

## 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.<sup>1</sup>

### Age Discrimination Regulations 2020 [F2020L01138]<sup>2</sup>

<b>Purpose</b>	This instrument prescribes particular regulations and provisions of regulations as exemptions from the <i>Age Discrimination Act 2004</i> .
<b>Portfolio</b>	Attorney-General
<b>Authorising legislation</b>	<i>Age Discrimination Act 2004</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 6 October 2020). Notice of motion to disallow must be given by 30 November 2020 in the House of Representatives and the first sitting day of 2021 in the Senate <sup>3</sup>
<b>Rights</b>	Equality and non-discrimination; right to work
<b>Status</b>	Concluded examination

2.3 The committee requested a response from the minister in relation to the bill in [Report 12 of 2020](#).<sup>4</sup>

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- 1 See [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](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, Age Discrimination Regulations 2020 [F2020L01138], *Report 14 of 2020*; [2020] AUPJCHR 176.
  - 3 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.
  - 4 Parliamentary Joint Committee on Human Rights, *Report 12 of 2020* (15 October 2020), pp. 2-5.

## **Exemptions from the Age Discrimination Act 2004**

2.4 The *Age Discrimination Act 2004* (the Age Discrimination Act) makes it unlawful to discriminate against someone on the ground of age in respect of a number of areas (including employment and the provision of goods and services).<sup>5</sup> The Age Discrimination Act sets out that an act will not be unlawful if it is done in compliance with certain listed legislation.<sup>6</sup> This includes 'prescribed regulations made under the *Airports Act 1996*' and 'prescribed provisions' of 'Regulations made under the *Defence Act 1903*'.<sup>7</sup> This instrument prescribes these exemptions.<sup>8</sup> In particular, it prescribes the entirety of the *Airports (Control of On-Airport Activities) Regulations 1997*, which deals with control of liquor, commercial trading, vehicles, gambling, smoking and infringement notices at airports. It also prescribes section 23 of the *Defence Regulation 2016*, which specifies a compulsory retirement age for certain members, and section 88, which provides that those covered under the previous regulations are also subject to the compulsory retirement age.<sup>9</sup> This instrument ensures that anything done by a person in direct compliance with these prescribed regulations will not constitute unlawful age discrimination.

### **Summary of initial assessment**

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

##### *Right to equality and non-discrimination and right to work*

2.5 Insofar as the instrument prescribes exemptions from the Age Discrimination Act, it engages and appears to limit the right to equality and non-discrimination, on the basis of age, as well as the right to work. By prescribing exemptions, the instrument has the effect of permitting discrimination on the grounds of age in certain circumstances, such as depriving certain members of the defence force the right to work when they reach their retirement age (listed as 60 years of age for most members of the Permanent Forces).<sup>10</sup> 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.<sup>11</sup> The right to equality

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5 *Age Discrimination Act 2004*, Part 4.

6 *Age Discrimination Act 2004*, section 39.

7 *Age Discrimination Act 2004*, Schedule 1, item 8 and Schedule 2, item 3AA.

8 Section 5.

9 *Defence Regulation 2016*, sections 23 and 88.

10 Subsection 5(2); *Defence Regulation 2016*, sections 23.

11 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.

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>12</sup> The right to work must be made available in a non-discriminatory way and includes a right not to be unfairly deprived of work.<sup>13</sup> While age is not specifically listed as a prohibited ground of discrimination under article 26 of the International Covenant on Civil and Political Rights, the United Nations Human Rights Committee has stated that 'distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of "other status" under [article 26]...or to a denial of the equal protection of the law within the meaning of the first sentence of article 26'.<sup>14</sup>

2.6 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. Mandatory retirement ages do not necessarily constitute age discrimination if justified on reasonable and objective grounds, in pursuit of a legitimate objective.<sup>15</sup>

2.7 In order to assess the compatibility of this instrument with the right to equality and non-discrimination and the right to work, further information is required as to:

- (a) what is the objective and effect of prescribing the entirety of the *Airports (Control of On-Airport Activities) Regulations 1997* as exempt from the Age Discrimination Act;
- (b) what is the objective of prescribing sections 23 and 88 of the *Defence Regulation 2016* as exempt from the Age Discrimination Act, and the objective behind the compulsory retirement age; and

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

13 International Covenant on Economic, Social and Cultural Rights, articles 2(1), 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

14 *Love v Australia*, United Nations Human Rights Committee Communication No. 983/2001 (2003) [8.2].

15 *Love v Australia*, United Nations Human Rights Committee Communication No. 983/2001 (2003). The Committee on Economic, Social and Cultural Rights has stated that while mandatory retirement ages may still be tolerated under international human rights law, 'there is a clear trend towards the elimination of such barriers' and 'States parties should seek to expedite this trend to the greatest extent possible': see United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 6: The economic, social and cultural rights of older persons* (1995) [12].

- (c) whether providing such exemptions is a proportionate limit on the rights to equality and non-discrimination and work, and in particular, are there any less restrictive ways to achieve the stated objective, and are there any safeguards in place to protect these rights.

### **Committee's initial view**

2.8 The committee noted that this instrument engages and may limit the right to equality and non-discrimination, specifically on the ground of age, and the right to work. Differential treatment on the basis of age may not be unlawful discrimination if it is shown to be justified on reasonable and objective grounds, in pursuit of a legitimate objective. It is unclear whether the exemptions from the discrimination provisions in the Age Discrimination Act pursue a legitimate objective and are proportionate to that objective.

2.9 In order to form a concluded view of the human rights implications of this instrument, the committee sought the minister's advice as to the matters set out at paragraph [2.7].

2.10 The full initial analysis is set out in [Report 12 of 2020](#).

### **Attorney-General's response<sup>16</sup>**

2.11 The Attorney-General advised:

***(a) What is the objective and effect of prescribing the entirety of the Airports (Control of On-Airport Activities) Regulations 1997 as exempt from the Age Discrimination Act (ADA)?***

Subsection 39(1) of the ADA provides that any acts done in direct compliance with an Act or regulation mentioned or covered in Schedule 1 is exempt from the application of Part 4 of the ADA, resulting in that act not being unlawful age discrimination. This acknowledges that there are often sound policy reasons for the use of age-based criteria in a Commonwealth law or program.

The Age Discrimination Regulations 2020 provide that, for the purposes of item 8 of the table in Schedule 1 to the Act, the Airports (Control of On-Airport Activities) Regulations 1997 (Airport Regulations) are prescribed. The result is that any acts done in direct compliance with the Airport Regulations will not be unlawful age discrimination under Part 4 of the ADA.

The objective of prescribing the Airport Regulations is to ensure that age based restrictions that apply in the wider community to the range of

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16 The minister's response to the committee's inquiries was received on 12 November 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](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports).

matters covered by the Airport Regulations can be matched in the airports to which the Airport Regulations apply.

