Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 14 of 2020

26 November 2020

© Commonwealth of Australia 2020

ISSN 2204-6356 (Print)

ISSN 2204-6364 (Online)

PO Box 6100

Parliament House

Canberra ACT 2600

Phone: 02 6277 3823

Fax: 02 6277 5767

Email: human.rights@aph.gov.au

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

This report can be cited as: Parliamentary Joint Committee on Human Rights, *Report 14 of 2020*; [2020] AUPJCHR 167.

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

Membership of the committee

Members

Senator the Hon Sarah Henderson, Chair	Victoria, LP
Mr Graham Perrett MP, Deputy Chair	Moreton, Queensland, ALP
Senator Patrick Dodson	Western Australia, ALP
Mr Steve Georganas MP	Adelaide, South Australia, ALP
Mr Ian Goodenough MP	Moore, Western Australia, LP
Senator Nita Green	Queensland, ALP
Ms Celia Hammond MP	Curtin, Western Australia, LP
Senator Andrew McLachlan CSC	South Australia, LP
Senator Lidia Thorpe	Victoria, AG
Dr Anne Webster MP	Mallee, Victoria, Nats

Secretariat

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

External legal adviser

Associate Professor Jacqueline Mowbray

Table of contents

Membership of the committee ii

Committee information vii

Chapter 1—New and continuing matters 1

Response required

Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 2

Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2020 [F2020L01190] and Health Insurance Legislation Amendment (Bulk-billing Incentive (No. 2)) Regulations 2020 [F2020L01203] 18

Higher Education Support Amendment (Freedom of Speech) Bill 2020 26

Migration (LIN 20/166: Australian Values Statement for Public Interest Criterion 4019) Instrument 2020 [F2020L01305] 34

Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020 and related instruments 38

Advice only

Australian Federal Integrity Commission Bill 2020 55

Commonwealth Parliamentary Standards Bill 2020 55

Bills and instruments with no committee comment 56

Chapter 2—Concluded matters 59

Age Discrimination Regulations 2020 [F2020L01138] 59

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] 71

Coronavirus Economic Response Package (Deferral of Sunsetting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020 [F2020L01134] 82

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.

---

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 assessments of the human rights compatibility of:

- bills introduced into the Parliament between 26 to 29 October and 9 to 12 November 2020;
- legislative instruments registered on the Federal Register of Legislation between 14 October and 10 November 2020;[2] and
- one bill and four instruments previously deferred.[3]

---

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 14 of 2020*; [2020] AUPJCHR 168.

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.

3 Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2020 [F2020L01190]; Health Insurance Legislation Amendment (Bulk-billing Incentive (No. 2)) Regulations 2020 [F2020L01203]; Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020; Social Security (Administration) (Declared child protection State or Territory – Northern Territory) Determination 2020 [F2020L01224]; and Social Security (Administration) (Exempt Welfare Payment Recipients – Principal Carers of a Child) (Indications of Financial Vulnerability) Principles 2020 [F2020L01225]was previously deferred in *Report 13 of 2020*.

Response required

1.2 The committee seeks a response from the relevant minister with respect to the following bills and instruments.

Foreign Investment Reform (Protecting Australia's National Security) Bill 2020[1]

Purpose	The bill seeks to amend various Acts relating to foreign acquisitions and takeovers to: • introduce a new national security test requiring mandatory notification for investments in a sensitive national security business or land, and allowing investments not otherwise notified to be 'called in' for review if they raise any national security concerns; • strengthen the Treasurer and Commissioner of Taxation's enforcement powers by increasing penalties, directions powers and new monitoring and investigative powers; • close potential gaps in the screening regime; • expand information sharing arrangements; and • establish a new Register of foreign owned assets to record all foreign interests acquired in Australian land, water entitlements and contractual water rights, and business acquisitions that require foreign investment approval
Portfolio	Treasury
Introduced	House of Representatives, 28 October 2020
Rights	Privacy; work; equality and non-discrimination; life; torture, cruel, inhuman or degrading treatment or punishment; fair hearing
Status	Seeking additional information

Expanded information sharing with foreign governments

1.3 The bill seeks to authorise the disclosure of protected information to a foreign government, or a separate government entity in relation to a foreign country,

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Foreign Investment Reform (Protecting Australia's National Security) Bill 2020, *Report 14 of 2020*; [2020] AUPJCHR 169.

if the information is disclosed in the course of the person performing their functions or duties, or exercising their powers under the Act, or the person is satisfied that disclosing the information will assist or enable the foreign government or entity to perform a function or duty, or exercise a power of that government or entity.[2] 'Protected information' is information obtained under, in accordance with or for the purposes of the Act and could include personal information, meaning information or an opinion about an identified individual or an individual who is reasonably identifiable.[3] Protected information could be disclosed to a foreign government or entity if:

- the Treasurer is satisfied that information relates to a matter for which a national security risk may exist for Australia or the foreign country;
- the Treasurer is satisfied that disclosure would not be contrary to the national interest;
- the person disclosing the information is satisfied it would only be used in accordance with an agreement between the Commonwealth or a Department of State, authority or agency of the Commonwealth and a foreign government or entity; and
- the foreign government or entity has undertaken not to use or further disclose the information except in accordance with the agreement or otherwise as required or authorised by law.[4]

1.4 The Treasurer may impose conditions to be complied with by the foreign government or entity in relation to the disclosed protected information.[5]

Preliminary international human rights legal advice

Rights to privacy, life, and prohibition against torture or cruel, inhuman or degrading treatment or punishment

1.5 By authorising the disclosure of protected information, including personal information, with foreign governments or entities for the purpose of assisting them to perform a function or duty, or exercise a power, the measure engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect private and confidential information, particularly the

2 Schedule 1, Part 1, item 205, proposed subsection 123B(1)(a).

3 *Foreign Acquisitions and Takeovers Act 1975*, section 120; *Privacy Act 1988*, section 6; explanatory memorandum p. 58.

4 Schedule 1, Part 1, item 205, proposed paragraphs 123B(1)(b)–(e) and subsection 123B(2).

5 Schedule 1, Part 1, item 205, proposed subsection 123B(3).

storing, use and sharing of such information.[6] It also includes the right to control the dissemination of information about one's private life.

1.6 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. The statement of compatibility states that the expanded information sharing arrangements between the Treasurer and foreign governments are necessary to regulate foreign investment and ensure that proposed investments are not contrary to Australia's national security.[7] It explains that the measure would enable the effective and timely collaboration in relation to cases where a national security risk may be present.[8] Enhancing the ability of the government to address national security risks would appear to constitute a legitimate objective for the purpose of international human rights law. By authorising the sharing of protected information relating to national security risks between the Treasurer and foreign governments, the measure would appear to be rationally connected to that objective. However, questions arise as to whether the measure is proportionate to achieving that objective.

1.7 In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be sufficiently circumscribed and accompanied by appropriate safeguards. The United Nations (UN) Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.[9] Proposed section 123B would allow protected information to be disclosed to a foreign government or entity either where the person disclosing it is doing so in performing their functions under the Act, or where the person is satisfied the information will assist or enable the foreign government or entity to perform or exercise their powers or functions. The statement of compatibility states that protected information can only be disclosed to a foreign government for a specific purpose—namely, to assist the foreign government to perform a function or duty, or exercise a power.[10] However, this stated purpose appears to be very broad insofar as it does not limit the types of functions or duties which the protected information can be used to perform. As drafted, the measure would appear to allow a foreign

6 International Covenant on Civil and Political Rights, article 17. Every person should be able to ascertain which public authorities or private individuals or bodies control or may control their files and, if such files contain incorrect personal data or have been collected or processed contrary to legal provisions, every person should be able to request rectification or elimination: UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]. See also, *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

7 Statement of compatibility, p. 221.

8 Statement of compatibility, p. 221.

9 *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

10 Statement of compatibility, p. 221.

government or entity to use the protected information to perform a wide variety of functions or duties, or exercise a broad scope of powers, including potentially with respect to matters unrelated to the Act. Given the very broad purpose for which information can be disclosed and used by a foreign government, questions remain as to whether the proposed limitation on the right to privacy is sufficiently circumscribed and only as extensive as is strictly necessary.

1.8 Regarding the existence of sufficient safeguards, the explanatory memorandum states that there are three tests that need to be satisfied before the information can be shared: the information must relate to national security; sharing the information must not be contrary to the national interest; and there must be an agreement in force between the Commonwealth and the foreign government. The explanatory memorandum notes that these tests provide appropriate safeguards to ensure that information is only shared when necessary and appropriate.[11] An additional safeguard identified is the application of the Privacy Act 1988 (Privacy Act) and the Australian Privacy Principles (APPs), which apply to the disclosure of information to foreign governments for national security purposes.[12]

1.9 Agreements between the Commonwealth and foreign governments may operate to safeguard the right to privacy in practice, however, the effectiveness of this as a safeguard will likely depend on the specific contents of the agreement and its enforceability. The statement of compatibility states that these agreements will set out mutually agreed standards for the handling of personal information that provide privacy protection and, where relevant, limitations surrounding public disclosure of commercial in confidence information.[13] An agreement could, for example, specify what information can be disclosed, how it can be used, and circumstances in which information should be de-identified or destroyed.[14] The statement of compatibility also states that agreements will specify that information should only be used for the purpose of assisting the foreign government to perform a function or duty, or exercise a power—although, as noted above, this purpose is very broad. If such agreements included adequate privacy protections, this could operate to safeguard the right to privacy as a matter of international human rights law. However, the bill does not make it a legislative requirement that the agreements include such protections and it is unclear to what extent these protections would apply after the information has been disclosed.

1.10 Furthermore, compliance with the Privacy Act and the APPs may not mitigate concerns about interference with the right to privacy for the purposes of

11 Explanatory memorandum, pp. 56–57.

12 Explanatory memorandum, p. 58 and statement of compatibility, p. 221. Australian Privacy Principle 8.2(c) authorises cross border disclosure of personal information.

13 Statement of compatibility, p. 221.

14 Explanatory memorandum, pp. 57–58.

international human rights law. This is because the APPs contain a number of exceptions to the prohibition on use or disclosure of personal information for a secondary purpose, including where its use or disclosure is authorised under an Australian law,[15] which may be a broader exception than permitted in international human rights law. APP 8.1 provides that prior to the disclosure of personal information to an overseas recipient, the entity must take reasonable steps to ensure the overseas recipient does not breach the APPs and that the entity is accountable for any breach of the APPs.[16] However, these safeguards do not need to be complied with where an agency is disclosing personal information to an overseas recipient as required or authorised by or under an international agreement relating to information sharing to which Australia is a party.[17] In addition, Australian privacy protections would not apply once the information is disclosed to the foreign government or entity, so it is not clear what would protect the right to privacy once the disclosure has been made.

1.11 In addition, to the extent that the measure would authorise the disclosure of protected information relating to national security risks posed by an individual to a foreign government which might then use it to investigate and convict a person of an offence to which the death penalty applies, the right to life may be engaged and limited. The right to life imposes an obligation on Australia to protect people from being killed by others or identified risks.[18] While the International Covenant on Civil and Political Rights does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another state. This includes prohibiting the provision of information to other countries that may use that information to investigate and convict someone of an offence to which the death penalty applies.[19] Additionally, it is not clear if sharing protected information with

15 Australian Privacy Principles 6.2(b) and 9.

16 Australian Privacy Principle 8.1.

17 Australian Privacy Principle 8.2(e). An international agreement includes a formal written document that is not binding at international law, for example, a memorandum of understanding or an official exchange of letters.

18 International Covenant on Civil and Political Rights, article 6. The right should not be understood in a restrictive manner: UN Human Rights Committee, *General Comment No. 6: article 6 (right to life)* (1982) [5].

19 Second Optional Protocol to the International Covenant on Civil and Political Rights. In 2009, the United Nations Human Rights Committee stated its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State': UN Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5 (2009) [20].

foreign governments, in circumstances relating to the investigation of national security matters, could risk exposing a person to torture or cruel, inhuman or degrading treatment or punishment. Australia has an obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.[20] Under international law the prohibition on torture is absolute and can never be subject to permissible limitations.[21]

1.12 The statement of compatibility does not acknowledge that the measure may engage and limit the right to life or have implications for the prohibition against torture or cruel, inhuman or degrading treatment or punishment, and so does not provide an assessment of whether the measure is compatible with these rights. In assessing whether the measure is compatible with these rights, the scope of personal information that may be disclosed is relevant as well as whether there are safeguards in place to ensure that information is not shared with a foreign government or entity in circumstances that could expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment.

