to the enhanced income management regime under Part 3AA, including by introducing eligibility criteria for mandatory participation in the enhanced income management regime and restricting the way a person subject to this regime can spend the

20 See Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 3 of 2022](#) (7 September 2022) pp. 15–26 and [Report 5 of 2022](#) (20 October 2022) pp. 39–55; [2016 Review of Strong Futures measures](#) (16 March 2016) pp. 37–62; [Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation](#) (June 2013) pp. 45–62. The committee has made similar comments regarding measures relating to the Cashless Debit Card program. See, e.g. Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21–36; [Report 7 of 2016](#) (11 October 2016) pp. 58–61; [Report 9 of 2017](#) (5 September 2017) pp. 34–40; [Report 11 of 2017](#) (17 October 2017) pp. 126–137; [Report 8 of 2018](#) (21 August 2018) pp. 37–52; [Report 2 of 2019](#) (2 April 2019) pp. 146–152; [Report 1 of 2020](#) (5 February 2020) pp. 132–142; [Report 14 of 2020](#) (26 November 2020) pp. 38–54; [Report 1 of 2021](#) (3 February 2021) pp. 83–102; [Report 14 of 2021](#) (24 November 2021) pp. 14–18.

21 International Covenant on Economic, Social and Cultural Rights, article 11, and Convention on the Rights of the Child. The statement of compatibility states that the bill promotes the right to an adequate standard of living by restricting individuals from spending a significant portion of their welfare payment to purchase excluded goods and services, such as alcohol, gambling products, pornography and tobacco, which ensures individuals will have sufficient funds available to meet their basic needs such as rent, food and household bills: p. 4. See also Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], statement of compatibility, p. 3.

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

23 International Covenant on Economic, Social and Cultural Rights, article 9.

24 International Covenant on Civil and Political Rights, articles 2, 16 and 26 and International Covenant on Economic, Social and Cultural Rights, article 2. It is further protected by the International Convention on the Elimination of All Forms of Racial Discrimination, articles 2 and 5.

'qualified' portion of their welfare payment, these same human rights are engaged and limited.

1.8 In particular, by subjecting an individual to mandatory income management under the Part 3AA regime and restricting how they may spend a portion of their social security payment (including, in some cases, portioning 100 per cent of a person's welfare payment as 'qualified'), the measure limits the rights to social security and a private life insofar as it interferes with an individual's freedom and autonomy to organise and make decisions about their private and family life, including making their own decisions about the way in which they use their social security payments.²⁵ The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and in preventing social exclusion and promoting social inclusion,²⁶ and enjoyment of the right requires that social support schemes must be accessible, providing universal coverage without discrimination.²⁷ The right to privacy is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

1.9 Further, authorising the disclosure of personal information between relevant authorities, the consequences of which may be to subject a person to compulsory income management, would also limit the right to informational privacy, which includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information.²⁸ It also includes the right to control the dissemination of information about one's private life.

1.10 The measure may also engage and limit the right to an adequate standard of living. This right is often engaged simultaneously with the right to social security and requires that Australia take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.²⁹ The committee has previously noted that were persons subject to mandatory income

25 The bill's statement of compatibility acknowledges the rights to social security and privacy are engaged: pp. 4–5. See also Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], statement of compatibility, pp. 3–4.

26 The Parliamentary Joint Committee on Human Rights has previously stated that the income management regime fails to promote social inclusion, but rather stigmatises individuals, and as such, limits the enjoyment of the right to social security, an adequate standard of living and privacy: [2016 Review of Strong Futures measures](#) (16 March 2016) p. 47.

27 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [3]. The core components of the right to social security are that social security, whether provided in cash or in kind, must be available, adequate, and accessible.

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

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

management to experience difficulties in accessing and meeting their basic needs, such as food, clothing and housing, the right to an adequate standard of living may be engaged and limited.³⁰ The enhanced income management regime contains some safeguards that may mitigate the risk that individuals subject to income management under this regime may experience difficulties accessing and meeting their basic needs. In particular, participants will have access to a new SmartCard that can be used at over one million outlets across Australia and provides banking functions including 'tap and pay' payments, online shopping and BPAY.³¹ The bill would also allow the secretary to vary the percentage of qualified and unqualified portions of a person's welfare payment if a person is unable to access their BasicsCard bank account as a direct result of a technological fault or malfunction with the card or account; a natural disaster; or a national emergency.³²

1.11 However, it is not clear whether allowing any transaction with a specified kind of business to be declined by a financial institution could have an adverse impact on the ability of people in remote communities to access certain goods and services. The statement of compatibility notes that businesses that offer excluded goods and services can still be used by people subject to the enhanced income management regime if the business has systems to prevent the sale of excluded products or services to holders of an enhanced BasicsCard account.³³ However, if, for example, the only grocery store in a remote town did not have adequate systems in place to prevent the sale of excluded products such that transactions made at the store were able to be declined, it is not clear how a participant subject to income management could purchase groceries, noting that online grocery shopping may not be available in remote communities. If listing such businesses did prevent participants from being able to effectively access essential goods, this could have implications for the realisation of their right to an adequate standard of living.³⁴

30 See *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 3 of 2022](#) (7 September 2022) pp. 15–26 and [Report 5 of 2022](#) (20 October 2022) pp. 39–5.

31 Statement of compatibility, p. 3.

32 Schedule 1, item 51, new subsections 123SLA(7)–(8), 123SLD(7)–(8), 123SLG(7)–(8), 123SLJ(7)–(8). See also *Social Security (Administration) Act 1999*, subsections 123SJ(4)–(5), 123SM(3)–(4), 123SP(3)–(4).

33 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], statement of compatibility, p.3.

34 This Parliamentary Joint Committee on Human Rights raised this issue in its consideration of the *Social Security (Administration) Amendment (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2021* [F2021L01473], [Report 14 of 2021](#) (24 November 2021).

1.12 The measures also engage the right to equality and non-discrimination insofar as they would have a disproportionate impact on certain groups of people based on their protected attributes. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights). 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.³⁵ The eligibility criteria set out in the bill include a criterion relating to a person's usual place of residence and, in the case of disengaged youth, a criterion relating to age. In this way, the measures would treat participants differently based on the protected attributes of place of residence within a state and age.³⁶ Further, due to the large number of Aboriginal and Torres Strait Islander persons participating in mandatory income management, the measures would have a disproportionate impact on this group, as acknowledged in the accompanying statements of compatibility.³⁷ In particular, the measure relating to the Ngaanyatjarra Lands would disproportionately impact Aboriginal and Torres

35 *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'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

36 Age and place of residence have been recognised as constituting an 'other status' for the purposes of the right to equality and non-discrimination. Regarding age, see *Schmitz-De-Jong v Netherlands*, UN Human Rights Committee Communication No. 855/1999 (2001). Regarding place of residence, see *Lindgren et al v Sweden*, UN Human Rights Committee Communications Nos. 298/1988 and 299/1988 (1991).

37 Statement of compatibility, p. 2. See also Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], statement of compatibility, p. 2.

Strait Islander peoples, noting that the majority of the population residing in this area are Aboriginal people.³⁸

1.13 Further, noting that 'disengaged youth' (which includes children aged between 15 and 17 years) are a class of participants who are to be subject to the enhanced income management regime,³⁹ the measure would engage the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.⁴⁰ Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds.⁴¹ For the reasons outlined above, the rights of a child to social security, privacy and equality and non-discrimination would be engaged and limited by subjecting disengaged youth to mandatory income management.⁴² Additionally, noting the eligibility criteria relating to disengaged youth do not provide for an individual assessment of those participants who would be subject to the enhanced income management regime, the measure would appear to raise issues regarding Australia's obligation to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.⁴³ This obligation requires legislative, administrative and judicial bodies and institutions to systematically

38 For the purposes of the Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 [F2023L00190], the Ngaanyatjarra Lands includes the shire of Ngaanyatjarraku in Western Australia and the remote community known as Kiwirrkurra Community located within the shire of East Pilbara in Western Australia: Explanatory statement, p. 1. According to the 2021 Census, there are 171 Aboriginal and/or Torres Strait Islander people living in [Kiwirrkurra](#) and 1,147 Aboriginal and/or Torres Strait Islander people living in the [Ngaanyatjarraku](#) Local Government Area (which represents 84.5 per cent of the total population). The [Ngaanyatjarra Lands School](#) also states that approximately 2,000 Aboriginal people live in eleven communities that comprise the Ngaanyatjarra Lands. Notwithstanding this, the accompanying statement of compatibility does not acknowledge that the right to equality and non-discrimination is limited, stating that the determination does not discriminate on the basis of race because anyone who resides in the Ngaanyatjarra Lands (regardless of race) will be eligible for the continuation of income management: p. 3.

39 Schedule 1, item 32, new subsection 123SDA(1).

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

41 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also International Covenant on Civil and Political Rights, articles 2 and 26.

42 Convention on the Rights of the Child, articles 2, 16 and 26.

43 Convention on the Rights of the Child, article 3(1).

consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.⁴⁴

1.14 Limits on the above rights may be permissible where a measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is proportionate to that objective.

Legitimate objective and rational connection

1.15 The stated objective of the bill is to reform the income management regime in order to facilitate a seamless transition to the enhanced income management regime which engages superior technology.⁴⁵ The statement of compatibility states that reforming the income management regime will offer self-determination for communities and choice and protection for vulnerable people.⁴⁶ The stated objectives of the enhanced income management regime more generally and the related instruments are to minimise access to goods and services that contribute to social harm and adverse behaviour and to restrict the purchase of excluded goods so participants prioritise expenditure on essential expenses such as rent, food and utilities.⁴⁷

1.16 The stated objective of facilitating the transition to the enhanced income management regime, which provides participants with access to a BasicsCard bank account and accompanying debit card that offers superior technology and improved banking functions, is capable of constituting a legitimate objective for the purposes of international human rights law. This is particularly so if the new SmartCard improves participants' access to businesses and outlets and reduces the stigma associated with the BasicsCard (that is, the debit card used under the Part 3B income management regime).⁴⁸ However, it is noted that in facilitating this transition, the bill and related instruments extend all measures relating to income management to the enhanced income management regime. Thus, in effect, the legislation remakes the law relating to income management and possibly expands its scope. The general objective of the enhanced income management regime as a whole therefore needs to be scrutinised as well as the specific stated objective relating to the bill and instruments.

44 UN Committee on the Rights of the Child, *General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013). See also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

45 Statement of compatibility, pp. 2, 4.

46 Statement of compatibility, p. 5.

47 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], statement of compatibility, p. 4; Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 [F2023L00190], explanatory statement, p. 4.

48 Statement of compatibility, pp. 3–5.

1.17 The general objective of the enhanced income management regime—to combat social harms caused by the use of harmful products—is capable of constituting a legitimate objective for the purposes of international human rights law. However, noting previous statements made by the minister to this committee regarding the government's intention to make income management voluntary in the future, it is not clear how expanding access to the enhanced income management regime and extending eligibility criteria for mandatory participation in this regime is consistent with this broader objective.⁴⁹ Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective in achieving the objective being sought. It is noted that previous evaluations of mandatory income management, including the cashless debit card program, were inconclusive regarding its effectiveness, and whether it has caused or contributed to other harms.⁵⁰ Based on earlier evaluations of the income management regime specifically, the committee found in 2016 that the compulsory income management regime does not appear to be an effective approach to addressing issues of budgeting skills and ensuring that an adequate amount of income support payments is spent on priority needs. It noted that while the income management regime may have some benefit for persons who voluntarily participated in the regime, it has limited effectiveness for the vast majority of people who are compelled to participate.⁵¹ There do not appear to be more recent evaluations of the income management regime and the explanatory materials accompanying the bill and related instruments do not address this point.⁵² It is

49 See Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 5 of 2022](#) (20 October 2022) pp. 39–55.

50 A summary of the evaluations of the Cashless Debit Card program is set out in Parliamentary Joint Committee on Human Rights, [Report 14 of 2020](#) (26 November 2020) pp. 38–54; [Report 1 of 2021](#) (3 February 2021) pp. 83–102. Studies have been conducted examining other specific elements of the cashless welfare trial, including its effects on: Indigenous mobility; homelessness; and perceptions of shame attached with use of the card. See, *Australian Journal of Social Issues*, vol. 55, no. 1, 2020. In particular: Eve Vincent et al, '“Moved on”? An exploratory study of the Cashless Debit Card and Indigenous mobility', pp. 27–39; Shelley Bielefeld et al, 'Compulsory income management: Combatting or compounding the underlying causes of homelessness?', pp. 61–72; Cameo Dalley, 'The “White Card” is grey: Surveillance, endurance and the Cashless Debit Card', pp. 51–60; and Elizabeth Watt, 'Is the BasicsCard “shaming” Aboriginal people? Exploring the differing responses to welfare quarantining in Cape York', pp. 40–50. See also Luke Greenacre et al, 'Income Management of Government payments on Welfare: The Australian Cashless Debit Card', *Australian Social Work* (2020) pp. 1–14.