The Airport Regulations provide the Department of Infrastructure, Transport, Regional Development and Communications with regulatory responsibility for certain matters at federally-leased airports in New South Wales (NSW) - namely (Sydney (Kingsford-Smith), Bankstown and Camden Airports). Matters covered by the Airport Regulations include the sale and supply of liquor, and the regulation of gambling, smoking and vehicle use on airports. The Airport Regulations were considered necessary at the time of privatisation of airports in Australia, as constitutional issues associated with the NSW liquor licencing regime at the time prevented the Australian Government from handing over certain responsibilities to the NSW Government. These constitutional issues have been resolved.

It is intended that these responsibilities (and specifically the responsibility for liquor licencing) will be transferred to NSW in relation to NSW airports.

The Airport Regulations are due to sunset in 2024. Work commenced earlier this year on the review and options for sunseting but was put on a temporary hold due to the COVID-19 pandemic. The sunseting work will continue in 2021. The sunseting review will examine the consequences of transferring responsibility for airport activities to NSW, including the removal of the exemption in the Age Discrimination Regulations.

***(b) what is the objective of prescribing sections 23 and 88 of the Defence Regulation 2016 as exempt from the Age Discrimination Act, and the objective behind the compulsory retirement age?***

In acknowledgement that there are often sound policy reasons for the use of age-based criteria in a Commonwealth law or program, subsection 39(1A) of the ADA provides that any acts done in direct compliance with a provision of an Act or regulation mentioned or covered in Schedule 2 is exempt from the application of Part 4 of the ADA, resulting in that act not being unlawful age discrimination. Provisions are included in Schedule 2 where an exemption is warranted, but where it is not necessary or appropriate to exempt the complete Act, regulation or instrument that contains the provision.

The Age Discrimination Regulations 2020 provide, as per section 5, that for the purposes of item 3AA of the table in Schedule 2 to the Act, sections 23 and 88 of the Defence Regulation 2016 (Defence Regulation) are prescribed.

Section 23 of the Defence Regulation provides for a member's retirement age. Subsection 23(3) provides there is no retirement age for an Admiral of the Fleet, a Field Marshal or a Marshal of the Royal Australian Air Force. Subsection 23(4) provides a retirement age for the following members: (a) for a member of the Permanent Forces who holds the rank of Admiral, General or Air Chief Marshal-63 years of age; (b) for any other member of

the Permanent Forces-60 years of age; (c) for a member of the Reserves-65 years of age.

Section 88 of the Defence Regulation forms part of the broader transitional provisions to deal with processes begun under the Defence (Personnel Regulations) 2002 (DPR 2002) before their repeal, and deals specifically with transitional retirement age provisions.

Subsection 88 provides that: Australian Defence Force (ADF) members who had a different retirement age under the DPR 2002 may retain that retirement age upon commencement of Defence Regulation 2016; an ADF member who was able to make an election in relation to their retirement age under the DPR 2002 may make such an election as if those regulations had not been repealed; the Chief of the Defence Force may revoke an extension of a compulsory retirement age made under the DPR 2002, with the effect that the extension is determined to have been revoked before the repeal of those regulations.

Service in the Defence Force is arduous, and there are much higher demands on Defence Force members' medical and physical fitness than members of the general population. Retaining Defence Force members at less than optimal fitness results in increased risks both to the individual member and to others, including in both training and operational environments.

An inherent requirement of service in the Defence Force is that a member is fit for duty and can be deployed at short notice without limitations. The realities of aging mean that, as members of the Defence Force become older, they also become less likely to be able to meet the required medical and fitness standards that must apply to Defence Force members. This is not to say that every individual who reaches retirement age is unable to meet the necessary medical and physical fitness requirements, but fewer and fewer members can do so as they approach and pass retirement age. Older Defence Force members represent invaluable years of experience.

However, this is balanced against increased costs associated greater healthcare requirements and ensuring that older members have the requisite health and fitness standards.

One way this risk is managed in Defence is to increase the required frequency of periodic medical examinations as Defence Force members get older (this policy is currently included in the internal Defence document: Defence Health Manual, Volume 2). Retirement age is another mechanism used to manage the increased risk. A decision to permit a member to serve beyond their retirement age under paragraph 23(2)(b) of the Defence Regulation is an acceptance of the risk in relation to a particular member. This is likely to be influenced by the particular characteristics of the member, including their occupational workgroup, medical and physical fitness.

Retirement ages for Defence Force members have increased over time. For example, amendments to the Defence (Personnel) Regulations 2002 in 2007 increased the retirement age for most members in the Permanent Forces from 55 years of age to 60 years of age. Section 88 of the Regulation provides a transitional provision for members who, under the Defence (Personnel) Regulations 2002, had a younger compulsory retirement age from an earlier iteration of the regulations.

***(c) whether providing such exemptions is a proportionate limit on the rights to equality and non-discrimination and work, and in particular, are there any less rights restrictive ways to achieve the stated objective, and are there any safeguards in place to protect these rights.***

#### Defence Force Regulations 2016

The concept of a compulsory retirement age in the Defence Force is a limitation on a person's right not to be discriminated against on the basis of age that is reasonable, necessary and proportionate in the circumstances.

The Defence Force's capability is dependent on the health and fitness of its members. Ensuring that Defence Force members are fit for duty and can be deployed at short notice without medical limitations is a legitimate purpose, and the retirement age in section 23 of the Defence Regulation is a necessary, reasonable and proportionate measure to achieve this.

The concept of a retirement age acts as an institutional milestone that restricts service beyond that age. It provides the ADF with fluent workforce planning and serves as an important capability management tool. That said, it does not guarantee that a member will be given an opportunity to serve to that age.

Subsection 12(5) of the Defence Regulation provides that appointment or enlistment may be for an indefinite period or for a specified period. Those appointed or enlisted for an indefinite, or open-ended, period will become subject to the retirement age provisions of section 23 of the Defence Regulation should their service not end on other grounds before that time. Members who are appointed or enlisted for a specified period will have their suitability for further service reviewed periodically in the context of Service need and ongoing operational capability requirements.

Defence's current preference is to continue to manage service beyond the regulated retirement ages by exception. It is open to any member approaching retirement age to apply to the Chief of the Defence Force (or their delegate) to serve beyond retirement age. The Chief of the Defence Force (or their delegate) may allow a member to serve beyond retirement age in order to fill a specific capability gap, subject to the member continuing to meet the inherent requirements of service, including those relating to medical and physical fitness.

Retirement age is a necessary and reasonable mechanism used to manage increased risks as member's age. The retirement ages in the Defence

Regulation represent a balance between the need to manage the risk of an aging Defence Force, with the need to not unfairly discriminate against people on the basis of age. The Defence Force retirement ages have increased over time, reflecting improvements in the average health and fitness of older people.

#### Airports (Control of On-Airport Activities) Regulations 1997

Discrimination on the basis of age in relation to the matters regulated by the Airport Regulations is a practical approach that mirrors Commonwealth and State age based laws restricting persons under the age of 18 from certain activities in relation to these matters.

