Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 10 of 2020

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Committee information

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

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

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

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

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

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1 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

2 See the committee's *Short Guide to Human Rights* and *Guide to Human Rights*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

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

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

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

Chapter 1[1]

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.[2]

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][3]

Purpose	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.
Portfolio	Treasury
Authorising legislation	*Coronavirus Economic Response Package (Payments and Benefits) Act 2020*
Last day to disallow	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[4]
Rights	Adequate standard of living; work; and equality and non-discrimination
Status	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.[5]

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.[6]

1.6 In addition, as the JobKeeper scheme was designed to support businesses to retain staff during economic downturn,[7] removing businesses from eligibility, and therefore their workers, may engage and limit the right to work.[8] 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.[9]

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.[10] 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.[11] 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.[12] 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).[13] 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.[14]

1.9 The statement of compatibility states only that this measure promotes rights under the Convention on the Rights of the Child.[15] 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.[16] 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.[17] 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

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.[18]

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;

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 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][1]

Purpose	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.
Portfolio	Infrastructure, Transport, Regional Development and Communications
Authorising legislation	*Norfolk Island Act 1979*
Last day to disallow	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[2]
Rights	Adequate standard of living; social security; persons with disability
Status	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;[3]

(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;[4]

(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;[5] 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.[6]

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.[7] 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.[8] 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

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.[9] It requires States to facilitate access to rehabilitation, and provide reasonable accommodation to persons with disabilities in the workplace.[10] 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.[11] 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.

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].

Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents 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]

Education Legislation Amendment (2020 Measures No. 1) Bill 2020[2]

Purpose	This bill seeks to amend various Acts in relation to higher education and vocational education and training to: • extend the unique student identifier (USI) regime to all higher education students by requiring students commencing from 1 January 2021, and all students from 1 January 2023, to have a USI in order to be eligible for Commonwealth assistance; • clarify that a student's HELP balance is taken to be reduced immediately after the census date for HECS-HELP assistance, FEE-HELP assistance and VET FEE-HELP assistance, and immediately after the census day for VET student loans; • provide undergraduate students seeking FEE-HELP loans with an exemption from the requirement to pay the 25 per cent loan fee for units of study with census dates from 1 April to 30 September 2020; and • make minor technical amendments
Portfolio	Education
Introduced	House of Representatives, 11 June 2020

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, Education Legislation Amendment (2020 Measures No. 1) Bill 2020, *Report 10 of 2020*; [2020] AUPJCHR 128.

	Passed both Houses on 18 June 2020
Rights	Education
Status	Concluded examination

2.3 The committee requested a response from the minister in relation to the bill in *Report 8 of 2020*.[3]

Unique student identifier

2.4 Schedule 1 of the bill would amend the *Higher Education Support Act 2003* to provide that, all new higher education students commencing study from 1 January 2021, and all students (including existing students) from 1 January 2023, are required to have a unique student identifier (USI) in order to be eligible for Commonwealth assistance.[4] The bill would also amend the *VET Student Loans Act 2016* to provide that all applications for VET student loans made on or after 1 January 2021 must include a student's USI.[5]

Summary of initial assessment

Preliminary international human rights legal advice

Right to education

2.5 As noted, the bill would require that higher education students and VET student loan students must obtain a USI, an identifying indicator which is designed to remain with a person for life, in order to qualify for a Commonwealth supported education place. The bill does not provide for any exemption to be made for students who do not wish to obtain a USI, for example due to privacy concerns.[6] Given that the lack of a USI would appear to bar a student from obtaining Commonwealth financial assistance in order to undertake further education, this appears to engage

3 Parliamentary Joint Committee on Human Rights, Report 8 of 2020 (1 July 2020), pp. 28-31.

4 Schedule 1, items 1-4. Commonwealth assistance includes FEE-HELP, OS-HELP, and SA-HELP. FEE-HELP is a loan available to Commonwealth supported students to pay for all or part of the tuition fees association with higher education studies. OS-HELP is a loan to assist students enrolled in a Commonwealth supported place who study some of their course overseas. SA-HELP is a loan to pay for all or part of the student services and amenities fee charged by a higher education provider.

