Responses from legislation proponents — Report 8 of 2020[1]

1 This can be cited as: Parliamentary Joint Committee on Human Rights, Responses from legislation proponents, *Report 8 of 2020*; [2020] AUPJCHR 113.

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-000846

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Senator Henderson

I am writing in response to your letter of 30 April 2020 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) regarding the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the Rules). In that letter, the Committee sought my advice as to the compatibility of the JobKeeper scheme with the rights of equality and non-discrimination. Under the rights of equality and non-discrimination, differential treatment will not be considered to be discrimination if the criteria for such differentiation is reasonable and objective, and if the aim is to achieve a purpose which is legitimate.

To the extent that the Rules result in differential treatment for particular groups of people, this treatment is based on reasonable and objective criteria. To access the JobKeeper scheme as an eligible employee or an individual who is self-employed (for example, a sole trader), you must be an Australian citizen, permanent residence visa holder, or New Zealand citizen on a Special Category (Subclass 444) visa at 1 March 2020.

The treatment of New Zealand citizens is appropriate as it supports the unique arrangements between Australia and New Zealand under the Trans-Tasman Travel Arrangement for travel and work in each country. To the extent that differentiation of treatment on the basis of national origin is applied to this cohort, it is reasonable and proportionate as it reaffirms the important role of the bilateral relationship between Australia and New Zealand.

Other temporary visa holders are unable to receive the JobKeeper payment. To the extent that differentiation of treatment on the basis of national origin is applied to this cohort, it is reasonable and proportionate as it reflects the temporary nature of their connection to Australia. The legitimate objective of the temporary JobKeeper scheme is to support employers to maintain their connection to their employees. Given the substantial cost of the scheme, focusing the payment to those who have a permanent connection to Australia is important to ensure the Government's fiscal strategy can include the broader economic response and any support that is required in the future for Australia's economic recovery.

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The treatment of temporary visa holders is consistent with the general operation of the social security system, under which most temporary visa holders do not have access to income support. Further, the eligibility criteria for the JobKeeper Payment also reflect the general expectation that to obtain a temporary visa these individuals are able to demonstrate that they can support themselves financially while in Australia.

Other measures intended to respond to the economic hardship caused by the Coronavirus may be available to visa holders. For example, temporary visa holders may, where eligible, seek early access to up to $10,000 of their superannuation in the 2019-20 financial year. In addition, emergency relief is also available to people, including temporary visa holders, experiencing financial hardship. The Government has announced an additional $200 million as part of a new Community Support Package. This includes more than $37 million for existing Commonwealth funded Emergency Relief providers and $7 million for the Australian Red Cross to deliver Emergency Relief and some counselling support to temporary visa holders facing significant vulnerabilities.

For these reasons, the Rules do not restrict the rights of equality and non-discrimination based on national origin beyond what is permissible on the basis of being reasonable, necessary and proportionate to achieve a legitimate objective.

Yours sincerely

THE HON JOSH FRYDENBERG MP

28 / 5 /2020

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

MC20-014706

Senator the Hon Sarah Henderson
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10 JUN 2020

Dear ~~Senator Henderson~~

Thank you for your email of 30 April 2020 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) concerning the *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020* (the Regulations).

The Regulations temporarily reduce the *minimum* period during which employees must have access to a copy of a propose variation of an enterprise agreement, and by which they must be notified about the details of the vote on the variation, before being asked to vote.

The Committee has sought my advice on the compatibility of the Regulations with the right to freedom of association and the right to just and favourable conditions of work.

In response to the Committee's concerns, I note that there are a range of safeguards in the *Fair Work Act 2009*. The Fair Work Commission must be satisfied when approving a variation that the employees have genuinely agreed to the variation and that other important safeguards have been observed, including that the employer has taken all reasonable steps to explain the terms of the variation and their effect to employees. This explanation must be provided in an appropriate manner taking into account the employees' particular circumstances and needs. These requirements operate alongside a number of other existing protections, including that a variation passes the Better Off Overall Test and does not contravene the National Employment Standards.

When the economic effects of the pandemic became clear, urgent industry wide award changes were made by the Fair Work Commission within days of applications for variations being made. I considered it important that those covered by enterprise agreements should also not be subject to unnecessary delays.

The Regulations recognise that the seven day access period before employees may vote on a proposed variation could present a barrier to employers and employees agreeing to implement changes quickly in response to the impacts of the COVID-19 pandemic, with a view to preserving business viability and jobs.

The Regulations recognise that in the very challenging circumstances arising because of the pandemic, a lesser access period can suffice. I note in this regard that employees can continue to seek and receive advice from their union (or other representative) during the period which must include a minimum of one clear calendar day, disregarding the day of the notification and the vote. If notice is given on one day, the earliest a vote could be taken is the day following the next day, if only the minimum period is used.

I note also that agreement variations commonly arise out of prior discussions between employers and employees before commencement of the formal statutory process. Of course, employers must make the case for change, and employees must still vote to agree. In many instances periods of notice can, and have continued to, be given beyond one day, and voting has occurred over a period of days.

The reduced access period set by the Regulations operates as a *minimum* (so more than one day's notice can be provided), and this is a temporary, time-limited measure.
To the extent that the Regulations may limit the right to right to freedom of association, or the right to just and favourable conditions of work, they are reasonable, necessary and proportionate to provide employers and employees with the flexibility to implement agreed workplace changes quickly for the purpose of the legitimate objective of keeping businesses operating and saving jobs in the context of the pandemic.