51 Parliamentary Joint Committee on Human Rights, [2016 Review of Strong Futures measures](#) (16 March 2016), p. 52.

52 Department of Social Services, [Income Management and Cashless Debit Card Evaluations](#) (23 January 2023).

therefore unclear whether the enhanced income management regime, which will continue to subject persons to mandatory income management, would be effective to achieve the stated objectives.

Proportionality

1.18 A key aspect of whether any limitation on rights can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether the measure provides sufficient flexibility to treat different cases differently. The bill provides that a person must participate in the enhanced income management regime if they meet certain eligibility criteria. The criteria do not provide for an individualised assessment, rather participation is broadly based on geographical location and the type of social security payment received. For example, a young person aged between 15 and 25 years of age who resides in a specified place, receives a category C welfare payment for at least 13 weeks during the 26-week period ending immediately before the test time, and is not exempt, will be subject to the enhanced income management regime.⁵³ There appears to be little flexibility to consider the merits of an individual case and questions arise as to whether this approach is sufficiently individualised.

1.19 Another consideration is whether the measure is accompanied by sufficient safeguards. The statement of compatibility states that there are a number of general safeguards accompanying the bill, including providing individuals currently subject to income management with the choice to transition to the enhanced income management regime.⁵⁴ The statement of compatibility states that the bill offers individuals with access to modern technology and an improved customer experience compared to the regime under Part 3B.⁵⁵ However, this choice is not afforded to new participants and does not change the fact that participants are compelled to participate in income management more generally. It is therefore not clear that this would operate as an effective safeguard in practice.

1.20 The general exemptions that apply to the income management regime may operate as a safeguard. For example, a person may not be subject to the enhanced income management regime if they are an 'exempt welfare payment recipient'. The secretary may determine that a person is an 'exempt welfare payment recipient' if they are included in a class of persons specified in a legislative instrument by the minister.⁵⁶ The value of this safeguard will depend on how it operates in practice,

53 Schedule 1, item 32, new subsection 123SDA(1).

54 Statement of compatibility, p. 2.

55 Statement of compatibility, p. 2.

56 Schedule 1, item 32, new section 123SDB.

including the nature and scope of any future legislative instruments that specify a class of persons who are to be exempt from income management.⁵⁷

1.21 The statement of compatibility also refers to community consultations, which may assist with proportionality. It states that extensive consultations have been undertaken and continue with First Nations communities and other stakeholders about the enhanced income management regime and the future of income management more broadly.⁵⁸ The explanatory materials accompanying the related instruments also state that community consultation has occurred, including on the issue of whether the technology supporting the income management regime is fit for purpose.⁵⁹ While it appears that general consultations have occurred regarding the technology around the new card, and there is an intention for further consultation to be undertaken, it is not clear whether, and to what extent, affected communities and individuals were consulted about those aspects of the bill which relate to mandatory participation in the enhanced income management regime.

1.22 As the committee has previously reported, for consultation to be an effective safeguard, it must be a two-way deliberative process of dialogue in advance of a decision to progress the measure.⁶⁰ This is particularly the case where Aboriginal and Torres Strait Islander people are affected by the decision. Article 19 of the United Nations (UN) Declaration on the Rights of Indigenous Peoples provides that States should consult and cooperate in good faith with indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.⁶¹ The right of indigenous peoples to be consulted about measures which impact on them is a

57 It is noted that the Parliamentary Joint Committee on Human Rights has previously raised concerns about the adequacy and effectiveness of exemptions in the context of the Cashless Debit Card program and the income management regime. See Parliamentary Joint Committee on Human Rights, [Report 1 of 2021](#) (3 February 2021) pp. 98–102; [2016 Review of Strong Futures measures](#) (16 March 2016) pp. 54–56.

58 Statement of compatibility, p. 3.

59 Social Security (Administration) (Declinable Transactions and BasicsCard Bank Accounts) Determination 2023 [F2023L00189], explanatory statement, p. 3; Social Security (Administration) (Declared income management area — Ngaanyatjarra Lands) Determination 2023 [F2023L00190], explanatory statement, pp. 3–4.

60 See Parliamentary Joint Committee on Human Rights, [Report 1 of 2021](#) (3 February 2021) pp. 95–98.

61 While the UN Declaration on the Rights of Indigenous Peoples is not included in the definition of 'human rights' that this committee considers under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides clarification as to how human rights standards under international law, including under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights apply to the particular situation of indigenous peoples, and as such is relevant to this analysis.

critical component of free, prior and informed consent.⁶² Genuine consultation in this context should be 'in the form of a dialogue and negotiation towards consent'.⁶³

1.23 It is not clear, based on the information in the explanatory materials, whether the consultation process associated with the bill and related instruments contained the constituent elements of free, prior and informed consent for the purposes of international human rights law. For instance, it is not clear whether communities and individuals affected had the opportunity to genuinely influence the outcome of the decision-making processes affecting them or whether consent was achieved prior to introducing the measures.⁶⁴ The ability to genuinely influence the decision-making process is a fundamental component of good faith consultation and important for realising article 19 of the UN Declaration on the Rights of Indigenous Peoples.⁶⁵

1.24 A further consideration is the extent of any interference with human rights. The greater the interference, the less likely the measure is to be considered proportionate. Compulsory income management, including under the enhanced income management regime, represents a significant interference with a person's autonomy and private and family life. The regime imposes stringent conditions on the provision of income support payments, including what goods or services a person may purchase and where, as well as to whom a person may transfer money. In relation to participants who are subject to the regime due to receiving a written notice by a child protection officer or because they have failed to ensure that their child is enrolled at school or there is an unsatisfactory school attendance situation, 100 per cent of their welfare payment would be qualified (unless a lower percentage is determined by the minister by legislative instrument), meaning there may be no amount available to be used at the person's discretion.⁶⁶

1.25 Regarding the sharing of personal information for the purposes of the operation of the enhanced income management regime, the resulting interference with privacy is significant because the consequences of this information sharing may

62 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [14].

63 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [20].

64 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [15]–[16].

65 UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, A/HRC/12/34 (2009) [46]–[47]; UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [15]. See also

66 Schedule 1, item 51, new sections 123SLA and 123SLD.

be compulsory income management. While these information sharing provisions would be subject to the secrecy provisions in the Act, it is not clear that this safeguard would ameliorate these adverse effects.⁶⁷

1.26 Finally, it is necessary to consider whether any less rights restrictive alternatives could achieve the same stated objective. It is not clear why the bill extends compulsory participation in the enhanced income management regime rather than introducing voluntary participation, or at a minimum, only subjects individuals to the regime on the basis of individual circumstances. These options would appear to be a less rights restrictive way of achieving the stated objective.

Committee view

1.27 The committee notes that the bill and related instruments seek to facilitate the transition to the enhanced income management regime, which provides participants with access to a BasicsCard bank account and accompanying debit card (known as a SmartCard) that offers superior technology and improved banking functions. The committee considers this aspect of the legislation to be a positive measure, noting that the new SmartCard will improve participants' access to businesses, including access to over one million outlets across Australia, and may reduce the stigma associated with the existing BasicsCard (that is, the debit card used under the Part 3B income management regime).

1.28 However, the committee also notes that in facilitating this transition, the bill and related instruments extend all measures relating to income management to the enhanced income management regime. Thus, in effect, the legislation remakes the law relating to income management and possibly expands its scope. The committee therefore needs to scrutinise the enhanced income management regime more broadly (and not just the specific measures relating to improving the technology of the BasicsCard bank account and accompanying debit card).

67 Statement of compatibility, p. 5.

1.29 For many years the committee has raised concerns regarding the compatibility of compulsory income management with multiple human rights.⁶⁸ By extending measures relating to income management under Part 3B to the enhanced income management regime under Part 3AA, these same human rights are engaged and limited by the bill and related instruments. In particular, by subjecting an individual to mandatory income management and restricting how they may spend a portion of their social security payment, the measure limits the rights to social security and a private life, and possibly the right to an adequate standard of living. By authorising the sharing of personal information between relevant authorities for the purposes of the operation of the enhanced income management regime, the right to informational privacy is also engaged and limited. Due to the disproportionate impact on certain groups with protected attributes, including Aboriginal and Torres Strait Islander peoples and children, the measures engage and limit the right to equality and non-discrimination and the rights of the child.

1.30 The committee considers further information is required to assess the compatibility of the measures contained in the bill and related instruments with multiple human rights, and as such seeks the minister's advice in relation to:

- (a) whether, as previously indicated, the government intends to eventually introduce a voluntary income management regime and, if so, how extending compulsory participation in the enhanced income management regime is consistent with this broader intention;⁶⁹
- (b) in relation to the eligibility criteria relating to disengaged youth and long-term welfare payment recipients, what other geographical areas are intended to be specified by the minister by legislative instrument;⁷⁰

68 See, e.g. Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 3 of 2022](#) (7 September 2022) pp. 15–26 and [Report 5 of 2022](#) (20 October 2022) pp. 39–55; [2016 Review of Strong Futures measures](#) (16 March 2016) pp. 37–62; [Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation](#) (June 2013) pp. 45–62. The committee has made similar comments regarding measures relating to the Cashless Debit Card program. See, e.g. Parliamentary Joint Committee on Human Rights, [Thirty-first report of the 44th Parliament](#) (24 November 2015) pp. 21–36; [Report 7 of 2016](#) (11 October 2016) pp. 58–61; [Report 9 of 2017](#) (5 September 2017) pp. 34–40; [Report 11 of 2017](#) (17 October 2017) pp. 126–137; [Report 8 of 2018](#) (21 August 2018) pp. 37–52; [Report 2 of 2019](#) (2 April 2019) pp. 146–152; [Report 1 of 2020](#) (5 February 2020) pp. 132–142; [Report 14 of 2020](#) (26 November 2020) pp. 38–54; [Report 1 of 2021](#) (3 February 2021) pp. 83–102; [Report 14 of 2021](#) (24 November 2021) pp. 14–18.

69 The minister previously advised the committee that the government intends to ultimately transition to a voluntary regime. See Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*, [Report 5 of 2022](#) (20 October 2022) pp. 39–55.

70 Schedule 1, item 32.

- (c) whether there is a risk that people in remote communities may experience difficulties accessing essential goods, particularly in situations where local businesses may not have adequate systems in place to prevent the sale of excluded products such that transactions made at these stores are able to be declined;
- (d) how mandatory participation in the enhanced income management regime is effective to achieve the stated objectives;
- (e) whether there are recent evaluations of the mandatory income management regime under Part 3B and/or Part 3AA;
- (f) the nature of the consultation that was undertaken with affected communities and individuals regarding those aspects of the bill that relate to compulsory participation in the enhanced income management regime, and the outcomes of such consultation;
- (g) noting that consultation is intended to continue regarding the future of mandatory income management, why the bill does not include a sunset date or other provision to ensure that mandatory participation in the regime is time-limited;
- (h) whether consideration was given to less rights restrictive ways to achieve the stated objective, including voluntary participation or only subjecting individuals to the regime based on individual circumstances;
- (i) what other safeguards would operate to assist proportionality; and
- (j) whether participants who will be compulsorily subjected to the enhanced income management regime will have an opportunity in the future to opt-out of this regime or cease their participation in mandatory income management.