Consideration will be given to removing the exemption for these regulations in the sunseting review process currently underway.

### **Concluding comments**

#### ***International human rights legal advice***

##### *Rights to equality and non-discrimination and work*

##### *Exemption of the Airports (Control of On-Airport Activities) Regulations 1997*

2.12 With respect to the *Airports (Control of On-Airport Activities) Regulations 1997* (the Airport Regulations), the Attorney-General has advised that the objective of exempting the Airport Regulations from the Age Discrimination Act is to ensure that the age based restrictions that apply in the wider community to the range of matters covered by the Airport Regulations can be matched in the airports to which the Airport Regulations apply. Matters include the sale and supply of liquor to minors, and the regulation of gambling, smoking and vehicle use on airports. The United Nations (UN) Committee on the Rights of the Child has consistently noted the harmful effects of alcohol and other illicit substances on children and recommended that States take appropriate measures to reduce access to and use of such substances by children, including by way of legislation prohibiting the sale and supply of alcohol to minors.<sup>17</sup> Such measures are considered by the Committee on the Rights of the Child to play an important role in realising other human rights, such as the right to health. The objective of applying age based restrictions in airports with respect to the sale and supply of alcohol to minors, and the regulation of gambling, smoking and vehicle use in airports, are likely to be legitimate objectives for the purpose of international human rights law. Exempting the specific provisions in the Airport Regulations which deal with the restriction of persons under the age of 18

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17 See Committee on the Rights of the Child, *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health* (2013) [65]; Committee on the Rights of the Child, *General comment No. 20 (2016) on the implementation on the rights of the child during adolescence* (2016) [40] and [64]; Committee on the Rights of the Child, *Concluding observations on the second periodic report of Nepal*, CRC/C/15/Add.261 (2005) [83]-[84].

from certain activities, such as sale and supply of liquor and tobacco, would appear to be rationally connected to that objective.

2.13 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider whether a proposed limitation is sufficiently circumscribed and whether any less rights restrictive alternatives could achieve the same stated objective. In assessing whether the measure is sufficiently circumscribed, a relevant consideration is whether it is necessary to exempt the Airport Regulations in its entirety (as opposed to the specific provisions that restrict persons under the age of 18 from certain activities). The Attorney-General has advised that the Airport Regulations are due to sunset in 2024 and as part of a sunset review, consideration will be given to removing the exemption for these regulations as well as the consequences of transferring responsibility for airport activities to New South Wales. While the Attorney-General has provided background information regarding the initial need to exempt the Airport Regulations in its entirety (due to constitutional issues that have now been resolved), it remains unclear why it is still necessary to exempt the entirety of the Airport Regulations. Questions therefore remain as to whether the measure is sufficiently circumscribed and the limitation on the right is only as extensive as is strictly necessary. As to whether there are less rights restrictive ways to achieve the objective, the Attorney-General has drawn attention to the fact that Schedule 2 of the Age Discrimination Act prescribes provisions of laws for which an exemption is warranted but where it is not necessary or appropriate to exempt the complete Act, regulation or instrument that contains the provision. It would appear that a less rights restrictive way of achieving the objective would be to exempt specific provisions as opposed to the entire Airport Regulations. As such, it does not appear to be a proportionate limit on the right to equality and non-discrimination to exempt the entirety of the Airport Regulations from the requirements of the Age Discrimination Act.

#### *Exemption of provisions of the Defence Regulations 2016*

2.14 With respect to the exemptions of sections 23 and 88 of the *Defence Regulations 2016*, the Attorney-General has advised that the objective of the mandatory retirement age measure is to manage the increased risks to members and to others that arise in training and operational environments with respect to older defence force members who may have less than optimal fitness. The Attorney-General has noted that it is an inherent requirement of service in the Defence Force that members are fit for duty and can be deployed at short notice without limitations. The Attorney-General has stated that older defence members are less likely to meet the required medical and fitness standards that apply to Defence Force members due to the realities of ageing. Ensuring that all members of the Defence Force are fit for duty and can be deployed at short notice without medical limitations would likely constitute a legitimate objective for the purposes of international human rights law. The mandatory retirement age would appear to be

rationality connected to this objective insofar as it would manage the risks to individual members and others associated with older defence members who may have less than optimal fitness.

2.15 In assessing the proportionality of the mandatory retirement age measure, it is relevant to consider whether any less rights restrictive alternatives could achieve the same stated objective and whether the measure provides sufficient flexibility to treat different cases differently. The Attorney-General acknowledged that not all individual members who reach retirement age are unable to meet the required medical and fitness standards. The Attorney-General has stated that two mechanisms are used to manage the risks posed by older members who may not meet the required medical and fitness standards. The first mechanism is increased frequency of required periodic medical examinations as Defence Force members get older. The second mechanism is the prescribed mandatory retirement age.

2.16 The Attorney-General has advised that it is open to any member approaching retirement age to apply to the Chief of the Defence Force (or their delegate) to serve beyond retirement age. A member may be allowed to serve beyond their retirement age in order to fill a specific capability gap, subject to meeting the inherent requirements of service, including medical and physical fitness standards.

2.17 As stated in the initial analysis, mandatory retirement ages do not necessarily constitute age discrimination if justified on reasonable and objective grounds, in pursuit of a legitimate objective.<sup>18</sup> The United Nations Committee on Economic, Social and Cultural Rights has stated that while mandatory retirement ages may still be tolerated under international human rights law, 'there is a clear trend towards the elimination of such barriers' and 'States parties should seek to expedite this trend to the greatest extent possible'.<sup>19</sup> The exception to the mandatory retirement age provides some flexibility to treat different cases differently and may serve as a safeguard to ensure interference with human rights is proportionate. However, it is unclear how often exemptions are granted, noting that it remains at the discretion of the Chief of the Defence Force (or their delegate) and it must be for the purpose of filling a specific capability gap. Discretionary safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law.<sup>20</sup> This is because discretionary safeguards are less stringent than the protection of statutory processes and may vary depending on who is exercising that discretion. The Attorney-General's response indicates there may be an alternative to the mandatory

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18 *Love v Australia*, United Nations Human Rights Committee Communication No. 983/2001 (2003).

19 United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 6: The economic, social and cultural rights of older persons* (1995) [12].

20 See, for example, Human Rights Committee, *General Comment 27, Freedom of movement (Art.12)* (1999).

retirement age, namely, that there be increased frequency of required periodic medical examinations as Defence Force members get older. This would appear to be a less rights restrictive way to achieve the stated objective than the imposition of the mandatory retirement age, as it would ensure that older members meet the necessary medical and physical fitness standards while not imposing a blanket policy without regard to the particular characteristics of individual members. As such, although the differential treatment imposed by the mandatory retirement age would appear to serve a legitimate objective and be rationally connected to that objective, questions remain as to the proportionality of this measure, noting that the Attorney-General's response indicates there may be less rights restrictive ways of achieving the stated objectives.