1.13 In order to assess the compatibility of this measure with human rights, further information is required as to:

(a) what is the nature and scope of personal information that is authorised to be disclosed to a foreign government or entity;

(b) whether the proposed limitation on the right to privacy is only as extensive as is strictly necessary, noting that the purpose for which protected information can be disclosed to a foreign government or entity is very broad;

(c) what are the consequences, if any, of a foreign government failing to use protected information in accordance with an agreement, particularly where an individual's right to privacy is not protected;

(d) how the specific safeguards in the Australian Privacy Principles and the *Privacy Act 1988* operate with respect to this measure;

(e) why there is no requirement in the bill requiring that the agreement with the foreign government or entity must seek to include privacy protections around the handling of personal information, and protection of personal information from unauthorised disclosure;

---

20 International Covenant on Civil and Political Rights, article 7; and Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5. See also the prohibitions against torture under Australian domestic law, for example the *Criminal Code Act 1995*, Schedule 1, Division 274.

21 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, article 4(2); UN Human Rights Committee, *General Comment 20: Article 7* (1992) [3].

(f) what is the level of risk that the disclosure of protected information relating to national security could result in: the investigation and conviction of a person for an offence to which the death penalty applies in a foreign country; and/or a person being exposed to torture or cruel, inhuman or degrading treatment or punishment in a foreign country; and

(g) what, if any, safeguards are in place to ensure that information is not shared with a foreign government or entity in circumstances that could expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment, including:

(i) the approval process for authorising disclosure; and

(ii) whether there will be a requirement to decline to disclose information where there is a risk that it may expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment.

Committee view

1.14 The committee notes that the measure serves a very important purpose in safeguarding Australia's national security. In doing so, the measure would authorise the disclosure of protected information relating to national security, including personal information, to a foreign government or entity for the purpose of assisting the foreign government or entity to perform a function or duty, or exercise a power. The committee notes that this measure engages and limits the right to privacy. To the extent that there may be a risk that disclosure of protected information to a foreign government or entity could expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment, the measure may engage and limit the right to life and the prohibition against torture or cruel, inhuman or degrading treatment or punishment.

1.15 The committee notes that the rights to privacy may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee considers that the measure seeks to enhance compliance with the *Foreign Acquisitions and Takeovers Act 1975* and address national security risks. This appears to be a legitimate objective for the purpose of international human rights law, and the measure would appear to be rationally connected to that objective. The committee notes that some questions remain as to the proportionality of the measure.

1.16 In order to form a concluded view of the human rights implications of these measures, the committee seeks the Treasurer's advice as to the matters set out at paragraph [1.13].

Treasurer's powers to give directions

1.17 The bill seeks to allow the Treasurer to make a direction if they have 'reason to believe' that a person has engaged, is engaging, or will engage in conduct that would constitute a contravention of the Act.[22] The Treasurer may direct the person to engage in conduct that addresses or prevents the contravention or a similar or related contravention.[23] Proposed subsection 79R(7) states that this includes the power to direct specified persons or specified kinds of persons, such as 'persons who are not Australian citizens, or who are foreign persons', to cease being or not become senior officers of a corporation.[24] The Treasurer may also direct that a specified proportion of the senior officers of the corporation are not specified kinds of people.[25] A direction made by the Treasurer must be published on a website maintained by the Department as soon as practicable after it is made.[26] Failing to comply with a direction made by the Treasurer is a criminal offence subject to up to 10 years imprisonment or 15,000 penalty units, or subject to a civil penalty of up to 5,000 penalty units.[27]

Preliminary international human rights legal advice

Rights to work, equality and non-discrimination, and privacy

1.18 By authorising the Treasurer to make directions requiring specified persons or kinds of persons to cease being, or not become senior officers of a corporation, the right to work is engaged and limited. The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be

---

22 Schedule 1, Part 1, item 132, proposed subsection 79R(1).

23 Schedule 1, Part 1, item 132, proposed subsection 79R(3). Directions that can be made under proposed section 79R can be extended by regulations: explanatory memorandum, p. 108.

24 Schedule 1, Part 1, item 132, proposed subsections 79R(7)(a)–(d). Proposed subsection 79R(7) sets out a non-exhaustive list of conduct to be engaged in as specified in the direction.

25 Schedule 1, Part 1, item 132, proposed subsection 79R(7)(e).

26 Schedule 1, Part 1, item 132, proposed section 79S. The Treasurer may decide to not publish a direction on a website maintained by the Department if it would be contrary to the national interest: proposed subsection 79S(2).

27 Schedule 1, Part 1, item 158, proposed section 88A. Contravention of a direction or interim direction is a civil penalty provision where the provision to which the relevant contravention relates is a civil penalty provision: Schedule 2, item 16, proposed section 98A. See also explanatory memorandum, p. 112. The civil penalty provisions in the bill are discussed in further detail below at paragraph [1.33]-[1.38].

unfairly deprived of work.[28] This right must be made available in a non-discriminatory way.[29]

1.19 While the directions power may apply to any person who has contravened, or may contravene, the Act, insofar as the directions power may apply to persons on the basis that they are foreign persons (being those not ordinarily resident in Australia) and persons who are not Australian citizens[30] and may have the effect of depriving them of certain types of work, the measure also engages and limits the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[31] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights).[32] Where the direction may treat non-Australian citizens differently to Australian citizens, this would have the effect of constituting direct discrimination. Where the direction may treat foreign persons (being those not ordinarily resident in Australia) differently to Australian residents, this may impact on non-nationals disproportionately and may constitute indirect discrimination.[33]

1.20 Additionally, as the measure would authorise interference with a person's private life and workplace, and require that directions, which may contain personal information, be published on a public website, the right to privacy is engaged and limited. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[34] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life, which includes a person's workplace.[35] The right to privacy also includes respect for

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

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

30 See for example Schedule 1, Part 1, item 132, proposed paragraphs79R(7)(c)–(e).

31 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.

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

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

34 International Covenant on Civil and Political Rights, article 17 and UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]–[4].

35 UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [5].

informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[36]

1.21 The rights to work, equality and non-discrimination and 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.

1.22 The statement of compatibility acknowledges that the right to work is engaged by the measure because it authorises the Treasurer to give directions to ensure that specified persons cease or do not become senior officers of particular corporations.[37] It states that the directions power would not necessarily prevent a person from working but is more likely to prevent them from holding a particular position within a particular corporation.[38] The statement of compatibility does not acknowledge that the rights to equality and non-discrimination or privacy are engaged by this measure.

1.23 Any limitation on a right, unless it is an absolute right, must be shown to be aimed at achieving a legitimate objective, which must be one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. The statement of compatibility states that the directions power is intended to achieve the objective of ensuring compliance with the Act. It notes that contraventions may have significant and long lasting economic repercussions and affect Australia's national interest and security, and hence compliance with the Act is paramount.[39] The explanatory memorandum explains that the directions powers are designed to provide a quick and efficient response to the conduct of a person and to require the person to promptly remedy a potential breach of the Act. The explanatory memorandum states that the measure supports early regulatory intervention in order to 'protect further or ongoing harm to the national interest'.[40] Regarding the publication of directions on a website, the explanatory memorandum states that there are strong public interest grounds for requiring directions to be published on a website maintained by Treasury, as this serves to increase public confidence that appropriate steps have been taken to ensure compliance with the Act.[41]

1.24 Although the objective of ensuring compliance with the Act in order to protect the national interest may be capable of constituting a legitimate objective,

---

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

37 Statement of compatibility, p. 230.

38 Statement of compatibility, p. 231.

39 Statement of compatibility, p. 230.

40 Explanatory memorandum, p. 108.

41 Explanatory memorandum, p. 111.

questions remain as to whether the measure addresses a pressing and substantial concern for the purposes of international human rights law. While the statement of compatibility provides some information regarding the importance of ensuring compliance with the Act, it does not fully address why it is necessary to introduce pre-emptive compliance powers rather than responding to contraventions when and if they occur. It is noted that introducing a broad directions power that may curtail individual rights and freedoms on the basis that the Treasurer 'has reason to believe' (noting the low evidentiary standard) that a contravention has occurred, or will occur, is a serious measure for the state to take. Accordingly, in order to demonstrate that the measure pursues a legitimate objective and is rationally connected to that objective for the purposes of international human rights law, a reasoned and evidence-based explanation of why the measure addresses a substantial and pressing concern is required.

1.25 In addition, 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; accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective.

1.26 The scope of the directions powers is relevant in considering whether the proposed limitation is sufficiently circumscribed. International human rights law jurisprudence states that laws conferring discretionary powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.[42] This is because, without sufficient precision and the existence of safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. The measure contains a proposed non-exhaustive list of directions and interim directions that the Treasurer may give to a person. The explanatory memorandum notes that the list is indicative of the kinds of directions and interim directions that could be issued and the list can be extended by regulations.[43] It is expected, although not legally required, that directions regularly being made by the Treasurer would be prescribed in the regulations to provide transparency to investors.[44] The directions may include a matter, detail or instruction contained in any instrument (legislative or not) or other writing.[45] The scope of the Treasurer's directions powers would appear to be very broad, noting that the power provides only that the Treasurer may direct the person in writing to engage in conduct as 'specified in the direction'.[46]

42 *Hasan and Chaush v Bulgaria,* European Court of Human Rights App No.30985/96 (2000) [84].

43 Explanatory memorandum, p. 108.

44 Explanatory memorandum, p. 108.

45 Explanatory memorandum, p. 110.

46 Schedule 1, Part 1, item 132, Division 5, proposed subsection 79R(3).

1.27 Furthermore, the basis on which a direction could be made would also appear to be very broad. The Treasurer may make a direction if they have a 'reason to believe' that a person has engaged, is engaging or will engage in conduct that constitutes a contravention of the Act.[47] It is unclear what evidence or information is required in order for the Treasurer to have a reason to believe, and whether this is a lower threshold than requiring that the Treasurer 'reasonably believes' something. This raises questions as to whether the measure's proposed limitation on the rights is sufficiently circumscribed.[48]

1.28 Regarding the existence of sufficient safeguards, the explanatory memorandum states that in order to comply with procedural fairness obligations, it is expected that the Treasurer will afford a person an opportunity to make a submission on the matter before they make or vary a direction.[49] However, this procedural fairness obligation is not set out in the legislation. It is also unclear whether there are any other effective safeguards or controls over the measure to ensure that any limitation on rights is proportionate.

1.29 In order to assess the compatibility of this measure with the rights to work, equality and non-discrimination and privacy, further information is required as to:

(a) what is the substantial and pressing concern that the measure seeks to address and how is the measure rationally connected to the objective;

(b) what, if any, safeguards are in place to ensure that the measure does not unlawfully discriminate against persons with protected attributes, particularly national origin;

(c) why is it appropriate that the standard of 'reason to believe' should be required for the Treasurer to make directions, noting the potential interference with human rights by making a direction, and whether 'reason to believe' imports a requirement that the belief must be one that is reasonable;

(d) why the bill does not set out that the Treasurer is required to afford a person an opportunity to make submissions on the matter before the Treasurer makes or varies a direction;

(e) whether consideration has been given to other less rights restrictive ways to achieve the objective ; and

---

47 Schedule 1, Part 1, item 132, division 5, proposed section 79R.

48 With respect to the right to privacy, the UN Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted: *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

49 Explanatory memorandum, p. 110.

(f) whether there is the possibility of oversight and the availability of review of the Treasurer's decision to make a direction.

Committee view

1.30 The committee notes that the measure would allow the Treasurer to make a direction if they have reason to believe that a person has engaged, is engaging or will engage in conduct which would constitute a contravention of the *Foreign Acquisitions and Takeovers Act 1975* (the Act). This could include directions that ensure specified persons (such as non-Australian citizens) not be senior officers of specified corporations. The committee notes that this measure engages and may limit the rights to work, equality and non-discrimination and privacy. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.31 The committee notes that the measure pursues the legitimate objective of ensuring compliance with the Act and supporting early regulatory intervention in order to protect further or ongoing harm to the national interest. However, further information is required as to whether the measure addresses a substantial and pressing concern and is rationally connected to the objective, and is proportionate.

1.32 In order to form a concluded view of the human rights implications of these measures, the committee seeks the Treasurer's advice as to the matters set out at paragraph [1.29].