Legislative instruments

Migration (Regional Processing Country—Republic of Nauru) Designation (LIN 23/017) 2023 [F2023L00093]¹

Purpose	This legislative instrument designates the Republic of Nauru as a regional processing country
Portfolio	Home Affairs
Authorising legislation	<i>Migration Act 1958</i>
Last day to disallow	This instrument is exempt from disallowance under section 42 of the <i>Legislation Act 2003</i>
Rights	Non-refoulement; torture or cruel, inhuman or degrading treatment or punishment; effective remedy; rights of the child; equality and non-discrimination

Designation of Nauru as a regional processing country

1.31 This legislative instrument designates Nauru as a regional processing country, pursuant to subsection 198AB(1) of the *Migration Act 1958* (Migration Act). The effect of this designation is to enable the operation of section 198AD of the Migration Act, which requires that an officer must, as soon as reasonably practicable, remove an unauthorised maritime arrival from Australia and take them to a regional processing country.² The term 'unauthorised maritime arrival' includes a range of persons, including a person who entered Australia by sea without a valid visa.³ Consequently, this legislative instrument has the effect of permitting the removal of unauthorised maritime arrivals from Australia to Nauru.

1.32 Nauru was previously designated as a regional processing country for the purposes of the Migration Act from 1 September 2012 to 1 October 2022, at which

-
- 1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Regional Processing Country—Republic of Nauru) Designation (LIN 23/017) 2023, *Report 4 of 2023*; [2023] AUPJCHR 31.
 - 2 *Migration Act 1958*, section 198AD. The minister has a non-compellable and non-delegable discretion to determine that section 198AD does not apply to an unauthorised maritime arrival if they think it is in the public interest to do so. See, *Migration Act 1958*, section 198AE.
 - 3 It also includes a child born of a person who is themselves an unauthorised maritime arrival and persons who entered Australia by sea after being rescued at sea. See, *Migration Act 1958*, section 5AA.

time the relevant legislative instrument sunsetted.⁴ This legislative instrument commenced on 7 February 2023 and will sunset on 1 April 2033.

Preliminary international human rights legal advice

Multiple rights

1.33 By designating Nauru as a regional processing country, and thereby enlivening the operation of section 198AD of the Migration Act in relation to Nauru, this measure has the effect of enabling the removal of any future unauthorised maritime arrivals from Australia to Nauru.⁵ This legislative instrument therefore engages and limits several human rights. Set out below is a consideration of the key rights engaged.⁶

1.34 Although this measure provides for the removal of persons from Australia to a foreign jurisdiction, questions of whether Australia's human rights obligations apply extra-territorially do not arise.⁷ This is because Australia's obligations are enlivened at the time a person arrives in Australian territory, at which time the power under section 198AD can be used, and this instrument enables the transfer of the person to Nauru.

1.35 It is noted that prior to the commencement of this legislative instrument there was a gap of 127 days during which time Nauru was not designated as a regional processing country for the purposes of the Migration Act. It would appear that the absence of a designation in this period was not relevant to persons already

4 Migration Act 1958 - Instrument of Designation of the Republic of Nauru as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958 - September 2012 [F2012L01851].

5 It is noted that Papua New Guinea is also designated as a regional processing country, although this designation is due to sunset on 1 April 2023. See, Migration Act 1958 - Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958 - October 2012 [F2012L02003].

6 Including the right to non-refoulement, the prohibition against torture and ill-treatment and the right to an effective remedy. In addition, noting the historical and contemporaneous concerns raised regarding the sufficiency of healthcare and other services in Nauru, the measure may also engage the right to health, and the right to an adequate standard of living. In addition, the measure may engage the right to protection of the family, if it may cause family members to be involuntarily separated.

7 The extraterritorial application of Australia's human rights obligations has previously been considered by this committee. See, Parliamentary Joint Committee on Human Rights, [Examination of the Migration Legislation Amendment \(Regional Processing and Other Measures\) Act 2012 and related legislation](#) (19 June 2013), pp. 30–37.

in Nauru, or persons temporarily in Australia for medical or other services,⁸ as the re-designation of Nauru impacts only on the rights of any future 'unauthorised maritime arrivals' to Australia who will be transferred to Nauru.⁹

1.36 No statement of compatibility with human rights is required as this legislative instrument is exempt from disallowance.¹⁰ As such, no analysis of the compatibility of this measure with human rights is available.

Right to non-refoulement; prohibition against torture and cruel, inhuman or degrading treatment; and right to an effective remedy

1.37 Providing for the removal of unauthorised maritime arrivals from Australia to Nauru engages Australia's non-refoulement obligations and the prohibition against torture. Australia is obliged not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.¹¹ Australia is prohibited from expelling, returning (refouling) or extraditing a person to a country where there is a real or substantial risk that the person may be subject to particular forms of human rights violations under the International Covenant on Civil and Political Rights,¹² including a risk of being subjected to torture.¹³ States parties are obliged to apply the principle

8 At 1 February 2023 there were 66 such persons on Nauru. See, Senate Standing Committee on Legal and Constitutional Affairs, *Senate Estimates*, Monday 13 February 2023, p. 29. Persons transferred to Nauru appear to be granted legal status in Nauru pursuant to the memorandum of understanding between Australia and Nauru. See, Department of Foreign Affairs and Trade, [Memorandum of Understanding between the Republic of Nauru and Australia on the Enduring Regional Processing Capability in Republic of Nauru](#). The Department of Home Affairs advises that such persons are permitted to remain in the country 'pending their departure' and are permitted to work and operate businesses. See, [Regional processing and resettlement](#).

9 The Department of Home Affairs has advised that no person was transferred to Nauru in the period of time during which Nauru was not designated. See, Senate Standing Committee on Legal and Constitutional Affairs, *Senate Estimates*, Monday 13 February 2023, p. 37.

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

11 International Covenant on Civil and Political Rights, article 7; and Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5. It does not appear that this measure would engage the prohibition on the expulsion of aliens without due process, as this right protects persons who are *lawfully* present in a country (according to the State's own laws). See, International Covenant on Civil and Political Rights article 13, and *General Comment 15 The position of aliens under the covenant* at [9].

12 See, *GT v Australia*, UN Human Rights Committee (2007) at [8.1];

13 International Covenant on Civil and Political Rights, article 7; and Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5. See also, UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (2018); and UN Human Rights Committee, *General Comment No. 20: article 7 (prohibition against torture)* (1992) [9].

of non-refoulement in good faith.¹⁴ Australia's non-refoulement obligations, and the obligation not to subject a person to torture or other cruel treatment are absolute. They may never be subject to any permissible limitations.

1.38 Numerous concerns have been raised in relation to the conditions and services provided to persons who have been transferred to Nauru in the past,¹⁵ raising concerns about the effect of this measure on these rights. International human rights bodies have stated that the policy of offshore refugee processing is itself inconsistent with Australia's non-refoulement obligations and the prohibition against torture.¹⁶ In 2017, in relation to the conditions on Nauru, the UN Special Rapporteur stated that '[t]he forced offshore confinement (although not necessarily detention anymore) in which asylum seekers and refugees are maintained constitutes cruel, inhuman and degrading treatment or punishment according to international human rights law standards'.¹⁷

1.39 As the removal of persons from Australia to Nauru pursuant to this measure may result in a violation of their human rights, this measure also appears to engage the right to an effective remedy. The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the ICCPR.¹⁸ The obligation of non-refoulement and the right to an effective remedy require an opportunity for independent, effective and

14 States 'may not pass laws or regulations, engage in policies or practices, or conclude agreements with other States or non-State actors that would undermine or defeat its object and purpose, which is to ensure that States refrain from any conduct or arrangement that they know, or ought to know in the circumstances, would subject or expose migrants to acts or risks of torture or ill-treatment by perpetrators beyond their jurisdiction and control'. See, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 23 November 2018 (A/HRC/37/50) at [42] and 10 April 2014 (A/HRC/25/60) at [40–58].

15 See, most recently, submissions made to the following inquiry: Senate Standing Committees on Legal and Constitutional Affairs, [Migration Amendment \(Evacuation to Safety\) Bill 2023](#) (7 March 2023).

16 See, most recently, UN Committee Against Torture, *Concluding observations on the sixth report of Australia*, (5 December 2022) CAT/C/AUS/CO/6 at [29].

17 See, UN Human Rights Council, François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, A/HRC/35/25/Add.3 (2017) [80].

18 International Covenant on Civil and Political Rights, article 2(3). See, *Kazantzis v Cyprus*, UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia*, UN Human Rights Committee Communication No. 1036/01 (2005). States parties must not only provide remedies for violations of the ICCPR, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia* UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect.

impartial review of decisions to deport or remove a person.¹⁹ Jurisprudence from bodies recognised as authoritative in specialised fields of law makes clear that there is a strict requirement for 'effective review' of non-refoulement decisions.²⁰ They also state that the purpose of an effective review is to 'avoid irreparable harm' to the individual.²¹ Section 198AE of the Migration Act provides the minister with a non-compellable and non-delegable discretion to determine that section 198AD does not apply to an unauthorised maritime arrival if they think it is in the public interest to do so. However, such a discretionary safeguard is unlikely to be sufficient for the purposes of international human rights law, particularly where the rights in question are absolute and may never be permissibly limited. It is unclear when and how such a discretion may be utilised. It is also unclear what other procedural mechanisms, if any, persons subject to removal to Nauru could access to challenge that removal, particularly prior to their removal from Australia.

Rights of the child

1.40 Because section 198AD of the Migration Act establishes a requirement that all unauthorised maritime arrivals be sent to a regional processing country, this instrument may result in the expulsion of children from Australia to Nauru where they have arrived in Australia by boat without a valid visa.²² Children are subject to the operation of section 198AD as a matter of law, and have historically been sent to Nauru on this basis. As such, the measure engages and is likely to limit the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.²³ Their rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, without discrimination on any

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

20 See *Agiza v Sweden*, UN Committee against Torture Communication No.233/2003 (2005) [13.7]; *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]–[8.9]; *Josu Arkauz Arana v France*, UN Committee against Torture Communication No.63/1997 (2000); *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005 (2006) [11.8]. For an analysis of this jurisprudence, see Parliamentary Joint Committee on Human Rights, [Thirty-sixth report of the 44th Parliament](#) (16 March 2016) pp. 182-183.

21 *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005 (2006) [11.8]; *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]–[8.9].

22 While there are no children currently on Nauru, children have historically been transferred there, see Australian Human Rights Commission, [Ms BK, Ms CO and Mr DE on behalf of themselves and their families v Commonwealth of Australia \(Department of Home Affairs\)](#) [2018] AusHRC 128, Report into the practice of the Australian Government of sending to Nauru families with young children who arrived in Australia seeking asylum.

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

grounds.²⁴ Of particular relevance to this measure is that in all actions concerning children the best interests of the child are required to be a primary consideration. The UN Committee on the Rights of the Child has explained that:

the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child...²⁵

1.41 In the migration context, the UN Committee on the Rights of the Child has further stated that unaccompanied children are to be provided with special protection and assistance, and that child asylum seekers are to receive appropriate protection and humanitarian assistance.²⁶ In particular, it has stated that a determination of what is in the best interests of the child (where a child is displaced) requires 'a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs'.²⁷

1.42 Noting the power to send all unauthorised maritime arrivals to Nauru, it is unclear whether and how the measure is consistent with the rights of the child, particularly Australia's obligation to treat the best interests of the child as a primary consideration in relevant decisions.

Right to equality and non-discrimination

1.43 Only persons who meet the definition of an 'unauthorised maritime arrival' in section 5AA of the Migration Act (relevantly, having arrived in Australia by sea), are liable to removal to a regional processing country. As such, the re-designation of Nauru in this measure would only impact on persons who arrive in Australia by sea without a valid visa (and not people who arrive with a valid visa and subsequently claim asylum, or who otherwise arrive in Australia by plane). As such, while Australia

24 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also International Covenant on Civil and Political Rights, articles 2 and 26.

25 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013). In this General comment, the UN Committee further stated that 'Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned'. See also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

26 UN Convention on the Rights of the Child, articles 3(1), 20 and 22. See also UN Committee on the Rights of the Child, *General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin* (2005) (CRC/GC/2005/6) at [26–27].

27 UN Committee on the Rights of the Child, *General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin* (2005) (CRC/GC/2005/6) at [20].

is permitted to create laws regulating who it will admit to its territory, this measure may have a discriminatory impact on some non-citizens, and so engage the right to equality and non-discrimination.

1.44 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.²⁸ Prohibited grounds of discrimination include discrimination based on nationality and national origin.²⁹ 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).³⁰ 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.³¹ Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination.³² Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.³³

1.45 There appears to be a risk that in applying this measure only to persons who arrive in Australian territory by sea without a valid visa, the measure may have a disproportionate impact on persons of certain nationalities, and therefore indirectly

28 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.