5 Schedule 1, items 6-7.

6 Applying for a USI requires the provision of personal information to the USI Registry System. This engages the right to privacy, as guaranteed under article 17 of the International Covenant on Civil and Political Rights. This is not identified in the statement of compatibility. This entry does not discuss the engagement of this right, noting the privacy protections set out in the *Student Identifiers Act 2014*, Student Identifiers Regulation 2014, and the *Privacy Act 1988*.

and may limit the right to education, as recognised in the statement of compatibility.[7]

2.6 The right to education is guaranteed by article 13 of the International Covenant on Economic, Social and Cultural Rights, which provides that higher education shall be made equally accessible to all, in particular by the progressive introduction of free education.[8] States have a duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of the right to education.[9] The measures in this bill, which would, in future, deny Commonwealth financial assistance to undertake further education to students without a USI, may constitute a retrogressive measure with respect to the obligation to progressively introduce free education. Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.[10]

2.7 With respect to the objective of the proposed measure, the statement of compatibility explains that the requirement that all higher education students have a USI will enable the government to de-commission the Commonwealth Higher Education Student Support Number (CHESSN), a government-issued identifier for Commonwealth-supported students.[11] It also states that these amendments will promote the right to education because having a USI which can track a student's entire tertiary education journey will strengthen the integrity and richness of data available in order to inform policy development and program delivery.[12] However, it is not clear that these would constitute legitimate objectives for the purposes of human rights law. 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 convenient. The statement of compatibility explains that this measure will facilitate the de-commissioning of the CHESSN. However, administrative convenience, in and of itself, is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights law. Further, while the statement of compatibility explains that a USI

7 Statement of compatibility, pp. 7-8.

8 See, article 13(2)(c).

9 See, UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999).

10 See, for example, UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999) [44]-[45].

11 Statement of compatibility, p. 7. The CHESSN is a unique personal identification number allocated to Commonwealth supported students as part of their first application or enrolment process. It is intended that students should have one CHESSN for the duration of their studies. The identifier is used to help monitor and manage Commonwealth assistance.

12 Statement of compatibility, pp. 7-8.

regime will enable the government to better inform policy development and program delivery by tracking a student's progress through all their tertiary studies, it is not clear that this is not already possible through the use of data associated with a CHESSN, which is designed to remain with students for the duration of their studies, or by other means.

2.8 It is also unclear whether this measure would constitute a proportionate limit on the right to education. The statement of compatibility notes that these measures may limit the right to education by requiring all students to have a USI before they can access Commonwealth assistance. However it states that any barriers are limited, as the process for applying for a USI is simple and free.[13] It also highlights that existing higher education students will have until 1 January 2023 to obtain a USI, giving them ample time to do so.[14] These are relevant considerations; however in assessing proportionality it is necessary to consider whether a proposed measure seeks to impose a blanket rule, or whether it provides flexibility to treat different cases differently. While the explanatory materials appear to anticipate that an exemption from the requirement to obtain a USI may apply,[15] the bill itself does not provide any avenue for students to request an exemption. By way of comparison, students completing a VET course are currently able to request an exemption from the requirement to possess a USI where they provide the details of a genuine personal objection to being assigned a student identifier.[16] It may be that such an exemption with respect to the measures in this bill will be contained in a legislative instrument, however no such information has been provided.

2.9 Further information is required in order to assess the compatibility of the measure with the right to education, and in particular:

(a) whether the requirement that higher education students obtain a USI in order to be eligible for Commonwealth assistance pursues a legitimate objective that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right to education; and

(b) whether any exemption from the requirement that higher education or VET students must possess a USI before they may receive Commonwealth financial assistance will apply, and if so, the details of any such exemption.

13 Statement of compatibility, p. 7.

14 Statement of compatibility, p. 7.

15 See, statement of compatibility, p. 6; and explanatory memorandum, p. 11.

16 Student Identifiers (Exemptions) Instrument 2018, section 8.

Committee's initial view

2.10 The committee noted that the extension of the USI regime may engage and limit the right to education but considered that, based on the information provided in the statement of compatibility, the measure appears to provide a proper administrative basis for the USI.

2.11 In order to assess the compatibility of this measure with the right to education, the committee sought the minister's advice as to the matters set out at paragraph [2.9].