Civil penalty provisions

1.33 Schedule 2 of the bill seeks to introduce and significantly increase the penalties for contraventions of civil penalty provisions. With respect to the proposed directions power, for example, a person who fails to comply with a Treasurer's direction or interim direction would be liable to a civil penalty of 5,000 penalty units ($1.11 million).[50] Schedule 2 would also introduce a civil penalty of up to 2,500,000 penalty units (up to $555 million) for persons who provide false or misleading information to the Treasurer in relation to a no objection notification.[51] Information could be false or misleading because of the omission of a matter or thing.[52] Likewise a person who contravenes a condition specified in a no objection notification or a

---

50 Schedule 2, Part 1, item 16, proposed section 98A. A penalty unit is $222: *Crimes Act 1914*, subsection 4AA(1A) and Notice of Indexation of the Penalty Unit Amount 2020.

51 Schedule 2, Part 1, item 16, proposed section 98B. Subsection 3 provides that the maximum penalty for contravention of section 98B is the lesser of the following: 2,500,000 penalty units or the greater of the following: 5,000 penalty units or the sum of the amounts worked out under section 98F.

52 Schedule 2, Part 1, item 16, proposed subsection 98B(7).

notice imposing conditions would be liable to a civil penalty of up to 2,500,000 penalty units ($555 million).[53]

International human rights legal advice

Right to a fair hearing

1.34 The significant increase in civil penalties, including up to 2,500,000 penalty units ($555 million) for individuals, raises the risk that these penalties may be considered criminal in nature under international human rights law. Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, if the new civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right to be presumed innocent until proven guilty according to law,[54] which requires that the case against the person be demonstrated on the criminal standard of proof of beyond reasonable doubt.

1.35 In assessing whether a civil penalty may be considered criminal, it is necessary to consider the domestic classification of the penalty as civil or criminal; the nature of the penalty; and the severity of the penalty. Regarding the domestic classification, the penalties would be classified as civil not criminal penalties. However, the classification of a penalty as 'civil' is not determinative as the term 'criminal' has an autonomous meaning in human rights law. Consequently, the domestic classification of the measures in the bill, while relevant, is not determinative.

1.36 In considering the nature and purpose of the penalty, a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty. The statement of compatibility states that the penalties would apply to persons who are already subject to the Act due to their economic activities.[55] The penalties would therefore appear to be restricted to persons in a specific regulatory context rather than applying to the general public. Regarding the purpose of the penalty, the statement of compatibility states that it is appropriate to increase penalties to deter persons from committing offences under the *Foreign Acquisitions and Takeovers Act 1975* (the Act).[56] Given the potential benefits and profits that may be derived from non-compliance with the Act, the statement of compatibility notes that increasing

53 Schedule 2, Part 1, item 14, proposed section 93.

54 International Covenant on Civil and Political Rights, article 14(2).

55 Statement of compatibility, pp. 226-227.

56 Statement of compatibility, p. 226.

penalties is necessary to create a sufficient deterrent to protect the national interest, effectively diminish the commercial incentives for misconduct and neutralise any financial benefits or gains obtained from illegal behaviour.[57] It further states that the increase in penalties reflects the seriousness of potential non-compliance and aligns with community standards and expectations.[58] It would therefore appear that the increased civil penalties in Schedule 2 are for the purpose of deterrence.

1.37 In determining whether a civil penalty is sufficiently severe as to amount to a 'criminal' penalty, the nature of the industry or sector being regulated and the relative size of the penalties in that regulatory context is relevant.[59] The penalty is more likely to be considered criminal for the purposes of international human rights law if the penalty carries a term of imprisonment or a substantial pecuniary sanction. The statement of compatibility acknowledges that the bill seeks to significantly increase the maximum penalties for multiple contraventions of civil penalty provisions to a level that is higher than suggested by the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.[60] The statement of compatibility states that the significant increase in pecuniary penalties is proportionate to the potential financial benefits derived from illegal behaviour and the potential harm to the national interest. While the civil penalty provisions in Schedule 2 would not carry a term of imprisonment, they would impose a potentially substantial pecuniary sanction on individuals. The severity of the pecuniary penalty raises the risk that they may constitute a criminal sanction for the purposes of international human rights law.

1.38 If the civil penalty provisions were considered to be 'criminal' for the purposes of international human rights law, this neither means that the relevant conduct must be turned into a criminal offence in domestic law nor that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in Schedule 2 must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right to be presumed innocent until proven guilty according to law.[61] This right requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. If the civil penalties in Schedule 2 were considered to

57 Statement of compatibility, p. 226.

58 Statement of compatibility, p. 226.

59 See Simon NM Young, 'Enforcing Criminal Law Through Civil Processes: How Does Human Rights Law Treat "Civil For Criminal Processes"?', *Journal of International and Comparative Law*, vol. 2, no. 2, 2017, pp. 133-170.

60 Statement of compatibility, p. 226.

61 International Covenant on Civil and Political Rights, article 14(2).

be 'criminal', the lower standard of civil proof would not appear to comply with article 14.

1.39 Further information is required in order to conduct a full assessment of the potential limitation on criminal process rights, in particular:

(a) noting the potential severity of the civil penalties, why any of the civil penalties would not be characterised as criminal for the purposes of international human rights law; and

(b) if such penalties are 'criminal' for the purposes of international human rights law, how are these compatible with criminal process rights under international human rights law

Committee view

1.40 The committee notes that Schedule 2 of the bill seeks to significantly increase penalties for contraventions of civil penalty provisions.

1.41 The committee considers that increasing civil penalties may be appropriate given the potential financial benefits that may be derived from illegal behaviour and the potential harm to the national interest. However, noting the substantial pecuniary sanctions that would apply to individuals, including up to 2,500,000 penalty units ($555 million), there is a risk that the penalties may be so severe as to constitute a criminal sanction under international human rights law. If the penalties were to be considered 'criminal' under international human rights law, the proposed provisions must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights.

1.42 In order to form a concluded view of the human rights implications of these measures, the committee seeks the Treasurer's advice as to the matters set out at paragraph [1.39].

Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2020 [F2020L01190]
Health Insurance Legislation Amendment (Bulk-billing Incentive (No. 2)) Regulations 2020 [F2020L01203][1]

Purpose	The first instrument amends the *Health Insurance Act 1973* to: • extend the availability of Medicare benefits for temporary remote service options from 30 September 2020 to 21 March 2021; • expand SARS-CoV-2 testing to include people who travel interstate as a rail crew member; and • remove the requirement to bulk-bill attendances in relation to telehealth and phone consultation for certain patients from 1 October 2020. The second instrument removes the temporary increase that was applied to the schedule fees for the bulk-billing incentive items and returns the schedule fees to their normal rate from 1 October 2020.
Portfolio	Health
Authorising legislation	*Health Insurance Act 1973*
Last day to disallow	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[2]
Rights]	Health; social security; equality and non-discrimination
Status	Seeking additional information

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2020 [F2020L01190] and Health Insurance Legislation Amendment (Bulk-billing Incentive (No. 2)) Regulations 2020 [F2020L01203], *Report 14 of 2020*; [2020] AUPJCHR 170.

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

Extension of Medicare benefits and changes to bulk-billing

1.43 The Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2020 (Telehealth instrument) extends by six months the availability of Medicare benefits for temporary remote service options to enable patients to access telehealth and phone consultation services. The provision of access to Medicare benefits for certain medical services, including remote service options, was originally introduced as a temporary measure in response to the COVID-19 pandemic,[3] and this instrument extends this until 31 March 2021. It also removes the requirement for General Practitioners (GPs) and other doctors in general practice to bulk-bill telehealth and phone attendances for certain patients, including persons at risk of COVID-19, concessional beneficiaries and persons under the age of 16 years,[4] leaving it to the discretion of the doctor to bulk-bill or patient bill such services.

1.44 The Health Insurance Legislation Amendment (Bulk-billing Incentive (No. 2)) Regulations 2020 (Incentive instrument) removes the increase that was applied to the schedule fees for the bulk-billing incentive items and returns the schedule fees to their normal rate from 1 October 2020. In effect, the regulations reduce the schedule fees for bulk-billing incentive items by 50 per cent. Bulk-billing incentive items are available for certain medical services, diagnostic imaging services and pathology services for patients who are either under 16 years old, or who are Commonwealth concessional beneficiaries.[5] The temporary increase in the bulk-billing incentive items was introduced in response to the COVID-19 pandemic.[6]

---

3 See Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Determination 2020 [F2020L00342].

4 Schedule 2 repeals the definition of bulk-billed in section 5 and subsection 8(4) of the Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Determination 2020. Subsection 8(4) prescribed that bulk-billing services were to be provided to a person who is a: patient at risk of COVID-19 virus; concessional beneficiary; or under the age of 16. A patient at risk of COVID-19 virus is defined as a person who is: required to self-isolate or self-quarantine in relation to COVID-19; at least 70 years old or 50 years old if Aboriginal or Torres Strait Islander; pregnant; a parent of a child under 12 months; being treated for a chronic health condition; immune compromised; or meets the current national triage protocol criteria for suspected COVID-19 infections.

5 Health Insurance Legislation Amendment (Bulk-billing Incentive (No. 2)) Regulations 2020, statement of compatibility, p. 4.

6 Health Insurance Legislation Amendment (Bulk-billing Incentive) Regulations 2020 [F2020L00341].

Preliminary international human rights legal advice

Rights to health, equality and non-discrimination and social security

1.45 The temporary provision of access to Medicare benefits for telehealth and phone consultation services, the requirement to bulk-bill certain patients, and the temporary doubling of the schedule fees for the bulk-billing incentive items, promoted the right to health by increasing access to certain health-care services, ensuring that no person was constrained from seeking health care. These measures were intended to be temporary in nature, being part of the government's health care package to protect all Australians from COVID-19.[7] The Telehealth Instrument, in extending Medicare benefits for telehealth and phone consultation services for a further six months, also promotes the right to health. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and requires available, accessible, acceptable and quality health care.[8] Regarding accessibility of health services, the United Nations (UN) Committee on Economic, Social and Cultural Rights has noted that payment for health-care services should be 'based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups'.[9]

1.46 In respect of economic, social and cultural rights, including the right to health, there is a duty to realise these rights progressively. Under international human rights law, there is also a corresponding duty to refrain from taking retrogressive measures, which means the state cannot unjustifiably take deliberate steps backwards which negatively affects the enjoyment of economic, social and cultural rights. Although the bulk-billing requirement and the 50 per cent increase in the schedule fees for bulk-billing incentive items was always intended to be temporary, the removal of these rights-enhancing measures might nonetheless, as a technical matter, constitute a retrogressive step, if the effect is to reduce access to affordable health-care services for certain patients. To the extent that these instruments may result in some health professionals now choosing to bill their patients, where previously they bulk-billed these patients, the measures may appear to be retrogressive in the sense of reducing access to existing more affordable health care options. This was not fully addressed in the statements of compatibility accompanying the instruments.

---

7 See explanatory statement to Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Determination 2020 [F2020L00342] and Health Insurance Legislation Amendment (Bulk-billing Incentive) Regulations 2020 [F2020L00341].

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

9 United Nations Economic, Social and Cultural Rights Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (2000) [12].

1.47 Further, Australia has an obligation to ensure that the right to health is made available in a non-discriminatory way.[10] Immediately prior to the introduction of the Telehealth instrument, the following patients were required to be bulk-billed for all telehealth appointments:

- patients at risk of COVID-19 (including pregnant women, older persons and those with chronic health conditions);
- patients who are concessional beneficiaries (being health care card holders – such as those receiving unemployment benefits and parenting payments – and pensioners); and
- patients under the age of 16.[11]

1.48 As a result of the Telehealth instrument, from 1 October 2020 doctors were 'able to choose to bulk-bill or patient bill any temporary COVID-19 telehealth and phone attendance service'.[12] Further, the Incentive instrument reduced by half the incentive for health professionals to bulk-bill concessional beneficiaries (such as pensioners and the unemployed) and persons under 16 years of age. As such, there is a risk that such persons may be patient charged rather than bulk-billed. The payment of an out-of-pocket expense may be financially burdensome for certain patients, noting that concession card holders may be more likely to be older persons, persons with disability, and persons experiencing socio-economic disadvantage. Although noting that the requirement to bulk bill was only a temporary measure, if these changes result in a disproportionate adverse impact on people with particular protected attributes, this could amount to indirect discrimination against persons with these protected attributes, such as age and disability.[13]

1.49 In addition, while the increase in the bulk-billing incentive was intended to be temporary, the reduction of the bulk-billing incentive by the Incentive instrument may, as a technical matter, engage and limit the right to social security. The right to social security includes the right to access benefits to prevent access to health care

---

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

11 Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Determination 2020, subsection 8(4) (as in force prior to 1 October 2020).