### **Committee view**

**2.18** The committee thanks the Attorney-General for this response. The committee notes that this instrument prescribes particular regulations under the *Airport Act 2006* and the *Defence Act 2003* as exempt from the requirements in the *Age Discrimination Act 2004*.

**2.19** The committee notes that this instrument engages and limits the rights to equality and non-discrimination, specifically on the ground of age, and the right to work. Differential treatment on the basis of age may not be unlawful discrimination if it is shown to be justified on reasonable and objective grounds, in pursuit of a legitimate objective.

**2.20** The committee considers that exempting the Airport Regulations from the Age Discrimination Act seeks to achieve the legitimate objective of ensuring that age based restrictions are applied in airports with respect to the sale and supply of alcohol to minors, and the regulation of gambling, smoking and vehicle use in airports. The committee notes the Attorney-General's advice as to which aspects of the Airport Regulations need to be exempt from the age discrimination requirements, but notes that the entirety of the regulations have been exempted (rather than solely those specific provisions). The committee welcomes the Attorney-General's advice that a review will be undertaken before 2024 which will consider removing the exemption from the Age Discrimination Act. However, pending such a review it does not appear to be a proportionate limit on the right to equality and non-discrimination to exempt the entirety of the Airport Regulations from the requirements of the Age Discrimination Act.

**2.21** The committee considers that the mandatory retirement age for members of the Australian Defence Force seeks to achieve the legitimate objective of ensuring that all members of the Defence Force are fit for duty and can be deployed at short notice without medical limitations. In addition, the committee notes the Attorney-General's advice that it is open to any member approaching retirement age to apply to the Chief of the Defence Force (or their delegate) to serve beyond retirement age. The committee considers this offers important flexibility to treat individual cases differently. However, the committee also notes

the Attorney-General's advice that there is an alternative to a mandatory retirement age, namely, increased frequency of required periodic medical examinations as Defence Force members get older. Noting this advice, some questions remain as to whether this measure is proportionate, noting that there may be a less rights restrictive way to achieve the stated objectives.

**2.22** The committee recommends that consideration be given to updating the statement of compatibility with human rights to reflect the information which has been provided by the Attorney-General.

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

## **Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020 [F2020L01114]**

## **Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 [F2020L01129]<sup>1</sup>**

<b>Purpose</b>	<p>The first instrument amends existing prohibitions on cruise ships entering Australian territory or ports unless an exemption applies, to remain in effect for the duration of the human biosecurity emergency period.</p> <p>The second instrument extends the human biosecurity emergency period for a further three months until 17 December 2020.</p>
<b>Portfolio</b>	Health
<b>Authorising legislation</b>	<i>Biosecurity Act 2015</i>
<b>Disallowance</b>	These instruments are exempt from disallowance (see subsections 475(2) and 477(2) of the <i>Biosecurity Act 2015</i> )
<b>Rights</b>	Life; health; freedom of movement, equality and non-discrimination, privacy
<b>Status</b>	Concluded examination

2.24 The committee requested a response from the minister in relation to these instruments in [Report 12 of 2020](#).<sup>2</sup>

- 1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020 [F2020L01114] and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 [F2020L01129], *Report 14 of 2020*; [2020] AUPJCHR 177.
- 2 Parliamentary Joint Committee on Human Rights, *Report 12 of 2020* (15 October 2020), pp. 6-13.

## Extension of the human biosecurity emergency period

2.25 On 18 March 2020 the Governor-General declared that a human biosecurity emergency exists regarding the listed human disease 'human coronavirus with pandemic potential', namely COVID-19.<sup>3</sup> Sections 475 and 476 of the *Biosecurity Act 2015* allow the Governor-General to make, and extend, the human biosecurity emergency period for a period of up to three months if the Minister for Health is satisfied of certain criteria. During a human biosecurity emergency period, sections 477 and 478 of the *Biosecurity Act 2015* allow the Minister for Health to determine emergency requirements, or give directions, that he or she is satisfied are necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australian territory or part of Australian territory. A person who fails to comply with an emergency requirement or direction may commit a criminal offence, punishable by imprisonment for a maximum of five years, or 300 penalty units, or both. The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 extends the human biosecurity emergency period for a further three months until 17 December 2020, unless further extended by the Governor-General.

2.26 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020 amends an earlier determination<sup>4</sup> which prevents a cruise ship from entering Australian territory or Australian ports, unless an exemption applies to the ship.<sup>5</sup> The amendments mean that the existing prohibitions are in effect for the duration of the human biosecurity emergency period (unless revoked earlier).

2.27 The explanatory statement notes that the Minister for Health has made the following determinations that will be extended by three months until 17 December 2020 as a result of this instrument:

- restrictions on cruise ships entering Australian territory or ports;<sup>6</sup>
- a ban on Australian citizens or permanent residents from leaving Australia unless otherwise exempted;<sup>7</sup>

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

4 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Determination 2020.

5 Explanatory statement, p. 1.

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

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*Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020 [F2020L01114] and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 [F2020L01129]*

- prohibition on price gouging in relation to essential goods, namely personal protective equipment and disinfectant products;<sup>8</sup> and
- restrictions on the trade of retail outlets at international airports.<sup>9</sup>

## Summary of initial assessment

### *Preliminary international human rights legal advice*

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

2.28 The extension of the human biosecurity emergency period, and the consequent extension of the restrictions on cruise ships, overseas travel ban, prohibition on price gouging in relation to essential goods, and restrictions on the trade of retail outlets at international airports, for a further three months, engages a number of human rights. As the measures are intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that the instruments promote the rights to life and health.<sup>10</sup> The right to life requires States parties to take positive measures to protect life.<sup>11</sup> The United Nations 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.<sup>12</sup> The right to health requires that States parties shall take steps to prevent, treat and control epidemic diseases.<sup>13</sup> With respect to the COVID-19 pandemic specifically, the United Nations Human Rights Committee has expressed the view that 'States parties

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7 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2020C00870].

8 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020 [F2020L00355].

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

10 Right to life: International Covenant on Civil and Political Rights, article 6. Right to health: International Covenant on Economic, Social and Cultural Rights, article 12.