Minister's response[17]

2.12 The minister advised:

> The Act mandates that new higher education and VET students commencing studies from 1 January 2021, and all higher education students from 1 January 2023, must obtain a USI in order to be eligible for Commonwealth financial assistance. This means that students will not be able to use the Commonwealth Higher Education Loan Program (HELP) or VET Student Loans (VSL) schemes to pay for their studies if they do not have a USI. However, crucially, students will still be able to study at higher education and VET providers if they do not have a USI–they will simply need to pay their tuition fees up front. Whilst this requirement does place some limitations on the ability for students to study (as some students may not be able to afford to pay their tuition fees up front), these limitations are reasonable, necessary and proportionate to achieve the legitimate policy objectives of the Act.
>
> There are currently two Government-issued student identifiers in the tertiary education sector: the student identifier in the VET sector, and the Commonwealth Higher Education Student Support Number (CHESSN) in the higher education sector. The Act will facilitate the provision of a single student identifier to each student that will record a student's entire tertiary education journey by expanding the student identifier to higher education.
>
> The amendments in the Act mirror the current requirement that a student be assigned a CHESSN in order to access Commonwealth financial assistance. Rationalising the number of student identifiers in tertiary education from two to one will reduce red tape for students and providers, and will ensure a seamless journey for students in the tertiary education sector.

17 The minister's response to the committee's inquiries was received on 17 July 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Further, there are limited barriers impeding a student from obtaining a USI and, in turn, accessing Commonwealth assistance, as the process for applying for a USI is simple, and there is no associated cost for applicants. Existing students will also have ample time between the commencement of the Act and 1 January 2023 to ensure that they have applied for, and obtained, a USI. Further, when necessary, higher education providers, Tertiary Admission Centres and the Australian Government Department of Education, Skills and Employment may also assist a student by applying for a USI on behalf of the student (with consent from the student).

To the extent the Act limits the right to education, these limits are justifiable as they are reasonable, necessary and proportionate to achieving the legitimate objectives of the Act described above.

Exemption from the requirement that higher education or VET students must possess a USI before they may receive Commonwealth financial assistance

The Committee requested clarification on whether any exemption from the requirement to possess a USI prior to receiving Commonwealth financial assistance would be granted.

Under section 53 and section 53A of the *Student Identifiers Act 2014*, the Student Identifiers Registrar may grant an exemption to the requirement to hold a student identifier if an 'issue' applies. The effect of this provision is that student may apply to the Registrar for an exemption. Approval of an application for an exemption would allow a student to receive their VET statement of attainment, or higher education award, in the absence of a student identifier.

However, this exemption does not extend to an application for financial assistance under the *Higher Education Support Act 2003* or the *VET Student Loans Act 2016*. This is to ensure that the legitimate objectives described in response to the Committee's first question (set out above) are achieved.

It is important to note that in 2019, less than 20 students applied to the Registrar for an exemption to the requirement to hold a USI, and all applications were granted. As such, it is expected that only a very small number of students would seek to apply for an exemption from the requirement to have a USI, and these students would still be able to study and obtain a VET statement of attainment or higher education award.

Concluding comments

International human rights legal advice

Right to education

2.13 In relation to the objective of the measure, the minister advised that introducing a single USI, and de-commissioning the CHESSN and VET student identifier, will reduce red tape for students and providers in the tertiary education

sector. This reflects information contained in the statement of compatibility, which also noted that introducing a single USI for higher education students will enable the government to better inform policy development and program delivery by tracking a student's progress through all their tertiary studies.

2.14 As noted in the initial analysis, 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 convenient. From the information provided, it remains unclear as to whether the introduction of a mandatory USI for all higher education students would address a pressing or substantial concern. While the minister advised that this measure will facilitate the decommissioning of two existing student identifiers, administrative convenience is unlikely to be sufficient to constitute a legitimate objective for the purposes of human rights law. Further, it is not clear how a USI regime will enable the government to better inform policy development and program delivery by tracking a student's progress through all their tertiary studies, in a manner which is not already possible through the use of data associated with a CHESSN, which is designed to remain with students for the duration of their studies, or by other means.