Arising from discussions with various stakeholders and the Senate cross bench I have indicated that changes to the regulation are appropriate, especially in relation to the length of time variations approved after a reduced access period can extend. I am also reviewing the operation of the regulation generally as I indicated I would when the regulation was made.

I thank the Committee for bringing these matters to my attention.

Yours sincerely

The Hon Christian Porter MP
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MC20-016106

Senator the Hon Sarah Henderson
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10 JUN 2020

Dear ~~Senator Henderson~~

I am writing in response to correspondence sent from the Parliamentary Joint Committee on Human Rights to the Minister for Health, the Hon Greg Hunt MP, dated 20 May 2020. The correspondence requested further information about human rights issues in relation to the *Privacy Amendment (Public Health Contact Information) Act 2020* (the Act). I am responding given that I am responsible for administering the Act.

The correspondence referred to the committee's *Report 6 of 2020*, which includes a request for further information about five matters:

(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?

The following data is collected or generated through the operation of the COVIDSafe app:

- **Registration data:** this is data collected from a COVIDSafe user when they register for the app, and includes their mobile phone number, name (which can include a partial name or pseudonym), age range and postcode. Based on this information an encrypted reference code is then generated for the app on that device.
- **Data generated through use of COVIDSafe:** this is data generated through an individual's use of COVIDSafe when they come into contact with another COVIDSafe user, and includes the other user's encrypted reference code, the date and time of contact, the Bluetooth signal strength of the other COVIDSafe user and the other user's device model. This information is securely encrypted and stored locally on the user's device.

The definition of 'COVID app data' in subsection 94D(5) is intended to capture all of the above data, by referring to data relating to a person that has been collected or generated (including before the commencement of the Act).

Importantly, the effect of paragraph 94D(2)(b) of the Act is that the National COVIDSafe Data Store administrator is only allowed to collect, use or disclose information through the COVIDSafe App to the extent required to enable State and Territory contact tracing, or to maintain COVIDSafe and the National COVIDSafe Data Store.

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

The COVIDSafe app collects 'digital handshake' data that is exchanged between users of the app at regular intervals. This contact information is stored on the user's phone/device. Contact information older than 21 days on the phone/device is automatically deleted. It is not technologically feasible to ignore other users' Bluetooth signals beyond 1.5 metres or to limit the collection of Bluetooth signals to 15 minutes contact. This is because the nature of Bluetooth technology means signals can be detected within about 10 metres and the COVIDSafe app detects the strength of Bluetooth signals not the distance.

When a user is diagnosed with COVID-19 and consents to their data being uploaded, contact information on the phone is stored in the National COVIDSafe Data Store. This includes the unique identifier of the contact, date/time the contact occurred and the proximity based on what has been detected via Bluetooth. However, the Government has put in place access restrictions to 'digital handshake' data uploaded to the National COVIDSafe Data Store such that, when a state or territory health official accesses the system, they are only presented with the user's close contacts, defined as contact between users for at least 15 minutes at a proximity approximately within 1.5 metres.

(c) Whether the de-identification process will sufficiently protect the privacy of personal information.

The Act has been designed to allow only very limited de-identification of COVID app data. Specifically, under paragraph 94D(2)(f), the only de-identified information that can be produced from COVID app data is de-identified statistical information about the total number of COVIDSafe registrations, and this can only be produced by the National COVIDSafe Data Store administrator. This minimises any potential risk of flaws in the de-identification process, or the publication of de-identified information that could be later re-identified.

(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?

Data uploaded to the National COVIDSafe Data Store will be accessed by State and Territory health officials to support contact tracing activities. This data is retained for the duration of the COVIDSafe data period to provide a record of any data accessed and by whom through use of the system. This includes investigations where authorised under the *Privacy Act 1988* (the Privacy Act).

Retaining data in the National COVIDSafe Data Store for the duration of the COVIDSafe data period will allow the Information Commissioner to effectively perform the oversight role provided for in the Act by enhancing the Commissioner's ability to investigate complaints about breaches of the legislation and undertake assessments of compliance with privacy

obligations under the legislation. The retention of COVID app data for this period will also support law enforcement undertaking investigations into breaches of the legislation.

The National COVIDSafe Data Store administrator will automatically delete all data from the National COVIDSafe Data Store at the conclusion of the COVIDSafe data period. Individuals can also request deletion of their registration data at any time under section 94L of the Act. Once a deletion request is actioned, State and Territory health officials will not be able to contact the user if they are a close contact of another user who is diagnosed with COVID-19.

(e) How long will state and territory health authorities be empowered to retain the data transferred to them by the data store administrator?

One effect of sections 94R and 94X of the Act is that State and Territory health authorities are subject to the Privacy Act when handling COVID app data, and that COVID app data is treated as 'personal information' under the Privacy Act. This in turn means that the existing provisions of the Privacy Act apply to State and Territory health authorities handling COVID app data (except where those existing provisions are overridden by the stricter protections contained in the Act).

Consequently, Australian Privacy Principle (APP) 11 is expected to apply to COVID app data that State and Territory health authorities hold. This would include APP 11.2, which requires entities to destroy personal information that is no longer required for a legally-permissible purpose (i.e. for contact tracing purposes).

I hope this information has been of assistance in addressing the Committee's concerns.

Thank you again for writing on this matter.

Yours sincerely

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

CC. Minister for Health, the Hon Greg Hunt MP