

## Chapter 1<sup>1</sup>

### New and continuing matters

1.1 This chapter provides an assessment of the human rights compatibility of legislative instruments registered on the Federal Register of Legislation between 25 June 2020 and 27 July 2020.

1.2 The committee has reported on two legislative instruments from this period. The committee has determined not to comment on the remaining instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.<sup>2</sup>

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 10 of 2020*; [2020] AUPJCHR 125.

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

## Response required

1.3 The committee seeks a response from the relevant minister with respect to these two instruments.

### Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 5) 2020 [F2020L00884]<sup>3</sup>

<b>Purpose</b>	This instrument provides that after 20 July 2020, approved providers of child care services are transitioned out of the JobKeeper scheme for certain employees or for a business participant.
<b>Portfolio</b>	Treasury
<b>Authorising legislation</b>	<i>Coronavirus Economic Response Package (Payments and Benefits) Act 2020</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the Senate and House of Representatives on 24 August 2020). Notice of motion to disallow must be given in the House of Representatives by 27 October 2020 and in the Senate by 1 December 2020 <sup>4</sup>
<b>Rights</b>	Adequate standard of living; work; and equality and non-discrimination
<b>Status</b>	Seeking additional information

### Exemption of child care workers from the JobKeeper wage subsidy

1.4 This instrument provides that from 20 July 2020, approved providers of child care services will no longer be eligible for the JobKeeper wage subsidy with respect to either business participants where the entity is an approved provider of child care services, or with respect to individual workers whose ordinary duties relate principally to the operation of the child care service.<sup>5</sup>

3 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 5) 2020 [F2020L00884], *Report 10 of 2020*; [2020] AUPJCHR 126.

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

5 Schedule 1, items 2 and 3, subsections 9(4)(d) and 11(1)(ba).

## **Preliminary international human rights legal advice**

### ***Rights to an adequate standard of living and equality and non-discrimination***

1.5 By removing eligibility for the JobKeeper wage subsidy for certain registered businesses and certain employees who were previously eligible for the subsidy, this instrument appears to engage a number of human rights. The JobKeeper payment is intended to subsidise (and in some cases, replace) a person's wages during the COVID-19 pandemic and during circumstances in which people may otherwise be at risk of losing their job. Since the measure removes this support, it would appear that this measure engages and may limit the right to an adequate standard of living. The right to an adequate standard of living requires that the State party take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.<sup>6</sup>

1.6 In addition, as the JobKeeper scheme was designed to support businesses to retain staff during economic downturn,<sup>7</sup> removing businesses from eligibility, and therefore their workers, may engage and limit the right to work.<sup>8</sup> The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work. The right to work also requires that states provide a system of protection guaranteeing access to employment. This right must be made available in a non-discriminatory way.<sup>9</sup>

1.7 Australia has obligations to progressively realise the rights to an adequate standard of living and work using the maximum of resources available. It also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.<sup>10</sup> Any retrogressive step with respect to the realisation of these rights must be directed towards a legitimate objective, be rationally connected (that is, effective to achieve) that objective, and be proportionate. It is noted that the effect of this change on childcare workers is not clear, noting that certain non-citizens and some casual workers in the childcare sector were not eligible for the JobKeeper subsidy.<sup>11</sup> In this respect those ineligible workers may benefit from the funding now available to the childcare sector (see paragraph [1.10] below).

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

7 See explanatory statement to the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020, p. 1.

8 International Covenant on Economic, Social and Cultural Rights, article 6.

9 International Covenant on Economic, Social and Cultural Rights, articles 6 and 2(1).

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

11 See Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 [F2020L00419].

1.8 In addition, it is not clear as to whether removing eligibility for the JobKeeper subsidy for employees in the child care sector, has a disproportionate impact on women, noting that the child care workforce is overwhelmingly staffed by women.<sup>12</sup> As such, this measure may engage and limit the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, 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).<sup>13</sup> Differential treatment, if this arises, 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.<sup>14</sup>

1.9 The statement of compatibility states only that this measure promotes rights under the Convention on the Rights of the Child.<sup>15</sup> Consequently, no information has been provided as to how this measure engages the rights to an adequate standard of living and work, or the right to equality and non-discrimination.