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

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

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

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*Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020 [F2020L01114] and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 [F2020L01129]*

must take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction'.<sup>14</sup>

2.29 However, extending the biosecurity emergency period, and thereby continuing to enliven the various powers under the *Biosecurity Act 2015*, is likely to engage and limit a number of rights, including the right to freedom of movement, equality and non-discrimination and the right to a private life. The right to freedom of movement encompasses the right to move freely within a country, including all parts of federal States, and the right to leave any country, including a person's own country.<sup>15</sup> It encompasses both the legal right and practical ability to travel within and leave a country and includes the right to obtain the necessary travel documents to realise this right.<sup>16</sup> The freedom to leave a country may not depend on any specific purpose or the period of time the individual chooses to stay outside the country, meaning that travelling abroad and permanent emigration are both protected.<sup>17</sup> The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, including for example on the grounds of nationality.<sup>18</sup> The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.<sup>19</sup> This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.<sup>20</sup>

2.30 By extending the emergency period to continue preventing Australian citizens and permanent residents from travelling outside Australia (unless an exemption applies) and cruise ships from entering Australian territory or Australian ports (unless an exemption applies), the right to freedom of movement appears to be limited. This is because the right to move freely within a country and the right to leave the country, including for travelling abroad, is restricted. The application of the

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

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

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

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

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

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

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

travel ban to Australian citizens and permanent residents may also limit the right to equality and non-discrimination, as the measure treats some people differently from others on the basis of their citizenship or visa status. The right to a private life may also be limited as the measures restricting movement and trade involve interference with a person's private life.

2.31 In order to assess the compatibility of these instruments with international human rights law, further information is required as to:

- (a) what is the objective, and how are the measures rationally connected to that objective, of each of the measures that are extended for a further three months under the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020, in particular:
  - restrictions on cruise ships entering Australian territory or ports;<sup>21</sup> and
  - a ban on Australian citizens or permanent residents from leaving Australia unless otherwise exempted.<sup>22</sup>
- (b) whether there are effective safeguards or controls over each of these measures, including the possibility of monitoring and access to review;
- (c) how exemptions from these prohibitions are applied, in particular, how many applications for exemptions have been made and how many have been granted to permit Australian citizens or permanent residents to leave the country under the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020; and
- (d) whether are there any other less rights restrictive ways to achieve the stated objectives.

### **Committee's initial view**

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

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

22 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2020C00870].

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

2.34 However, as there has been no statement of compatibility provided with respect to either instrument, which we noted are not required in relation to these instruments, questions remain as to whether all of the measures are reasonable, necessary and proportionate. Given the human rights implications of legislative instruments dealing with the COVID-19 pandemic, the committee considered that it would be appropriate for all such COVID-19 related legislative instruments to be accompanied by a detailed statement of compatibility.

2.35 In order to form a concluded view of the human rights implications of these instruments, the committee sought the minister's advice as to the matters set out at paragraph [2.30].

2.36 The full initial analysis is set out in [Report 12 of 2020](#).

### **Minister's response**<sup>23</sup>

2.37 The minister advised:

The Report acknowledges specifically that the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020 and the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 are non-disallowable instruments, and therefore, the requirement to prepare compatibility statements does not apply.

That statements of compatibility are not required to be prepared for instruments I make under the *Biosecurity Act 2015* (Act) in no way indicates that such rights are not a key consideration in the Australian Government's response. Although a statement of compatibility with human rights is not required, I note that the instruments I have made

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23 The minister's response to the committee's inquiries was received on 6 November 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](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports).

under the Act are underpinned by engagement with rights such as the rights to life and health.

Instruments made during a human biosecurity emergency under Chapter 8 of the Act are made by me on the advice of the Commonwealth Chief Medical Officer and/or the Australian Health Principal Protection Committee. The text of an instrument is drafted by the Office of Parliamentary Counsel on instructions from my Department and with advice from the Australian Government Solicitor. Once made, the instrument is then published on the Federal Register of Legislation.

Before determining a requirement, I must be satisfied of the following (subsection 477(4)):

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

While each of these requires a strict assessment, I draw your particular attention to subsections (c) and (d) which, in effect, provide that I must be satisfied that a requirement is no more restrictive or intrusive than is required in the circumstances, in both its construction and proposed application.

Additionally, individual determinations made under the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 (Declaration) are required to be revoked if circumstances change to reduce the period the requirement is needed. Individual measures under the Declaration are regularly reviewed, based on expert advice, for appropriateness and proportionality.

The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Determination 2020 is designed to protect Australians from the high human biosecurity risk in relation to the spread of COVID-19 on cruise ships. As at 23 October 2020, there have been 1,554 cases of COVID-19 acquired at sea (including on cruise ships, merchant ships and commercial vessels). Statistics on the number of exemptions on cruise ship restrictions are more appropriately sought from the Australian Border Force. Decisions

made in relation to exemptions of the restrictions on cruise ships can be the subject of judicial review.

The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 is designed to protect Australia against COVID-19 infections brought in by overseas travellers and to limit the global spread of COVID-19. Statistics on the number of individuals that have been exempted from overseas travel restrictions are more appropriately sought from the Australian Border Force. Applicants are eligible to reapply.

I am satisfied that the measures taken by the Government are necessary and appropriate to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australia and are compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Once again, I would like to assure the Committee that compatibility with human rights will continue to be a central consideration in the review of current measures and development of additional measures taken by the Government to address the COVID-19 pandemic.

## Concluding comments

### ***International human rights legal advice***

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

2.38 In relation to the objective of these measures, the minister advised that the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Determination 2020 is designed to protect Australians from the high human biosecurity risk in relation to the spread of COVID-19 on cruise ships, and the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 is designed to protect Australia against COVID-19 infections brought in by overseas travellers and to limit the global spread of COVID-19. The minister advised that as at 23 October 2020, there have been 1,554 cases of COVID-19 acquired at sea (including on cruise ships, merchant ships and commercial vessels). Preventing the spread of COVID-19, an infectious disease that has caused and has the ability to continue causing high levels of morbidity and mortality, constitutes a legitimate objective for the purposes of international human rights law. As these instruments seek to protect public health and the rights and freedoms of others (in particular by protecting the Australian population from exposure to COVID-19 and limiting the global spread of the disease), and given that there are a number of cases of people contracting COVID-19 at sea

and overseas, these instruments would appear to be rationally connected to that objective.

2.39 With respect to proportionality, the minister highlighted that, pursuant to subsection 477(4) of the Biosecurity Act, he may only make a determination if satisfied that a requirement is no more restrictive or intrusive than is required in the circumstances, in both its construction and proposed application. In addition, the minister noted that individual determinations must be revoked if circumstances change to reduce the period the requirement is needed. The minister advised that decisions made in relation to cruise ship controls are subject to judicial review, and that applicants for a travel ban exemption are able to reapply if their initial request is denied. This would appear to indicate that there is the capacity for the travel ban to be applied flexibly, as well as for reviews of exemption decisions relating to the cruise ship ban. However, it is not clear how and to what extent these exemptions have operated flexibly in practice, as the minister has advised that the statistics on exemptions from these rules are the purview of the Australian Border Force. However, from research it appears a directive<sup>24</sup> has been issued to Australian Border Force staff that sets out further detail on when individual exemptions from the travel ban might be granted, including when an applicant:

- (a) is attending the funeral of an immediate family member;
- (b) is travelling due to critical or serious illness of an immediate family member;
- (c) is travelling for necessary medical treatment not available in Australia;
- (d) needs to pick up a minor child (adoption, surrogacy, court order etc) and return to Australia with that child;
- (e) intends to commence or continue education overseas for at least three months;
- (f) has an existing work contract overseas;
- (g) is travelling to an Australian territory (e.g. Christmas Island) which is outside the migration zone;
- (h) has a compelling reason and will remain overseas for at least three months; and
- (i) has had a previous request approved and the reasons for travel have not changed.