29 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989) at [10–11].

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

31 *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'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

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

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

discriminate against them on that basis. A recent statistical comparison of all persons who claim asylum onshore having arrived with a valid visa, compared to those who arrive in Australia by boat without a valid visa, does not appear to be readily available. However, relevantly, of all refugee lodgements made in the Administrative Appeals Tribunal in the 2022–23 financial year to date, 52 per cent of refugee lodgements by persons not classified as unauthorised maritime arrivals (totalling 3,410 lodgements) were from Chinese and Malaysian citizens, whereas over 60 per cent of those from unauthorised maritime arrivals (totalling 14 lodgements) related to Iran, Sri Lanka and Afghanistan.³⁴ This raises the question of whether the measure may have an indirectly discriminatory impact on persons from certain nationalities in practice and, if so, whether this would constitute permissible discrimination.

Committee view

1.46 The committee notes that this legislative instrument designates Nauru as a regional processing country with the effect that this enlivens the operation of section 198AD of the Migration Act, which requires that an unauthorised maritime arrival must be sent to a regional processing country as soon as practicable.

1.47 The committee considers that this measure engages and limits multiple rights. The committee notes that as this legislative instrument is exempt from disallowance no statement of compatibility with human rights is required, and so no assessment of the measure's compatibility with human rights is available.

1.48 The committee considers further information is required to assess the compatibility of this measure with human rights, and as such seeks the minister's advice in relation to:

- (a) whether and how the measure is consistent with Australia's non-refoulement obligations and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment;
- (b) whether a person who is liable to removal to Nauru under section 198AD would have access to an effective remedy in relation to that power;
- (c) how many times the ministerial discretion under section 198AE has been exercised previously, and in what circumstances;
- (d) whether the measure is consistent with the rights of the child, and in particular with Australia's obligation to treat the best interests of the child as a primary consideration in relevant decisions, including:

34 Administrative Appeals Tribunal, Migration and Refugee Division, [Caseload Report Financial year to 28 February 2023](#).

- (i) whether Australia conducts an assessment of the best interests of the child prior to their removal to Nauru under section 198AD, and if so, what this process entails; and
 - (ii) what other protection and humanitarian assistance is provided to child unauthorised maritime arrivals;
- (e) whether the measure may have an indirectly discriminatory impact on persons from certain nationalities in practice and, if so, whether this would constitute permissible discrimination; and
- (f) why this instrument will sunset in 10 years and not a shorter period of time.

Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2023 [F2023L00188]¹

Purpose	This legislative instrument sets out the rules that decision-makers must use when assessing a person's work-related impairment for the disability support pension under the <i>Social Security Act 1991</i>
Portfolio	Social Services
Authorising legislation	<i>Social Security Act 1991</i>
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives on 6 March 2023 and in the Senate on 7 March 2023). Notice of motion to disallow must be given by 22 May 2023 in the House and by 13 June 2023 in the Senate) ²
Rights	Social security; adequate standard of living; equality and non-discrimination; rights of persons with disability

Eligibility for the Disability Support Pension

1.49 This legislative instrument sets out the rules that must be used when assessing whether a person meets the work-related impairment level for the purposes of assessing eligibility for the Disability Support Pension (DSP) under section 94 of the *Social Security Act 1991* (Social Security Act). This legislative instrument replaces, with amendments, the previous such measure.³

1.50 The instrument sets out 15 impairment tables, each of which are intended to measure the extent of the person's impairment level with respect to different bodily functions (these include, for example, visual impairment, mental health function, and communication function). The term 'impairment' refers to 'a loss of functional

-
- 1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2023 [F2023L00188], *Report 4 of 2023*; [2023] AUPJCHR 32.
 - 2 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.
 - 3 The Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011 [F2011L02716] was due to sunset on 1 April 2022. The Legislation (Deferral of Sunsetting – Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011) Certificate 2022 [F2022L00127] deferred this to 1 April 2023.

capacity affecting a person's ability to work that results from the person's condition'.⁴ The tables describe functional activities, abilities, symptoms and limitations against which a person's impairments are to be assessed in order for an impairment rating (expressed as points) to be assigned.⁵ For a person to be eligible for the DSP, the impairment must be rated at 20 points or above according to these tables.⁶

Preliminary international human rights legal advice

Rights to social security, an adequate standard of living, equality and non-discrimination, and rights of persons with disability

1.51 By setting out rules that must be used when assessing whether a person meets the work-related impairment level for the purposes of assessing eligibility for the DSP, this measure engages several human rights.

1.52 By supporting the provision of a social security payment specifically to support persons with disability, this measure promotes the rights to social security, an adequate standard of living, equality and non-discrimination and the rights of persons with disability for those who are eligible for the DSP.

1.53 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.⁷ The right to social security plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living.⁸ The right to an adequate standard of living requires that Australia take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its

4 Section 5.

5 Explanatory statement, p. 12.

6 Eligibility for DSP is assessed according to several criteria, including relevantly the requirements that the person: has a physical, intellectual or psychiatric impairment; the impairment is of 20 points or more under the Impairment Tables; and either the person has a continuing inability to work, or the Secretary is satisfied that the person is participating in the program administered by the Commonwealth known as the supported wage system. Section 94 of the *Social Security Act 1991*, which also sets out further criteria including that the person has turned 16 and meets residency requirements.

7 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).

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

jurisdiction.⁹ The United Nations (UN) Convention on the Rights of Persons with Disabilities recognises the equal rights of persons with disability to live in the community with choices equal to others,¹⁰ and to enjoy an adequate standard of living.¹¹ The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.¹²

1.54 However, in restricting which persons may be eligible for the DSP according to the work-related impairment tables set out in the instrument, the measure also limits these human rights. In this regard the statement of compatibility with human rights states:

Disability support pension is designed to support people with disability if they are unable to work for at least 15 hours per week at or above the relevant minimum wage, due to a physical, intellectual or psychiatric impairment. This means not all people with a condition will be eligible for disability support pension.¹³

1.55 Australia is obliged to take reasonable measures within its available resources to progressively secure broader enjoyment of the right to an adequate standard of living and to social security. It also has immediate obligations to satisfy certain minimum aspects of the rights; not to unjustifiably take any backwards steps that might affect living standards; and to ensure the rights are made available in a non-discriminatory way.¹⁴ In this regard, the UN Committee on Economic, Social and Cultural Rights has identified a 'minimum core' to the right to social security, which

9 International Covenant on Economic, Social and Cultural Rights, article 11. See also, UN Human Rights Committee, *General Comment No. 3: Article 2 (Implementation at a national level)*. The Committee explains that 'implementation [of the ICCPR] does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction'.

10 Convention on the Rights of Persons with Disabilities, article 19.

11 Convention on the Rights of Persons with Disabilities, article 28.

12 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights. See also Convention on the Rights of Persons with Disabilities, article 5.

13 Statement of compatibility, p. 72.

14 See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [40].

includes requiring that States parties ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged or marginalised individuals or groups.¹⁵ The right to equality and non-discrimination provides that 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.¹⁶

1.56 The UN Committee on the Rights of Persons with Disabilities has stated that states parties should define eligibility criteria and procedures for accessing support services 'in a non-discriminatory way, objectively and focused on the requirements of the person rather than on the impairment, following a human rights-compliant approach'.¹⁷ It has stated that where a state adopts specific measures to help achieve equality for persons with disability, such measures must be consistent with all principles and provisions of the Convention, and must not result in perpetuation of isolation, segregation, stereotyping, stigmatisation or otherwise discrimination against persons with disabilities.¹⁸ The UN Committee on the Rights of Persons with Disabilities has expressed concern about the existence of eligibility restrictions for the DSP, and has recommended that Australia end these eligibility restrictions to ensure that persons with disabilities have access to an adequate standard of living.¹⁹

1.57 The statement of compatibility with human rights acknowledges that the eligibility criteria may limit the rights of persons with disability to social security and an adequate standard of living where they cannot be assigned a rating (such as where their condition has not been diagnosed), or where their impairments are not severe enough to be assigned 20 points (such as where their condition has not been reasonably treated or stabilised, or, in light of available evidence, their condition and resulting impairment is not likely to persist for more than 2 years).²⁰ It states that these limitations achieve a legitimate objective in that they 'balance a person's right to social security with the resources of the community' and recognise that a person

15 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [59].

16 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].

17 UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community*, [71].

18 UN Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination*, [29].

19 UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia* (2019), [51].

20 Statement of compatibility, p. 72.

who is not eligible for the DSP may access other benefits, including Medicare, the National Disability Insurance Scheme (NDIS) and other social security payments including jobseeker payment. It also states that the measure is consistent with the promotion of these rights.²¹

1.58 With respect to a legitimate objective, the International Covenant on Economic, Social and Cultural Rights establishes a specific restriction on the reasons for, and the manner in which, economic, social and cultural rights may be limited. Article 4 of this Convention establishes that States Parties may limit economic, social and cultural rights only insofar as this may be compatible with the nature of those rights, and 'solely for the purpose of promoting the general welfare in a democratic society'.²² Restricting eligibility in order to balance the resources of the community may be seen to be for the purposes of promoting general welfare (if those resources were to be spent in other ways on promoting general welfare) and therefore constitute a legitimate objective. However, as noted above, Australia has an immediate obligation to satisfy certain minimum aspects of the rights to social security,²³ meaning that it is required to ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.²⁴ The UN Committee on Economic, Social and Cultural Rights has stated that '[u]nder no circumstances should an individual be deprived...of the minimum essential level of benefits'.²⁵

1.59 It is not clear that denying certain persons with disability access to the DSP would meet Australia's minimum core obligations. The UN Committee on the Rights of Persons with Disability has expressed its concern that 'a significant proportion of persons with disabilities are living either near or below the poverty line'.²⁶ . In this regard, it is not clear whether the potential availability of other benefits, such as the NDIS, would be an adequate safeguard in practice, noting that a person who does not meet the eligibility criteria for the DSP may also not meet the eligibility criteria

21 Statement of compatibility, p. 72.

22 International Covenant on Economic, Social and Cultural Rights, article 4.

23 See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [40].

24 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [59].

25 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [78].

26 UN Committee on the Rights of Persons with Disability, Concluding observations on the combined second and third periodic reports of Australia (2019), [51].

for the NDIS as the latter similarly requires a person to have a permanent impairment that substantially reduces their functional capacity and ability to work, study and take part in social life.²⁷ Considering the potentially high costs of disability-related supports, it is not clear whether benefits such as Medicare and jobseeker payment would be sufficient to ensure persons with disability who are ineligible for the DSP are able to access the necessary social support to enjoy an adequate standard of living and live independently in the community. In terms of accessing the JobSeeker payment, it is not clear if persons with disability would always be able to meet the mutual obligations requirements (being tasks and activities to find a job) or be able to access effective longer-term exemptions from these obligations.²⁸

1.60 In order to realise the rights of persons with disabilities,²⁹ Australia has an obligation to ensure access to appropriate and affordable services, devices and other assistance for impairment-related requirements, especially for those persons with disabilities who live in poverty.³⁰

1.61 In addition, it is not clear from the statement of compatibility whether in remaking this instrument if any amendments to the eligibility criteria might constitute a backward step in relation to the realisation of these rights (for example, by reducing eligibility or taking something away which was previously available). In this regard, Australia has a duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. If it does so this must be justified, that is, the backwards step must be shown to address a legitimate objective, be effective to achieve (that is, rationally connected to) that objective, and constitute a proportionate means of achieving that objective.

1.62 The statement of compatibility further states that the measure promotes the right to equality and non-discrimination by regulating the manner in which a person's eligibility for the DSP is determined. In particular it states that it sets out what constitutes reasonable treatment for the purposes of qualifying for the DSP, such as treatment that is available at a reasonably accessible location and cost and can reliably be expected to result in significant functional improvement.³¹ However, the

27 *National Disability Insurance Scheme Act 2013*, section 24. See also NDIS, [Do you meet the disability requirements?](#) (20 June 2022).

28 Noting that based on information on the [Services Australia](#) website (as at 21 March 2023) it appears that mutual obligations may be suspended for up to 13 weeks on the basis of a medical certificate, but it is not clear if these obligations can be suspended for longer.

29 Including the right to live independently and be included in the community, to enjoy an adequate standard of living and to personal mobility. See Convention on the Rights of Persons with Disabilities, articles 19, 20 and 28.

