

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

### COVID-19 legislation

1.1 This chapter provides an assessment of the human rights compatibility of legislation made in response to the COVID-19 pandemic, specifically:

- bills introduced into the Parliament between 12 to 14 May 2020; and
- legislative instruments registered on the Federal Register of Legislation between 22 April 2020 and 12 May 2020.

1.2 Appendix 1 lists all legislation considered in this chapter, including legislation on which the committee makes no comment, on the basis that the legislation does not engage, or only marginally engages, human rights; promotes human rights; and/or permissibly limits human rights.

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, COVID-19 legislation, *Report 6 of 2020*; [2020] AUPJCHR 79.

## Response required

1.3 The committee seeks a response from the relevant ministers with respect to the following bill and legislative instruments.

### **Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment Determination (No. 2) 2020 [F2020L00466]<sup>1</sup>**

<b>Purpose</b>	This instrument amends the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 to prevent or control the entry or spread of COVID-19 in Queensland, Western Australia, South Australia and the Northern Territory. The instrument commenced on 24 April 2020
<b>Portfolio</b>	Health
<b>Authorising legislation</b>	<i>Biosecurity Act 2015</i>
<b>Disallowance</b>	This instrument is exempt from disallowance (see subsection 477(2) of the <i>Biosecurity Act 2015</i> )
<b>Rights</b>	Life; health; freedom of movement; equality and non-discrimination
<b>Status</b>	Seeking additional information

### **Controlling entry to certain remote communities**

1.4 This instrument amends the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020,<sup>2</sup> which establishes that persons cannot enter designated areas except in specified circumstances, to prevent or control the entry

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 Remote Communities) Amendment Determination (No. 2) 2020 [F2020L00466], *Report 6 of 2020*; [2020] AUPJCHR 80.

2 The Parliamentary Joint Committee on Human Rights considered this in *Report 5 of 2020* (29 April 2020), pp. 6-9.

or spread of COVID-19 in Queensland, Western Australia, South Australia and the Northern Territory.

1.5 The key changes are: to require a person entering a designated area to have not been in a foreign country, rather than outside Australian territory, in the 14 days immediately prior to entry; to add a new designated area in Queensland; to remove two designated areas in South Australia; and to exclude certain areas in the Northern Territory as designated areas.

1.6 This instrument is made under section 477(1) of the *Biosecurity Act 2015*, which provides that during a human biosecurity emergency period, the Health Minister may determine emergency requirements, or give directions, that they are satisfied are necessary to prevent or control the entry, emergence, establishment or spread of the disease in Australian territory. A person who fails to comply with a requirement or direction may commit a criminal offence (imprisonment for maximum 5 years, or 300 penalty units).<sup>3</sup>

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

### ***Life, health, freedom of movement, and equality and non-discrimination***

1.7 The explanatory statement notes that the purpose of these amendments is to manage the human biosecurity risk posed by COVID-19 and to improve the operational effectiveness of the current Determination.<sup>4</sup> As the measure is intended to prevent and manage the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that the measure may promote the rights to life and health.<sup>5</sup> However, by restricting entry to these locations, and adding a new location as a designated area, the instrument may also limit the right to freedom of movement. Furthermore, the restrictions of entry would appear to apply to anyone who lives in the designated area, and would mean that they would need to be granted permission to re-enter their community subject to the requirements stipulated by the instruments, thereby potentially limiting their freedom of movement. It appears that these remote geographical areas may have a high proportion of Indigenous people living there, although this has not been specifically addressed in the explanatory materials. As such, the restrictions may have a disproportionate impact on Indigenous persons. Consequently, the measure may also engage the right to equality and non-discrimination,<sup>6</sup> which provides that

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3 *Biosecurity Act 2015*, section 479.

4 Explanatory statement, p. 1.

5 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.

6 International Covenant on Civil and Political Rights, articles 2 and 26. See also International Convention on the Elimination of All Forms of Racial Discrimination.

everyone is entitled to enjoy their rights without distinction based on a personal attribute (for example, race).<sup>7</sup>

1.8 These rights 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.

1.9 As there is no statement of compatibility accompanying the explanatory statement to this instrument (noting that this is not required),<sup>8</sup> no assessment of the compatibility of this measure with any human rights has been provided. Further information is required as to the compatibility of these measures with human rights, particularly the rights to freedom of movement, and equality and non-discrimination.

### Committee view

**1.10 The committee notes that this instrument amends requirements designed to prevent or control the entry or spread of COVID-19 in designated remote communities in Australia, including establishing requirements for entry to these areas, for the duration of the period of emergency under the *Biosecurity Act 2015*.**

**1.11 The committee considers that the measure, which is designed to prevent the spread of COVID-19, is likely to promote and protect the rights to life and health, noting that the right to life requires Australia to take positive measures to protect life and the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee notes that the measure may also limit the rights to freedom of movement and equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.**

**1.12 As no statement of compatibility has been provided, which we note is not required, the committee seeks the minister's advice as to the compatibility of this measure with human rights, particularly the rights to freedom of movement and equality and non-discrimination.<sup>9</sup>**

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7 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'.

