Chapter 1[1]

New and continuing matters

1.1 In this chapter the committee has examined the following bills and legislative instruments for compatibility with human rights:

- bills introduced into the Parliament between 3 to 12 August 2021;
- legislative instruments registered on the Federal Register of Legislation between 25 June to 4 August 2021;[2] and
- one bill previously deferred.[3]

1.2 Bills and legislative instruments from this period that the committee has determined not to comment on are set out at the end of the chapter.

1.3 The committee comments on the following bills and legislative instruments, and in some instances, seeks a response from the relevant minister.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 10 of 2021*; [2021] AUPJCHR 90.

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 Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021, which were previously deferred in *Report 9 of 2021* (4 August 2021).

Bills

Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021[1]

Purpose	The bill seeks to extend for a further three years the declared areas provisions in sections 119.2 and 119.3 of the *Criminal Code Act 1995*, scheduled to sunset on 7 September 2021. It also seeks to extend by a further 15 months the following Australian Federal Police powers that are also scheduled to sunset on 7 September 2021: • the control order regime in Division 104 of the Criminal Code; • the preventative detention order regime in Division 105 of the Criminal Code; and • the stop, search and seizure powers in Division 3A of Part IAA of the *Crimes Act 1914*. The bill also seeks to amend the *Intelligence Services Act 2001* to provide for the Parliamentary Joint Committee on Intelligence and Security to review the declared areas provisions prior to the new sunset date
Portfolio	Attorney-General
Introduced	Senate, 4 August 2021 *Passed both Houses on 23 August 2021*
Rights	Liberty; freedom of movement; fair trial and fair hearing; privacy; freedom of expression; freedom of association; equality and non-discrimination; to be treated with humanity and dignity; protection of the family; work; social security; an adequate standard of living; and rights of children

Extension of counter-terrorism powers

1.4 This bill, which has now passed both Houses, extends the operation of a number of counter-terrorism related provisions which are due to sunset on 7 September 2021.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021, *Report 10 of 2021*; [2021] AUPJCHR 91.

1.5 In particular, it extends by a further three years (to 7 September 2024) the operation of the declared area provisions. Under these provisions, it is an offence, punishable by up to 10 years' imprisonment, to enter or remain in an area declared by the Minister for Foreign Affairs, unless the accused can raise evidence to demonstrate it is for one of a limited set of purposes as set out in the Criminal Code.[2]

1.6 It also extends by a further 15 months (until 7 December 2022) the operation of the following provisions:

- the control order regime in Division 104 of the Criminal Code, which allows a court to impose on a person a number of obligations, prohibitions and restrictions;
- the preventative detention order regime in Division 105 of the Criminal Code, which allows a person to be taken into custody and detained if it is suspected, on reasonable grounds, that they are preparing to engage in a terrorist act; and
- the stop, search and seizure powers in Division 3A of Part IAA of the *Crimes Act 1914*, which provide a range of powers for the Australian Federal Police and state and territory police officers to exercise in a Commonwealth place (such as an airport) relating to counter-terrorism.

International human rights legal advice

Multiple rights

1.7 The powers extended by this measure are intended to protect Australia's national security interests and protect against the possibility of terrorist acts in Australia.[3] As such, if these powers were capable of assisting in achieving these objectives, it would appear that extending these powers would promote the rights to life and security of the person. The right to life[4] includes an obligation on the state to protect people from being killed by others or identified risks.[5] The right to security of

2 *Criminal Code Act 1995*, section 119.2. Subsection 119.2(3) sets out that the offence will not apply if the person enters, or remains in, the area solely for one or more of the following purposes: providing aid of a humanitarian nature; appearing before a court; performing an official duty; acting as a journalist; making a bona fide visit to a family member; or any other purpose prescribed by the regulations. Subsection 119.2(4) provides it also will not apply if the person was there as part of the person's service with the armed forces of a foreign country (unless it is a prescribed organisation).

3 See statement of compatibility, pp. 6, 9, 16 and 20.

4 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.

5 UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [3]: the right should not be interpreted narrowly and it 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

the person requires the state to take steps to protect people against interference with personal integrity by others.[6]

1.8 However, the extended powers also engage and limit numerous human rights, including the:

- right to liberty;
- right to freedom of movement;
- right to a fair trial and fair hearing;
- right to privacy;
- right to freedom of expression;
- right to freedom of association;
- right to equality and non-discrimination;
- right to be treated with humanity and dignity;
- right to the protection of the family;
- right to work;
- rights to social security and an adequate standard of living; and
- rights of children.[7]

1.9 The committee has previously considered the human rights compatibility of all of the provisions that are extended by this measure. After detailed consideration of these provisions, the committee has previously found that while all of the measures likely sought to achieve a legitimate objective (namely, that of seeking to prevent terrorist acts), there were questions whether the measures would be effective to achieve this and were necessary, and, in particular, the measures did not appear to be

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

7 See International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and the Convention of the Rights of the Child.

proportionate. As a result, the committee previously found the measures were likely to be incompatible with a range of human rights.[8]

1.10 The same human rights concerns as were raised previously apply in relation to the further extension of these coercive powers. In addition, there are questions as to whether all of these powers remain necessary. In relation to the declared area provisions, there has never been a prosecution for breach of these provisions,[9] no areas are currently declared by the minister,[10] and since these provisions were enacted in 2014, new legislation has conferred further powers to investigate terrorism related offences.[11] The Parliamentary Joint Committee on Intelligence and Security (PJCIS) recommended that the declared area provisions be extended for a further three years. It did so, despite noting the limited use of the offence and that there are no currently declared areas, on the basis that it would not be 'prudent' to repeal the provisions during a period of uncertainty as caused by COVID-19 and at a time when international borders may be reopening.[12] However, no evidence was presented as to how the implications of the pandemic relate to the need for this specific offence. The statement of compatibility accompanying the bill states generally that the current terrorism threat level to Australia is 'probable', but no specific information is provided as to why these provisions remain necessary. As this is the only information presented as to why these powers are required to be extended, it has not been established that the extension for three years of the declared area provisions is necessary and seeks to address a current pressing and substantial need.