30 UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community*, [92].

31 Statement of compatibility, p. 73.

statement of compatibility does not recognise that the measure may limit the right to equality and non-discrimination, on the basis of the type of disability a person has, and so no analysis of its compatibility in this regard is provided. In particular, it is unclear whether the impairment tables set out would provide for differential treatment of persons with disability which is based on reasonable and objective criteria, including the appropriate assessments of individual circumstances.

Committee view

1.63 The committee notes that this legislative instrument sets out the rules that decision-makers must use when assessing a person's work-related impairment for the purposes of being eligible to receive the disability support pension (DSP).

1.64 The committee notes that this legislative instrument re-makes the previous legislative instrument providing for these matters, with some amendments. The committee notes that the previous legislative instrument was made in 2011, prior to the requirement for a statement of compatibility with human rights, meaning that this is the first opportunity for the committee to assess the compatibility of these rules with international human rights law.

1.65 By supporting the provision of a social security payment specifically to support persons with disability, the committee considers this measure promotes the rights to social security, an adequate standard of living, equality and non-discrimination and the rights of persons with disability for those who are eligible for the DSP. However, restricting which persons with disability may be eligible for the DSP also engages and limits these rights. The committee considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the minister's advice in relation to:

- (a) whether in restricting access to the DSP in the manner set out in the instrument, Australia is fulfilling its minimum core obligations regarding the rights to social security and an adequate standard of living, such that when persons are ineligible for the DSP they are still provided with a minimum essential level of benefits;
- (b) whether the measure is necessary and proportionate, in particular, whether a person who does not meet the eligibility criteria can have their individual circumstances considered and so nonetheless be provided access to the DSP; and

- (c) whether any of the amendments in this measure are retrogressive (in that they constitute a backwards step) when compared with the previous legislative instrument, and if so whether this is a permissible retrogressive measure.

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

Bioresecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2023 [F2023L00009]²

Purpose	This legislative instrument imposes entry requirements on passengers to provide proof of a negative test for Covid-19 taken within a 48-hour period prior to boarding a flight that has commenced from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau and ends in Australian territory
Portfolio	Health and Aged Care
Authorising legislation	<i>Bioresecurity Act 2015</i>
Disallowance	This legislative instrument is exempt from disallowance (see subsection 44(3) of the <i>Bioresecurity Act 2015</i>)
Rights	Life; health; freedom of movement; privacy; equality and non-discrimination

2.3 The committee requested a response from the minister in relation to the instrument in [Report 2 of 2023](#).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, *Bioresecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2023 [F2023L00009]*, *Report 4 of 2023*; [2023] AUPJCHR 33.

3 Parliamentary Joint Committee on Human Rights, *Report 2 of 2023* (8 March 2023), pp. 38-44.

Restriction of passengers entering Australia

2.4 This determination sets out entry requirements on passengers on flights that commence from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau and end in Australian territory. The requirements are to provide proof of a negative test for Covid-19 taken within 48 hours prior to the flight. This requirement does not apply to:

- children less than 12 years old;
- individuals with evidence from a medical practitioner that:
 - (a) they have a medical condition that prevents them from taking a Covid-19 test;
 - (b) it has been at least 7 days since the person has had Covid-19 and they have now recovered, are not considered to be infectious, and have not had a fever or respiratory symptoms in the last 72 hours; or
 - (c) they have a serious medical condition that requires emergency management or treatment in Australia within 48 hours, that is not reasonably available in China, Hong Kong or Macau;
- individuals accompanying and supporting a person who is on an emergency medical evacuation flight;
- individuals granted an exemption by an official in exceptional circumstances (being that the individual provided a compelling reason for not being tested), or flights being granted an exemption in exceptional circumstances;
- class of individuals for whom no test for Covid-19 is reasonably available.

2.5 If a person fails to comply with an entry requirement they may contravene a civil penalty provision of 30 penalty units (\$8,250).⁴

Summary of initial assessment

Preliminary international human rights legal advice

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

2.6 The explanatory statement does not explain why this determination has been made. However, the provision in the *Biosecurity Act 2015* that empowers the making of this determination states that the section applies for the purpose of preventing a listed human disease (in this case Covid-19) from entering, or

4 *Biosecurity Act 2015*, section 46.

establishing itself or spreading in, Australia.⁵ As such, if the determination assists in preventing and managing the spread of Covid-19 it may 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.⁶ 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.⁷

2.7 The right to health is the right to enjoy the highest attainable standard of physical and mental health.⁸ 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.⁹ 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.¹⁰

2.8 While the measure may promote the rights to life and health for persons in Australia, the effect of the measure may mean that persons who cannot produce a negative Covid-19 test may be temporarily banned from entering Australia, including Australian citizens and permanent residents. As such, this 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.¹¹ 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'.¹² 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

5 *Biosecurity Act 2015*, section 44.

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

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

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

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

10 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].

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

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

ties, such as long-standing residence and close personal and family ties.¹³ The right to freedom of movement is not absolute: limitations can be placed on the right provided certain standards are met. However, the UN Human Rights Committee has stated in relation to the right to enter one's own country:

In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.¹⁴

2.9 Further, requiring the production of a negative Covid-19 test also engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.¹⁵ It also includes the right to control the dissemination of information about one's private life. A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

2.10 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

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

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

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

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

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.

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 requiring passengers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test is likely to disproportionately affect persons of Chinese 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

Committee's initial view

2.11 The committee noted that requiring only travellers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test before entering Australia limits the rights to freedom of movement, a private life and equality and non-discrimination. The committee considered further information was required to assess the compatibility of this measure with these rights and sought the minister's advice in relation to:

- (a) what is the objective behind requiring travellers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test before entering Australia;
- (b) how is requiring only travellers from China, Macau and Hong Kong to show such evidence rationally connected to – that is, effective to achieve – that objective;

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].

- (c) whether persons of Chinese descent will be disproportionately affected by this requirement, and if so, is this differential treatment based on reasonable and objective criteria;
- (d) 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; and
- (e) why this instrument is not time-limited, but is due to sunset ten years from the date it was made.

2.12 The full initial analysis is set out in [Report 2 of 2023](#).

Minister's response²²

2.13 The minister advised:

The decision to implement predeparture testing requirements was made to safeguard Australia from the risk of potential new emerging variants, and in recognition of the rapidly evolving situation in China and uncertainty about emerging viral variants at that time. These arrangements were precautionary and temporary and were kept under review. With effect from 11 March this year, on the basis of public health advice and epidemiological evidence, the requirements you wrote about were repealed.

(a) what is the objective behind requiring travellers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test before entering Australia;

The objective of the requirements made by the *Biosecurity (Entry Requirements Human Coronavirus with Pandemic Potential) Determination 2023 (the Determination)* was to prevent the entry, emergence, establishment and spread of new COVID-19 variants in an Australian territory or part of an Australian territory.

At the time the Determination was made, surveillance data from China was scant, and media reporting suggested very significant waves of infection being experienced across the country. Health experts in China predicted three winter waves of COVID-19 transmission, with the spike in transmission predicted to run until mid-January 2023, and subsequent waves predicted in late January and late February /early March – associated with the Lunar New Year celebrations and returning to work respectively. New variants of concern had the potential to emerge and circulate throughout these waves.

22 The minister's response to the committee's inquiries was received on 23 March 2023. This is an extract of the response. The response is available in full on the committee's [website](#).

Subsections 44(1) and 44(2) of the *Biosecurity Act 2015* (the Act) provide that the Health Minister (who is the Federal Minister for Health and Aged Care) may determine one or more requirements for individuals who are entering Australian territory at a landing place or port for the purpose of preventing a listed human disease from entering, or establishing itself or spreading in, Australian territory or a part of Australian territory. Human coronavirus with pandemic potential, which includes COVID-19, is a listed human disease under the Act.

(b) how is requiring only travellers from China, Macau and Hong Kong to show such evidence rationally connected to - that is, effective to achieve – that objective;

The decision to require only travellers from China, Macau and Hong Kong to show evidence of a negative COVID-19 test was made to safeguard Australia from the risk of potential new emerging variants, in recognition of the rapidly evolving situation in China and the uncertainty about emerging variants of concern. More simply, a risk in China was identified, and measures were put in place to protect Australians.

I note that imposing pre-departure testing requirements is a legal and legitimate method of safeguarding against the entry and spread of listed human diseases under the Act. Pre-departure testing provides travellers, airport staff, airline staff and the Australian community with peace of mind and assurance they are travelling, working or existing with relevant and effective safeguards in place.

Many like-minded countries across the Asia-Pacific, Europe and North America also moved to reinstate or implement border measures in response to the evolving COVID-19 situation in China in early January 2023. These like-minded countries have also only recently removed those requirements or recently announced their intention to remove those requirements.

(c) whether persons of Chinese descent will be disproportionately affected by this requirement, and if so, is this differential treatment based on reasonable and objective criteria;

The requirement affected all travellers from China, including from Hong Kong and Macau, regardless of nationality or descent. It is important to note that the requirement did not prevent the uplift of passengers. The information collected through the pre-departure testing was collected in accordance with the relevant Australian privacy laws.

(d) 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; and

As outlined under Section 34 of the Act, one of the principles that must be considered prior to making a determination under the Act is that the measure is no more restrictive or intrusive than is required in the

circumstance. The exemptions to the requirements provided for in the Determination made the instrument proportionate and as least restrictive as possible.

Since the Determination came into effect, the Department of Health and Aged Care has been exploring ways to enhance Australia's existing surveillance capabilities, to further strengthen our capacity to detect and respond to emerging variants of concern of international origin.

This includes:

- pilot program to test aircraft wastewater
- expansion of the existing community sentinel wastewater testing program, and
- enhancing national consistency in follow-up of people who test positive for
- COVID-19 and have travelled overseas in the preceding 14 days.

(e) why this instrument is not time-limited, but is due to sunset ten years from the date it was made.

The *Biosecurity (Entry Requirements - Human Coronavirus with Pandemic Potential) Determination 2023* (Biosecurity Determination) is a legislative instrument made under subsection 44(2) of the *Biosecurity Act 2015* (Biosecurity Act). Subsection 44(2) of the Biosecurity Act enables the Health Minister to determine one or more requirements for individuals who are entering Australian territory at a landing place or port for the purpose of preventing a listed human disease from entering, or establishing itself or spreading in, Australian territory. Instruments made under subsection 44(2) of the Biosecurity Act are not time limited since they are in force for as long as required to achieve the instrument's purpose, and this timeframe is not evident at the time of the instrument's making.

Sunsetting is the automatic repeal of legislative instruments after a fixed 10-year period. All legislative instruments, including the Biosecurity Determination, are subject to sunsetting unless they are exempt from sunsetting under section 54 of the Legislation Act. Generally, legislative instruments sunset on 1 April or 1 October on or after the tenth anniversary of their registration. An instrument will continue to remain in force until the instrument sunsets or is actively repealed prior to the sunset date.

The human health provisions in the Act are intended to be flexible to provide the Government with options to manage human biosecurity risks in Australia. Every requirement made under the Act, particularly in relation to the COVID-19 pandemic response, is regularly reviewed based on the latest available public health advice. The Australian Government has been

monitoring the situation in China and reviewing epidemiological data as it became available. The instrument was repealed on 11 March 2023 as there have been no new variants of concern reported from China, and a significant decrease in cases, hospitalisations and deaths noted in the data from China.

Concluding comments

International human rights legal advice

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

2.14 The minister advised that the objective of this measure was to prevent the entry, emergence, establishment and spread of new Covid-19 variants, because at the time it was made media reporting suggested very significant waves of infection being experienced across China, with the potential for new variants of concern to emerge and circulate. Preventing the entry or spread of new Covid-19 variants is a legitimate objective for the purposes of international human rights law. In terms of whether the requirements in the determination would be rationally connected, that is, effective to achieve that objective, the minister advised that the measure was introduced in recognition of the rapidly evolving situation in China and the uncertainty about emerging variants of concern. The minister also advised that many like-minded countries across the Asia-Pacific, Europe and North America also moved to reinstate or implement border measures in response to the evolving Covid-19 situation in China in early January 2023. As this determination was preventative in nature, as it was seeking to mitigate the possibility of variants emerging, it is difficult to assess whether the measure was (at the time it was made) effective to achieve its objective. Rather, it is preferable to consider if the measure is reasonable and proportionate.