8 Noting that this instrument is not subject to disallowance, and as such section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* does not apply, as it only requires rule-makers to prepare a statement of compatibility in relation to a legislative instrument that is subject to disallowance under section 42 of the *Legislation Act 2003*,

9 The committee's consideration of the compatibility of a measure which limits rights is assisted if the response addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

## Privacy Amendment (Public Health Contact Information) Bill 2020<sup>11</sup>

<b>Purpose</b>	The bill seeks to provide stronger privacy protections for users of the Commonwealth's COVIDSafe app and data collected through the COVIDSafe app than that which would otherwise apply in the <i>Privacy Act 1988</i>
<b>Portfolio</b>	Health
<b>Rights</b>	Health, privacy
<b>Status</b>	Seeking additional information

### COVIDSafe application

1.13 The COVIDSafe application (COVIDSafe app), which can be voluntarily downloaded and operated on Android and iOS personal devices, has been developed by the Commonwealth Government in response to the COVID-19 pandemic. The COVIDSafe app is designed to help find close contacts of persons who have tested positive for COVID-19.<sup>12</sup>

1.14 Legislation to protect privacy and impose requirements on data collected through the COVIDSafe app, and the use or disclosure of such data, was first made on 25 April 2020 via the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020 (the determination). This determination was made under section 477 of the *Biosecurity Act 2015* (Biosecurity Act) and set out a number of requirements in relation to the collection, use and disclosure of COVIDSafe app data, failure to comply with which could result in a criminal sanction imposed under the Biosecurity Act.<sup>13</sup>

1.15 The Privacy Amendment (Public Health Contact Information) Bill 2020 (the bill), which received Royal Assent on 15 May 2020, amends the *Privacy Act 1988*

<sup>11</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, Privacy Amendment (Public Health Contact Information) Bill 2020, *Report 6 of 2020*; [2020] AUPJCHR 81. Note that this entry also considers the human rights compatibility of the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020 [F2020L00480].

<sup>12</sup> Explanatory memorandum, p. 2.

<sup>13</sup> *Biosecurity Act 2015*, section 479. Such an offence is punishable by imprisonment for a maximum of 5 years, or 300 penalty units (currently \$63,000, see *Crimes Act 1914*, section 4AA), or both.

(Privacy Act) to establish a series of offences for misuse of data from the COVIDSafe app, or coercion relating to the use of the COVIDSafe app; sets out specific requirements regarding COVIDSafe app data and COVIDSafe; and includes the application of general privacy measures. Many of the measures set out in the bill are substantially similar to those contained in the determination. All offences are punishable by imprisonment for 5 years, or 300 penalty units, or both. Extended geographical jurisdiction applies to all offences,<sup>14</sup> which has the effect that persons may be prosecuted for an offence even where the relevant conduct took place outside Australia.<sup>15</sup>

1.16 As the bill replaces the determination,<sup>16</sup> this report focuses on the provisions of the bill in assessing the compatibility of this legislation with human rights.

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

### ***Rights to health and privacy***

1.17 It is important to note that this legislation does not authorise or require the use of the COVIDSafe app, rather it seeks to protect the privacy interests associated with the voluntary use of the COVIDSafe app. As such, in assessing the bill and determination for compatibility with human rights, this analysis does not focus on any privacy implications that may emanate from the COVIDSafe app itself; the efficacy of such technology in achieving the goal of contact tracing; or the policy merits of the COVIDSafe app. Rather, its focus is on whether the legislation under consideration may promote or limit human rights.

1.18 As the legislation is designed to regulate the use, collection and disclosure of data generated through the COVIDSafe app, it appears to engage a number of human rights. The object of the bill is stated to be:

to assist in preventing and controlling the entry, emergence, establishment or spread of the coronavirus known as COVID-19 into Australia or any part of Australia by providing stronger privacy protections for COVID app data and COVIDSafe users in order to:

- (a) encourage public acceptance and uptake of COVIDSafe; and
- (b) enable faster and more effective contact tracing.<sup>17</sup>

1.19 As such, as this is a measure designed to help prevent the establishment and spread of COVID-19, which has the ability to cause high levels of morbidity and

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<sup>14</sup> Privacy Amendment (Public Health Contact Information) Bill 2020, section 94J.

<sup>15</sup> *Criminal Code Act 1995*, section 15.1.

<sup>16</sup> See Schedule 2, item 1 which repeals the determination, which section 2 states applies the day after the Act receives Royal Assent.