8 In relation to the declared area provisions, see Parliamentary Joint Committee on Human Rights, Fourteenth Report of the 44th Parliament (October 2014) pp. 34-44; *Nineteenth Report of the 44th Parliament* (3 March 2015) pp. 75-82; and most recently, *Report 6 of 2018*, (26 June 2018), pp. 17-21. In relation to control orders, preventative detention orders, and stop, search and seizure powers, see most recently *Report 10 of 2018* (18 September 2018) p. 25-53. Note in relation to the stop, search and seizure powers the committee concluded that in circumstances where a police officer believes on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act, these powers might be a proportionate limit on human rights, however, the scope of the other powers are likely to be incompatible with human rights, see *Report 10 of 2018* (18 September 2018) p. 45-53.

9 See Parliamentary Joint Committee on Intelligence and Security, *Review of 'declared areas' provisions: Sections 119.2 and 119.3 of the Criminal Code* (February 2021) p. 14.

10 See statement of compatibility, p. 6.

11 Such as temporary exclusion orders; citizenship cessation; surveillance powers; the grounds for control orders; and a compulsory industry assistance scheme. For further details see Law Council of Australia, *Submission 2*, p. 14, to the Parliamentary Joint Committee on Intelligence and Security, Review of 'declared areas' provisions of the *Criminal Code Act 1995* (Cth), 25 August 2020.

12 See Parliamentary Joint Committee on Intelligence and Security, *Review of 'declared areas' provisions: Sections 119.2 and 119.3 of the Criminal Code* (February 2021) p. 18.

1.11 In addition, it is noted that the PJCIS, in recommending the provisions be extended by three years, also recommended changes that may have assisted with the proportionality of the measure, namely that the *Criminal Code Act 1995* be amended to allow Australian citizens to request an exemption to travel to a declared area for reasons not listed in the Criminal Code, but which are not otherwise illegitimate under Australian law.[13] While the government adopted the recommendation to extend the provisions by three years, it did not adopt this exemption recommendation.[14]

1.12 Noting this committee's previous conclusion that the declared area provisions did not contain sufficient safeguards or flexibility to constitute a proportionate limit on rights, and noting the government has not demonstrated the continued necessity of these powers, it has not been established that the extension of these provisions for a further three years is compatible with human rights.

1.13 In addition, the extension of the remaining powers by a further 15 months is stated as being in order to ensure the powers do not sunset and provide time for the government to consider any recommendations of the PJCIS's most recent review into these powers.[15] It is noted that the PJCIS was required, under the *Intelligence Services Act 2001*, to review the operation, effectiveness and implications of these powers and report by 7 January 2021. However, as at the time of tabling, it does not appear that the PJCIS has reported on this inquiry.[16] As such, it appears the lack of reporting under the statutory timeframe is the reason why these coercive powers are being extended by a further 15 months. It is noted that while the statement of compatibility refers to reports from 3-4 years ago as to the continued need for these powers, no recent evidence has been presented that establishes the necessity of continuing these powers. For example, no preventative detention orders have ever been issued in the 16 years since those powers commenced,[17] and no recent evidence demonstrates the continuing need for these powers, including in light of the additional legislative powers that have been enacted since this regime originally commenced. As such, noting the committee's previous conclusion that these provisions do not contain sufficient safeguards to constitute a proportionate limit on rights, and noting the government has not demonstrated the continued necessity of these powers, it has not been demonstrated that the extension of the control order, preventative detention order

13 See Parliamentary Joint Committee on Intelligence and Security, *Review of 'declared areas' provisions: Sections 119.2 and 119.3 of the Criminal Code* (February 2021) p. 21.

14 See Australian Government response to the Parliamentary Joint Committee on Intelligence and Security, *Review of 'declared areas' provisions: Sections 119.2 and 119.3 of the Criminal Code* (July 2021) pp. 2-3.

15 See *Intelligence Services Act 2001*, paragraph 29(1)(bb).

16 See Parliamentary Joint Committee on Intelligence and Security, Review of AFP powers, listed under 'current inquiries' on the PJCIS's webpage.

17 Statement of compatibility, p. 16.

and stop, search and seizure provisions for a further 15 months is compatible with human rights.

Committee view

1.14 The committee notes this bill, now Act, extends the operation of a number of counter-terrorism related measures which are otherwise due to sunset on 7 September 2021. The extended measures are the declared area provisions (which make it an offence for a person to travel to any area which the Minister for Foreign Affairs declares to be a declared area); the control order regime; the preventative detention order regime; and certain police stop, search and seizure powers.

1.15 The committee notes it has previously considered the human rights compatibility of the provisions being extended. The committee has previously found that while all of the measures likely sought to achieve a legitimate objective (namely, that of seeking to prevent terrorist acts), there were questions whether the measures would be effective to achieve this and were necessary, and, in particular, the measures did not appear to be proportionate, and therefore were likely to be incompatible with a range of human rights.

1.16 The committee notes that limited evidence has been presented as to the necessity for continuing these coercive powers beyond their sunset date. In particular, it notes that many of these powers are being extended because no report on their continued effectiveness has been presented to Parliament in the requisite timeframe.