2.15 Further information was also sought with respect to the proportionality of the proposed measures, namely whether any exemption from the requirement that higher education or VET students must possess a USI before they may receive Commonwealth financial assistance will apply. The minister advised that, while an exemption could be sought in order to receive a VET statement of attainment or higher education award in the absence of a student identifier, no exemption would be provided to an application for financial assistance under the *Higher Education Support Act 2003* or the *VET Student Loans Act 2016*. This minister advised that this is to ensure that the legitimate objectives of the measure are achieved, and noted that there are limited barriers impeding a student from obtaining a USI, which is a simple and free process. It is useful that the process to obtain a USI itself would appear to be straightforward, and would not itself constitute a barrier for students. However, it is the capacity to seek an exemption from this requirement, and to treat different cases differently, which is relevant in assessing the proportionality of the measure. There may be many reasons why a student may wish to seek an exemption from the requirement to have a single identifier which tracks their progress through all their tertiary studies, including, for example, victims of domestic violence who may not want their personal information included in such a centralised way. It is not clear, from the information provided, why no exemption is established with respect to an application for financial assistance. The minister noted that 20 students sought an exemption from the requirement to obtain a USI with respect to receiving a VET statement of attainment or higher education award in 2019, and advised that all these requests were granted. This would appear to indicate that the existing exemption provision is being utilised, and would not be unduly burdensome to administer.

2.16 The measures in this bill would, in future, deny Commonwealth financial assistance to undertake further education to students without a USI. The minister advised that students will still be able to study at higher education and VET providers if they do not have a USI, they will 'simply need to pay their tuition fees up front'. However, it is noted that many higher education fees may be prohibitively expensive for a large number of students. In such instances, the measure may constitute a retrogressive measure with respect to the obligation to progressively introduce free education. While retrogressive measures may be permissible under international human rights law, they must address a legitimate objective, and constitute a proportionate way to achieve that objective. However, as set out above, it is not clear that these measures seek to achieve a pressing and substantial concern such as to constitute a legitimate objective for the purposes of human rights law, or constitute a proportionate limit on the right to education.

Committee view

2.17 The committee thanks the minister for this response. The committee notes that this bill requires that new higher education and VET students commencing studies from 1 January 2021, and all higher education students from 1 January 2023, must obtain a unique student identifier (USI) in order to be eligible for Commonwealth financial assistance.

2.18 The committee notes that the extension of the USI regime may engage and limit the right to education, which provides that higher education shall be made equally accessible to all, in particular by the progressive introduction of free education. The committee notes that, as a person without a USI would not be able to apply for Commonwealth financial assistance under this measure, this may constitute a retrogressive measure with respect to the obligation to progressively introduce free education. Retrogressive measures may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

2.19 The committee notes the minister's response and the legal advice and considers that the measure establishes a proper administrative basis for the USI but that it is not clear that the proposed expansion of the USI scheme seeks to achieve a legitimate objective for the purposes of human rights, being one which addresses a pressing or substantial concern.

2.20 The committee considers that the lack of an exemption from the requirement for all students seeking Commonwealth financial assistance to obtain a USI means that these measures may not constitute a proportionate limitation on the right to education.

2.21 The committee considers that the proportionality of this measure would be assisted if the legislation were amended to establish an exemption from the requirement to obtain a USI in order to apply for Commonwealth financial assistance.

2.22 The committee draws these human rights concerns to the attention of the minister.

National Disability Insurance Scheme Amendment (Strengthening Banning Orders) Bill 2020[1]

Purpose	This bill seeks to amend the *National Disability Insurance Scheme Act 2013* to broaden the circumstances in which the National Disability Insurance Scheme (NDIS) Commissioner may make a banning order against an NDIS provider or other person
Portfolio	National Disability Insurance Scheme
Introduced	House of Representatives, 12 June 2020
Rights	Persons with disability; privacy
Status	Concluded examination

2.23 The committee requested a response from the minister in relation to the bill in *Report 8 of 2020*.[2]

Publication of personal information on NDIS Provider Register

2.24 The *National Disability Insurance Scheme Act 2013* (NDIS Act) currently provides that the National Disability Insurance Scheme Quality and Safeguards Commissioner (Commissioner) can make a banning order prohibiting or restricting specified activities by National Disability Insurance Scheme (NDIS) providers and persons currently employed or engaged by a NDIS provider.