<sup>17</sup> Schedule 1, item 2, section 94B.

mortality, it would appear that it may promote the right to health.<sup>18</sup> The right to health is the right to enjoy the highest attainable standard of physical and mental health.<sup>19</sup> Article 12(2) of the International Covenant on Economic, Social and Cultural Rights requires that State parties shall take steps to prevent, treat and control epidemic diseases.<sup>20</sup> The United Nations Committee on Economic, Social and Cultural Rights has stated that the control of diseases refers to efforts to:

make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.<sup>21</sup>

1.20 Prohibiting unauthorised collection, use and disclosure of COVIDSafe app data is also likely to promote the right to privacy. As noted in the statement of compatibility, the bill provides stronger provisions than existing protections for personal information collected by the COVIDSafe app, thereby promoting the right to privacy.<sup>22</sup> However, regulating the collection, use and disclosure of such data is also likely to limit the right to privacy, as such data contains personal information about the user of the COVIDSafe app. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.<sup>23</sup> It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. 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.

1.21 Any limitation on a right must be shown to be aimed at achieving a legitimate objective, which is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. As noted above, the object of the bill is to encourage more people to download the COVIDSafe app in order to enable faster and more effective contact tracing of anyone who may have been exposed to COVID-19. The statement of compatibility states the bill is intended to provide privacy safeguards that build confidence in the COVIDSafe app and is intended to bolster the uptake and effectiveness of the COVIDSafe app as a tool to help Australia respond to the serious health risks posed

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<sup>18</sup> International Covenant on Economic, Social and Cultural Rights, article 12.

<sup>19</sup> International Covenant on Economic, Social and Cultural Rights, article 12(1).

<sup>20</sup> International Covenant on Economic, Social and Cultural Rights, article 12(2)(c).

<sup>21</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (2000), [16].

<sup>22</sup> Statement of compatibility, p. 5.

<sup>23</sup> International Covenant on Civil and Political Rights, article 17.

by COVID-19.<sup>24</sup> It further states that the bill seeks to achieve the objective of combatting the community spread of COVID-19 by collecting personal information about users who come into contact with each other.<sup>25</sup> These would appear to constitute legitimate objectives for the purposes of international human rights law.

1.22 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective in achieving the objective being sought. In this instance, while not explained in the statement of compatibility, the privacy measures in this bill may be capable of achieving the stated objective of improving the uptake and effectiveness of the COVIDSafe app. Further, the establishment of offences for the unauthorised collection, use or disclosure of COVIDSafe app data, and the significant corresponding penalties, may also be effective to achieve the stated objective of improving confidence in the COVIDSafe app, and bolstering its uptake. However, there are inherent challenges in assessing what impact (if any) the introduction of these legislative privacy measures may have on an individual's decision to install and use the COVIDSafe app.

1.23 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. A relevant consideration in determining the proportionality of the measure is whether there are adequate safeguards in place to protect the right to privacy.

### **Safeguards**

1.24 The bill seeks to amend the Privacy Act to include a new Part VIIIA which contains a number of measures that are designed to provide privacy protections relating to COVIDSafe app data and the COVIDSafe app.<sup>26</sup> A key protection is that the bill establishes<sup>27</sup> that it is an offence to collect, use or disclose COVIDSafe app data, other than for specified permitted purposes. These purposes include the collection, use or disclosure:

- by a person working for a state or territory health authority, or a contracted service provider for a government contract with the 'data store administrator', for the purposes of 'contact tracing';<sup>28</sup>

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<sup>24</sup> Statement of compatibility, p. 5.

<sup>25</sup> Statement of compatibility, p. 6.

<sup>26</sup> See also, statement of compatibility, pp. 5-7.

<sup>27</sup> Schedule 1, item 2, section 94D.

<sup>28</sup> 'Contact tracing' is defined in Schedule 1, item 2, subsection 94D(4) of the bill to mean the process of identifying and notifying persons who have been in contact with a person who has tested positive for COVID-19, and providing information and advice to those persons. See also subsection 6(4) of the determination.



- by the 'data store administrator'<sup>29</sup> to enable contact tracing by the state or territory health authorities or to ensure the proper functioning, integrity or security of the COVIDSafe app or of the 'National COVIDSafe Data Store';<sup>30</sup>
- for the purpose of transferring encrypted data between communications devices through the COVIDSafe app or transferring such data to the National COVIDSafe Data Store;
- for the Information Commissioner to perform various functions, including to investigate any interferences with privacy;
- for investigating or prosecuting persons who may have committed an offence under this Part;
- for producing de-identified statistical information about the total number of registrations through the COVIDSafe app; or
- for confirming that data requested to be deleted by the COVIDSafe user is the correct data.