1.17 As such, noting the committee's previous conclusion that these provisions do not contain sufficient safeguards to constitute a proportionate limit on rights, and noting the government has not demonstrated the continued necessity of these powers, the committee considers it has not been demonstrated that the extension of these provisions is compatible with human rights.

1.18 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

Defence Legislation Amendment (Discipline Reform) Bill 2021[1]

Purpose	This bill seeks to amend the *Defence Force Discipline Act 1982* to: • expand the operation of the disciplinary infringement scheme in dealing with minor breaches of military discipline; • remove the subordinate summary authority, to reduce the number of summary authority levels; and • introduce several new service offences relating to failure to perform duty or carry out activity, cyber-bullying, and failure to notify change in circumstances concerning the receipt of a benefit or allowance
Portfolio	Defence
Introduced	House of Representatives, 12 August 2021
Rights	Freedom of expression

Service offence to use social media and electronic services to offend

1.19 The bill proposes to make a number of new service offences that would apply to Australian Defence Force (ADF) personnel. This includes making it an offence for a defence member to use a social media service or relevant electronic service (such as email, text or chat messages), 'in a way that a reasonable person would regard as offensive or as threatening, intimidating, harassing or humiliating another person'. The maximum punishment would be imprisonment for two years.[2]

1.20 In addition, if a defence member is convicted of this offence a service tribunal can make an order that the member take reasonable action to remove, retract, recover, delete or destroy the material.[3] A failure to comply with such an order would also be an offence punishable by up to two years imprisonment.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Defence Legislation Amendment (Discipline Reform) Bill 2021, *Report 10 of 2021*; [2021] AUPJCHR 92.

2 Schedule 3, item 2, proposed section 48A.

3 Schedule 3, item 5, proposed section 84A.

4 Schedule 3, item 2, proposed section 48B.

Preliminary international human rights legal advice

Right to freedom of expression

1.21 Making it a service offence for an ADF member to use social media, or send text messages or emails, that might offend a reasonable person, engages and limits the right to freedom of expression. This right 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 freedom of expression protects all forms of expression and the means of their dissemination, including spoken, written and sign language and non-verbal expression, such as images and objects of art.[6] This right embraces expression that may be regarded as deeply offensive.[7] This right 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 recognises that freedom of expression is engaged and limited, but says the proposed offence 'is necessary, reasonable and proportionate for the maintenance or enforcement of service discipline of Australian Defence Force personnel'.[8] The explanatory memorandum provides further detail regarding the need for this offence. It states that cyber-bullying 'is conduct that is corrosive to good order and discipline; it is contrary to the Defence Value of respect towards others and has a negative impact on the morale, operational effectiveness, and reputation of the ADF'. It goes on to explain that commanders in the ADF are responsible for ensuring the discipline of ADF members and for the safety, health and well-being of people under their command '24 hours a day, seven days a week'. As such, instances of cyber-bullying within the ADF 'need to be dealt with quickly by commanders to minimise the impact not only on individuals, but also to the morale and operational effectiveness of the ADF more generally'.[9]

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

6 UN Human Rights Committee*, General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [12].

7 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [11]. This is subject to the provisions of article 19(3) and article 20 of the International Covenant on Civil and Political Rights. Article 19(3) states that the right to freedom of expression carries with it special duties and responsibilities, and may be subject to restrictions but only such that are provided by law and are necessary for respecting the rights or reputations of others, or to protect national security, public order, public health or morals. Article 20 provides any propaganda for war, and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited.

8 Statement of compatibility, [40].

9 Explanatory memorandum, in the discussion regarding Schedule 3, item 2, proposed section 48A.

1.23 Maintaining or enforcing military service discipline would be likely to constitute a legitimate objective for the purposes of international human rights law, and having an enforceable service cyber-bullying offence may be rationally connected to that objective. 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 a number of factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective. In this respect the explanatory materials accompanying the bill are silent.

1.24 It is noted that the proposed service offence applies broadly to where a defence member uses a social media service or relevant electronic service in a way that a reasonable person would regard 'as offensive or as threatening, intimidating, harassing or humiliating another person'. While threatening, intimidating, harassing or humiliating another person would appear to be limited to serious online abuse, the proposed service offence of using a service in a way that is 'offensive' to a reasonable person may be employed in relation to conduct with effects that range from slight to severe, and could capture a large range of uses that may not constitute cyber-bullying.

1.25 The right to freedom of expression, to be meaningful, protects both popular and unpopular expression and ideas, including expression that may be regarded as deeply offensive (so long as it does not constitute hate speech).[10] The term 'offensive' has been the subject of extensive consideration in existing areas of Australian law. The High Court of Australia has noted that, 'offensiveness is a protean concept which is not readily contained unless limited by a clear statutory purpose and other criteria of liability'.[11] It has further stated that the modern approach to interpretation—particularly in the case of general words—requires that the context be considered in the first instance: '[w]hilst the process of construction concerns language, it is not assisted by a focus upon the clarity of expression of a word to the exclusion of its context'.[12]

1.26 In *Monis v R*, the High Court considered the meaning of the term 'offensive' within the context of the alleged offence of using a postal service in a way that reasonable persons would regard as being, in all the circumstances, 'menacing,

10 See UN Human Rights Committee, *General Comment 34: Freedom of opinion and expression* (2011) [11].

11 *Monis v R; Droudis v R* [2013] HCR 4 [47] per French CJ. Gleeson CJ (dissenting) in *Coleman v Power* [2004] HCA 39 further commented that concepts of what is offensive will vary within time and place, and may be affected by the circumstances in which the relevant conduct occurs, at [12].