2.25 This bill seeks to broaden the circumstances in which the Commissioner may make a banning order, so as to allow an order to be made:

- in relation to a person no longer employed or engaged by an NDIS provider,[3] and to provide that the banning order will remain in force despite a person ceasing to deliver NDIS services;[4] and
- proactively by the Commissioner where the person has not previously been employed or otherwise engaged by an NDIS provider, or not been an NDIS

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme Amendment (Strengthening Banning Orders) Bill 2020, *Report 10 of 2020*; [2020] AUPJCHR 129.

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2020* (1 July 2020), pp. 32-36.

3 Schedule 1, item 2.

4 Schedule 1, item 4, proposed subsection 73ZN(5A)

provider themselves, and the Commissioner reasonably believes that the person is not suitable to be so involved.[5]

2.26 In addition, the NDIS Act currently provides that the NDIS Provider Register (Register) must include the name of persons who are, or were, NDIS providers and set out any information about banning orders made against such persons. The bill proposes expanding this to allow the Register to include information in relation to individual employees of NDIS providers who have had banning orders made against them. The information included may include the person's name, their Australian Business Number (if any), information about the banning order and any other matter prescribed by the NDIS Rules.[6]

Summary of initial assessment

Preliminary international human rights legal advice

Rights of persons with disabilities and right to privacy

2.27 As this legislation is designed to expand the NDIS Commissioner's powers to allow a banning order to be made against a person who may pose a risk of harm to people with disabilities, to prevent them from entering or re-entering the NDIS sector, it appears to promote the rights of persons with disabilities. The right to be free from all forms of violence, abuse and exploitation is enshrined in article 16 of the Convention on the Rights of Persons with Disabilities, which requires that State parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse.[7] As the statement of compatibility notes, this recognises that some NDIS participants are amongst the most vulnerable people in the community, and these changes could promote the rights of such people with disability to live free from abuse, violence, neglect and exploitation.[8]

2.28 However, publishing on a public website the personal details of employees who are subject to a banning order is also likely to limit the right to privacy, as such data contains personal reputational information that may affect an individual's ability to get employment in other, unrelated sectors. The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation. It includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and

5 Schedule 1, item 3 proposed subsection 73ZN(2A).

6 Schedule 1, item 5, proposed subsection 73ZS(5A).

7 Convention on the Rights of Persons with Disabilities. Article 16(1).

8 Statement of compatibility, p. 5.

sharing of such information. It also includes the right to control the dissemination of information about one's private life.[9]

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

2.30 Minimising the risk of banned individuals working with people with disability is a legitimate objective for the purposes of international human rights law, and making such information publicly accessible is likely to be effective to achieve (that is, rationally connected to) that objective. However, it is not clear that the inclusion of this personal information on a public website would be a proportionate means of achieving that objective.

2.31 The initial analysis stated further information was required in order to assess the proportionality of the measure in relation to the right to privacy, in particular:

- why the bill allows the NDIS Provider Register to include any 'information about the banning order', without any restriction on the level of detail that will be included;
- why it is necessary to list the names of current and former employees of NDIS providers who are subject to a banning order on a public website, and whether there are other less rights-restrictive means to achieve the stated objective (for example, allowing the Register to be accessed on request); and
- when is such information included in the Register and what safeguards are in place to ensure that an individual's right to privacy is adequately protected pending any review of a banning order decision.

Committee's initial view

2.32 The committee considered that the bill, which is designed to help prevent the violence, abuse, neglect and exploitation of persons with disabilities, promotes and protects the rights of persons with disabilities. However, publishing on a public website the details of employees who have been banned also engages and limits the right to privacy. However, this may be a permissible limitation if it is shown to be reasonable, necessary and proportionate.

2.33 In order to fully assess the compatibility of this measure with right to privacy, the committee sought the minister's advice as to the matters set out at paragraph [2.31].