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24 Department of Home Affairs, Outward Travel Restrictions Operation Directive, V1.0, available at <https://www.homeaffairs.gov.au/covid-19/Documents/outward-travel-restrictions-operation-directive.pdf> [accessed 9 November 2020].

2.40 The directive also states that exemptions may be granted where the travel is in the national interest; is in response to the COVID-19 outbreak; or is essential for the conduct of critical industries and businesses (including import and export industries).

2.41 This directive gives greater clarity and guidance on when a person may be able to seek an individual exemption to travel overseas. Depending on how this is applied in practice (noting that it is unknown what proportion of travel exemptions applications are denied), it appears that while the risk of the spread of COVID-19 from travellers returning from overseas remains high, this may constitute a permissible limitation on the right to freedom of movement, and other rights such as the right to a private life and family reunification.

### **Committee view**

**2.42 The committee thanks the minister for this response. The committee notes that these instruments extend the human biosecurity emergency period for a further three months until 17 December 2020, which has the effect that the following determinations will continue in operation as a result of this instrument:**

- **restrictions on cruise ships entering Australian territory or ports;**
- **a ban on Australian citizens or permanent residents from leaving Australia unless otherwise exempted;**
- **prohibition on price gouging in relation to essential goods, namely personal protective equipment and disinfectant products; and**
- **restrictions on the trade of retail outlets at international airports.**

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

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

**2.45** The committee notes the minister's advice that these instrument seek to address the risks of COVID-19 cases entering Australia via cruise ships, as well as the risk of the disease spreading outside Australia through persons travelling internationally. The committee notes that minister's advice that these instruments are developed pursuant to the advice of the Commonwealth Chief Medical Officer and/or the Australian Health Principal Protection Committee, and that determinations may only be made if the minister is satisfied that a requirement is no more restrictive or intrusive than is required in the circumstances. The committee considers that these serve as important statutory safeguards.

**2.46** The committee also notes the directive issued by the Australian Border Force which gives greater clarity as to when individual exemptions from the overseas travel ban may be granted. Noting this flexibility (but also noting that much will depend on how this is applied in practice), the committee considers that while the risk of the spread of COVID-19 from travellers returning from overseas remains high, these restrictions constitute a permissible limitation on the right to freedom of movement, and other rights such as the right to a private life and family reunification.

**2.47** The committee continues to recommend, that given the potential impact on human rights of legislative instruments dealing with the COVID-19 pandemic, that it would be appropriate for all such COVID-19 legislative instruments to be accompanied by a detailed statement of compatibility with human rights.

## Coronavirus Economic Response Package (Deferral of Sunsetting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020 [F2020L01134]<sup>1</sup>

<b>Purpose</b>	This instrument defers the enacted sunset of Division 3 of Part III (Special powers relating to terrorism offences) of the <i>Australian Security Intelligence Organisation Act 1979</i> until 7 March 2021
<b>Portfolio</b>	Home Affairs
<b>Authorising legislation</b>	<i>Coronavirus Economic Response Package Omnibus Act 2020</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 6 October 2020). Notice of motion to disallow must be given by 30 November 2020 in the House of Representatives and the first sitting day of 2021 in the Senate <sup>2</sup>
<b>Rights</b>	Multiple rights
<b>Status</b>	Concluded examination

2.48 The committee requested a response from the minister in relation to the instrument in [Report 12 of 2020](#).<sup>3</sup>

### Extending the operation of ASIO's compulsory questioning and detention powers

2.49 This instrument defers the enacted sunset of Division 3 of Part III (Special powers relating to terrorism offences) of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) by six months, until 7 March 2021.<sup>4</sup> Division 3 of

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Coronavirus Economic Response Package (Deferral of Sunsetting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020 [F2020L01134], *Report 14 of 2020*; [2020] AUPJCHR 178.

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 Parliamentary Joint Committee on Human Rights, *Report 12 of 2020* (15 October 2020), pp. 14-19.

4 Pursuant to Schedule 16, item 1 of the *Coronavirus Economic Response Package Omnibus Act 2020*.

the ASIO Act sets out the Australian Security Intelligence Organisation's (ASIO's) powers with respect to two types of warrants, namely compulsory questioning warrants (without detention), and compulsory questioning warrants which authorise detention for up to seven days. These powers were due to sunset on 7 September 2020.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

#### *Multiple rights*

2.50 ASIO's compulsory questioning and detention warrants regime empowers ASIO to seek a warrant to either compulsorily question, or compulsorily question and detain, a person where a judge is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.<sup>5</sup>

2.51 The explanatory statement notes that this instrument extends the operation of these powers as the passage of the Australian Security Intelligence Organisation Amendment Bill 2020 (ASIO 2020 bill) (which would repeal and replace Part III, Division 3) has been delayed. The extension is therefore necessary to ensure that the current law does not sunset while the Parliament considers the provisions of that bill.<sup>6</sup> While it is noted that the purpose of the instrument is to give more time for the Parliament to consider the ASIO 2020 bill, in assessing the human rights compatibility of a measure, it is necessary to consider if the extension of these coercive powers is compatible with human rights.

2.52 The extension of both ASIO's compulsory questioning powers and detention powers for a further six months, engages numerous human rights. The statement of compatibility provides that the continued operation of these powers is of vital importance to the counter-terrorism efforts of ASIO.<sup>7</sup> To the extent that the compulsory questioning powers could have the effect of preventing any likely and imminent terrorist acts, the extension of these powers could operate to protect the right to life.<sup>8</sup> The right to life imposes an obligation on the state to protect people

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5 *Australian Security Intelligence Organisation Act 1979*, sections 34E and 34G.

6 Explanatory statement, pp. 1–2.

7 Statement of compatibility, p. 4.

8 Although it is noted that ASIO has never used the power to issue a questioning and detention warrant and last issued a questioning warrant in 2010. See Attorney-General's Department, submission to the Parliamentary Joint Committee on Intelligence and Security, *Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (March 2018), *Submission 7*, pp. 14 and 55.

from being killed by others or identified risks.<sup>9</sup> However, the extension of these compulsory questioning powers, and the power to detain a person for up to seven days without charge,<sup>10</sup> also engages and limits numerous other human rights, including the right to liberty, freedom of movement, humane treatment in detention, privacy, fair trial, freedom of expression and the rights of persons with disability.<sup>11</sup> In relation to the compulsory questioning powers (without detention), many of the human rights issues raised in relation to Division 3 of Part III of the ASIO Act are the same as those with respect to the ASIO 2020 bill, which sought to continue the compulsory questioning powers. As such, the relevant advice provided in relation to the ASIO 2020 bill in [Report 7 of 2020](#) and [Report 9 of 2020](#) is reiterated in relation to the extension of the compulsory questioning warrant powers by this instrument.<sup>12</sup>

2.53 Extending the operation of ASIO's compulsory questioning and detention warrants, which could empower ASIO to detain a person for up to seven days,<sup>13</sup> specifically engages and limits the right to liberty. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.<sup>14</sup> The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the circumstances. The right to liberty 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.