12 Explanatory statement, p. 1, to the Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2020 [F2020L01190].

13 Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute: *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2].

from being unaffordable.[14] In this regard, Medicare benefits could be considered to constitute a form of social security benefit that is provided to secure protection from unaffordable access to health care. It is not clear if the removal of the temporary increase to the schedule fees for the bulk-billing incentive items could amount to a reduction in a social security benefit available to certain patients and thus be a retrogressive measure with respect to the right to social security.

1.50 The rights to health, equality and non-discrimination and social security may be subject to permissible limitations (noting that retrogressive measures are a type of limitation), where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[15]

1.51 With respect to the Telehealth instrument, the statement of compatibility states that its purpose is to support the continued viability of the health-care sectors during the COVID-19 pandemic. This is likely to constitute a legitimate objective for the purposes of international human rights law, and the measure would appear to be rationally connected to that objective.

1.52 With respect to the Incentive instrument, the statement of compatibility states that its purpose is to reduce the schedule fees for bulk-billing incentive items to their normal rate.[16] This appears to be a description of what the measure does rather than articulating the pressing or substantial concern the measure addresses as required to constitute a legitimate objective for the purposes of international human rights law. Further information is required in order to identify the objective being pursued by the Incentive instrument.

1.53 Regarding the proportionality of the measures, neither of the statements of compatibility provide any information as to whether there are sufficient safeguards to protect vulnerable groups and whether any less rights restrictive alternatives could achieve the same stated objective. As a result of the changes made by these measures, GPs or other doctors have the discretion to determine their own billing arrangements. This includes the option to bulk-bill a service at no cost to the patient, which could operate in practice to protect vulnerable persons, having regard to their

---

14 United Nations Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008) [13].

15 The United Nations Economic, Social and Cultural Rights Committee has noted that any measures taken in response to the COVID-19 pandemic that limits rights 'must be necessary to combat the public health crisis posed by COVID-19, and be reasonable and proportionate': United Nations Economic, Social and Cultural Rights Committee, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights* (2020) [11].

16 Health Insurance Legislation Amendment (Bulk-billing Incentive (No. 2)) Regulations 2020, statement of compatibility, p. 4.

personal circumstances and attributes. However, it is unclear how this discretion is exercised, and in practice some GPs or other doctors may choose to patient bill rather than bulk-bill a service. The UN Committee on Economic, Social and Cultural Rights in its general comment in relation to the right to health, has stated that States have the burden of proving that any deliberately retrogressive measures that are taken are 'introduced after the most careful consideration of all alternatives' and are justified by 'reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources'.[17] Noting the recommendation of the UN Committee on Economic, Social and Cultural Rights that 'States parties should take a range of urgent measures' to protect and fulfil Covenant rights and obligations during the COVID-19 pandemic, it may be easier for States parties to justify taking retrogressive measures where those measures were originally introduced on a temporary basis as an urgent measure to respond to the COVID-19 pandemic.[18] It is noted that the UN Committee on Economic, Social and Cultural Rights has also called on States to:

> ensure that the extraordinary mobilization of resources to address the COVID-19 pandemic provides the impetus for long-term resource mobilization towards the full and equal enjoyment of the economic, social and cultural rights enshrined in the Covenant.[19]

1.54 It is unclear whether there has been careful consideration of less rights restrictive alternatives and consideration of the extent to which these measures may indirectly discriminate against certain patients, particularly those experiencing socio-economic disadvantage.[20]

1.55 In order to assess the compatibility of these instruments with the rights to health, social security and equality and non-discrimination, further information is required as to:

17 United Nations Economic, Social and Cultural Rights Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (2000) [32].

18 See United Nations Economic, Social and Cultural Rights Committee, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights* (2020) [10].

19 United Nations Economic, Social and Cultural Rights Committee, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights* (2020) [25].

20 The United Nations Economic, Social and Cultural Rights Committee has noted that 'even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes' to realise the right to health: United Nations Economic, Social and Cultural Rights Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (2000) [18].

(a) whether the removal of the temporary increase to the schedule fees for the bulk-billing incentive items would have the effect of reducing the benefit available to certain patients;

(b) what is the objective of removing the temporary increase to the schedule fees for the bulk-billing incentive items;

(c) how does the reduction of the schedule fees for the bulk-billing incentive items achieve the stated objective;

(d) the extent to which GPs and other doctors exercise the discretion to bulk-bill instead of patient bill, particularly for patients at risk of COVID-19, concessional beneficiaries, or patients under the age of 16;

(e) what, if any, alternatives were considered to reducing the schedule fees for the bulk-billing incentive items and removing the bulk-billing requirement for certain patients;

(f) what, if any, safeguards are in place to ensure that the measures constitute a proportionate limitation on the rights to health, social security and equality and non-discrimination; and

(g) what, if any, safeguards are in place to ensure that the measures do not indirectly discriminate against certain patients with protected attributes.

Committee view

1.56 The committee notes that at the beginning of the COVID-19 pandemic, a number of vital steps were taken to protect Australians from the risk posed by COVID-19. Part of this health care package included introducing Medicare benefits for telehealth consultation services to provide services remotely to patients, and temporarily increasing the incentive for doctors to bulk-bill certain patients. The committee considers that these measures were extremely important emergency measures in the management of the pandemic. The committee recognises that Australia's universal health care system is one of the best in the world and that the government invested very significantly in these additional measures to support Australians to access health care at this very difficult time for our nation, particularly given the additional health risk that would have arisen if a patient with COVID-19 was to attend a medical clinic in person. We also note that the government was able to implement nation-wide telehealth services in an incredibly short time frame which we assume played a critically important role in protecting and saving lives during this pandemic. The committee considers the Telehealth instrument, in extending Medicare benefits for telehealth appointments by six months, promotes the right to health.

1.57 The committee notes that these instruments remove the requirement that doctors undertaking telehealth and phone appointments bulk-bill certain patients and removes the temporary increase to the schedule fees for bulk-billing incentive items. The committee notes the legal advice that as the initial measures promoted the right to health, pending receipt of further information, it is not clear if removing these temporary measures may be seen under international human rights law to constitute a backwards step in the realisation of the right to health and social security and may have a disproportionate impact on certain persons.

1.58 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of these measures, and as such, the committee seeks the minister's advice as to the matters set out at paragraph [1.55].

Higher Education Support Amendment (Freedom of Speech) Bill 2020[1]

Purpose	This bill seeks to amend the *Higher Education Support Act 2003* to: • insert a new definition of 'academic freedom'; and • replace the existing term 'free intellectual inquiry' with 'freedom of speech' and 'academic freedom'
Portfolio	Education
Introduced	House of Representatives, 28 October 2020
Rights	Multiple rights
Status	Seeking additional information

Academic freedom and freedom of expression

1.59 This bill seeks to amend the *Higher Education Support Act 2003* (the Act) to provide that one of the objectives of the Act is to support a higher education system that promotes and protects freedom of speech and academic freedom.[2] The bill would also require higher education providers to have a policy upholding freedom of speech and academic freedom.[3]

1.60 The term 'freedom of speech' is not defined by the bill or in the Act. The bill would define the term 'academic freedom' to mean:

(a) the freedom of academic staff to teach, discuss, and research and to disseminate and publish the results of their research;

(b) the freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;

(c) the freedom of academic staff and students to express their opinions in relation to the higher education provider in which they work or are enrolled;

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Higher Education Support Amendment (Freedom of Speech) Bill 2020, *Report 14 of 2020*; [2020] AUPJCHR 171.

2 Schedule 1, item 1, proposed subparagraph 2-1(a)(iv).

3 Schedule 1, item 3, proposed section 19-115.

(d) the freedom of academic staff to participate in professional or representative academic bodies;

(e) the freedom of students to participate in student societies and associations;

(f) the autonomy of the higher education provider in relation to the choice of academic courses and offerings, the ways in which they are taught and the choices of research activities and the ways in which they are conducted.[4]

Preliminary international human rights legal advice

Multiple rights

1.61 This bill seeks to enhance protections around freedom of expression, as well as provide for the protection of academic freedom, in higher education institutions. In this respect, these measures may promote a number of human rights, including the rights to freedom of expression, education, and to benefit from cultural and scientific progress. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.[5] The right to education provides that education should be accessible to all, and requires that States Parties recognise the right of everyone to education, and agree that education shall be directed to the full development of the human personality and sense of dignity, and shall strengthen the respect for human rights and fundamental freedoms.[6] The United Nations (UN) Committee on Economic, Social and Cultural Rights has stated that academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State, and to enjoy all the internationally recognised human rights applicable to other individuals in the same jurisdiction.[7]

1.62 The explanatory memorandum states that these amendments are proposed in response to the 2019 Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers (undertaken by the Honourable Robert French

---

4 Schedule 1, item 4.

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

6 International Covenant on Economic, Social and Cultural Rights, article 13. Article 15 further provides that every person has a right to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

7 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education (Art. 13)* (1999) [39].

AC) (the French Review),[8] and are designed to strengthen protections for academic freedom and freedom of speech in Australian universities.[9] The statement of compatibility provides that these amendments will oblige higher education providers to have policies that support and uphold free intellectual inquiry going to the preservation of the institutional autonomy and self-governance of universities to decide how best to run their institutions without unreasonable interference, in developing curricula and other programmes or services.[10] It states that the amendments expressly extend to the individual right of academic staff and students to engage in the production, consumption and dissemination of knowledge without unreasonable restrictions.[11] The statement of compatibility further states that the new definition of 'academic freedom' also supports the right to education by recognising higher education is a collective as well as an individual undertaking, which is underpinned by open discussion and critical debate, and by expressly recognising that academic staff need freedom to teach, test and challenge the body of knowledge and promulgate ideas.[12]

1.63 The UN Human Rights Council has emphasised that freedom of expression has foundational importance in relation to the realisation of other human rights:

> The exercise of the right to freedom of opinion and expression is one of the essential foundations of a democratic society, is enabled by a democratic environment, which offers, inter alia, guarantees for its protection, is essential to full and effective participation in a free and democratic society, and is instrumental to the development and strengthening of effective democratic systems.[13]

1.64 The right to freedom of expression often overlaps with the realisation of other rights, such as freedom of assembly, and so its promotion may assist in the promotion of other rights.[14] Furthermore, academics and academic institutions play

8 Explanatory memorandum, p. 2. The Honourable Robert French AO undertook the review. He stated that he found no evidence of a freedom of speech 'crisis' in Australia, although he observed that the diversity and language of a range of policies and rules give rise to unnecessary risks to freedom of speech and to academic freedom. See, *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (2019) p. 224.

9 Explanatory memorandum, p. 2.

10 Statement of compatibility, p. 6.

11 Statement of compatibility, p. 6.

12 Statement of compatibility, p. 6.

13 UN Human Rights Council, *Resolution 12/16, Freedom of opinion and expression*, UN Doc A/HRC/RES/12/16, 12 October 2009, preamble.

14 See, for example, UN Human Rights Committee, *General comment No. 37 (2020) on the right of peaceful assembly (article 21)* (2020) [9].

a special role in democratic societies, and so it is recognised that attacks on academic freedom may corrode the pillars of democratic life.[15]

1.65 It is also necessary, however, to consider the human rights which operate synchronously with the right to freedom of expression, and in relation to which its exercise must be balanced. While the right to *hold* an opinion is absolute, and may never be permissibly limited under law,[16] the right to freedom of expression (that is, the freedom to *manifest* one's beliefs or opinions) is limited.[17] In particular, the International Covenant on Civil and Political Rights expressly provides that the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.[18] The International Covenant on the Elimination of Racial Discrimination also requires States to make it an offence to disseminate 'ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'.[19] These provisions are understood as constituting compulsory limitations on the right to freedom of expression.[20]

1.66 In addition, other human rights operate alongside (and must be balanced with) the right to freedom of expression, including:

- the right to privacy and reputation (which provides that no person shall be subjected to arbitrary or unlawful interference with their privacy, family,

---

15 Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report on academic freedom* (28 July 2020) A/75/261 [2]–[4].

16 International Covenant on Civil and Political Rights, article 19(1).

17 Article 19(3) of the International Covenant on Civil and Political Rights states that the exercise of the right to freedom of expression carries with it special duties and responsibilities, and may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: for respect of the rights or reputations of others; for the protection of national security or of public order; or of public health or morals.