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

Minister's response[10]

2.34 The minister advised:

> The practical effectiveness of a banning order relies on appropriate publication of information about the banned provider or worker on a register accessible to the public. People with disability are a vulnerable cohort and only a public register provides sufficient visibility to ensure people with disability are informed of the risks associated with certain providers and individuals.
>
> The NDIS Provider Register is generally publically available, and people with disability and their representatives can search to ensure that particular providers or workers are not subject to banning orders. It will also be a tool for providers looking to employ workers to ensure the employees they recruit are safe to work with people with disability and provide NDIS services.
>
> Publishing information authorised by rules may impact a person's privacy. However, the overarching aim of a banning order is to protect persons with disability, noting that there must be an objective basis for making the order, and some impact on privacy is necessary. The rules are disallowable and open to scrutiny by the Australian parliament.
>
> The publication of the NDIS Provider Register is discretionary, although the rules prevent the Commissioner from publishing information that is considered contrary to the public interest or to the interests of persons with disability receiving supports or services.
>
> In deciding what is to be published, the Commissioner is guided by the principles underlying the provisions in the NDIS Act that preclude the inappropriate disclosure of personal or otherwise sensitive information, as well as privacy legislation. These provisions place appropriate limitations on the Commissioner's discretion to include personal information on the register.
>
> The matters included in the NDIS Provider Register do not, and will not under the Bill, extend to any highly sensitive information about the person subject to the banning order. However, a high level of flexibility in relation to the NDIS Provider Register is necessary to support the exercise of choice and control by people with disability in response to the developing NDIS market. In this case, the flexibility of enabling additional matters to be prescribed by the rules will allow the Commissioner to respond if situations arise where the person's name and ABN (if any) are insufficient to adequately and accurately identify the person. Any matters prescribed

10 The minister's response to the committee's inquiries was received on 21 July 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

would be directed to factors which would avoid confusing the person with someone else, such as the location, nature of services or manner of operation.

As a request for an internal review does not affect the operation of the banning order. It would not be in keeping with the protective function of a banning order to remove the name of the banned provider or worker from the NDIS Provider Register. Rather, a notification on the register that the decision is under review could be included.

For the reasons outlined above, it is important for the NDIS Commissioner to have flexibility in relation to the information to be published on the register. Given this, I do not consider it appropriate to include prescription around such information in the primary legislation.

Concluding comments

International human rights legal advice

Right to privacy

2.35 The minister stated that the practical effectiveness of a banning order relies on appropriate publication of information, which is accessible to the public. The minister stated that people with disability are a vulnerable cohort and only a public register provides sufficient visibility to ensure people with disability are informed of the risks associated with certain providers and individuals. The minister noted that, although the bill allows the NDIS Provider Register to include any 'information about the banning order', without any restriction on the level of detail that will be included, the Commissioner's discretion to include personal information on the register would be limited as the Commissioner would be guided by the principles underlying the NDIS Act which preclude the inappropriate disclosure of personal or otherwise sensitive information, and by privacy legislation. The minister also advised that the bill will provide flexibility, enabling additional matters to be prescribed by the rules which would allow the Commissioner to provide further information about a provider or worker where their name and other particulars would be insufficient to identify them. The minister noted that any such additional matters would be directed to factors which would avoid confusing the person with someone else, such as the location, nature of services or the manner of operation. The minister further advised that where a review of a banning order has been sought, this request does not affect the operation of the banning order, and that it would therefore be inappropriate to remove the name of a banned provider or worker from the Register in such circumstances. Rather, the minister stated, a notification on the Register that a decision is under review could be included.

2.36 The measures which the minister has outlined could serve to provide some safeguards with respect to the right to privacy. For example, where a person had sought a review of a banning order, and a notice of this was placed on the register,

this may assist somewhat in protecting that person's right to privacy, which includes the right to reputation.[11]

2.37 However, it is not clear that making such information about a banning order available on a public website would constitute the least rights restrictive way of achieving the objective of protecting people with disabilities. As noted in the initial analysis, there may be other methods by which an employer or person with disability could determine whether a person is subject to a banning order, or otherwise cleared to work with persons with disability, rather than publishing those details on a public website. For example, where a provider (rather than an employee of a provider) is subject to a banning order, it would be possible to instead identify if the provider is registered, noting that those that are subject to a banning order would not be registered. In relation to employees of a provider, if it is necessary to advise if a person is subject to a banning order, it may be possible to make the register available on request, for example by contacting the NDIS Quality and Safeguards Commission, rather than being publicly available by default. For NDIS providers who are seeking to employ individuals, the provider would need to screen applicants for suitability, and at that point any relevant banning orders would be made available to the provider as part of the screening process.[12]