2.54 In order to form a concluded view regarding the extended operation of ASIO's compulsory questioning and detention warrants powers, further information is required as to:

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9 International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1.

10 *Australian Security Intelligence Organisation Act 1979*, section 34S.

11 International Covenant on Civil and Political Rights, articles 9, 10, 12, 14, 17, 19 and Convention on the Rights of Persons with Disabilities.

12 The preliminary international human rights legal advice provided in relation to this bill is set out in Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020), pp. 32–69. The concluding international human rights legal advice provided in relation to this bill is set out in Parliamentary Joint Committee on Human Rights, *Report 9 of 2020* (18 August 2020), pp. 1–115. The recent international human rights legal advice provided with respect to the Australian Security Intelligence Organisation Bill 2020 did not consider the particular human rights implications of ASIO's compulsory questioning and detention warrant powers, as these powers are proposed to be repealed by that bill.

13 *Australian Security Intelligence Organisation Act 1979*, section 34S.

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

- (a) what evidence demonstrates a pressing and substantial concern sought to be addressed by maintaining ASIO's questioning and detention warrant power, noting that the government has introduced primary legislation seeking to repeal the detention powers, and that the power itself has never been used;
- (b) how maintaining ASIO's questioning and detention warrant powers is rationally connected with (that is, effective to achieve) any such pressing and substantial concern; and
- (c) whether the extension of ASIO's detention warrant powers is a proportionate means by which to address a pressing and substantial concern; and whether there are any less rights restrictive measures (such as the use of questioning warrants without detention) to achieve the stated objective.

### ***Committee's initial view***

2.55 The committee noted that to the extent that the compulsory questioning powers could have the effect of preventing any likely and imminent terrorist acts, the extension of these powers could operate to protect the right to life. However, the extension of these powers also engages and limits numerous human rights. The committee recently assessed the human rights compatibility of compulsory questioning warrants in [Report 9 of 2020](#), when it considered the ASIO 2020 bill. As such, the committee referred the minister and parliamentarians to the relevant parts of that report in relation to the assessment of the human rights compatibility of the extension of the questioning warrant powers.

2.56 In relation to the questioning and detention warrant powers, the committee noted the legal advice that the power for ASIO to detain a person for up to seven days limits the right to liberty. While the committee appreciated that the COVID-19 pandemic has resulted in delays to the parliamentary schedule, this committee's role is to assess all legislation for compatibility for human rights. As such, the extension of the questioning and detention powers needs to be demonstrated to be compatible with the right to liberty. The committee noted that the right to liberty can be permissibly limited if it is shown to be reasonable, necessary and proportionate.

2.57 In order to form a concluded view of the human rights implications of this instrument, the committee sought the minister's advice as to the matters set out at paragraph [2.52].

2.58 The full initial analysis is set out in [Report 12 of 2020](#).

## Minister's response<sup>15</sup>

### 2.59 The minister advised:

The Australian Security Intelligence Organisation Amendment Bill (the Bill) was introduced into Parliament on 13 May 2020 and referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) for review. The Bill repeals the Australian Security Intelligence Organisation's (ASIO) existing questioning, and questioning and detention, warrant framework in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) and introduces a reformed compulsory questioning and apprehension framework. The proposed framework in the Bill remains subject to consideration by the PJCIS.

The Bill implements the Government's response to recommendations of the PJCIS in its Inquiry Report on ASIO's questioning and detention powers of 10 May 2018. In its report, the PJCIS recommended that ASIO retain a compulsory questioning power. Consistent with this recommendation, the Determination will ensure that ASIO's compulsory questioning power is retained while the PJCIS and the Parliament consider the reforms to ASIO's compulsory questioning powers brought forward in the Bill. The Government intends to pass the Bill as soon as possible after carefully considering any recommendations of the PJCIS's current review of the Bill.

In addition, allowing ASIO's detention power to sunset before the new questioning framework contained in the Bill is implemented would risk a capability gap for ASIO. The ability to detain a person under a questioning and detention warrant is potentially necessary to ensure that ASIO's questioning and investigation is not prejudiced where there are reasonable grounds on which to believe that the person may not comply with a request to appear, may alert people involved in a terrorism offence to the investigation, or may destroy records or other things that the person may be requested to produce. This power is necessary to ensure the timely gathering of information relevant to investigating a terrorism offence. If a person is allowed to disrupt questioning this could jeopardise the effectiveness of the information gathering process, thereby undermining an investigation into a terrorism offence. This issue has been addressed by the addition of an apprehension power contained in the Bill, but could not be addressed if only ASIO's questioning, but not its questioning and detention, powers were extended pending passage of the Bill.

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15 The minister's response to the committee's inquiries was received on 3 November 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](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports).

The Government's aim remains to pass the Bill as soon as possible, at which time the extension of the existing powers will cease to have effect, and the new framework contained in the Bill will come into force.

## **Concluding comments**

### ***International human rights legal advice***

#### *Multiple Rights*

2.60 In relation to the need for extending the sunset date of ASIO's powers, the minister advised that the instrument will ensure that ASIO's compulsory questioning power is retained (as was recommended by the Parliamentary Joint Committee on Intelligence and Security (PJCIS)), while the PJCIS and the Parliament consider the reforms to ASIO's compulsory questioning powers in the ASIO 2020 bill. The minister stated that allowing ASIO's detention power to sunset before the new questioning framework contained in the bill is implemented would risk a capability gap for ASIO. He stated that the ability to detain a person under a questioning and detention warrant is potentially necessary to ensure that ASIO's questioning and investigation is not prejudiced where there are reasonable grounds on which to believe that the person may not comply with a request to appear, may alert people involved in a terrorism offence to the investigation, or may destroy records or other things that the person may be requested to produce. The minister advised that this power is necessary to ensure the timely gathering of information relevant to investigating a terrorism offence. The response explained that this issue has been addressed by the addition of an apprehension power contained in the ASIO 2020 bill, but could not be addressed if only ASIO's questioning, but not its questioning and detention, powers were extended pending passage of the bill.