18 International Covenant on Civil and Political Rights, article 20(2).

19 International Covenant on the Elimination of Racial Discrimination, article 4(a). Where each of the treaty provisions above refer to prohibition by law, and offence punishable by law, they refer to criminal prohibition. Although Australia has ratified these treaties, Australia has made reservations in relation to both the International Covenant on Civil and Political Rights and International Covenant on the Elimination of Racial Discrimination in relation to its inability to legislate for criminal prohibitions on race hate speech.

20 See, also, UN Special Rapporteur, F La Rue, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, Human Rights Council, UN Doc A/HRC/14/23 (20 April 2010) [79(h)] available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23 (accessed 4 November 2020).

home or correspondence, or to unlawful attacks on their honour and reputation);[21]

- freedom of thought, conscience and religion (which is the right of all persons to think freely, and to entertain ideas and hold positions based on conscientious or religious or other beliefs, and to manifest those beliefs subject to certain limitations);[22] and
- the right to equality and non-discrimination (which provides that everyone is entitled to enjoy their rights without discrimination of any kind, and which protects persons from serious forms of racially discriminatory speech).[23]

1.67 The process of balancing the realisation of these rights may necessitate a limit on the right to freedom of expression. Such a limitation will be permissible where it is reasonable, necessary and proportionate. The statement of compatibility notes that the right to freedom of expression may be permissibly limited in relation to the realisation of other human rights, stating that:

> [T]o the extent that the right to freedom [of] expression may be limited by the scope of the definition of academic freedom, the limits are reasonable and proportionate in that they impliedly recognise the countervailing rights of students and academics not be subjected to stigmatising, derogatory and discriminatory statements aimed at particular students (or other academic staff).[24]

1.68 It is not clear whether the provisions of this bill would permit certain types of speech which could infringe on the rights of others. For example, it is not clear whether a person could permissibly engage in speech that might constitute hate speech, or incitement to discrimination, and be in compliance with their university policy that guarantees the right to freedom of speech and academic freedom. The explanatory memorandum explains that the Government is working with universities to support the adoption of the Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers, which was proposed in the French Review.[25] This model code proposes, for example, that academic staff and students shall enjoy academic freedom subject only to prohibitions, restrictions or conditions which are imposed by the reasonable and proportionate regulation necessary to discharge the university's duty to foster the

---

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

22 International Covenant on Civil and Political Rights, article 18.

23 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.

24 Statement of compatibility, p. 6.

25 Explanatory memorandum, p. 2.

wellbeing of students and staff, and to give effect to the university's legal duties.[26] However, no further information is provided as to how the proposed legislative amendments themselves (and any resulting policies) would operate alongside existing protections against discrimination in Australian law,[27] and with Australia's relevant obligations under international human rights law. It is also not clear if requiring a higher education provider to have a policy in these terms would restrict their ability to implement any employment related action against academic staff who engaged in conduct that has been proven to constitute incitement to discrimination, if that conduct fell within the definition of academic freedom. Consequently, some questions remain as to how these proposed amendments would operate in relation to other corresponding human rights, including the rights of persons not to be subjected to stigmatising, derogatory and discriminatory statements based on a protected characteristic (for example, a person's race or gender).

1.69 The UN Committee on Economic, Social and Cultural Rights has relevantly explained that, 'the enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds'.[28] The Convention on the Elimination of all forms of Racial Discrimination requires that States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnic groups.[29] Further, the UN Committee on the Elimination of Racial Discrimination has stated that, '[t]he rights to equality and freedom from discrimination, and the right to freedom of expression, should be fully reflected in law, policy and practice as mutually supportive human rights'.[30]

1.70 Further information is required to establish how these proposed amendments would operate, and consequently to assess the compatibility of the bill,

---

26 See, *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (2019), p. 234.

27 For example, pursuant to the *Age Discrimination Act 2004, Disability Discrimination Act 1992, Racial Discrimination Act 1975,* and *Sex Discrimination Act 1984*.

28 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education (Art. 13)* (1999) [39].

29 Article 7.

30 UN Committee on the Elimination of Racial Discrimination, *General recommendation No. 35: Combating racist hate speech* (2013) [45]. The committee further stated that the relationship between proscription of racist hate speech and the flourishing of freedom of expression should be seen as complementary and not the expression of a zero sum game where the priority given to one necessitates the diminution of the other. It also posited that because racism can be the product of inadequate education, education for tolerance and counter-speech can be effective antidotes to racist hate speech. See, [30] and [45].

which would promote the right to freedom of expression, with other human rights. In particular:

(a) whether these proposed provisions may engage and limit other human rights, including the right to equality and non-discrimination, freedom of religion, privacy and reputation, and the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence;[31]

(b) how these legislative provisions would operate in relation to existing Commonwealth, state and territory legislative prohibitions against discrimination; and

(c) whether these legislative provisions could restrict higher education providers' ability to take employment-related action against academic staff who engage in conduct that has been found to constitute incitement to discrimination;

Committee view

1.71 The committee notes that the bill seeks to amend the *Higher Education Support Act 2003* to provide that one of the objectives of the Act is to support a higher education system that promotes and protects freedom of speech and academic freedom, and to require higher education providers to have a policy upholding freedom of speech and academic freedom.

1.72 The committee notes that these amendments are in response to the 2019 Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers, undertaken by the Honourable Robert French AC, and are designed to strengthen protections for academic freedom and freedom of speech in Australian universities. The committee considers that these amendments will promote the right to freedom of expression, and the right to education, in higher education institutions in Australia. The committee notes the foundational importance of the right to freedom of expression in relation to the realisation of other human rights, and the importance of academic freedom.

1.73 The committee further notes that the promotion of freedom of expression must also be balanced with the realisation of other related human rights, and that the right to freedom of expression may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

---

31 The committee's guidance note 1 provides information as to when human rights may be limited.

1.74 In order to form a concluded view as to whether this bill, in addition to promoting the right to freedom of expression, limits any other rights, the committee seeks the minister's advice as to the matters set out at paragraph [1.70].

Migration (LIN 20/166: Australian Values Statement for Public Interest Criterion 4019) Instrument 2020 [F2020L01305][1]

Purpose	This instrument amends the language of the values statement for all visa subclasses
Portfolio	Population, Cities, and Urban Infrastructure
Authorising legislation	Migration Regulations 1994
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives on 19 October 2020 and in the Senate on 9 November 2020). Notice of motion to disallow must be given by 3 December 2020 in the House of Representatives and on fourth sitting day of 2021 in the Senate[2]
Rights	Equality and non-discrimination; rights of people with disabilities
Status	Seeking additional information

Australian Values Statement

1.75 This instrument approves the Australian Values Statement for specified subclasses of visas. This replaces the existing statement and adds a new statement for specified permanent visa subclasses, whereby applicants for these visas are required to sign a values statement which includes an undertaking to make reasonable efforts to learn English, if it is not the applicant's native language.[3] If an applicant does not sign the Australian Values Statement when they apply for a visa, their application may be delayed or refused.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (LIN 20/166: Australian Values Statement for Public Interest Criterion 4019) Instrument 2020 [F2020L01305], *Report 14 of 2020*; [2020] AUPJCHR 172.

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 2, Part 2. See also, Migration Regulations 1994, Schedule 4, Part 1, 4019 (public interest criteria).

4 Department of Home Affairs, 'Australian values' https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/australian-values [Accessed 4 November 2020].

Preliminary international human rights legal advice

Right to equality and non-discrimination; rights of people with disabilities

1.76 Requiring that specified permanent visa subclass applicants undertake to make reasonable efforts to learn English, if it is not their native language, may assist new migrants in integrating into the Australian community and in helping them to access a broader range of employment opportunities. It is also noted that there is legislation currently before the Parliament which would allow more migrants to access more free English language classes. This would assist migrants in meeting the requirement that they learn English.[5]

1.77 However, the requirement to make reasonable efforts to learn English may also have a disproportionate impact on people of certain nationalities, notably those from non-English speaking countries and countries where English is not routinely taught. In this respect, the instrument engages and may limit the right to equality and non-discrimination.[6] This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[7] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights).[8] Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.[9]

1.78 In addition, requiring a permanent visa applicant to undertake to take efforts to learn English may impact on persons living with a cognitive, intellectual or other developmental disability, and those with health challenges for whom learning an additional language may be more challenging. People with disabilities have the right

---

5 See Immigration (Education) Amendment (Expanding Access to English Tuition) Bill 2020.

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

7 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.

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

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

to equality and non-discrimination, a right which may require that reasonable accommodations be made.[10] This right may be limited where such limitations are directed towards a legitimate objective, are rationally connected to (that is, effective to achieve) that objective, and are proportionate.

1.79 In assessing whether and how these rights may be engaged, it is unclear how this requirement would operate in practice, in particular whether it would represent an enforceable undertaking, and could be assessed for compliance. The Migration Regulations 1994 provide that a visa applicant may be excused from signing the values statement, but only where the minister considers that compelling circumstances exist.[11] It is not clear what range of circumstances would be captured by this provision. For example, it is not clear whether a person with an intellectual disability, or an elderly person with health difficulties for whom learning English may be extremely challenging, would be exempted from this requirement. In this respect, it is unclear whether the requirement that a person undertake to learn English is severable from the remainder of the values statement. In addition, it is not clear whether the undertaking to make reasonable efforts to learn English could be enforced against a visa holder at a later time or may, for example, constitute a basis for cancelling a person's visa.

1.80 As this instrument is exempt from disallowance, no statement of compatibility is required to be included in the explanatory statement.[12] Consequently, there is insufficient information with which to assess the compatibility of the instrument with human rights. Further information is required in order to assess whether the rights to equality and non-discrimination and the rights of persons with disabilities may be engaged and limited, and in particular:

(a) whether a person's compliance with an undertaking to make reasonable efforts to learn English pursuant to this instrument is assessed following their agreement to the statement of values, and, if so, how;

(b) whether an undertaking to make reasonable efforts to learn English pursuant to this instrument is enforceable and, if so, what type of action could be taken in response to a failure to make such reasonable efforts (for example, whether a person's visa could be cancelled on that basis);

---

10 Convention on the Rights of Persons with Disabilities, article 5 and International Covenant on Civil and Political Rights, article 26.

11 Migration Regulations 1994, Schedule 4, Part 1, 4019(2).

12 Legislation (Exemptions and Other Matters) Regulation 2015, section 10.

(c) whether the requirement that a person undertake to learn English could be severed from the remainder of the Australia values statement; and

(d) what kind of circumstances would be captured by the 'compelling circumstances' which may excuse an applicant from the requirement to sign a values statement, and whether this could include flexibility to excuse visa applicants based on their age, disability status, or other personal circumstances.

Committee view

1.81 The committee notes that this instrument approves the Australian Values Statement for specified subclasses of visas, and would require that for specified permanent visa subclasses, applicants must sign a values statement which includes an undertaking to make reasonable efforts to learn English, if it is not the applicant's native language.

1.82 The committee notes that requiring that specified permanent visa subclass applicants undertake to make reasonable efforts to learn English, if it is not their native language, is likely to give rise to a number of positive benefits particularly in relation to the seeking of employment and to supporting applicants integrate into the community.

1.83 The committee notes this measure may have a disproportionate impact on some applicants on the basis of nationality, and may pose particular challenges for those with cognitive disabilities. The committee also notes that this may, therefore, engage the right to equality and non-discrimination, and the rights of persons with disabilities. The committee notes that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.84 In order to form a concluded view of the human rights implications of this legislative instrument, the committee seeks the minister's advice as to the matters set out at paragraph [1.80].

Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020 and related instruments[1]

Purpose	This bill seeks to transition Income Management participants in the Northern Territory and Cape York region in Queensland onto the Cashless Debit Card and provide for the cashless welfare arrangements to continue as an ongoing measure The related instruments[2] determine that the Northern Territory is a 'declared child protection State or Territory'; and set out the decision-making principles that the Secretary must comply with, in deciding whether they are satisfied that there are no indications of financial vulnerability in relation to a person in the preceding 12 months
Portfolio	Social Services
Introduced	House of Representatives, 8 October 2020
Rights	Privacy; social security; equality and non-discrimination; adequate standard of living; rights of the child
Status	Seeking additional information

Establishing cashless welfare as an ongoing measure

1.85 The bill seeks to amend the *Social Security (Administration) Act 1999* (the Act) to establish the Cashless Debit Card scheme as a permanent measure in locations which are currently 'trial sites', as well as to transition the Northern Territory and Cape York areas from income management to cashless welfare. Currently, the cashless welfare trials and the Cape York income management scheme are due to cease operation on 31 December 2020.[3] The bill would also amend the stated objectives of the cashless debit card, providing that instead of the objective of determining whether the reduction in the amount of certain restrictable payments decreases violence or harm in trial areas, and whether such arrangements are more

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020 and related instruments, *Report 14 of 2020*; [2020] AUPJCHR 173.