2.15 In this respect, the minister advised that shortly after the committee reported on this determination it was repealed, as there have been no new variants of concern reported from China, and a significant decrease in cases, hospitalisations and deaths noted in the data from China.²³ As such, the requirements imposed by the determination lasted from 5 January to 11 March 2023. The time-limited nature of the measure assists with its proportionality. As set out in the initial analysis, there are also a number of other matters that assist with proportionality. In particular, this is not a complete ban on travel to Australia from these countries, rather if an individual has Covid-19 they would need to wait until they were no longer infectious. Further, the instrument sets out a number of exceptions from the requirement, including exceptions based on individual circumstances.

23 See Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Repeal Determination 2023 [[F2023L00209](#)].

2.16 While it remains unclear whether only subjecting travellers from China, Macau and Hong Kong to the extra testing requirement was effective to prevent the spread of Covid-19 variants in Australia, as the measure has now been repealed and so was time-limited, and noting the exemptions that applied in the instrument, the limits on the rights to freedom of movement, a private life and equality and non-discrimination appear likely to have been reasonable and proportionate.

Committee view

2.17 The committee thanks the minister for this response. As stated in the initial report, the committee considers that as the determination was designed to prevent the spread of new Covid-19 variants, it likely promoted and protected 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 that Australia takes steps to prevent, treat and control epidemic diseases.

2.18 The committee welcomes the minister's advice that this determination was repealed shortly after the committee reported. As such, noting the determination sought to achieve the legitimate objective of seeking to prevent potential new variants of concern emerging and circulating in Australia, and as the determination was strictly time-limited and had exemptions available for individual circumstances, the committee considers any limit on human rights by this determination was likely reasonable and proportionate.

2.19 The committee notes the minister's advice that such determinations will be in force for as long as is required to achieve their purpose and in general such determinations will sunset after 10 years. The committee welcomes the advice that every requirement made under the *Biosecurity Act 2015* is regularly reviewed based on the latest available public health advice. The committee remains concerned, however, that there is no legislative requirement to regularly review such determinations. The committee notes that previous legislative responses to the Covid-19 pandemic were time-limited to three months, meaning new legislative instruments needed to be made to continue the measures.²⁴ The committee considers there is some risk, without a legislative requirement to regularly review the continued necessity for such measures, that these could continue beyond that which is strictly necessary.

24 For example, the declaration of the human biosecurity emergency period can only last for three months, see *Biosecurity Act 2015*, section 475. Further, the ban on travel from passengers from India was time limited to 12 days, see *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021* [F2021L00533].

2.20 Further, as noted in the initial analysis, there was no statement of compatibility provided with this instrument. The committee's role is to scrutinise all legislative instruments for compatibility with human rights.²⁵ There is no legislative requirement that these determinations, which are exempt from the disallowance process, be accompanied by a statement of compatibility.²⁶ However, the committee has consistently said since the start of the legislative response to the Covid-19 pandemic,²⁷ that given the human rights implications of legislation regulating the movement of persons, it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility.

Suggested action:

2.21 The committee recommends that sections 44 and 45 of the Biosecurity Act 2015 be amended to provide that a determination made under these provisions:

- (a) must not be in force longer than the period that the Health Minister considers necessary to meet the purposes stated in those provisions; and
- (b) in any case, must not be longer than 3 months.

2.22 The committee reiterates that the Department of Health and Aged Care should be providing statements of compatibility for instruments made under the *Biosecurity Act 2015*, many of which can have a profound effect on human rights.

2.23 The committee considers that its concerns have been addressed by the repeal of this instrument, and makes no further comment in relation to this legislative instrument.

25 The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 7, provides that the function of the committee is to examine all legislative instruments that come before either House of the Parliament for compatibility with human rights.

26 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.

27 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).

Fair Entitlements Guarantee Regulations 2022 [F2022L01529]¹

Purpose	This legislative instrument repeals and replaces the Fair Entitlements Guarantee Regulation 2012 and makes modifications to the <i>Fair Entitlements Guarantee Act 2012</i> for the purpose of continuing the established scheme of financial assistance for textile, clothing and footwear industry contract outworkers
Portfolio	Employment and Workplace Relations
Authorising legislation	<i>Fair Entitlements Guarantee Act 2012</i>
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives on 29 November 2022 and in the Senate on 30 November 2022).
Rights	Just and favourable conditions of work; equality and non-discrimination

2.24 The committee requested a response from the minister in relation to the legislative instrument in [Report 1 of 2023](#).²

Financial assistance scheme for textile, clothing and footwear industry contract outworkers

2.25 These regulations continue the scheme of financial assistance for textile, clothing and footwear (TCF) industry contract outworkers in situations where their employer has become insolvent.³ A 'TCF contract outworker' is an individual who does, or has done, work in the TCF industry otherwise than as an employee and at a premises not normally regarded as a business premises, such as a residential premises.⁴ The scheme allows TCF contract outworkers to recover unpaid employment entitlements, including annual leave, long service leave, payment in lieu

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Fair Entitlements Guarantee Regulations 2022 [F2022L01529], *Report 4 of 2023*; [2023] AUPJCHR 34.

2 Parliamentary Joint Committee on Human Rights, [Report 1 of 2023](#) (8 March 2023), pp. 46-53.

3 The financial assistance scheme for TCF contract outworkers was first established by the Fair Entitlements Guarantee Regulation 2012, which is repealed and replaced by this instrument. The scheme operates under the Fair Entitlements Guarantee (FEG), which is established under the *Fair Entitlements Guarantee Act 2012*.

4 Section 4; *Fair Work Act 2009*, section 12. See generally Department of Employment and Workplace Relations, [TCF contract outworkers scheme](#) (September 2022).

of notice, redundancy pay and wages entitlements.⁵ A TCF contract outworker is eligible to recover such entitlements if, among other things, they are an Australian citizen or a holder of a permanent visa or a special category visa (namely persons who hold New Zealand citizenship).⁶

Summary of initial assessment

Preliminary international human rights legal advice

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

2.26 For those eligible for the scheme, the payment of financial assistance to workers who are owed unpaid employment entitlements would promote the right to just and favourable conditions of work.⁷ This includes the right of all workers to adequate and fair remuneration, which, at a minimum, encompasses:

fair wages, equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work...and a decent living for workers and their families.⁸

2.27 The United Nations (UN) Committee on Economic, Social and Cultural Rights has stated that workers 'should receive all wages and benefits legally due upon termination of a contract or in the event of the bankruptcy or judicial liquidation of the employer'.⁹ The enjoyment of the right to just and favourable conditions of work is important for realising other economic, social and cultural rights, including the right to an adequate standard of living through decent remuneration.¹⁰

2.28 However, by excluding TCF contract outworkers who are not Australian citizens, permanent residents or holders of a special category visa from accessing the financial assistance scheme, the measure engages and limits the right to equality and non-discrimination by treating individuals differently on the basis of nationality. The

5 Schedule 1, item 1.

6 Schedule 1, item 2, paragraph 10(1)(f).

7 International Covenant on Economic, Social and Cultural Rights, article 7. The statement of compatibility states that this measure also promotes the right to social security, p. 16.

8 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [9].

9 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [10].

10 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [1]. The right to an adequate standard of living is protected by the International Covenant on Economic, Social and Cultural Rights, article 11.

statement of compatibility acknowledges that the measure limits this right by making citizenship or visa status a condition of eligibility for financial assistance.¹¹ The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.¹² 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).¹³ This measure not only treats people differently on the basis of nationality or migration status, but it appears to also have a disproportionate impact on people with other protected attributes, such as sex and race, noting that the majority of TCF contract outworkers are women, many of whom are from migrant backgrounds and experience cultural and linguistic barriers.¹⁴

2.29 Under international human rights law, where a person possesses characteristics which make them particularly vulnerable to intersectional discrimination, such as on the grounds of both sex and race or nationality, the UN Committee on Economic, Social and Cultural Rights has highlighted that 'particularly special or strict scrutiny is required in considering the question of possible

11 Statement of compatibility, p. 12.

12 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights. Articles 1–4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women further describe the content of these obligations, including the specific elements that State parties are required to take into account to ensure the rights to equality for women.

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

14 See Fair Work Ombudsman, *Textile, Clothing and Footwear Compliance Phase Campaign Report* (January 2019) p. 10, which reports women comprise 59.1% of TCF workers and 44 % are people born overseas. The Fair Work Ombudsman states that TCF workers are 'especially vulnerable to exploitation' due to a number of factors, including that 'a high proportion are mature-aged migrant women, who face cultural and linguistic barriers to understanding and inquiring about their workplace entitlements' and 'an unverified number are outworkers, who work away from business premises (often at home) at the end of long and complex production supply chains - and are therefore difficult to identify, or "hidden": p 5. See also The Senate Education, Employment and Workplace Relations Legislation Committee, [Fair Work Amendment \(Textile, Clothing and Footwear Industry\) Bill 2011](#) (February 2012) pp. 3, 12; Textile Clothing and Footwear Union of Australia, *Submission No 214 to the Productivity Commission Review into the Workplace Relations Framework* (27 March 2015) [3.2].

discrimination'.¹⁵ In general, differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria.¹⁶

2.30 Additionally, insofar as the measure results in certain workers enjoying more favourable working conditions than others, the measure may engage and limit the right to just and favourable conditions of work and potentially associated rights, such as the right to an adequate standard of living, for those workers unable to access the scheme. States parties have an immediate obligation to guarantee that the right to just and favourable working conditions is exercised without discrimination of any kind, including distinction based on race, ethnicity, nationality, migration status or gender.¹⁷ The right to just and favourable conditions of work is to be enjoyed by 'all workers in all settings', including workers in the informal sector, migrant workers and workers from ethnic and other minorities.¹⁸ Regarding migrant workers in particular, the UN Committee on Economic, Social and Cultural Rights has stated that 'laws and policies should ensure that migrant workers enjoy treatment that is no less favourable than that of national workers in relation to remuneration and conditions of work'.¹⁹ More generally, States parties have an obligation to fulfil the right to just and favourable conditions of work, which could include 'establishing non-

-
- 15 See *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.2]. See also *Rodriguez v Spain*, UN Committee on Economic, Social and Cultural Rights, Communication No. 1/2013 E/C.12/57/D/1/2013 (20 April 2016) [14.1]; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [17] and *General Comment 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005) [5]; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GS/28 (16 December 2010) [28].
- 16 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].
- 17 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [5], [11], [53].
- 18 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [5].
- 19 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [47(e)].

contributory social security programmes for certain workers, such as workers in the informal economy'.²⁰

2.31 The above rights may be subject to permissible limitations where the limitation pursues a legitimate objective and is rationally connected to, and a proportionate means of achieving, that objective.

2.32 Seeking to financially support vulnerable workers during an insolvency event would, in general, constitute a legitimate objective for the purposes of international human rights law. However, in relation to the specific objective sought to be achieved by excluding certain TCF contract outworkers from the scheme, it is not clear that ensuring legislative consistency would constitute a legitimate objective. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or administratively convenient. It must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved.

2.33 In assessing whether the limitation is proportionate to the objective being sought, it is necessary to consider a number of factors, including whether a proposed limitation is accompanied by sufficient safeguards and whether any less rights restrictive alternatives could achieve the same stated objective.

Committee's initial view

2.34 The committee noted that providing a financial assistance scheme for eligible TCF contract outworkers during an insolvency event would promote the right to just and favourable conditions of work. However, restricting access to this scheme on the basis of migration status also engages and limits the rights to equality and non-discrimination and may limit the right to just and favourable conditions of work. The committee sought the minister's advice in relation to:

- (a) what is the pressing or substantial concern sought to be addressed by excluding certain TCF contract outworkers from accessing the financial assistance scheme on the basis of migration status;

20 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (2016) [64]. International labour law has also recognised that migrant workers have a right to access non-contributory schemes for income support and grants migrant workers in irregular situations equality of treatment in respect of rights arising out of past employment, including access to social security and other benefits. See International Labour Organization, [Protecting the rights of migrant workers in irregular situations and addressing irregular labour migration: A compendium](#) (2022) pp. 24–25; ILO Convention of 1974 concerning Migrant Workers (Supplementary Provisions) (ILO Convention No. 143), article 9(1); ILO Social Protection Floors Recommendation 2012 (ILO Recommendation No. 2020).