1.25 The bill also prohibits anyone taking action designed to coerce another to download or have the COVIDSafe app, or to coerce them into consenting to upload COVIDSafe app data.<sup>31</sup> This includes refusing to enter into a contract with that person, taking adverse action against them for the purposes of the *Fair Work Act 2009*, declining to provide or receive goods or services to or from that person (or providing or receiving less monetary consideration for the goods or services), or refusing that person entry to certain premises.<sup>32</sup>

1.26 Further, the bill makes it an offence to:

- cause COVIDSafe app data to be uploaded from a mobile device without the consent of the individual device user;<sup>33</sup>
- retain COVIDSafe app data which has been uploaded to the National COVIDSafe Data Store on a database outside Australia, or disclose such data

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<sup>29</sup> 'Data store administrator' is defined in Schedule 1, item 1, subsection 6(1), to mean the agency specified in a determination made by the Secretary of the Health Department, or otherwise the Health Department. Subsection 94Z(3) states that the Secretary of the Health Department must not determine an enforcement agency, intelligence agency, the Australian Geospatial Intelligence Organisation or the Defence Intelligence Organisation to be the data store administrator.

<sup>30</sup> 'National COVIDSafe Data Store' is defined in Schedule 1, item 1, subsection 6(1), to mean the database administered by or on behalf of the Commonwealth for the purpose of contact tracing.

<sup>31</sup> Schedule 1, item 2, subsection 94H(1). See also section 9 of the determination.

<sup>32</sup> Schedule 1, item 2, subsection 94H(2). See also subsection 9(2) of the determination.

<sup>33</sup> Or, where relevant, a parent, guardian or carer. See Schedule 1, item 2, section 94E. See also subsection 7(1) of the determination.

to a person outside Australia (except by a person working for a state or territory health authority and the disclosure is for undertaking contact tracing);<sup>34</sup> or

- decrypt encrypted COVIDSafe app data that is stored on a telecommunications device.<sup>35</sup>

1.27 In addition, the data store administrator must take reasonable steps to ensure COVIDSafe app data is not retained on a mobile telecommunications device for more than 21 days (or if that is not possible, for no longer than the shortest practicable period).<sup>36</sup> A user can also request the deletion of their registration data, but the data administrator does not have to delete data which has been de-identified, or data which is only uploaded to the National COVIDSafe Store as a result of that user interacting with another device.<sup>37</sup> The 'data store administrator'<sup>38</sup> is further restricted from collecting any COVIDSafe app data from a former app user, who has deleted the app from their telecommunications device.<sup>39</sup> Further, a person who has received COVIDSafe app data in error is required to delete it, and notify the data store administrator that they have received it.<sup>40</sup>

1.28 The bill also requires that once the Minister for Health has determined that use of the COVIDSafe app is no longer required, or likely to be effective, in preventing or controlling the entry, emergence, establishment or spread of COVID-19, the data store administrator must delete all COVIDSafe App data from the National COVIDSafe Store as soon as reasonably practicable, and notify all users of the COVIDSafe app of these measures.<sup>41</sup>

1.29 The bill further provides that a breach of a requirement under this new Part VIIIA is an interference with privacy under the Privacy Act,<sup>42</sup> and a breach of a requirement by the data store administrator constitutes an eligible data breach

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<sup>34</sup> Schedule 1, item 2, section 94F. See also subsections 7(3) – (4) of the determination.

<sup>35</sup> Schedule 1, item 2, section 94G. See also section 8 of the determination.

<sup>36</sup> Schedule 1, item 2, section 94K. See also subsection 7(2) of the determination, which makes this a requirement, non-compliance with which would be an offence under the *Biosecurity Act 2015*.

<sup>37</sup> Schedule 1, item 2, section 94L.

<sup>38</sup> Under section 94Z, the Secretary of the Department of Health may, by notifiable instrument, determine that a particular agency is the data store administrator for the purposes of one or more provisions of Part VIIIA.

<sup>39</sup> Schedule 1, item 2, section 94N.

<sup>40</sup> Schedule 1, item 2, section 94M.

<sup>41</sup> Schedule 1, item 2, section 94P.

<sup>42</sup> Schedule 1, item 2, section 94R.