12 *Monis v R; Droudis v R* [2013] HCR 4 [309] (per Crennan, Kiefel and Bell JJ). See also *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 [315] per Mason J; and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [381].

harassing or offensive'.[13] In that instance, Justices Crennan, Kiefel and Bell guided that the terms 'menacing, harassing or offensive' must be considered together:

> It is true that a communication which has the quality of being menacing or harassing can be seen to be personally directed and deliberately so. An offensive communication may have those qualities; it may not…Importantly, the grouping of the three words and their subjection to the same objective standard of assessment for the purposes of the offences in s 471.12 suggests that what is offensive will have a quality at least as serious in effect upon a person as the other words convey. The words "menacing" and "harassing" imply a serious potential effect upon an addressee, one which causes apprehension, if not a fear, for that person's safety. For consistency, to be "offensive", a communication must be likely to have a serious effect upon the emotional well-being of an addressee.[14]

1.27 Section 18C of the *Racial Discrimination Act 1975* similarly prohibits an act done on the basis of race or colour that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate. In this context, having had regard to the collective phrase 'offend, insult, humiliate or intimidate', Australian courts have considered that this establishes an objective test of whether the act is reasonably likely to have a 'profound and serious effect', in all the circumstances, and is not to be likened to mere slights.[15]

1.28 The *Online Safety Act 2021*, which was recently enacted, also gives powers to take down material from websites where an ordinary reasonable adult would regard the material as being, in all the circumstances, 'menacing, harassing or offensive', and that it is likely that the material was intended to have an effect of causing serious harm.[16]

1.29 In contrast, this proposed offence uses different wording that separates out the term 'offensive' from the terms 'threatening, intimidating, harassing or humiliating'. The explanatory memorandum states that this proposed provision differs from similar civilian criminal legislation in that there is no requirement for the cyber-bullying conduct to be 'serious'. It states this distinction is important as 'the availability of this service offence supports the maintenance and enforcement of discipline through deterrence of such conduct by members, which is distinct from the civilian criminal law provisions dealing with criminal behaviour'.[17] However, while the fact that

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13 Pursuant to section 471.12 of the *Criminal Code Act 1995*.

14 *Monis v R; Droudis v R* [2013] HCR 4 [310].

15 *Creek v Cairns Post* [2001] FCA 1007 [16]. See also, *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 [131]; *Jones v Scully* (2002) 120 FCR 243 [102]; and *Eatock v Bolt* (2011) 197 FCR 261 at [267]-[268].

16 *Online Safety Act 2021*, section 7.

17 Explanatory memorandum, in the discussion regarding Schedule 3, item 2, proposed section 48A.

this service offence does not result in a criminal conviction may operate in some respects to safeguard its proportionality, it still could lead to a penalty of up to two years imprisonment being imposed. In addition, it is noted that charges under the ADF's military discipline law system appear able to be laid even in circumstances where the offending conduct occurs outside of what might ordinarily be considered a military context.[18] As such, making it a service offence for an ADF member to, in potentially even a non-military context, post anything on social media, or via email or text message, that a reasonable person may regard as offensive, would appear to be a significant limit on an ADF member's right to freedom of expression.

1.30 It is also not clear whether there are any safeguards in place to protect an ADF member's right to freedom of expression, to ensure speech is not disproportionately restricted. The explanatory memorandum states that the new service offence will enable less serious disciplinary breaches of cyber-bullying to be dealt with by a summary authority, and for more serious breaches, by court martial or Defence Force magistrate, with referral to civilian authorities remaining an option for matters that may constitute a criminal offence.[19] However, as a matter of law all types of uses may be subject to up to two years imprisonment, with no gradients provided as to the level of seriousness. It is also not clear why the current approach to dealing with cyber-bullying, including relying on existing criminal offences, has not proved effective, and whether there are any less rights restrictive ways to achieve the same objective.

1.31 In order to assess the proportionality of this measure with the right to freedom of expression, further information is required, and in particular:

(a) what type of use is likely to be considered 'offensive' for the purposes of proposed section 48A;

(b) is it intended that the term 'offensive' will be considered together with the terms 'threatening, intimidating, harassing or humiliating', or is it intended to have a stand-alone meaning, and, if so, is it intended that this would capture uses that a reasonable person would merely find offensive, without necessarily any profound and serious effects;

(c) could this service offence apply to ADF members in their personal capacity where the offensive use has no, or little, link to their ADF service;

(d) what safeguards are in place to ensure the proposed service offence does not unduly restrict an ADF member's freedom of expression; and

(e) what other, less rights restrictive approaches would be available to achieve the stated objective. In this respect, further information is

18 See *Private R v Cowen* [2020] HCA 31.

19 Explanatory memorandum, in the discussion regarding Schedule 3, item 2, proposed section 48A.

required as to the approach currently taken to deal with cyber-bullying in the ADF and why this has proved not to be effective to achieve the objective of maintaining military discipline.

Committee view

1.32 The committee notes this bill seeks to make it an offence for Australian Defence Force members to use a social media service or relevant electronic service (such as email, text or chat messages), 'in a way that a reasonable person would regard as offensive or as threatening, intimidating, harassing or humiliating another person'. The maximum punishment would be imprisonment for two years.

1.33 The committee considers that this measure engages and limits the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, including expression that may be regarded as offensive. This right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.34 The committee considers that the measure seeks to achieve the legitimate objective of maintaining or enforcing military service discipline, and the proposed offence may be effective to achieve this. However, questions remain as to whether the measure is proportionate.