2 The related instruments are the Social Security (Administration) (Declared child protection State or Territory – Northern Territory) Determination 2020 [F2020L01224] and the Social Security (Administration) (Exempt Welfare Payment Recipients – Principal Carers of a Child) (Indications of Financial Vulnerability) Principles 2020 [F2020L01225].

3 Coronavirus Economic Response Package (Deferral of Sunsetting—Income Management and Cashless Welfare Arrangements) Determination 2020 [F2020L00572].

effective when community bodies are involved, it would instead be to support participants 'with their budgeting strategies'.[4]

1.86 The bill would create, or continue, different eligibility criteria for cashless welfare program participants in the different geographical areas:

- following the transition from income management, individuals in the Cape York area would be subject to cashless welfare arrangements where they or their partner receive a category P welfare payment (which includes most welfare payments such as the age pension, parenting payments and unemployment benefits)[5] and a written notice is given by the Queensland Commission requiring that the person be a trial participant;[6]
- following the transition from income management, individuals in the Northern Territory would be subject to cashless welfare arrangements[7] where:
  - they receive a category E welfare payment (which includes unemployment benefits and certain parenting payments);[8] or
  - they or their partner receive a category P welfare payment and a Northern Territory child protection officer has given the Secretary written notice requiring them to be a participant;[9] or

4 Schedule 1, Part 1, item 9, proposed subsection 124PC(b). Section 124PC of the Act currently provides that the objects of the cashless welfare arrangements are to: reduce the amount of certain restrictable payments available to be spent on alcoholic beverages, gambling and illegal drugs; determine whether such a reduction decreases violence or harm in trial areas; determine whether such arrangements are more effective when community bodies are involved; and encourage socially responsible behaviour.

5 A 'category P' welfare payment means a social security benefit, or social security pension, or payment under the ABSTUDY scheme that includes an amount identified as living allowance (per *Social Security (Administration) Act 1990,* section 123TC). A 'social security benefit' means a widow allowance; youth allowance; Austudy payment; Newstart allowance; sickness allowance; special benefit; partner allowance; a mature age allowance under Part 2.12B; or benefit PP (partnered); or parenting allowance (other than non-benefit allowance). A 'social security pension' means an age pension; disability support pension; wife pension; carer payment; pension PP (single); sole parent pension; bereavement allowance; widow B pension; mature age partner allowance; or a special needs pension: see section 23 of the *Social Security Act 1991*.

6 Schedule 1, Part 2, item 74, proposed section 124PGD.

7 Schedule 1, Part 2, item 74, proposed section 124PGE.

8 A category E welfare payment means youth allowance, Newstart allowance, special benefit, pension PP (single) or benefit PP (partnered): *Social Security (Administration) Act 1990,* section 123TC.

- they receive a category P welfare payment and are characterised by the secretary as a 'vulnerable welfare payment recipient';[10] and

- individuals in Ceduna, East Kimberley and the Goldfields, would continue to be subject to cashless welfare arrangements if they receive a 'trigger payment'[11] (most unemployment benefits and some pensions, including the disability support pension, but excluding the age pension);[12] and
- individuals in the Bundaberg and Hervey Bay area would continue to be subject to cashless welfare arrangements if they receive a 'trigger payment' and are aged under 36.[13]

1.87 The bill would retain the existing cashless welfare and income management restriction rates. That is, persons subject to the cashless debit card would have 80 per cent of their welfare payments restricted,[14] or between 50 and 70 per cent in the case of persons in Cape York or the Northern Territory.[15] However, the Act provides that the Secretary may vary the restricted portion of a welfare payment amount up to 100 per cent for individuals.[16] The bill also seeks to enable the minister to, by

9 The Social Security (Administration) (Declared child protection State or Territory – Northern Territory) Determination 2020 [F2020L01224] determines the Northern Territory as a ‘declared child protection State or Territory’ for the purposes of Part 3B of the *Social Security (Administration) Act 1990*. It repeals and re-makes the existing instrument, which is due to sunset.

10 Under section 123UGA of the *Social Security (Administration) Act 1990*, the Secretary may determine that a person is a 'vulnerable welfare payment recipient' for the purposes of Part 3B of the Act. The term is not defined in the Act.

11 A 'trigger payment' means a social security benefit (other than a mature age allowance); an ABSTUDY payment; or a social security pension of the following kind: a carer payment; a bereavement allowance; a disability support pension; a pension PP (single); a widow B pension; or a wife pension: see section 124PD of the *Social Security (Administration) Act 1999*.

12 *Social Security (Administration) Act 1990*, sections 124PG, 124PGA and 124PGB, subject to the amendments proposed in Schedule 1, Part 2, items 66–71.

13 *Social Security (Administration) Act 1990*, section 124PGC, subject also to the proposed amendment contained in Schedule 1, Part 2, items 72–73.

14 *S*chedule 1, Part 2, item 82, proposed subsections 124PJ(1)(a)–(b).

15 *S*chedule 1, Part 2, item 84, proposed subsections 124PJ(1)(1A)–(1D).

16 *Social Security (Administration) Act 1990*, subsection 124PJ(3). The bill proposes to extend this power such that it could be exercised in relation to individuals in the Cape York and Northern Territory areas. See, Schedule 1, Part 2, items 90–92.

notifiable instrument, vary the percentage of restricted welfare payments for a group of persons in the Northern Territory to a rate of up to 80 per cent.[17]

1.88 The bill also seeks to amend the process by which reviews of the cashless welfare measure are subsequently evaluated, removing the requirement that the evaluation be completed within six months, and be conducted by an independent evaluation expert with significant expertise in the social and economic aspects of welfare policy, who must consult participants and make recommendations.[18]

1.89 A person subject to cashless welfare could seek an exemption from the scheme, and would bear the onus of producing evidence to demonstrate that they are either suitable to be exempted, or that continued participation would cause serious risk to their physical or mental health.[19] The Social Security (Administration) (Exempt Welfare Payment Recipients – Principal Carers of a Child) (Indications of Financial Vulnerability) Principles 2020 similarly sets out the decision-making principles which the Secretary must comply with when considering whether a person should be exempt from income management under the disengaged youth and long-term welfare payment recipient income management measures. It likewise causes the individual to bear the burden of producing evidence to satisfy the Secretary pursuant to the instrument.

Preliminary international human rights legal advice

Multiple rights

1.90 The cashless welfare arrangements outlined in this bill engages and may promote a number of human rights.[20] For example, as noted in the statement of compatibility,[21] restricting a substantial portion of a person's welfare payments may promote the right to an adequate standard of living in some instances, to the extent that quarantining those funds means that the individual is not able to spend the money on items other than essential goods such as groceries and bills. 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.[22] In particular the right to housing (which is part of the right

17 Schedule 1, Part 2, item 87, proposed section 124PJ(2A). Proposed subsection 124PJ(2C) clarifies that where the Secretary has made an individual determination that one person's restricted rate of payment will be varied, a broader determination by this Minister varying rates of restriction for cohorts of participants would not impact that individual.

18 Schedule 1, Part 3, item 114.

19 *Social Security (Administration) Act 1990*, sections 124PHA-124PHB.

20 As noted in the Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020) pp. 132–142.

21 Statement of compatibility, p. 35.

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

to an adequate standard of living) may be advanced if the measures help to ensure that a portion of a person's income support payments is spent on rent. Further, as noted in the statement of compatibility, by ensuring that a portion of welfare payments is available to cover essential goods and services, this measure may have the capacity to improve the living conditions of children of welfare recipients.[23] This may have the effect of promoting the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.[24] Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds.[25] In particular, the right of a child to benefit from social security, and the rights of the child to the highest attainable standard of health and to an adequate standard of living[26] may be advanced by these measures as they could help to ensure income support payments are used to cover minimum basic essential goods and services necessary for the full development of these rights.

1.91 The cashless welfare arrangements outlined in this bill also engage and limit a number of other human rights, including the right to privacy,[27] right to social security,[28] and right to equality and non-discrimination.[29]

1.92 The bill engages and limits the rights to privacy and social security as it significantly intrudes into the freedom and autonomy of individuals to organise their private and family lives by making their own decisions about the way in which they use their social security payments. The right to privacy is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to social security recognises the importance of adequate social benefits in reducing the

---

23 Statement of compatibility, p. 35.

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

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

26 Convention on the Rights of the Child, articles 24, 26 and 27.

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

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

29 International Covenant on Civil and Political Rights, articles 2, 16 and 26 and International Covenant on Economic, Social and Cultural Rights, article 2. It is further protected with respect to people with disability by the Convention on the Rights of Persons with Disabilities, article 2.

effects of poverty and in preventing social exclusion and promoting social inclusion,[30] and enjoyment of the right requires that social support schemes must be accessible, providing universal coverage without discrimination.

1.93 The statement of compatibility provided with respect to the proposed amendments largely mirrors the information provided with respect to earlier proposed extensions of the cashless welfare trial. The statement of compatibility recognises that the bill engages the right to a private life and the right to social security but states that the measures in the bill do not detract from the eligibility of a person to receive welfare, or reduce the amount of their social security entitlement. They merely limit how payments can be spent and provide 'a mechanism to ensure that certain recipients of social security entitlements are restricted from spending money on alcohol, gambling and drugs'.[31]

1.94 The measure also engages 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). Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.[32]

1.95 The statement of compatibility provides that the right to equality and non-discrimination is not directly limited by these measures. It states that the program is not applied on the basis of race or cultural factors, and that locations for the program have been chosen based on objective criteria including high levels of

30 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [3]. The core components of the right to social security are that social security, whether provided in cash or in kind, must be available, adequate, and accessible. Whether the provision of the majority of a social security payment via a debit card, which limits the goods and services in relation to which those funds may be used, and prevents the payments being withdrawn and converted to cash, raises some questions as to whether cashless welfare fulfils the fundamental components of the right, in particular noting the geographical isolation of the relevant areas and the likely limited choices of shops and service providers; the potential poor mobile phone reception in these areas; and potentially also an absence of mobile phone or internet access on an individual level.

31 Statement of compatibility, p. 30.

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

welfare dependence, and community harm.[33] However, while the measure may not *directly* limit the right to equality and non-discrimination it would appear to *indirectly* limit this right given the measure’s significantly disproportionate impact on Indigenous Australians. The committee's 2016 report, which examined income management in the Northern Territory, noted that around 90 per cent of those subject to income management in the Northern Territory were Indigenous.[34] At March 2017, 75 per cent of participants in the Ceduna trial area, and 80 per cent of participants in the East Kimberley, were Aboriginal and/or Torres Strait Islander.[35] In 2019, 43 per cent of participants in the Goldfields trial site were Indigenous.[36]

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

Legitimate objective

1.97 The statement of compatibility provides that cashless welfare aims to 'support communities where high levels of welfare dependence coexist with high levels of social harm by limiting the amount of welfare payment available as cash in a community', and aims to 'ensure that income support payments are spent in the best interests of welfare payment recipients and their dependents, and in line with community expectations'.[37] The bill would also amend the stated objectives of the cashless debit card scheme, such that it would now state that the objective of the scheme is to reduce the amount of certain restrictable payments available to be spent on alcoholic beverages, gambling and illegal drugs; support participants with their budgeting strategies; and encourage socially responsible behaviour.[38]

---

33 Statement of compatibility, p. 33.

34 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016), p. 40.

35 ORIMA, *Cashless Debit Card Trial Evaluation – Final Evaluation Report*, August 2017, p. 37.

36 University of Adelaide Future of Employment and Skills Research Centre, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, p. 10.

37 Statement of compatibility, p. 29.

38 Schedule 1, Part 1, item 7, proposed subsection 124PC(b). Section 124PC of the Act currently provides that the objects of the cashless welfare arrangements are to: reduce the amount of certain restrictable payments available to be spent on alcoholic beverages, gambling and illegal drugs; determine whether such a reduction decreases violence or harm in trial areas; determine whether such arrangements are more effective when community bodies are involved; and encourage socially responsible behaviour.