(which requires that individuals affected by the breach are notified).<sup>43</sup> It also states that the Information Commissioner can assess whether entities or State or territory authorities comply with the requirements of new Part VIIIA,<sup>44</sup> and in the course of an assessment must notify the Commissioner of Police or the Director of Public Prosecutions if they form the view that an offence may have been committed.<sup>45</sup>

1.30 Under the Privacy Act, the Information Commissioner can investigate complaints regarding acts or practices which may have interfered with a person, or a class of persons', privacy.<sup>46</sup> Complaints may be dealt with as 'representative' of a class of persons, in which case it is not necessary to obtain the consent of members of that class, or identify class members by naming them or specifying how many there are.<sup>47</sup> The Information Commissioner may also, on their own initiative, investigate an act or practice that may be an interference with the privacy of an individual.<sup>48</sup>

1.31 In undertaking such investigations, the Information Commissioner may: conciliate complaints;<sup>49</sup> make preliminary inquiries of any person;<sup>50</sup> require a person to give information or documents, or attend a compulsory conference;<sup>51</sup> and transfer matters to an alternative complaints body under certain circumstances.<sup>52</sup> After an investigation, the Information Commissioner may make a non-binding determination requiring that the person or entity must: not repeat or continue the act or practice; take specified steps within a specified period to ensure that the act or practice is not repeated or continued; or perform any reasonable act or course of conduct to redress any loss or damage suffered by one or more of those individuals.<sup>53</sup> The Information Commissioner may also determine that one or more of the complainants are entitled to compensation for any loss or damage suffered by reason of the act or practice (including injury to feelings or humiliation).<sup>54</sup> A Commonwealth agency to which a determination relates must comply with declarations included in a determination which require that it not repeat the relevant conduct, or take steps or

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<sup>43</sup> Schedule 1, item 2, section 94S. See also Part IIIC of the *Privacy Act 1988*.

<sup>44</sup> Privacy Amendment (Public Health Contact Information) Bill 2020, section 94T.

<sup>45</sup> Privacy Amendment (Public Health Contact Information) Bill 2020, section 94U.

<sup>46</sup> *Privacy Act 1988*, sections 36 and 40.

<sup>47</sup> *Privacy Act 1988*, section 38.

<sup>48</sup> *Privacy Act 1988*, subsection 40(2).

<sup>49</sup> *Privacy Act 1988*, section 40A.

<sup>50</sup> *Privacy Act 1988*, section 42.

<sup>51</sup> *Privacy Act 1988*, sections 44 and 46.

<sup>52</sup> *Privacy Act 1988*, section 50.

<sup>53</sup> *Privacy Act 1988*, section 52. Subsection 52(1B) provides that a determination under section 52 is not binding or conclusive between relevant parties.

<sup>54</sup> *Privacy Act 1988*, subsection 52(1AB).

perform an act set out under the determination.<sup>55</sup> Where an agency fails to comply, an application may be made to the Federal Circuit Court or the Federal Court for an order directing the agency to comply.<sup>56</sup> Where a determination states that a complainant is entitled to compensation, that sum is recoverable as a debt due by the agency or the Commonwealth.<sup>57</sup>

1.32 The bill also provides that the Health Minister must, every six months, cause a report to be prepared on the operation and effectiveness of COVIDSafe and the National COVIDSafe Data Store during that six month period.<sup>58</sup> The Information Commissioner must, likewise, cause a report to be prepared on the performance of the Commissioner's functions, and the exercise of the Commissioner's powers, under or in relation to this new Part VIIIA within the same timeframe.<sup>59</sup>

### ***Initial privacy assessment***

1.33 As set out above, in considering the proportionality of any limitation on the right to privacy, it is important to consider any relevant safeguards. In this instance, the bill sets out a range of privacy safeguards. It is significant that data on a personal telecommunications device is encrypted and must not be retained for more than 21 days, and that it is an offence to collect, use or disclose such data other than in specified circumstances. It is also relevant that use of the COVIDSafe app itself is voluntary, data can only be uploaded to the National COVIDSafe Data Store after the COVIDSafe app user has consented to the upload, that there are offences for requiring the use of the COVIDSafe app, and that users can delete the COVIDSafe app at any time and request the deletion of their registration data. It is also significant that the bill provides that any COVIDSafe app data which has been uploaded onto the National COVIDSafe Data Store must be held within Australia, and cannot be disclosed to a person outside Australia other than in limited circumstances. Further, it is relevant that the bill provides that any breach of a requirement under this new Part VIIIA constitutes an 'eligible data breach' under the Privacy Act, and enlivens the oversight and investigatory powers of the Information Commissioner. These are all important privacy safeguards that assist in assessing the proportionality of any limitation on the right to privacy.

1.34 However, some questions remain as to the manner in which personal information will be collected, used and disclosed in practice. Foremost, the scope of the information being collected by the COVIDSafe app is unclear, as this is not set out in the bill (and could therefore change over time without legislative oversight). The bill defines 'COVIDSafe app data' as 'data which has been collected or

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<sup>55</sup> *Privacy Act 1988*, section 58.

<sup>56</sup> *Privacy Act 1988*, section 62.

<sup>57</sup> *Privacy Act 1988*, section 60.

<sup>58</sup> Schedule 1, item 2, section 94ZA.