2.61 As set out in the initial analysis, while the purpose of the instrument may be to give more time for the Parliament to consider the ASIO 2020 bill, in assessing the human rights compatibility of the measure, it is necessary to consider if the extension of these coercive powers is compatible with human rights. As such, it is necessary to consider whether the extension by six months of the questioning and detention powers is compatible with multiple human rights, including the right to liberty. In assessing any limitation on such rights, it is necessary to consider whether the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.62 In relation to the objective of the measure, and whether it is one that is necessary and seeks to address an issue that is pressing and substantial enough to warrant limiting the right, as noted in the initial analysis, ASIO has not drawn on its power to issue a questioning warrant since 2010, and has never utilised the power to

issue a questioning and detention warrant.<sup>16</sup> The minister has not provided any information indicating that this is anticipated to change in the near future (for example, that there is evidence to indicate that there will be any need to rely in future on the questioning and detention powers, including before the passage of the ASIO 2020 bill). Consequently, it remains unclear as to whether there is a pressing and substantial concern which warrants extending the operation of ASIO's detention power.

2.63 The minister has stated that the ASIO 2020 bill addresses a capability gap by introducing an apprehension power to Division 3 Part III, and that this could not be addressed if ASIO's detention warrant powers were permitted to sunset. This suggests that there would be no such power in Division 3 Part III if the detention warrant powers were allowed to sunset. The ASIO Act does, however, establish other mechanisms by which to enforce compliance with a questioning warrant, and to prevent persons from disturbing the questioning process, which apply to both the questioning warrant (without detention) and the questioning and detention warrant, and would therefore still be available to ASIO even if the detention warrant power alone was allowed to sunset.<sup>17</sup> Subdivisions D and E provide that failure to attend compulsory questioning pursuant to a warrant is a serious criminal offence punishable by five years' imprisonment,<sup>18</sup> as is destroying or damaging a relevant record or thing,<sup>19</sup> or disclosing information related to the warrant to another person other than where permitted.<sup>20</sup> A police officer may take a person into custody and bring them before a prescribed authority for questioning under either type of warrant if the person fails to appear as required.<sup>21</sup> Further, when a person is appearing before a prescribed authority for questioning under either type of warrant, the authority may direct that the person be detained, where they are satisfied that there are reasonable grounds for believing that if the person is not detained they may alert a person involved in a terrorism offence; may not continue

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16 See Attorney-General's Department, submission to the Parliamentary Joint Committee on Intelligence and Security, *Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (March 2018), *Submission 7*, pp. 14 and 55.

17 In Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*, Subdivision B deals with questioning warrants; Subdivision C deals with questioning and detention warrants; Subdivision D sets out certain obligations and protections relating to both type of warrants; and Subdivision E sets out other provisions applicable to both type of warrants.

18 *Australian Security Intelligence Organisation Act 1979*, subsection 34L(1).

19 *Australian Security Intelligence Organisation Act 1979*, subsection 34L(10).

20 *Australian Security Intelligence Organisation Act 1979*, section 34ZS.

21 *Australian Security Intelligence Organisation Act 1979*, subsection 34K(7).

to appear, or may destroy or damage a record or thing.<sup>22</sup> As such, it is not clear why it was necessary to extend *both* type of warrants, including that enabling the detention of a person for up to seven days, rather than extending only the questioning warrant powers (without detention) and existing non-compliance powers.<sup>23</sup> As such, there would appear to be existing less rights restrictive alternative mechanisms by which to achieve the stated objective of ensuring that any questioning process is not frustrated due to non-compliance.

2.64 The extension of ASIO's detention warrant power engages and limits multiple human rights, including the right to liberty. In order for a limitation on human rights to be permissible under international human rights law (and thus compatible with human rights), it must pursue a legitimate objective (one which is directed towards a matter of pressing and substantial concern), be rationally connected to that objective, and constitute a proportionate means of achieving that objective. It remains unclear that there is a pressing and substantial concern which would warrant the extension of ASIO's detention warrant power. Further, as the questioning without detention powers could be extended (alongside existing mechanisms for addressing non-compliance with the warrant), without extending the detention powers, there appears to be less rights restrictive mechanisms available to achieve the objectives of the measure. As such, the extension of the operation of ASIO's detention warrant powers for a further six months, thereby enabling ASIO to detain a person for up to seven days for questioning, does not appear to be compatible with multiple human rights, in particular, the right to liberty.

### **Committee view**

**2.65 The committee thanks the minister for this response. The committee notes that the instrument extends the operation of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*, by six months. The committee notes that this has the effect of extending the operation of ASIO's powers with respect to compulsory questioning warrants and compulsory questioning and detention warrants. The committee notes that this extension is temporary, pending the passage of the ASIO 2020 bill which is currently before Parliament.**

**2.66 The committee reiterates, to the extent that the compulsory questioning powers could have the effect of preventing any likely and imminent terrorist acts, the extension of these powers could operate to protect the right to life.**

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22 *Australian Security Intelligence Organisation Act 1979*, section 34K.

23 Noting that it appears it would have been possible to extend Subdivisions A, B, D and E of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*, but not Division C (which sets out the questioning and detention warrant powers).

**2.67** The committee notes that the extension of these powers also engages and limits numerous human rights. The committee recently assessed the human rights compatibility of compulsory questioning warrants in [Report 9 of 2020](#), when it considered the ASIO 2020 bill. As such, the committee refers the minister and parliamentarians to the relevant parts of that report in relation to the assessment of the human rights compatibility of the extension of the questioning warrant powers.

**2.68** In relation to the questioning and detention warrant powers, the committee notes that the power for ASIO to detain a person for up to seven days limits the right to liberty. The committee notes that the right to liberty can be permissibly limited if it is shown to be reasonable, necessary and proportionate. It is important to reiterate that this preventative regime – enacted essentially to prevent acts of terrorism – has a different purpose from pre-trial detention regime which is imposed solely to facilitate prosecution and conviction. The committee notes the minister's advice that allowing ASIO's detention power to sunset before the new questioning framework contained in the ASIO 2020 bill is implemented would risk a capability gap for ASIO, and that the ability to detain a person under a questioning and detention warrant is necessary to ensure that ASIO's questioning and investigation powers are not prejudiced. The committee notes the minister's advice that this issue has been addressed by the addition of an apprehension power contained in the bill, but could not be addressed if only ASIO's questioning, but not its questioning and detention, powers were extended pending passage of the bill. However, the committee also notes the legal advice that the ASIO Act has existing mechanisms by which to enforce compliance with a questioning warrant, and to prevent persons from disturbing the questioning process, and as it would be possible to extend the questioning without detention powers (alongside these existing mechanisms for addressing non-compliance), there appear to be less rights restrictive mechanisms available rather than extending the detention powers. The committee notes the advice that the temporary extension of the operation of ASIO's detention warrant powers for a further six months, thereby enabling ASIO to detain a person for up to seven days for questioning, does not appear to be compatible with multiple human rights, including the right to liberty.

**2.69** The committee acknowledges these human rights concerns, although it also notes that extending these powers is required by reason that the passage of the ASIO 2020 bill (which would repeal and replace Part III, Division 3) has been delayed. Accordingly, the committee recognises that the extension of these measures is intended to put in place only temporary powers with respect to the compulsory questioning and detention framework until such time as the ASIO 2020 bill is presumably passed by the Parliament.

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

**Senator the Hon Sarah Henderson**

**Chair**