- (b) what proportion of TCF contract outworkers are not eligible for the financial assistance scheme (namely, how many TCF contract outworkers are not Australian citizens, permanent residents or holders of a special category visa);
- (c) why was it considered necessary to make the eligibility criteria exhaustive such that the secretary is unable to consider the individual circumstances of each worker who were to apply for financial assistance;
- (d) whether, in the period since the establishment of the scheme in 2012, any TCF contract outworkers who were ineligible for the scheme have successfully recovered unpaid entitlements from former employers in the event of insolvency;
- (e) what safeguards accompany the measure; and
- (f) whether consideration was given to less rights restrictive ways of achieving the stated objective, and if so, why these alternatives were considered inappropriate.

2.35 The full initial analysis is set out in [Report 1 of 2023](#).

Minister's response²¹

2.36 The minister advised:

a) what is the pressing or substantial concern sought to be addressed by excluding certain TCF contract outworkers from accessing the financial assistance scheme on the basis of migration status

The TCF Regulations (and its predecessor, the *Fair Entitlements Guarantee Regulation 2012*) mirror arrangements under the FEG Act, under which eligibility is limited to Australian citizens, permanent visa holders and special category visa holders. It is desirable that such eligibility criteria are consistent across the FEG Act and the TCF Regulations to achieve equitable outcomes.

b) what proportion of TCF contract outworkers are not eligible for the financial assistance scheme (namely, how many TCF contract outworkers are not Australian citizens, permanent residents or holders of a special category visa)

The Department of Employment and Workplace Relations has been unable to source data that identifies the proportion of TCF contract outworkers who are ineligible under the financial assistance scheme.

21 The minister's response to the committee's inquiries was received on 9 March 2023. This is an extract of the response. The response is available in full on the committee's [website](#).

c) why was it considered necessary to make the eligibility criteria exhaustive such that the Secretary is unable to consider the individual circumstances of each worker who were to apply for financial assistance

The TCF Regulations (and its predecessor Regulation) mirrors core eligibility conditions under the FEG Act, which sets out exhaustive criteria that must be satisfied for a person to be eligible for financial assistance. It is desirable that such eligibility criteria are consistent across the FEG Act and the TCF Regulations to achieve equitable outcomes.

d) whether, in the period since the establishment of the scheme in 2012, any TCF contract outworkers who were ineligible for the scheme have successfully recovered unpaid entitlements from former employers in the event of insolvency

The Department of Employment and Workplace Relations has been unable to source information about whether TCF contract outworkers who were ineligible for the scheme have successfully recovered unpaid amounts in insolvency. Additionally, it is noted that since the establishment of the scheme in 2013, there have not been any claims from TCF contract outworkers made under the scheme.

e) what safeguards accompany the measure

TCF outworkers who are ineligible for financial assistance under the scheme due to their migration status may be entitled under the *Fair Work Act 2009* to recover unpaid amounts from indirectly responsible entities in the supply chain. No additional safeguards accompany the measure in order to maintain consistency with the scheme established under the FEG Act.

f) whether consideration was given to less rights restrictive ways of achieving the stated objective, and if so, why these alternatives were considered inappropriate

As noted above, the TCF Regulations extend the scheme established under the FEG Act to TCF contract outworkers. Given this, it is appropriate that such an extension is consistent with the core policy parameters set out in the FEG Act, with modifications limited to those necessary to recognise the different characteristics of the relationship between a TCF contract outworker and their direct engagers.

Concluding comments

International human rights legal advice

2.37 In relation to the objective sought to be achieved by excluding certain TCF contract outworkers from the scheme, the minister advised that the regulations mirror arrangements under the *Fair Entitlements Guarantee Act 2012* (the Fair Entitlements Guarantee Act), under which eligibility is limited to Australian citizens, permanent visa holders and special category visa holders. The minister stated that it

is desirable that such eligibility criteria are consistent across the Fair Entitlements Guarantee Act to achieve equitable outcomes.

2.38 As noted in the initial analysis, seeking to financially support vulnerable workers during an insolvency event would, in general, constitute a legitimate objective for the purposes of international human rights law. However, with respect to the specific measure of excluding certain TCF contract outworkers from the scheme on the basis of migration status, the primary objective appears to be ensuring legislative consistency, which would likely be regarded as a desirable outcome and one of administrative convenience. However, to be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek a desirable or administratively convenient outcome. Moreover, in light of the minister's advice that there is no available data on the number of TCF contract outworkers who are ineligible for the scheme, it is not clear that making such workers eligible for the scheme would pose any real threat to the sustainability or integrity of the scheme, such that excluding them is necessary. As such, it has not been established that the measure pursues a legitimate objective for the purposes of international human rights law.

2.39 As to what safeguards accompany the measure, the minister stated that those outworkers who are excluded from the scheme are entitled to recover unpaid amounts from indirectly responsible entities in the supply chain under the *Fair Work Act 2009* (Fair Work Act). As to the number of outworkers who have successfully recovered unpaid amounts in the event of insolvency, the minister advised that this information is unavailable and noted that since the establishment of the scheme in 2013, there have been no claims made under the scheme by TCF contract outworkers. The minister stated that there are no additional safeguards that accompany the measure.

2.40 As noted in the initial analysis, noting that there is a recognised need to establish a financial assistance scheme for workers affected by an insolvency event, in part due to their unique vulnerabilities and the challenges in recovering unpaid entitlements, it seems unlikely that the alternative option of individuals recovering payments under the Fair Work Act would be effective in practice. The fact that there is no available information regarding outworkers successfully recovering unpaid amounts may suggest that this avenue of redress is rarely utilised. It appears that seeking to recover unpaid accounts from indirectly responsible entities in the supply chain would likely be a complex process to navigate, particularly for individuals who experience linguistic and cultural barriers to accessing justice. Questions also arise as to whether claims may not have been made from TCF contract outworkers under the scheme because a significant number of those to whom unpaid entitlements are owed are excluded from the scheme on the basis of their migration status, noting

that a large number of outworkers are migrants.⁴⁹ As such, the avenues for redress under the Fair Work Act do not appear to assist with the proportionality of the measure.

2.41 Another relevant factor in assessing proportionality is whether the measure provides sufficient flexibility to treat different cases differently. As to why it is necessary that the eligibility criteria be exhaustive such that the secretary is unable to consider the individual circumstances of each worker who were to apply for financial assistance, the minister advised that the criteria under these regulations mirror core eligibility conditions under the Fair Entitlements Guarantee Act and it is desirable that eligibility criteria are consistent. Under international human rights law, a measure that imposes a blanket policy without regard to the merits of an individual case is less likely to be proportionate. With respect to this measure, the eligibility criteria to access the scheme are exhaustive and do not afford the secretary any discretion to consider the individual circumstances of each worker who were to apply for financial assistance. A desire for legislative consistency does not appear to be a sufficient justification for restricting the matters which the secretary may take into account in assessing eligibility for the scheme. Were the secretary conferred with the discretion to consider, for example, the impact of the insolvency event on the worker's personal and family life; the amount of unpaid entitlements owing; whether the worker has access to other social security benefits or financial assistance; or any other vulnerabilities experienced by the worker, such as disability, linguistic and cultural diversity or family and caring responsibilities, noting these other factors may influence a worker's ability to obtain other employment,⁵⁰ this may be a less rights restrictive and more proportionate approach when providing a benefit, rather than restricting access on the basis of nationality.

Committee view

2.42 The committee thanks the minister for this response. The committee notes that providing a financial assistance scheme for eligible TCF contract outworkers during an insolvency event promotes the right to just and favourable conditions of work. However, restricting access to this scheme on the basis of migration status also

49 See Fair Work Ombudsman, *Textile, Clothing and Footwear Compliance Phase Campaign Report* (January 2019) p. 10, which reports women comprise 59.1% of TCF workers and 44% are people born overseas. See also The Senate Education, Employment and Workplace Relations Legislation Committee, *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011* (February 2012) pp. 3, 12; Textile Clothing and Footwear Union of Australia, *Submission No 214* to the Productivity Commission Review into the Workplace Relations Framework (27 March 2015) [3.2].

50 The FWO observed that the 'lack of higher-level educational attainment [among TCF workers] compounds the vulnerability of [this] labour force by imposing further barriers to alternative employment options'. See Fair Work Ombudsman, *Textile, Clothing and Footwear Compliance Phase Campaign Report* (January 2019) p.11.

engages and limits the rights to equality and non-discrimination and may limit the right to just and favourable conditions of work.

2.43 The committee considers that the overall objective of the scheme, that is, to provide financial support to vulnerable workers during an insolvency event, constitutes a legitimate objective for the purposes of international human rights law. With respect to the specific objective sought to be achieved by excluding certain TCF contract outworkers on the basis of their migration status, the committee notes the minister's advice that it is desirable for eligibility criteria to be consistent across the Fair Entitlements Guarantee Act in order to achieve equitable outcomes. The committee considers that while achieving legislative consistency is desirable, it is not, in itself, sufficient to constitute a legitimate objective for the purposes of international human rights law. Regarding proportionality, the committee notes that the only safeguard identified, that is, the possibility of recovering unpaid amounts under the Fair Work Act, appears unlikely to be effective in practice, and that the measure offers no flexibility to consider the individual circumstances of each case. The committee notes the minister's advice that there are no additional safeguards accompanying the measure in order to maintain consistency with the scheme established under the Fair Entitlements Guarantee Act.

2.44 Having regard to these factors, the committee considers there to be a risk that limiting eligibility of workers in Australia on the basis of migration status may not constitute a proportionate limitation on the right to equality and non-discrimination and, to the extent that it results in certain workers enjoying more favourable working conditions than others (noting Australia's immediate obligation to realise this right without discrimination of any kind), the right to just and favourable conditions of work.

Suggested action:

2.45 The committee considers that the proportionality of the measure may be assisted were the regulations amended to provide the secretary with discretion to allow those who are ineligible for assistance to receive assistance after consideration of their individual circumstances.

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

Federal Court Legislation Amendment Rules 2022 [F2023L00033]⁵¹

Purpose	This legislative instrument amends the Federal Court Rules 2011, Federal Court (Criminal Proceedings) Rules 2016, Federal Court (Bankruptcy) Rules 2016, and Federal Court (Corporations) Rules 2000 to provide updates to references to rules, regulations and the Federal Circuit and Family Court of Australia. It clarifies the transfer of proceedings to and from the Federal Circuit and Family Court of Australia (Division 2)
Portfolio	Attorney-General
Authorising legislation	<i>Federal Court of Australia Act 1976</i>
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 6 February 2023). Notice of motion to disallow must be given by 23 March 2023 in the House and by 29 March 2023 in the Senate ⁵²
Right	Freedom of expression

2.47 The committee requested a response from the minister in relation to the instrument in [Report 2 of 2023](#).⁵³

Access to court documents

2.48 These rules provide that a person who is not a party to a Federal Court proceeding cannot inspect certain court documents in a proceeding until after the first directions hearing or the hearing (whichever is earlier).⁵⁴

2.49 This applies to documents such as originating applications; pleadings; statements of agreed facts; judgments or orders of court; notices of appeal; and reasons for judgment.⁵⁵

51 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Federal Court Legislation Amendment Rules 2022 [F2023L00033], *Report 4 of 2023*; [2023] AUPJCHR 35.

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

53 Parliamentary Joint Committee on Human Rights, [Report 2 of 2023](#) (8 March 2023), pp. 45-48.

54 Schedule 1, item 4.

55 See Federal Court Rules 2011, subrule 2.32(2).

Summary of initial assessment

Preliminary international human rights legal advice

Right to freedom of expression

2.50 Restricting access to court documents, which journalists may use to help them accurately report on cases before the Federal Court, engages and limits the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.⁵⁶ The United Nations (UN) Human Rights Committee has noted the important status of this right under international human rights law.⁵⁷

2.51 The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.⁵⁸ A free, uncensored and unhindered press is essential to ensure freedom of opinion and expression, and the enjoyment of other civil and political rights.⁵⁹

2.52 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others,⁶⁰ national security,⁶¹ public

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

57 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [2]–[3].

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

59 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [13].