1.10 The explanatory statement explains that, instead of JobKeeper, the child care sector will be supported through the reintroduction of the Child Care Subsidy and the introduction of an additional Transition Payment.<sup>16</sup> The Child Care Subsidy is a payment to the families of children attending child care to subsidise the cost of that care. The Transition Payment, payable to child care providers until 27 September 2020, is 25 per cent of fee revenue or the existing hourly rate cap, whichever is lower, in the relevant reference period that has been used during the Relief Package.<sup>17</sup> Neither of these payments are made to child care workers themselves. However, with respect to the Transition Payment, the Department of Education, Skills and Employment advises that payment is conditional on a provider offering an 'Employment Guarantee' by continuing to employ those employees over the

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12 For example, in a 2017 report prepared for the Department of Education and Training, the Australian National University Social Research Centre noted that 96 per cent of workers in long-day care were female. See, Australian National University Social Research Centre, *2016 Early Childhood Education and Care National Workforce Census* (September 2017) p. 16.

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

14 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].

15 Statement of compatibility, p. 7.

16 Explanatory statement, p. 1

17 See, Department of Education, Skills and Employment 'Transition Payment to early childhood education and care providers' <https://www.dese.gov.au/transition-payment> [Accessed 14 August 2020].

transition period who were working or being paid JobKeeper at the end of the Relief Package:

The Employment Guarantee reflects the department's and the community's expectation that services will look after their educators and their staff, permanent and casual. The Transition Payment and return to full CCS (including the ability to charge fees) have replaced the Relief Payments and JobKeeper, and is supplemented by extra support for Victoria and Melbourne. These measures should be used to support educators and employees and should be passed on through wages and payments.

The Department considers that standing down permanent staff without pay is inconsistent with the Employment Guarantee.

Services which do not fulfil the conditions of the Transition Payment will be investigated and may be required to repay transition payments and may lose access to future payments.<sup>18</sup>

1.11 These payments to businesses may incentivise those employers to retain child care employees in relation to whom JobKeeper wage subsidies will no longer be payable, by helping the business to remain viable. However, it is not clear whether the effect of these two payments will be equivalent to the payment of a substantial wage subsidy to workers themselves. Further, it does not appear that a business which was found to have breached this Employment Guarantee would be required to reinstate an employee who was stood down during that period due to COVID-19 related financial concerns.

1.12 As such, further information is required in order to assess the compatibility of the measure with the rights to an adequate standard of living, work and equality and non-discrimination, and in particular:

- (a) how the reintroduction of the Child Care Subsidy and Transition Payment compares to JobKeeper in terms of the likely effect on childcare workers;
- (b) what is the proportion of child care workers who were not previously eligible for JobKeeper;
- (c) whether a child care provider which breaches its obligations under the Transition Payment by terminating the employment of a worker who was in receipt of JobKeeper, will be required to reinstate the worker and/or provide some other form of compensation to that worker;

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18 See, Department of Education, Skills and Employment 'Transition Payment to early childhood education and care providers' <https://www.dese.gov.au/transition-payment> [Accessed 14 August 2020].

- (d) whether a child care provider would be considered to breach its obligations under the Transition Payment were it to significantly reduce the rostered hours of a worker who was previously in receipt of JobKeeper;
- (e) whether and how the measure is based on reasonable and objective criteria such that it serves a legitimate objective; and
- (f) whether the measure is a proportionate means of achieving that objective.

### **Committee view**

**1.13** The committee notes that this instrument provides that from 20 July 2020, approved providers of child care services were transitioned out of the JobKeeper wage subsidy scheme for certain employees or business participants engaged in the provision of child care services. The committee notes that this is because those businesses would instead be in receipt of a Transitional Payment, which would be conditional on the retention of staff members affected by this amendment, as well as benefiting from the re-introduction of the Child Care Subsidy.

**1.14** The committee notes the legal advice that this measure may engage the rights to an adequate standard of living, work and equality and non-discrimination. The committee notes that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee also recognises that providing child care workers with the benefit of a Transitional Payment will impact positively on those workers who are currently employed in a child care centre but are not eligible for the JobKeeper payment.

**1.15** The committee seeks the Treasurer's advice as to the matters set out at paragraph [1.12].

**1.16** For those who are unfamiliar with the work of the committee, we take this opportunity to reiterate that the committee has not formed a concluded view on the human rights implications of this instrument, as is the case with the committee's preliminary report on any bill or instrument.

## Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020 [F2020L00870]<sup>1</sup>

<b>Purpose</b>	This instrument allows for a new service provider to administer the Norfolk Island Workers' Compensation Scheme, and makes several amendments to the scheme itself, including with respect to mutual obligations.
<b>Portfolio</b>	Infrastructure, Transport, Regional Development and Communications
<b>Authorising legislation</b>	<i>Norfolk Island Act 1979</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the Senate and House of Representatives on 24 August 2020). Notice of motion to disallow must be given in the House of Representative by 27 October 2020 and in the Senate by 1 December 2020 <sup>2</sup>
<b>Rights</b>	Adequate standard of living; social security; persons with disability
<b>Status</b>	Seeking additional information

### Suspension of workers' compensation payments

1.17 This instrument amends the Norfolk Island Continued Laws Ordinance 2015 with the effect of amending the *Employment Act 1988* (NI) and the *Employment Regulations 1991* (NI). It relevantly provides that an employee's right to compensation is suspended in the following circumstances:

- (a) if the employee fails, without reasonable excuse, to comply with a notice to attend for a permanent incapacity assessment given to the employee, their right to lump sum compensation in relation to a loss or impairment of a bodily or mental function is suspended until they comply with a new notice;<sup>3</sup>
- (b) if the employee is required to undertake a rehabilitation program for an injury or condition, and they fail without reasonable excuse to begin, or

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020 [F2020L00870], *Report 10 of 2020*; [2020] AUPJCHR 127.

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 Schedule 1, substituted item 73ZY, new section 32A.

continue with, the program, their right to compensation is suspended until they begin, or continue with, the program;<sup>4</sup>

- (c) if a claim for compensation is made in relation to an injury or condition of, or the death of, an employee, and the claimant fails, without reasonable excuse, to provide information to the Employment Liaison Officer within the time specified, any right of the claimant to compensation is suspended until they comply with the notice;<sup>5</sup> and
- (d) if an employee fails, without reasonable excuse, to comply with a notice to attend for an independent medical examination, their right to compensation in relation to an injury or condition is suspended until they comply with a new notice to attend such an examination.<sup>6</sup>

### **Preliminary international human rights legal advice**

#### ***Rights to social security and an adequate standard of living, and rights of persons with disability***

1.18 Under international human rights law, the provision of compensation for workplace injuries, including those which lead to a worker's permanent incapacitation, forms part of the provision of social security. Consequently, the power to suspend a worker's entitlement to compensation for failure to do certain specified things, engages and may limit the right to social security, as well as the related right to an adequate standard of living.

1.19 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 other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.<sup>7</sup> The right to an adequate standard of living requires that the State party take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.<sup>8</sup> Australia has obligations to progressively realise these rights using the maximum of resources available, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to their realisation. Introducing the ability for payments to be suspended, which was not previously available, appears to be a retrogressive measure. Retrogressive measures may be permissible if it can be

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4 Schedule 1, substituted item 74P, substituted section 38.

5 Schedule 1, substituted item 74ZF, substituted section 47.

6 Schedule 1, substituted item 74ZF, new section 47B.

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

8 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.'

demonstrated that the measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) such an objective, and is proportionate.

1.20 Suspending a person's entitlement to workers' compensation may also engage the rights of persons with disability, where the eligible worker has suffered an injury leading to a disability. The Convention on the Rights of Persons with Disabilities recognises the right of all persons with disability to enjoy their rights without discrimination on the basis of disability.<sup>9</sup> It requires States to facilitate access to rehabilitation, and provide reasonable accommodation to persons with disabilities in the workplace.<sup>10</sup> It is not clear whether and how these measures would accommodate the particular needs of persons with disability, including where they are required to engage in a rehabilitation program.

1.21 The statement of compatibility does not identify the engagement of any rights, other than the right to privacy in relation to the collection of information.<sup>11</sup> Consequently further information is required in order to assess the compatibility of these measures with the rights to social security, an adequate standard of living, and of persons with disability. In particular:

- (a) how long payments may be suspended for;
- (b) whether there is any requirement that new notices to attend medical examinations etc, be promptly provided;
- (c) what is the legitimate objective behind suspending such payments, and how is suspending such payments rationally connected (that is, effective to achieve) that objective; and
- (d) what safeguards are in place to ensure any limitation on rights is proportionate to the objective sought to be achieved.

### **Committee view**

**1.22 The committee notes that this instrument provides that, under the Norfolk Island Workers' Compensation Scheme, an employee's right to compensation will be suspended if they fail, without reasonable excuse, to attend an assessment, provide information or engage with a rehabilitation program as required.**

**1.23 The committee notes that these measures may engage the rights to social security and an adequate standard of living, and the rights of persons with disability. The committee notes that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.**

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9 Convention on the Rights of Persons with Disability, article 4.

10 Convention on the Rights of Persons with Disability, articles 26–27.

11 Statement of compatibility, p. 9.

**1.24** The committee seeks the minister's advice as to the matters set out at paragraph [1.21].