1.98 It is likely that combatting social harms caused by the use of harmful products including alcohol and illicit drugs would constitute a legitimate objective for the purposes of international human rights law.[39]

Rational connection

1.99 In relation to whether the measures are, or will be, effective to achieve their stated objectives, the statement of compatibility cites an independent evaluation of the cashless welfare trial in Ceduna and East Kimberley in 2017, and a report on baseline data collection in the Goldfields trial site in 2019.[40] It notes that these evaluations found that cashless welfare had a positive impact, including by reducing alcohol consumption and the use of illegal drugs, as well as some evidence of consequential reductions in violence and harm.[41]

1.100 However, the 2017 trial evaluation cited in the statement of compatibility also contains some other more nuanced and mixed findings on the operation of the scheme,[42] which are not cited in the statement of compatibility. In addition, the methodology employed in the course of this 2017 study has been the subject of some criticism. In 2018 the Australian National Audit Office (ANAO) conducted a performance audit of the cashless welfare trial.[43] The audit found that the department's approach to monitoring and evaluation was inadequate, meaning that it was difficult to conclude whether there had been a reduction in social harm and whether the card was a lower cost welfare quarantining approach.[44]

---

39 As previously set out in the Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 132–142.

40 Statement of compatibility, p. 28.

41 Statement of compatibility, p. 28.

42 For example, the evaluation noted that there was no statistical decrease in violent crime at the trial sites, no substantive improvement in peoples' perception of safety at home or on the streets, and that there were efforts to circumvent income restriction including selling purchased goods for cash, and humbugging (or harassing and making unreasonable demands) of family members. See, ORIMA, *Cashless Debit Card Trial Evaluation – Final Evaluation Report*, August 2017, pp. 60–90.

43 Australian National Audit Office, 'The Implementation and Performance of the Cashless Debit Card Trial', *Auditor-General Report No.1 2018–19 Performance Audit*, pp. 7–8.

44 The audit also found that while arrangements to monitor and evaluate the trial were in place, key activities were not undertaken or fully effective, and the level of unrestricted cash available in the community was not effectively monitored The audit further found that there was a lack of robustness in data collection and the department's evaluation did not make use of all available administrative data to measure the impact of the trial including any change in social harm. The ANAO also found that the trial was not designed to test the scalability of the cashless debit card and there was no plan in place to undertake further evaluation, see Australian National Audit Office, 'The Implementation and Performance of the Cashless Debit Card Trial', *Auditor-General Report No.1 2018–19 Performance Audit*, pp. 7–8.

1.101 The statement of compatibility also cites the 2019 baseline data collection study in the Goldfields trial site by the University of Adelaide.[45] It states that in this report, a majority of respondents considered that early impacts were starting to be observed, including 'a reduction in levels of substance misuse, a decrease in alcohol-related anti-social behaviour and crime, improvements in child welfare, and improvements in financial literacy and management'.[46] However, this report also contains some other more mixed findings on the operation of the scheme at the Goldfields trial site, which are not discussed in the statement of compatibility.[47]

1.102 The results of these trial evaluations are a critical component of demonstrating a rational connection between cashless welfare and its intended objectives. The mixed results of these two evaluations, and other studies, provide some positive results as to the effectiveness of the trials but also raise some questions as to the efficacy of the cashless debit card scheme in achieving the stated objectives (including reducing the amount of payments available to be spent on alcohol, gambling and illegal drugs, and encouraging socially responsible behaviour).[48] They also raise questions as to whether the cashless debit card scheme would, in practice, promote the rights set out in paragraph [1.90].

1.103 The statement of compatibility also notes that the University of Adelaide is conducting a second impact evaluation in Ceduna, East Kimberley and Goldfields, as well as a baseline data collection in the Bundaberg and Hervey Bay region.[49] It states

---

45 Statement of compatibility, p. 28.

46 Statement of compatibility, p. 28.

47 For example, the report observes that the reductions in substance misuse levels during the time of the study may have been connected with concurrent policing and alcohol management interventions in the region, and so not a direct consequence of cashless welfare. The report further notes the development of 'workarounds' which trial participants used in order to gain access to alcohol, including pooling resources, and drinking cheaper forms of alcohol. University of Adelaide Future of Employment and Skills Research Centre (University of Adelaide), *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, pp. 7 and 88.

48 In addition, more contemporaneous studies have been conducted examining other specific elements of the cashless welfare trial, including its effects on: Indigenous mobility; homelessness; and perceptions of shame attached with use of the card. See, *Australian Journal of Social Issues*, vol. 55, no. 1, 2020. In particular: Eve Vincent et al, '“Moved on”? An exploratory study of the Cashless Debit Card and Indigenous mobility', pp. 27–39; Shelley Bielefeld et al, 'Compulsory income management: Combatting or compounding the underlying causes of homelessness?', pp. 61–72; Cameo Dalley, 'The “White Card” is grey: Surveillance, endurance and the Cashless Debit Card', pp. 51–60; and Elizabeth Watt, 'Is the BasicsCard “shaming” Aboriginal people? Exploring the differing responses to welfare quarantining in Cape York', pp. 40–50. See also Luke Greenacre et al, 'Income Management of Government payments on Welfare: The Australian Cashless Debit Card', *Australian Social Work* (2020) pp. 1–14.

49 Statement of compatibility, p. 29.

that this was to assess the ongoing effectiveness of the program, build on the initial results, and further develop a rigorous evidence base for the cashless debit card.[50] It states that this second impact evaluation would be published from late 2019. However, the evaluation does not appear to have been published,[51] and no information is provided as to any such findings, or the status of any such second evaluation. In particular, the most recent trial evaluation, published in February 2019, notes that at the time of the interviews conducted, the cashless debit card had only been implemented for a few months.[52] The statement of compatibility does not explain why the bill proposes establishing cashless welfare as an ongoing measure before these trial evaluations have been completed, published, and considered. It is also noted that the bill seeks to alter the existing legislative requirement that trial reviews be subsequently evaluated by an expert within six months of the trial results being published.[53] As it stands, no independent evaluations of the two reviews of the cashless welfare trial have been undertaken.[54]

Proportionality

1.104 The existence of adequate and effective safeguards, to ensure that limitations on human rights are the least rights restrictive way of achieving the legitimate objective of the measure, is relevant to assessing the proportionality of these limitations. In assessing whether a measure is proportionate, relevant factors to consider include whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the circumstances of individual cases.[55]

1.105 The cashless welfare card scheme is imposed without an assessment of individuals' suitability for the scheme. The measure applies to anyone residing in a specified geographical location who receives specified social security payments. No assessment is required that a person subject to the scheme has been using their

---

50 Statement of compatibility, p. 29.

51 The departmental website notes that a second evaluation of the Ceduna, East Kimberley and Goldfields trial sites is being undertaken, but does not advise when such results will be published. See, Department of Social Services 'Cashless Debit Card - Evaluation' https://www.dss.gov.au/families-and-children-programs-services-welfare-reform-cashless-debit-card/cashless-debit-card-evaluation (accessed 16 October 2020).

52 University of Adelaide, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, p. 7.

53 Schedule 1, Part 3, item 114.

54 As section 124PS was only incorporated into the Act in 2018, the first review of the cashless welfare trial was not captured by this legislative requirement for a subsequent independent evaluation of the review.

55 See, Dinah Shelton (ed), 'Proportionality', *The Oxford Handbook of International Human Rights Law*, pp. 450-468.

funds on alcohol, gambling or illicit drugs, or that they are likely to do so. By making cashless welfare an ongoing measure any such person would be indefinitely subject to these cashless welfare conditions, unless those conditions were varied by the secretary, but this would require the participant to bear the onus of producing evidence to demonstrate that they should no longer be subject to cashless welfare restrictions.[56] Even persons who have never spent their money on alcohol, gambling or illegal drugs would be subject to these arrangements, solely because they reside in one of the specified geographical locations and receive a relevant social welfare payment. This raises significant concerns as to whether the measure provides sufficient flexibility and is the least rights restrictive way of achieving the stated objectives.

1.106 There are also concerns as to whether the cashless debit card scheme may have unintended consequences that would impact on the proportionality of the measure. For example, the committee's 2016 review noted that evaluations had found that compulsory income management, rather than encouraging people to take control of their financial wellbeing, may produce negative effects, including feelings of stigmatisation.[57] In addition, the 2019 baseline data collection study undertaken in the Goldfields trial site[58] noted that trial participants had been unable to participate in the market for second-hand goods, to pool funds for larger purchases, to make small transactions in cash-based settings, or to complete some online transactions.[59] It noted concerns about the potential for stigma and discrimination and noted feedback from many cashless welfare participants that the trial should be better targeted at those people with alcohol and drug issues, and/or who have neglected their children, with the card considered particularly unsuitable for people with disability, including those with mental health conditions.[60] It also noted a number of practical concerns about the workability of the cashless welfare card.[61]

1.107 The statement of compatibility outlines what it describes as 'General safeguards', being four measures which have been incorporated to 'help protect human rights'.[62] Firstly, it notes that the rollout of the cashless debit card 'has been

56 See the discussion at paragraph [1.109] below in relation to the mechanism by which a person may apply to exit cashless welfare arrangements.

57 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) pp. 57-59.

58 Statement of compatibility, p. 28.

59 University of Adelaide, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, p. 89.

60 University of Adelaide, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, see pp. 75–76; 101; and 112–113.

61 University of Adelaide, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019, pp. 6–7, 68.

62 Statement of compatibility, p. 20.

and continues to be the subject of an extensive community consultation and engagement process', advising that:

> The Department of Social Services (the Department) has held several information sessions throughout the NT in preparation for the transition and consulted with key community leaders and organisations to provide initial information about the CDC and seek guidance about the most appropriate way to consult with the broader community. The information sessions focused on providing communities with an understanding of the CDC product, how it operates, and how the card is different in both policy and function to the BasicsCard in the IM regime.[63]

1.108 It is helpful that information sessions have been held informing key community leaders and organisations about the fact that the scheme was being rolled-out, and advising those communities about how the cashless welfare card will operate. However, the value of this as a safeguard is limited given that it does not appear to be a two-way deliberative process of dialogue in advance of a decision to progress the scheme, allowing for a discussion with community leaders about whether the community wants to participate in the scheme. This is evidenced from the fact that the regulation impact statement included in the explanatory memorandum describes the process carried out in the Northern Territory and Cape York with communities affected as 'post-decision' consultation.[64]

1.109 In addition, the process described appears to deal only with the transition from income management to the cashless debit card in the Northern Territory and Cape York. The statement of compatibility is silent on what consultation was undertaken in relation to making the cashless debit card scheme ongoing in relation to the trial sites. The regulation impact statement sets out the date of consultations with communities in Ceduna, East Kimberley, the Goldfields region and Bundaberg and Hervey Bay. These dates range from April 2015 to December 2017 at the latest.[65] Therefore, no evidence has been provided that demonstrates that consultation was undertaken with affected communities in the trial site as to whether such

---

63 Statement of compatibility, p. 29.

64 Regulation impact statement, p. 35.

65 Regulation impact statement, pp. 37-38.

communities wanted the cashless debit card scheme to be implemented permanently in those locations.[66]

1.110 The second general safeguard described in the statement of compatibility is the conduct of evaluations of the cashless welfare trial. The statement of compatibility notes that the government is currently conducting a second evaluation of the cashless welfare trial across the first three trial sites in order to 'assess the ongoing effectiveness of the trial', and states that this will 'continue to build on initial results and further develop a rigorous evidence base for the Cashless Debit Card'.[67] It explains that this evaluation will draw on the data and methodology developed as part of the Goldfields baseline data collection, and use data collected through program monitoring. The use of such evaluations can constitute an important safeguard with respect to proportionality, as they can be used to ensure that the scheme will only continue where the benefits of the scheme in achieving its legitimate objectives outweigh any negative impact on human rights. However, as discussed above, this evaluation is not yet publicly available, and no information is provided as to why the bill proposes expanding cashless welfare before that evaluation has been completed and reviewed. Further, as set out above, the trial reviews conducted to date have elicited a number of mixed findings relating to the success of the cashless welfare trials and it is not clear that the evaluation findings were considered when the decision was made to expand the existing cashless welfare measures. Finally, it is not clear how future evaluations of the cashless debit card scheme would operate to safeguard human rights given that the measure is proposed to be made ongoing, regardless of the results of any evaluation. No information has been provided as to why it is proposed that cashless welfare should be established as an ongoing measure before a contemporaneous evaluation has been completed, and its results used to inform a future decision as to the efficacy of the measure on a trial basis.

1.111 The third general safeguard identified in the statement of compatibility relates to the mechanism by which a person may apply to exit the cashless welfare arrangements.[68] Section 124PHB of the Act allows a person to apply to the Secretary to exit the cashless welfare trial where they can demonstrate reasonable and

66 The importance of consultation is also noted. The principles contained in the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) are also relevant. The Declaration provides context as to how human rights standards under international law apply to the particular situation of Indigenous peoples (see in particular article 19). While the Declaration is not included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides clarification as to how human rights standards under international law, including under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights apply to the particular situation of Indigenous peoples.