60 Restrictions on this ground must be constructed with care. For example, while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

61 Extreme care must be taken by State parties to ensure that treason laws and similar provisions relating to national security are crafted and applied in a manner that conforms to the strict requirements of paragraph 12(3) of the International Covenant on Civil and Political Rights. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [30].

order, or public health or morals.⁶² Additionally, such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.⁶³

Committee's initial view

2.53 The committee noted that restricting access to certain court documents prior to a hearing, including access by journalists, engages and limits the right to freedom of expression. The committee considered further information was required to assess the compatibility of this measure with this right, and as such sought the Chief Justice's advice in relation to:

- (a) what is the objective behind preventing people who are not parties to a proceeding from inspecting certain documents in the proceeding until after the first directions hearing or the hearing;
- (b) is restricting such access likely to be effective to achieve that objective; and
- (c) is this a proportionate way to achieve that objective. In particular, are there any safeguards in place or any less rights restrictive ways to achieve the objective (for example, allowing non-parties to apply for access; allowing decisions to be made on a case-by-case basis).

2.54 The full initial analysis is set out in [Report 2 of 2023](#).

Chief Justice's response⁶⁴

2.55 The Chief Justice advised:

- (a) What is the objective behind preventing people who are not parties to a proceeding from inspecting certain documents in the proceeding until after the first directions hearing or the hearing?**

The principle of "open justice", including justice being seen to be done and ensuring that nothing is done to discourage the making of fair and accurate reports of proceedings, is an overarching principle which guides the Court in its judicial and procedural operations. However, the principle of open justice is not absolute, and must be balanced with the

62 The concept of 'morals' here derives from myriad social, philosophical and religious traditions. This means that limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32].

63 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

64 The Chief Justice's response to the committee's inquiries was received on 23 March 2023. This is an extract of the response. The response is available in full on the committee's [website](#).

need of the Court to act at all times in the "interests of justice" and avoid prejudice to the administration of justice or other potential harm.

"Interests of justice" is a broad concept that gives rise to many matters that a Court must consider when assessing a request for access, including the interests of all parties (e.g. questions of confidentiality and privacy), the community, the application of any Commonwealth law, and any reasonably necessary requirements to ensure the just and fair administration of justice. Further, the Court must consider whether a request may be unreasonably burdensome on the administration of justice.

It is not the objective of the Federal Court, nor the amendment to subrule 2.32(2) of the *Federal Court Rules 2011* pursuant to the *Federal Court Legislation Amendment Rules 2022* (which subrule must be read as part, and in the context, of the whole rule, especially subrule 2.32(4)), to prevent in all circumstances people who are not parties to a proceeding from inspecting documents in a proceeding until after the first directions hearing or a hearing (whichever comes first).

The objective of the amendment to subrule 2.32(2) (as part of rule 2.32) is to protect the administration of justice through the protection of the legitimate rights and interests of parties to proceedings in the Court. It is contrary to the administration of justice for respondents to learn of the case made against them, whether through the media or other publication, before they are served and before they have a reasonable opportunity to protect their legitimate interests and rights by seeking properly-founded suppression or non-publication orders. The amendments to subrule 2.32(2) are about ensuring that the Rules of the Court are not used, knowingly or innocently, as an instrument of injustice.

The Court is mindful of the need to adopt procedures that afford the same protections to all parties and to guard against the abuse of its procedures. When commencing proceedings, applicants are able to take steps to protect confidential information in their own interests. As a matter of fairness, it is necessary to ensure that respondents (and in some instances third parties) are afforded the same opportunity. Additionally, applicants are able to make allegations that have not been scrutinised by respondents. Publication of claims and allegations before respondents have been given an opportunity to raise any claim that the Court's procedures are being used improperly also creates the possibility of unfairness and opportunities for abuse.

Subrule 2.32(2) establishes the first directions hearing or hearing (whichever is earlier) as the point in time at which non-parties are—in the absence of other orders—generally permitted to inspect

unrestricted documents. As such, it is the default rule. Subrule 2.32(2) must not however, be considered in isolation. Subrule 2.32(2) must be considered in conjunction with subrule 2.32(4). Subrule 2.32(4) provides that a person may apply to the Court for leave to inspect a document that the person is not otherwise entitled to inspect. The effect of the operation of these two subrules is that, prior to a first directions hearing or hearing (whichever is earlier), a non-party will require leave of the Court to inspect such documents. Non-parties are therefore not necessarily prevented from inspecting documents prior to the earlier of the directions hearing or hearing by rule 2.32. Non-parties, including the media, before a first directions hearing or hearing (whichever is earlier) may still inspect documents at this time. The amendments to subrule 2.32(2) do however mean that such inspection is by leave of the Court. In many, if not most cases, the originating processes will be available upon application before the first directions hearing or hearing (whichever is earlier), if application for access is made.

Subrule 2.32(4) was not subject to recent amendments. Leave of the Court has long been required for non-parties to access restricted documents. The effect of the amendments to subrule 2.32(2) is simply to extend that requirement for leave for a limited period of time, and require access by leave regulated by a practice note (as to which, see below).

The Federal Court has not expanded the processes or basis of suppression or non-publication orders through the amendment to subrule 2.32(2). The amendment does not enable a party to simply avoid embarrassment through suppression or non-publication orders. Further, the Court expects parties to lodge any application seeking suppression or non-publication orders promptly.

On 10 February 2023, the Federal Court introduced an amended practice note, the *Access to Documents and Transcripts Practice Note (GPN-ACCS)* which provides detailed guidance in respect of access to documents in the court file relating to a proceeding in the Court, including by non-parties and the media, and including guidance on access to originating process before the first directions hearing.

Without going into too much detail, the processing of such requests by a non-party involves the following:

- coordination by the National Operations Registry in conjunction with the Director of Public Information and assisted by Court and Tribunal staff from within each Registry;

- an initial assessment to determine whether the relevant proceeding has been allocated to a judge;
- consultation with the parties to determine whether the originating application and supporting material have been served on the respondent or respondents;
- the provision of a reasonable opportunity for the parties to file an application seeking suppression or non-publication orders; and
- in the ordinary course of events the grant of leave to access the document by a Registrar.

Where an application for a suppression or non-publication order is made, this will be quickly allocated to a judge for consideration. Nothing in the practice note is intended to remove any entitlement of any interested person (including the media) to be heard on the application for a suppression or non-publication order.

If leave is granted to inspect an otherwise restricted document, then, in the ordinary course of events and subject to any order of the Court, a Registrar will grant leave for the inspection of that document pursuant to subsequent requests.

The practices outlined within the practice note ensure applications for leave to inspect documents are considered promptly and efficiently by the Court. A copy of the practice note is attached.

(b) Is restricting such access likely to be effective to achieve that objective?

Yes. The restriction provided by subrule 2.32(2) (when read in the context of the whole rule, including subrule 2.32(4)) is an essential element of a practice that ensures that non-parties can only access court documents prior to a first directions hearing or hearing (whichever is earlier) by seeking leave of the Court and having that application considered on a case-by-case basis.

Subrule 2.32(2) as amended is highly effective in meeting the objectives outlined in response to your first question. It is also highly effective in enabling the Court to act in the "interests of justice", whilst avoiding prejudice to the administration of justice or other potential harm, including to the rights and interests of respondents (and in some instances third parties).

(c) Is this a proportionate way to achieve that objective? In particular, are there any safeguards in place or any less rights restrictive ways to achieve the objective (for example, allowing non-parties to apply for access; allowing decisions to be made on a case-by-case basis)

Yes, subrule 2.32(2) is a proportionate way to achieve that objective. As outlined in the response to your first question, subrule 2.32(2) must not be considered in isolation, but must be considered as part of the whole rule, especially in conjunction with subrule 2.32(4). The Court has not created a blanket prohibition on access to documents by a non-party prior to a first directions hearing or a hearing (whichever is earlier). The restriction provided by subrule 2.32(2) is an essential element of a practice that ensures that non-parties can only access court documents prior to a first directions hearing or hearing (whichever is earlier) by seeking leave of the Court and having that application considered on a case-by-case basis. That case-by-case assessment will be founded on two questions: whether the originating process has been served, and whether it contains material that gives rise to a properly-founded application for suppression.

The Federal Court has encouraged non-parties, including the media, to apply for access by seeking leave of the Court pursuant to subrule 2.32(4). Detailed guidance is provided on how such applications are made, handled and considered within the *Access to Documents and Transcripts Practice Note*.

As has already been detailed, a non-party, including the media, may still inspect unrestricted documents prior to the first directions hearing or hearing (whichever is earlier), provided leave of the Court is obtained pursuant to subrule 2.32(4).

There are no fees associated with an application for leave to inspect a document and such an application can be considered on the papers without need to appear in Court. A non-party seeking leave of the Court to inspect a document only needs to complete a short access request form. The same form is used for both non-party requests requiring leave of the Court and those that do not require leave of the Court.

The *Access to Documents and Transcripts Practice Note* provides the detail as to how a non-party may make a request for these documents and the processes put in place by the Court to ensure those requests are considered promptly and efficiently.

Concluding comments

International human rights legal advice

Right to freedom of expression

2.56 In relation to the objective behind preventing people who are not parties to a proceeding from inspecting certain documents until after the first directions hearing or the hearing, the Chief Justice advised that this is to protect the administration of justice through the protection of the legitimate rights and interests

of parties to court proceedings. The Chief Justice stated that it is contrary to the administration of justice for respondents to learn of the case made against them, whether through the media or other publication, before they are served and before they have a reasonable opportunity to protect their interests and rights by seeking suppression or non-publication orders. The Chief Justice noted that the court rules already provide that a person may apply to the court for leave to inspect a document that the person is not otherwise entitled to inspect, meaning that prior to a first directions hearing or hearing (whichever is earlier), a non-party will be able to inspect such documents with leave of the Court. The Chief Justice stated that the effect of the amendments is to extend that requirement for leave for a limited period of time, and to require access by leave as regulated by a practice note. In this regard, the Chief Justice stated that this amendment balances the principle of open justice with the need of the court to act in the interests of justice, and to avoid prejudice to the administration of justice or other potential harm. Protecting the administration of justice through protecting the legitimate rights and interests of parties to court proceedings would constitute a legitimate objective for the purposes of international human rights law.

2.57 As to whether restricting such access is likely to be effective to achieve that objective, the Chief Justice stated that the restriction, read in its context, ensures that non-parties can only access court documents prior to a first directions hearing or hearing where they have sought leave of the court and that application has been assessed on a case-by-case basis. The Chief Justice also stated that the amendment is highly effective in enabling the court to act in the interests of justice, while avoiding prejudice to the administration of justice or other potential harm, including to the rights and interests of respondents (and in some instances third parties). This measure would therefore appear to be rationally connected to the stated objective.

2.58 As to whether this a proportionate way to achieve that objective, the Chief Justice stated that this amendment does not establish a blanket prohibition on access to documents by a non-party prior to a first directions hearing or hearings. Rather, it ensures that non-parties can only get early access to court documents by seeking leave of the court and having that application considered on a case-by-case basis. The Chief Justice stated that this assessment will be founded on two questions: whether the originating process has been served, and whether it contains material that gives rise to a properly-founded application for suppression.

2.59 The Chief Justice also stated that the Federal Court has encouraged non-parties, including the media, to apply for access by seeking leave of the court, and noted that detailed guidance is provided on how such applications are made, handled and considered within the *Access to Documents and Transcripts Practice Note*. The Chief Justice stated that no fees are associated with such an application, and that a non-party seeking leave of the court to inspect a document only needs to complete a short access request form. The Chief Justice further stated that the Practice Note provides detail as to the processes to ensure that such requests are

considered promptly and efficiently. Having regard to this additional information, it appears that the measure constitutes a proportionate means by which to achieve the stated objective. As such, it appears that these rules are compatible with the right to freedom of expression.

Committee view

2.60 The committee thanks the Chief Justice for this response. The committee considers that, by providing that a person who is not a party to a Federal Court proceeding cannot inspect certain court documents until after the first directions hearing or the hearing (whichever is earlier), this measure limits the right to freedom of expression.

2.61 The committee considers that, having regard to the detailed information provided by the Chief Justice, particularly the fact that non-parties, including the media, are able to apply to the court to obtain access to court documents prior to the first hearing, this measure is compatible with the right to freedom of expression.

Suggested action:

2.62 The committee recommends that the statement of compatibility with human rights be updated to include the information provided by the Chief Justice.

2.63 The committee considers that its concerns have been addressed and makes no further comment in relation to this legislative instrument.

Mr Josh Burns MP
Chair