1.35 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 measure, and as such seeks the minister's advice as to the matters set out at paragraph [1.31].

Electoral Legislation Amendment (Party Registration Integrity) Bill 2021[1]

Purpose	This bill seeks to amend the registration eligibility requirements for a federal non-Parliamentary party by increasing the minimum membership from 500 to 1500 unique members
Portfolio	Finance
Introduced	House of Representatives, 12 August 2021
Rights	Freedom of association; political participation

Increasing unique party membership for non-parliamentary parties

1.36 This bill would amend the *Commonwealth Electoral Act 1918* to increase, from 500 to 1500, the minimum number of unique members required by a political party in order for it to be federally registered.[2] Further, the bill would provide that a person may not qualify as a unique member of multiple political parties which are not represented in the federal parliament. Rather, within at least 30 days of being notified by the Australian Electoral Commission, they would be required to nominate one party in order to count towards its unique membership.[3] If they failed to nominate a party within at least 30 days, no party would be permitted to rely on their membership as contributing to their unique membership.

1.37 Where a political party is registered, that party name may be printed on the ballot papers for an election adjacent to the name of a candidate who has been endorsed by that party.[4]

Preliminary international human rights legal advice

Right to freedom of association and right to participate in public affairs

1.38 By increasing the minimum required membership for a non-parliamentary political party to be registered as a political party for the purposes of a federal election, this bill may limit the right to freedom of association. The right to freedom of association protects the right of all persons to group together voluntarily for a

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Electoral Legislation Amendment (Party Registration Integrity) Bill 2021, *Report 10 of 2021*; [2021] AUPJCHR 93.

2 Schedule 1, item 1, subsection 123(1).

3 Schedule 1, item 2, proposed section 123A.

4 *Commonwealth Electoral Act 1918*, subsection 169(1).

common goal and to form and join an association.[5] This right prevents the State from imposing unreasonable and disproportionate restrictions on the right to form an association, including imposing procedures for formal recognition as an association that effectively prevent or discourage people from doing so.[6] Further, this bill may also engage and limit the related right to participate in public affairs, which gives citizens the right to take part in the conduct of public affairs, directly or through freely chosen representatives, and includes guarantees of the right of Australian citizens to stand for public office and to vote in elections.[7] Any conditions which apply to the exercise of the right to participate in public affairs should be based on objective and reasonable criteria.[8]

1.39 These rights may be permissibly limited where the limitation seeks to achieve a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving the objective. The right to freedom of association may only be limited where the measures are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.[9]

1.40 The statement of compatibility does not identify that this measure engages and may limit the right to participate in public affairs, and so no information is provided with respect to its compatibility. The statement of compatibility notes that this measure engages the right to freedom of association. It states that the amendment is intended to ensure that any political party on the federal Register of Political Parties has 'a genuine foundation of national community support', and notes that the reforms would not preclude members of smaller associations from standing as independent candidates for federal elections with organisational endorsement.[10] However, no information is provided as to: how the figure of 1500 unique members was reached; why a membership of 1500 people (as opposed to 500) is indicative of a foundation of national community support; or why a person may only count as a unique member with respect to one non-parliamentary political party. Further, it is

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

6 The European Court on Human Rights has similarly stated that requiring proof of minimum levels of support by political parties must be reasonable and democratically justifiable and not so burdensome as to restrict the political activities of small parties or to discriminate against parties representing minorities. See, *Republican Party of Russia v. Russia*, European Court of Human Rights, Application No. 12976/07 (2011) [110]-[119]. See also, Council of Europe, European Commission for Democracy through Law, *Guidelines on Political Party Regulation* (December 2020) pp. 27-28.

7 International Covenant on Civil and Political Rights, article 25.

8 UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) [4].

9 International Covenant on Civil and Political Rights, article 22(2).

10 Statement of compatibility, p. 4.

not clear whether and how the measure is necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. The statement of compatibility states that the proposed amendment is proportionate given that there are over 16 million people on the Commonwealth Electoral Roll who can be a member of a political party for the purposes of registration, and noting that the revised threshold would still be less restrictive than equivalent thresholds under some state electoral laws.[11] However, given that voting in federal elections occurs based on a person's electorate (in the House of Representatives) and state or territory (in the Senate), it is not clear that the total number of voters at the federal level is directly relevant to the minimum number of registered party members (particularly where a party may be focused on concerns specific to a particular region, or particular cohort in society).[12]

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

(a) whether and how increasing the minimum required unique membership of a non-parliamentary political party from 500 to 1500 members is necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others;

(b) how the figure of 1500 unique members was reached, and why a membership of 1500 members is considered to be indicative of a foundation of national community support (whereas 500 members is not);

(c) how many federally-registered political parties currently have less than 1500 registered members;

(d) whether this amendment may have the effect of discriminating against parties representing minority groups;

(e) why a person would only be permitted to count as a unique member with respect to one non-parliamentary political party; and

(f) whether and how this measure constitutes a proportionate limit on the right to participate in public affairs.

11 Statement of compatibility, p. 4.

12 Excluding those parties represented in the federal parliament, there would appear to be approximately 38 political parties registered at a federal level. See, Australian Electoral Commission, *Current register of political parties,* 11 August 2021, https://www.aec.gov.au/parties_and_representatives/party_registration/Registered_parties/ (accessed 16 August 2021).

Committee view

1.42 The committee notes that this bill seeks to amend the registration eligibility requirements for a federal non-parliamentary party by increasing the minimum membership from 500 to 1500 unique members. The committee notes that this engages and may limit the right to freedom of association, and the right to participate in political affairs. The committee notes that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.43 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 seeks the assistant minister's advice as to the matters set out at paragraph [1.41].

Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021[1]

Purpose	This bill seeks to amend a number of Acts in relation to social security, family assistance and paid parental leave to: • increase the existing newly arrived resident's waiting period (NARWP) for carer payment and carer allowance from 104 weeks to 208 weeks; • remove the 104 week qualifying residency requirement for parenting payment as this payment already has a 208 week NARWP; • ensure the existing 208 week NARWP applies to relevant temporary visa holders for the low income health care card and Commonwealth seniors health card; • increase the existing NARWP for family tax benefit Part A from 52 weeks to 208 weeks; • introduce a new NARWP of 208 weeks for family tax benefit Part B; and • increase the existing NARWP for parental leave pay and dad and partner pay, from 104 weeks to 208 weeks
Portfolio	Social Services
Introduced	House of Representatives, 24 June 2021
Rights	Social security; adequate standard of living; health; maternity leave; equality and non-discrimination

Increased waiting period for social security payments

1.44 This bill seeks to standardise the newly arrived resident's waiting period for social security payments by applying a consistent four-year (or 208 weeks) waiting period across all relevant payments and concession cards (including low income health care card and commonwealth seniors health card). Specifically, the bill would introduce a four-year waiting period for family tax benefit Part B (where no waiting period currently exists) and increase the waiting period to four years (from either 52 or 104 weeks depending on the payment) for carer payment and carer allowance; parenting payment; family tax benefit Part A; parental leave pay; and dad and partner

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021, *Report 10 of 2021*; [2021] AUPJCHR 94.

pay.[2] The increased waiting period would apply prospectively to people granted the relevant visa on or after the commencement of these amendments.[3] The bill would not affect the waiting period or social security payments and concession cards for existing visa holders, or amend the existing exemptions in relation to the waiting period.[4]

Preliminary international human rights legal advice

Rights to social security, adequate standard of living, health and maternity leave

1.45 By extending the waiting period for certain social security payments and concession cards (including health care cards) and so restricting access to social security for newly arrived residents for four years, this measure engages and limits the rights to social security, adequate standard of living, health and maternity leave.

1.46 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living, the right to health and the rights of the child and the family.[5] Social security benefits must be adequate in amount and duration.[6] States must guarantee the equal enjoyment by all of minimum and adequate protection, and the right includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage.[7] The right to social security also includes the right to access benefits to prevent access to health care from being unaffordable.[8] The right to an adequate standard of living requires states to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.[9] Additionally, the right to health includes the right to enjoy the highest attainable standard of physical and mental health, and

2 Schedule 1, items 5, 6, 13–16; Schedule 2, items 3–5; Schedule 3, items 1–6.

3 Schedule 1, item 17; Schedule 2, item 6; Schedule 3, item 7.

4 Statement of compatibility, p. 13.

5 International Covenant on Economic, Social and Cultural Rights, article 9. See also, UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008).

6 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [22].

7 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [4] and [9].

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

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

requires available, accessible, acceptable, and quality health care that is affordable for all.[10]

1.47 Further, the right to maternity leave is protected by article 10(2) of the International Covenant on Economic, Social and Cultural Rights and article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination against Women.[11] The right to maternity leave includes an entitlement for parental leave with pay or comparable social security benefits for a reasonable period before and after childbirth.[12]

1.48 Under international human rights law, Australia has obligations to progressively realise economic, social and cultural rights, including the rights to social security, adequate standard of living, health and maternity leave, using the maximum

10 International Covenant on Economic, Social and Cultural Rights, article 12(1). The United Nations Economic, Social and Cultural Rights Committee has noted that 'health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups': *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [12]. See also Economic, Social and Cultural Rights Committee, *General Comment No. 12: the right to food (article 11)* (1999); *General Comment No. 15: the right to water (articles 11 and 12)* (2002); and *General Comment No. 22: the right to sexual and reproductive health* (2016).

11 The Australian government on ratification of the Convention on the Elimination of All Forms of Discrimination against Women in 1983 made a statement and reservation that: 'The Government of Australia advises that it is not at present in a position to take the measures required by Article 11(2)(b) to introduce maternity leave with pay or with comparable social benefits throughout Australia.' This statement and reservation has not been withdrawn. However, after the Commonwealth introduced the Paid Parental Leave scheme in 2011, the Australian Government committed to establishing a systematic process for the regular review of Australia's reservations to international human rights treaties: See, Attorney-General's Department, Right to Maternity Leave: https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttomaternityleave.aspx. In its concluding observations on Australia in 2018, the CEDAW committee expressed concern at the lack of measures taken to withdraw its reservation to Article 11(2) and recommended that Australia expedite the necessary legislative steps to withdraw its reservation: see Committee on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Australia,* CEDAW/C/AUS/CO/8 (2018) [9]-[10].

12 The UN Committee on Economic, Social and Cultural Rights has further explained that the obligations of state parties to the International Covenant on Economic, Social and Cultural Rights in relation to the right to maternity leave include the obligation to guarantee 'adequate maternity leave for women, paternity leave for men, and parental leave for both men and women'. See UN Committee on Economic, Social and Cultural Rights, *General Comment 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005).

of resources available.[13] Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.[14] Insofar as the measure would further restrict access to social security payments and concession cards (including health care cards), the measure would appear to constitute a retrogressive measure. 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.