<sup>59</sup> Schedule 1, item 2, section 94ZB.

generated...through the operation of COVIDSafe' and is either registration data, or is stored, or has been stored (including before the commencement of this new Part VIIIA), on a communications device.<sup>60</sup> However, it does not explain the nature and type of data that is actually collected or generated through the operation of the COVIDSafe app, nor does it define 'registration data'. The explanatory memorandum states that 'COVIDSafe does not collect geolocation data',<sup>61</sup> however, there is nothing in the bill to this effect.

1.35 Further, the bill provides that the COVIDSafe app will facilitate 'contact tracing',<sup>62</sup> meaning identifying persons who have been 'in contact' with a person who has tested positive for COVID-19. 'In contact' is in turn defined to mean where the operation of the COVIDSafe app indicates that the person may have been 'in the proximity of' another person.<sup>63</sup> However, the term 'proximity' is not defined in the bill. The explanatory memorandum states that a person will only have been considered to be 'in contact' with another person where they are both COVIDSafe app users, have the COVIDSafe app operating and it subsequently detects the presence of the other person 'within the detectable proximity' of the COVIDSafe app.<sup>64</sup> This does not explain how close each telecommunications device must be in order to be considered 'in contact', nor if there is any particular duration required before a COVIDSafe app user is registered as being 'in contact' with another user's COVIDSafe app. Such information is significant for the purposes of privacy because it provides an indication of the scope of potential data that an individual with the COVIDSafe app installed collects when they carry their mobile device, and in turn shares with other users, and may potentially be uploaded onto the National COVIDSafe Data Store. The Privacy Impact Assessment undertaken in relation to the COVIDSafe app stated that where the COVIDSafe app detects another device with the COVIDSafe app installed within its bluetooth signal range, it will create an encrypted file, or 'digital handshake', every minute.<sup>65</sup> The Privacy Impact Assessment also stated that if a user consents, all digital handshakes will be uploaded to the National COVIDSafe Data Store.<sup>66</sup> The Department of Health's response to this is that data on the Data Store can only be accessed by state and territory health authorities if it meets the 'risk parameters'.<sup>67</sup> This would appear to suggest that data uploaded

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<sup>60</sup> Schedule 1, item 2, subsection 94D(5).

<sup>61</sup> Explanatory memorandum, p. 18.

<sup>62</sup> Schedule 1, item 2, subsection 94D(6).

<sup>63</sup> Schedule 1, item 1, subsection 6(1).

<sup>64</sup> Explanatory memorandum, p. 10.

<sup>65</sup> Maddocks, *The COVIDSafe Application, Privacy Impact Assessment*, 24 April 2020, pp. 19-20.

<sup>66</sup> Maddocks, *The COVIDSafe Application, Privacy Impact Assessment*, 24 April 2020, p. 21.

<sup>67</sup> Department of Health, *The COVIDSafe Application, Privacy Impact Assessment, Agency Response*, p. 17.

onto the National COVIDSafe Data Store will include *all* digital handshakes, including those that were for a minute or less, so long as the other user was in bluetooth range, but policies may be put in place so that not all of this data is shared with state and territory health authorities. Further information is required to assess why it is necessary to include all such data in the Data Store if it may not be necessary for the purposes of contact tracing, noting that in assessing the proportionality of any restriction on the right to privacy it is necessary to consider whether a measure is sufficiently circumscribed.

1.36 Further, as it is unclear what 'COVIDSafe app data' includes, it is also unclear how such data is de-identified, and whether such de-identification processes would sufficiently protect the privacy of personal information. For example, it is unclear whether data which has been de-identified could subsequently be reverse engineered, such that it could indicate personal information about COVIDSafe app users.

1.37 In addition, while the bill prescribes that data held on a telecommunications device is not to be retained for more than 21 days,<sup>68</sup> it would appear that once data is uploaded onto the National COVIDSafe Data Store it is retained until a determination is made by the Health Minister that the use of the COVIDSafe app is no longer required or is no longer likely to be effective.<sup>69</sup> It is not clear why it is necessary to retain the data for this length of time, noting that once the data is transferred to the state and territory health authorities for contact tracing, it would not appear necessary to continue to retain the data on the National COVIDSafe Data Store. It is also not clear how long state and territory health authorities are empowered to retain the data transferred to them by the data store administrator.<sup>70</sup>

1.38 As such, further information is required to assess the proportionality of the measure in relation to the right to privacy, in particular:

- (a) what is the nature and type of data that is collected or generated through the operation of the COVIDSafe app, what information falls under the definition of 'COVIDSafe app data', and why does the bill not specify such matters;
- (b) whether the COVIDSafe app data uploaded to the National COVIDSafe Data Store will include all 'digital handshakes' between two users, regardless of the length of time the users are in proximity and what

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<sup>68</sup> Schedule 1, item 2, section 94K.

<sup>69</sup> Schedule 1, item 2, sections 94F and 94Y.