2.38 In conclusion, as stated in the initial analysis, this measure, in seeking to protect people with disability from harm, appears to promote the rights of persons with disabilities.[13] However, publishing on a public website the personal details of employees who are subject to banning orders also limits the right to privacy,[14] as such data contains personal reputational information that may affect an individual's abilities to get employment in other, unrelated sectors (noting that an internet search of the person's name would bring up search results in relation to the banning order). The right to privacy may be subject to limitations that seek to achieve a legitimate objective, are rationally connected to that objective and proportionate. Minimising the risk of banned individuals working with people with disability is a legitimate objective for the purposes of international human rights law, and making such information publicly accessible is likely to be rationally connected to that objective. However, in assessing the proportionality of the measure it is necessary to consider whether there are other less rights restrictive ways to achieve the same

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

12 National Disability Insurance Scheme (Practice Standards—Worker Screening) Rules 2018, section 11. The NDIS Quality and Safeguards Commission notes that a national NDIS Worker Screening Database will soon be established, and that registered providers will have access, as will self-managed NDIS participants and unregistered providers on application. See, 'NDIS Worker Screening Check' https://www.ndiscommission.gov.au/about/ndis-worker-screening-check [Accessed 14 August 2020].

13 Convention on the Rights of Persons with Disabilities.

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

aim. In this case, it would appear that there would be other, equally accessible ways, for a person with disability to determine whether a person seeking employment was appropriately registered. In determining proportionality it is also important to consider if there are any safeguards in place to mitigate the impact on rights, and in this case, the safeguards appear limited as the rules may allow for 'any information about the banning order' to be included on the Register, and information about the banning order would be included on the Register immediately, regardless of whether the decision is subject to review. As such, it would appear that the proposed measure does not constitute a permissible limitation on the right to privacy.

Committee view

2.39 The committee thanks the minister for this response. The committee notes that this bill broadens the circumstances in which the NDIS Quality and Safeguards Commissioner (Commissioner) may make a banning order against an NDIS provider or other person, and would allow the names of current and former employees of NDIS providers who are subject to a banning order to be listed on a public website.

2.40 The committee considers that the bill, which is designed to help prevent the violence, abuse, neglect and exploitation of persons with disabilities, promotes and protects the rights of persons with disabilities. The committee notes that some NDIS participants are amongst the most vulnerable people in the community, and broadening the circumstances in which a banning order can be made promotes the rights of such people with disability to live free from abuse, violence, neglect and exploitation. In particular, the committee notes the bill remedies the current shortfalls in the law being that the Commissioner does not have the power to issue a banning order against a person who is no longer employed or engaged by an NDIS provider or the power to make a pre-emptive banning order against a person (whether an individual or otherwise) who has been identified as unsuitable to work with people with disability as a result of their actions in another field, such as aged care.

2.41 The committee notes the minister's advice that the practical effectiveness of a banning order relies on appropriate publication of information about the banned provider or worker on a register accessible to the public. The committee notes that publishing on a public website the details of employees who have been banned also engages and limits the right to privacy. This right may be permissibly limited if it is shown to be reasonable, necessary and proportionate.

2.42 The committee considers that minimising the risk of banned individuals working with people with disability is clearly a legitimate objective, and making such information publicly accessible is rationally connected to that objective.

2.43 The committee notes the legal advice that in assessing the proportionality of the measure it is necessary to consider whether there are other less rights restrictive ways to achieve the same aim.

2.44 The committee, however, respectfully disagrees that it is appropriate to impose additional barriers on people with disability seeking to access information about banned providers or employers, given the critical importance of protecting people with disability from abuse, violence, neglect or exploitation. If people with disability were required, for instance, to contact the NDIS Quality and Safeguards Commission in order to obtain information about banned providers or employees, the committee considers this would impose an unacceptable additional administrative burden on people with disabilities, their families and carers such that it may give rise to a real risk that people with disability may inadvertently engage a banned provider or employee.

2.45 Accordingly, we have concluded that the measure constitutes a proportionate limit on the right to privacy. In reaching this view, we appreciate that this involves balancing the competing rights of persons with disability with the right of privacy but that protecting people with disability from abuse, violence, neglect or exploitation, including conduct so serious that it may result in the permanent injury or death of a person with disability, is of paramount importance.

Senator the Hon Sarah Henderson

Chair