Rights of the child

1.49 Insofar as this measure restricts access to social security payments and concession cards for migrant families once in Australia, including introducing a four-year waiting period for Family Tax Benefit Part B (which is paid per family, with the amount depending on the age of the youngest child), the measure also engages and limits the rights of the child. Under the Convention on the Rights of the Child, children have the right to benefit from social security and to a standard of living adequate for a child's physical, mental, spiritual, moral and social development.[15] The Convention requires States to assist parents or carers of children, through social assistance and support, to realise a child's right to an adequate standard of living.[16] To the extent that the measure restricts newly arrived migrant parents' access to social security, which may limit their ability meet the basic needs of themselves and their children, it may adversely affect the rights of their children to benefit from social security and to an adequate standard of living. The UN Committee on Economic, Social and Cultural Rights has emphasised that the provision of benefits (in the form of cash or services) is crucial for realising the rights of child.[17] Australia is also required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[18] This requires legislative, administrative and judicial bodies

13 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)* (1990) [9]. The obligation to progressively realise the rights recognised in the International Covenant on Economic, Social and Cultural Rights imposes an obligation on States to move 'as expeditiously and effectively as possible' towards the goal of fully realising those rights.

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

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

16 See also Convention on the Rights of the Child, article 27(3).

17 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [18].

18 Convention on the Rights of the Child, article 3(1).

and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[19]

Right to equality and non-discrimination

1.50 In addition, the measure appears to engage and limit the right to equality and non-discrimination insofar as it treats people differently on the basis of national origin, and would appear to have a disproportionate impact on women, as they are the primary recipients of certain social security payments, including paid parental leave and parenting payment, carer payment and carer allowance. 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.[20] 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).[21] 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.[22] The United Nations (UN) Committee on Economic, Social and Cultural Rights has observed that where a legal provision, 'although formulated in a neutral manner, might in fact affect a clearly higher percentage of women than men, it is for the State party to show that such a situation does not constitute indirect discrimination on grounds of gender'.[23]

1.51 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

19 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013).

20 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. Articles 1–4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women further describe the content of these obligations, including the specific elements that State parties are required to take into account to ensure the rights to equality for women.

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

22 *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'.

23 *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.4].

objective (one which, where an economic, social and cultural right is in question, is solely for the purpose of promoting the general welfare in a democratic society),[24] is rationally connected to that objective and is a proportionate means of achieving that objective.[25] Further, where a person possesses characteristics which make them particularly vulnerable to intersectional discrimination, such as on the grounds of both gender or sex and national origin or ethnicity, the UN Committee on Economic, Social and Cultural Rights has highlighted that 'particularly special or strict scrutiny is required in considering the question of possible discrimination'.[26]

Right to protection of the family

1.52 Australia also has obligations to provide the widest possible protection and assistance to the family.[27] To the extent that a four-year waiting period may operate as a deterrent or barrier to newly arrived migrants bringing members of their family to join them in Australia, the measure may engage and limit the right to protection of the family. This is particularly so for families experiencing financial disadvantage as a result of the measure, as without access to social security payments, they may be unable to support family members for the duration of the waiting period. A measure which limits the ability of certain family members to join others in a country is generally a limitation on the right to protection of the family.[28] An important element of protection of the family[29] is to ensure family members are not involuntarily

24 International Covenant on Economic, Social and Cultural Rights, article 4.

25 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13] and UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [13]. See also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

26 *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.2]. See also *Rodriguez v Spain,* UN Committee on Economic, Social and Cultural Rights, Communication No. 1/2013 E/C.12/57/D/1/2013 (20 April 2016) [14.1]; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [17] and *General Comment 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005) [5]; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GS/28 (16 December 2010) [28].

27 Under articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights.

28 See, for example, *Sen v the Netherlands,* European Court of Human Rights Application no. 31465/96 (2001); *Tuquabo-Tekle And Others v The Netherlands,* European Court of Human Rights Application No. 60665/00 (2006) [41]; *Maslov v Austria,* European Court of Human Rights Application No. 1638/03 (2008) [61]-[67].

29 Protected by articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights.

separated from one another. Additionally, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[30] While the state has a right to control immigration, the right to protection of the family does require Australia to create the conditions conducive to family formation and stability, including the interest of family reunification.[31]

Legitimate objective

1.53 Any limitation on any of the above rights must pursue a legitimate objective, namely, one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. This general test is further qualified by specific requirements that apply to economic, social and cultural rights, namely that states may limit these rights only insofar as 'this may be compatible with the nature' of those rights, and 'solely for the purpose of promoting the general welfare in a democratic society'.[32] This means that the only legitimate objective in the context of the economic, social and cultural rights is a limitation for the 'promotion of general welfare'. The term 'general welfare' is to be interpreted restrictively and refers primarily to the economic and social well-being of the people and the community as a whole, meaning that a limitation on a right which disproportionately impacts a vulnerable group may not meet the definition of promoting 'general welfare'.[33]

1.54 The statement of compatibility states that the purpose of the measure is to standardise the waiting period across all relevant payments and concession cards, and to reinforce the existing expectations of self-reliance for new permanent migrants.[34] In this way, the statement of compatibility states that the measure will help to target access to payments to those most in need, in line with the fundamental principles underpinning Australia's welfare payment system.[35] The statement of compatibility

30 Convention on the Rights of the Child, article 3(1). See also article 10, which requires States parties to treat applications by minors for family reunification in a positive, humane and expeditious manner.

31 See *Ngambi and Nebol v France,* United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4]–[6.5].

32 See International Covenant on Economic, Social and Cultural Rights, article 4.

33 Limburg Principles on the Implementation of the ICESCR, June 1986 [52]. See also, Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review* vol. 9, no. 4, 2009, p. 573; Erica-Irene A Daes, The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, *Study of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, E/CN.4/Sub.2/432/Rev.2 (1983), pp. 123–4.