<sup>70</sup> Schedule 1, item 2, section 94X provides that the Privacy Act relevantly applies to a state or territory health authority. Australian Privacy Principle 11 provides that where personal information is not needed 'for any purpose for which the information may be used or disclosed under the APPs', reasonable steps must be taken to destroy the information or ensure that it is de-identified. However, this does not apply to 'Commonwealth records'.

'proximity' means in this context; and if so, why is it necessary to include all such data in the National COVIDSafe Data Store;

- (c) whether the de-identification process will sufficiently protect the privacy of personal information;
- (d) why is it necessary to retain data uploaded to the National COVIDSafe Data Store for the duration of the COVIDSafe data period, rather than requiring data to be deleted once it has been transferred to state and territory health authorities for the purposes of contact tracing; and
- (e) how long will state and territory health authorities be empowered to retain the data transferred to them by the data store administrator.

### **Committee view**

**1.39** The committee notes that this bill sets out stronger privacy protections for data collected through the COVIDSafe contact tracing application than would otherwise apply in the *Privacy Act 1988*.

**1.40** The committee considers that the bill, which is designed to encourage more people to download the COVIDSafe app in order to enable faster and more effective contact tracing of anyone who may have been exposed to COVID-19, is likely to promote and protect the right to health, noting that the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee also considers that as the bill provides stronger privacy protections for personal information collected by the COVIDSafe app, it is likely to promote the right to privacy.

**1.41** However, regulating the collection, use and disclosure of such data is also likely to engage the right to privacy, as such data contains personal information about the user of the COVIDSafe app. The right to privacy may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate. The committee thanks those organisations and individuals who have written to it in relation to its assessment of the human rights compatibility of COVID-19 related legislation.<sup>71</sup>

**1.42** In order to fully assess the compatibility of these measures with right to privacy, the committee seeks the minister's advice as to the matters set out at paragraph [1.38].

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<sup>71</sup> In relation to scrutiny of this bill, see in particular correspondence to the committee from UNSW Sydney, Australian Human Rights Institute and The Allens Hub dated 7 May 2020, available on the committee's [website](#).

## Concluded matters

1.43 The committee has concluded its examination of this matter on the basis of the response received.

1.44 Correspondence relating to this matter is available on the committee's website.<sup>1</sup>

### Public Service (Terms and Conditions of Employment) (General wage increase deferrals during the COVID-19 pandemic) Determination 2020 [F2020L00418]<sup>2</sup>

<b>Purpose</b>	This instrument provides a six month delay to Australian Public Service wage increases occurring during a twelve month period
<b>Portfolio</b>	Prime Minister and Cabinet
<b>Authorising legislation</b>	<i>Public Service Act 1999</i>
<b>Disallowance</b>	This instrument is exempt from disallowance (see subsection 24(3) of the <i>Public Service Act 1999</i> )
<b>Right</b>	Just and favourable conditions of work
<b>Status</b>	Concluded

1.45 The committee requested a response from the minister in relation to the determination in [Report 5 of 2020](#).<sup>3</sup>

### Altering terms and conditions of employment

1.46 This determination alters the terms and conditions of public service employment for non-SES (Senior Executive Service) Australian Public Service workers by delaying wage increases for six months. This relates to salary and salary-related allowances. It does not apply to increases in salary which take effect because of a

1 See [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports).

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Public Service (Terms and Conditions of Employment) (General wage increase deferrals during the COVID-19 pandemic) Determination 2020 [F2020L00418], *Report 6 of 2020*; [2020] AUPJCHR 82.

3 Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020), pp. 45-46.



variation in the rate of salary in an award, or an increase which takes effect because of a performance or training-based progression.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

#### *Right to just and favourable conditions of work*

1.47 This determination applies to the majority of non-SES Australian Public Service Employees (with some specific worker and salary type exclusions set out in sections 5 and 7). By delaying wage increases for Australian Public Service workers for six months, this measure may engage the right to just and favourable conditions of work. The right to just and favourable conditions in work protects the right of all persons to fair wages.<sup>4</sup> This is considered to be a minimum requirement in the protection of the right to work.<sup>5</sup> The right to just and favourable conditions of work 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.

1.48 The initial analysis considered further information was required as to the compatibility of this measure with human rights, particularly the right to just and favourable conditions of work.

1.49 The full initial legal analysis is set out in [Report 4 of 2020](#).

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

1.50 The committee noted the legal advice that this may engage and limit the right to just and favourable conditions of work, and sought the assistant minister's advice as to the compatibility of this measure with human rights, particularly the right to just and favourable conditions of work.<sup>6</sup>

### **Assistant minister's response<sup>7</sup>**

1.51 The assistant minister advised:

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4 International Covenant on Economic, Social and Cultural Rights, articles 6-7.