67 Statement of compatibility, p. 29.

68 Statement of compatibility, p. 29.

responsible management of their affairs (including their financial affairs). The bill would also allow the minister to determine, by legislative instrument, decision-making principles which the Secretary would be bound by in deciding whether they are satisfied that the person can demonstrate reasonable and responsible management of their affairs.[69] Having some flexibility to ensure a person can exit the cashless debit card scheme assists with the proportionality of the measure. However, the scheme is still premised on the basis that all recipients of specified forms of social security are compulsorily included in the scheme, without any individual assessment as to the appropriateness of their inclusion. This measure would require the affected individual to apply to a government department and to provide evidence to demonstrate that they can reasonably and responsibly manage their affairs, including their financial affairs. Noting that such an applicant would already be subject to the cashless debit card scheme at the time of the application, with up to 80 per cent of their social security quarantined, it is not clear what evidence they could show to demonstrate that they could independently manage their financial affairs. As the onus is shifted onto the affected person to prove such matters and to make the application this lessens the effectiveness of this as a safeguard. This is particularly problematic given that once a person has exited the cashless welfare scheme they can still be required to re-enter it, and the processes through which this occurs are not contained in the bill.[70]

1.112 The final general safeguard identified in the statement of compatibility relates to the wellbeing exemption contained in section 124PHA of the Act. This provides that the Secretary must determine that a person is not a program participant if the Secretary is satisfied that being on the program would pose a serious risk to the person's mental, physical or emotional wellbeing. The statement of compatibility states that this is determined on a case by case basis, taking into account the applicant's personal circumstances, which could assist with the proportionality of the measure. However, it is noted that the Act also provides that the Secretary is not required to inquire into whether a person being in the program would pose a serious risk to the person's mental, physical or emotional well-being.[71] As such, unless the risk is somehow brought to the Secretary's attention, the person would remain a program participant. In addition, the threshold for the wellbeing exemption is set very high, with the requirement that participation in the program would pose a 'serious risk' to mental, physical or emotional wellbeing, rather than a risk of any sort. This lessens the value of this exemption process as a safeguard.

---

69 Schedule 1, Part 1, item 37, proposed subsection 124PHB(7B).

70 *Social Security (Administration) Act 1990*, section 124PHA.

71 *Social Security (Administration) Act 1990*, subsection 124PHA(2).

Concluding remarks

1.113 The cashless welfare measures contained in this bill, which would cause the cashless welfare trial to become an ongoing measure in certain geographical areas, may potentially promote a number of human rights, but also engage and limit a number of other rights, including the right to social security, privacy, and equality and non-discrimination. As set out above, the statement of compatibility provided with respect to the proposed amendments largely mirrors the information provided with respect to earlier proposed extensions of the cashless welfare trial. There is limited information in the statement of compatibility on which to base an assessment of the proposed permanency of cashless welfare in these locations. The proposal to establish cashless welfare as an ongoing measure, and a permanent fixture in particular geographical locations, is a substantially different proposal to establishing a time-bound trial of such a measure. The trial evaluations and reviews raise a range of concerns as to whether the cashless welfare scheme is effective to achieve its stated goals, and whether it has caused or contributed to other harms. This raises questions in assessing the compatibility of the current measure, which would make the scheme permanent in certain geographical locations, with human rights.

1.114 Further information is required in order to assess the proposed measures for compatibility with human rights, and in particular:

(a) why these measures propose to establish the cashless debit card scheme as an ongoing measure, before the completion of the trial reviews;

(b) what evidence demonstrates that the cashless debit card scheme is effective in achieving the stated objectives, considering the evaluation reports in their totality;

(c) what consultation was undertaken with affected communities, seeking their views as to whether they wanted the trials to be made into an ongoing measure, or if no consultation was undertaken, why it was not undertaken;

(d) whether the evaluation of the cashless debit card scheme, which is designed to assess its ongoing effectiveness, can operate as a safeguard to protect human rights when this bill seeks to establish the scheme on an ongoing basis, regardless of the results of those evaluations;

(e) what percentage of persons who would be required to participate in the cashless welfare scheme (including those transitioning from income management) as a result of this bill identify as being Aboriginal or Torres Strait Islander;

(f) why the onus is on the person who is already subject to the cashless debit card scheme to demonstrate that they can manage their own

affairs in order to be exempt from the scheme, rather than applying the scheme on the basis of individual circumstances or on a voluntary basis;

(g) why is the wellbeing exemption restricted to circumstances when there is 'a serious risk', rather than 'a risk', to a person's mental, physical or emotional wellbeing, and is it appropriate, when all participants are automatically included in the program, that the Secretary is not required to inquire into whether a person being in the program would pose a risk to the person's mental, physical or emotional well-being; and

(h) what other safeguards, if any, would operate to assist the proportionality of this proposed measure.

Committee view

1.115 The committee notes that the bill seeks to establish the cashless debit card scheme as a permanent measure in locations which are currently 'trial sites', and to transition the Northern Territory and Cape York areas from income management to the cashless debit card scheme.

1.116 The committee considers that the cashless debit card scheme engages and may promote a number of human rights, including the right to an adequate standard of living and the rights of the child. Restricting a substantial portion of a person's welfare payments may promote the right to an adequate standard of living as these funds may only be spent on essential goods such as groceries and bills, and in particular, may advance the right to housing if the measures help to ensure that a portion of a person's income support payments is spent on rent. Further, by ensuring that a portion of welfare payments is available to cover essential goods and services, this measure may improve the living conditions of children of welfare recipients, which may have the effect of promoting the rights of the child. In particular, the right of a child to benefit from social security, the right of the child to the highest attainable standard of health and to an adequate standard of living may be advanced by these measures as they could help to ensure income support payments are used to cover minimum basic essential goods and services necessary for the full development of these rights. In this regard, the committee reiterates its previous comments on the manner in which cashless welfare measures engage positive human rights.[72]

1.117 The committee further notes that these measures may limit some human rights, including the right to privacy, social security, and equality and non-discrimination. These rights may be subject to permissible limitations if they are

72 See, Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019, *Report 6 of 2019* (5 December 2019), pp. 39–53; and *Report 1 of 2020* (5 February 2020), pp. 132–142.

shown to be reasonable, necessary and proportionate. The committee considers the bill seeks to achieve a number of legitimate objectives, including reducing immediate hardship and deprivation, and encouraging socially responsible behaviour. However, some questions remain in relation to rational connection and proportionality.

1.118 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill, and as such the committee seeks the minister's advice as to the matters set out at paragraph [1.114].

Advice only[1]

1.119 The committee notes that the following private member's bills appears to engage and may limit human rights. Should either of these bills proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill:

- Australian Federal Integrity Commission Bill 2020; and
- Commonwealth Parliamentary Standards Bill 2020.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Advice Only, *Report 14 of 2020*; [2020] AUPJCHR 174.

Bills and instruments with no committee comment[1]

1.120 The committee has no comment in relation to the following bills which were introduced into the Parliament between 26 to 29 October and 9 to 12 November 2020. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:[2]

- Anti-Money Laundering and Counter-Terrorism Financing Amendment (Making Gambling Businesses Accountable) Bill 2020;
- Climate Change (National Framework for Adaptation and Mitigation) Bill 2020;
- Climate Change (National Framework for Adaptation and Mitigation) (Consequential and Transitional Provisions) Bill 2020;
- Corporations Amendment (Corporate Insolvency Reforms) Bill 2020;
- Corporations (Fees) Amendment (Hayne Royal Commission Response) Bill 2020;
- Education Services for Overseas Students Amendment (Refunds of Charges and Other Measures) Bill 2020;
- Export Control Amendment (Miscellaneous Measures) Bill 2020;
- Financial Sector Reform (Hayne Royal Commission Response) Bill 2020;
- Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020;
- Health Insurance Amendment (Compliance Administration) Bill 2020;
- Immigration (Education) Amendment (Expanding Access to English Tuition) Bill 2020;
- Migration Amendment (New Maritime Crew Visas) Bill 2020;
- Social Security (Administration) Amendment (Protecting Consumers from Predatory Leasing Practices) Bill 2020;
- Social Services and Other Legislation Amendment (Extension of Coronavirus Support) Bill 2020;
- Treasury Laws Amendment (2020 Measures No. 4) Bill 2020;

---

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 14 of 2020*; [2020] AUPJCHR 175.

2 Inclusion in the list is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

- Treasury Laws Amendment (2020 Measures No. 5) Bill 2020; and
- VET Student Payment Arrangements (Miscellaneous Amendments) Bill 2020.

1.121 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 14 October 2020 and 10 November 2020.[3] The committee has reported on 5 legislative instruments from this period earlier in this chapter. 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.

3 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.

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]

Age Discrimination Regulations 2020 [F2020L01138][2]

Purpose	This instrument prescribes particular regulations and provisions of regulations as exemptions from the *Age Discrimination Act 2004.*
Portfolio	Attorney-General
Authorising legislation	*Age Discrimination Act 2004*
Last day to disallow	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[3]
Rights	Equality and non-discrimination; right to work
Status	Concluded examination

2.3 The committee requested a response from the minister in relation to the bill in *Report 12 of 2020*.[4]

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, 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).[5] The Age Discrimination Act sets out that an act will not be unlawful if it is done in compliance with certain listed legislation.[6] This includes 'prescribed regulations made under the *Airports Act 1996*' and 'prescribed provisions' of 'Regulations made under the *Defence Act 1903*'.[7] This instrument prescribes these exemptions.[8] 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.[9] 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).[10] 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.[11] The right to equality

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).[12] The right to work must be made available in a non-discriminatory way and includes a right not to be unfairly deprived of work.[13] 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'.[14]

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.[15]

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

---

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 rights 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[16]

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

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.

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 sunsetting but was put on a temporary hold due to the COVID-19 pandemic. The sunsetting work will continue in 2021. The sunsetting 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.
>
> <u>Airports (Control of On-Airport Activities) Regulations 1997</u>
>
> 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 sunsetting 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.[17] 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

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 sunsetting 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

rationally 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.[18] 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'.[19] 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.[20] 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

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][1]

Purpose	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. The second instrument extends the human biosecurity emergency period for a further three months until 17 December 2020.
Portfolio	Health
Authorising legislation	*Biosecurity Act 2015*
Disallowance	These instruments are exempt from disallowance (see subsections 475(2) and 477(2) of the *Biosecurity Act 2015*)
Rights	Life; health; freedom of movement, equality and non-discrimination, privacy
Status	Concluded examination

2.24 The committee requested a response from the minister in relation to these instruments in *Report 12 of 2020*.[2]

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.[3] 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[4] which prevents a cruise ship from entering Australian territory or Australian ports, unless an exemption applies to the ship.[5] 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;[6]
- a ban on Australian citizens or permanent residents from leaving Australia unless otherwise exempted;[7]

---

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].

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

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.[10] The right to life requires States parties to take positive measures to protect life.[11] 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.[12] The right to health requires that States parties shall take steps to prevent, treat and control epidemic diseases.[13] With respect to the COVID-19 pandemic specifically, the United Nations Human Rights Committee has expressed the view that 'States parties

---

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).

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'.[14]

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.[15] 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.[16] 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.[17] 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.[18] The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[19] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.[20]

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

---

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;[21] and
- a ban on Australian citizens or permanent residents from leaving Australia unless otherwise exempted.[22]

(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.

---

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[23]

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

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.

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[24] 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.

---

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][1]

Purpose	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* until 7 March 2021
Portfolio	Home Affairs
Authorising legislation	*Coronavirus Economic Response Package Omnibus Act 2020*
Last day to disallow	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[2]
Rights	Multiple rights
Status	Concluded examination

2.48 The committee requested a response from the minister in relation to the instrument in *Report 12 of 2020*.[3]

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.[4] 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.[5]

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.[6] 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.[7] 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.[8] The right to life imposes an obligation on the state to protect people

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.[9] However, the extension of these compulsory questioning powers, and the power to detain a person for up to seven days without charge,[10] 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.[11] 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.[12]

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,[13] specifically engages and limits the right to liberty. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[14] 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:

---

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[15]

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.

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.

> 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 sunsetting 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.[16] 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.[17] 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,[18] as is destroying or damaging a relevant record or thing,[19] or disclosing information related to the warrant to another person other than where permitted.[20] 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.[21] 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

---

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.[22] 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.[23] 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.

---

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