5 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 23 (2016) on the right to just and favourable conditions of work, [7].

6 The committee's consideration of the compatibility of a measure which limits rights is assisted if the response addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

7 The assistant minister's response to the committee's inquiries was received on 12 May 2020. This is an extract of the response. The response is available in full on the committee's website at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports).

The Determination engages but does not limit the right to just and favourable conditions of work. This is because the Determination gives effect to the Government's expectations in respect of public service wage increases in light of the exceptional circumstances and serious economic challenges being faced by many Australians during the COVID-19 pandemic.

The Determination also reflects the Government's view that, while many Australians are facing significant economic hardship and challenges, it is not appropriate for those serving the public to receive wage increases.

The Determination does not limit the fair wages and remuneration of non-Senior Executive Service APS employees for the following reasons:

- 1 non-SES APS employees will continue to receive their current wage;
- 2 the Determination only defers scheduled general wage increases for a temporary period of six months for non-SES APS employees and it does not indefinitely freeze wages;
- 3 the Determination only defers by six months general wage increases scheduled to occur over a time limited period, namely those due in the next 12 months;
- 4 the Determination does not affect any other terms and conditions of non-SES APS employees; and
- 5 the Determination does not affect increases in salary or allowances that result from performing higher duties, annual performance reviews, the completion of training or the obtaining of a qualification.

Paragraph 1.125 of the Report states:

"As no statement of compatibility has been provided, the committee seeks the Prime Minister's advice as to the compatibility of this measure with human rights, particularly the right to just and favourable conditions of work."

Under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, a statement of compatibility is required to accompany a disallowable instrument. The Determination, as made under section 24(3) of the *Public Service Act 1999*, is not a disallowable instrument.

## **Concluding comments**

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

1.52 The assistant minister states that the measure does not limit the right to just and favourable conditions of work, as it does not limit the fair wages and remuneration of non-Senior Executive Service (SES) APS employees, as they will continue to receive their current wage, it is only a temporary wage increase freeze and does not affect other terms and conditions or other salary increases.

1.53 Nonetheless, delaying wage increases for six months, which had previously been bargained for and agreed on, would appear to be a backwards step in the realisation of the right to just and favourable conditions of work. Australia has obligations to progressively realise this right and also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps.<sup>8</sup> However, retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

1.54 As such, it is necessary to consider if this measure is a permissible limitation on the right to just and favourable conditions of work. As the assistant minister's response does not acknowledge that the measure limits human rights, it does not provide a full explanation of the limitation as assessed against the limitation criteria.<sup>9</sup>

1.55 The assistant minister's response suggests that the objective of the measure is to give 'effect to the Government's expectations in respect of public service wage increases in light of the exceptional circumstances and serious economic challenges being faced by many Australians during the COVID-19 pandemic', and that while many Australians are facing significant economic hardship and challenges 'it is not appropriate for those serving the public to receive wage increases'. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. It is not clear that the stated objective meets this criterion. However, it may be stated that the decision not to implement these wage increases also serves the objective of prioritising the distribution of finite resources in light of the economic challenges posed by the COVID-19 pandemic. This is a matter that may be capable of constituting a legitimate objective, and as such, the measure would seem to be rationally connected to this objective.

1.56 In relation to whether the measure is a proportionate means to achieve the stated objective, the minister's response provides that the determination does not limit the fair wages and remuneration of employees as they will continue to receive their current wage. In addition, the assistant minister notes that the determination only defers scheduled general wage increases for a temporary period of six months and not indefinitely; does not affect any other terms and conditions of employment; and does not affect increases in salary or allowances that result from performing higher duties, annual performance reviews, the completion of training or the

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

9 While it is accepted that there is no legal requirement for a non-disallowable legislative instrument to be accompanied by a statement of compatibility, the Parliamentary Joint Committee on Human Rights is nevertheless required to assess such legislation for compatibility with human rights, see *Human Rights (Parliamentary Scrutiny) Act 2011*, see sections 7 and 9.

obtaining of a qualification. These matters are relevant in assessing the proportionality of the measure in achieving its legitimate objective.

1.57 As this is a temporary measure that does not affect other terms and conditions or pay increases, it may be that the temporary six month delay to non-SES Australian Public Service wage increases is a permissible limitation on the right to just and favourable conditions of work.

### **Committee view**

**1.58 The committee thanks the assistant minister for this response. The committee notes that this determination provides a six month delay to non-Senior Executive Service Australian Public Service wage increases occurring during a twelve month period.**

**1.59 The committee considers that the measure engages and limits the right to just and favourable conditions at work. However, as this is a temporary measure that does not affect other terms and conditions or pay increases, the committee consider this temporary delay constitutes a permissible limitation on the right to just and favourable conditions of work.**