34 Statement of compatibility, pp. 15, 18 and 24.

35 Statement of compatibility, p. 18.

notes that the broader purpose of the welfare payment system is to encourage people to support themselves so that the system remains sustainable into the future.[36]

1.55 In general terms, ensuring the financial sustainability of the welfare system may be capable of constituting a legitimate objective for the purposes of international human rights law, insofar as it may ensure that limited resources are directed towards those most in need.[37] However, the other stated objective of reinforcing expectations of self-reliance for new migrants is unlikely to constitute a legitimate objective for the purposes of international human rights law, noting that a legitimate objective must address a pressing or substantial concern and not simply seek a desirable or convenient outcome, such as meeting community expectations. To the extent that a financially sustainable social security system promotes the economic and social well-being of the people and the community as a whole, the limitation may be for the purpose of promoting general welfare. However, a limitation which disproportionately impacts a vulnerable group may not meet the definition of promoting 'general welfare'.[38] Insofar as this measure would appear to have a disproportionate impact on vulnerable groups, including newly arrived migrants and women experiencing financial disadvantage, questions arise as to whether this measure would, in practice, promote general welfare for the purpose of international human rights law. In addressing these questions, the UN Committee on Economic, Social and Cultural Rights has indicated that the reasonableness and proportionality of the proposed limitation is relevant, including whether the limitation is the only way to achieve the stated purpose and whether there are alternative measures that do not seriously limit rights (see discussion below from paragraph [1.57]).[39]

Rational connection

1.56 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to (that is, effective to achieve) the objective sought to be achieved. By introducing a four-year waiting period across all

36 Statement of compatibility, p. 12.

37 Jurisprudence of the UN Committee on Economic, Social and Cultural Rights indicates that the aim of protecting the resources of a social security system can be a valid and legitimate objective: *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [17.1].

38 Limburg Principles on the Implementation of the ICESCR, June 1986 [52]. See also, Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review* vol. 9, no. 4, 2009, p. 573; Erica-Irene A Daes, The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, *Study of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, E/CN.4/Sub.2/432/Rev.2 (1983), pp. 123–4.

39 See *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [17.1], [23(c)].

relevant payments and concession cards and restricting access to social security payments for newly arrived migrants, the measure may be effective to achieve the objective of requiring newly arrived migrants to support themselves and their families, which in turn, may help to achieve the broader objective of ensuring the financial sustainability of the welfare payment system.

Proportionality

1.57 In assessing proportionality, it is necessary to consider a number of factors, including whether the proposed limitation is accompanied by sufficient safeguards; whether there is sufficient flexibility to treat different cases differently; and whether any less rights restrictive alternatives could achieve the same stated objective.

1.58 The statement of compatibility states that the existing waiting period exemptions and safeguards will continue to apply as well as be extended to family tax benefit Part B, providing a safety net for individuals who find themselves in need of support.[40] The statement of compatibility notes that some exemptions apply to all relevant payments, while others only apply to specific payments and/or to specific visa holders.[41] For example, permanent humanitarian migrants and their family members will continue to be exempt from the waiting periods for all social security, family assistance and paid parental leave payments, including carer payment, carer allowance, family tax benefit parts A and B, parental leave pay and dad and partner pay.[42] Temporary humanitarian visa holders will also be exempt from the waiting periods for the social security payments that they are eligible for, including special benefit, low income health care card, family tax benefit, parental leave pay and dad and partner pay.[43]

1.59 The statement of compatibility states that migrants who experience a substantial change in circumstances, such as illness, injury, job loss, death of a partner or sponsor, or family or domestic violence, will continue to be exempt from the waiting period for special benefit. The statement of compatibility states that special benefit is a payment of last resort to provide a safety net for people experiencing hardship who are otherwise not eligible for other social security payments. The special benefit payment is equivalent to the jobseeker or youth allowance payment, and may be supplemented with other payments, such as rent assistance. Individuals who are granted special benefit are also entitled to a health care card or pensioner concession card, and depending on their circumstances, may also be eligible for exemptions for

40 Statement of compatibility, pp. 15–16.

41 Statement of compatibility, pp. 16–18. For example, New Zealand citizens on a Special Category Visa will be exempt from the waiting period for family tax benefit, parental leave pay and dad and partner pay, but will be subject to the waiting periods for other social security payments.

42 Statement of compatibility, p. 16.

43 Statement of compatibility, p. 16.

other payments relating to caring responsibilities, including family tax benefit parts A and B and carer allowance.[44] Becoming a lone parent after becoming an Australian resident will also be considered a change in circumstance allowing the individual to access exemptions for the main payments for principal carers of a dependent child.[45] In addition, the statement of compatibility notes that individuals who hold an Orphan Relative or Remaining Relative visa are excluded from the measure, meaning they are not subject to the amendments contained in this bill.[46]

1.60 These exemptions, in combination with access to other government-funded services, including Medicare, the National Disability Insurance Scheme, employment services, schools and tertiary education, will likely operate as important safeguards to ensure that those experiencing financial hardship or whose circumstances have changed can afford to meet their basic needs and maintain an adequate standard of living. In particular, exempting humanitarian visa holders from the waiting periods for all relevant social security payments appears to assist with the proportionality of this measure as these individuals are particularly vulnerable and more likely to require economic and social support. The exemptions process also appears to provide the measure with some flexibility to treat different cases differently, having regard to the individual circumstances of each case. This flexibility would appear to assist with the proportionality of the measure. The strength of the exemptions as a safeguard will likely depend on how the exemption process operates in practice, noting that certain vulnerable individuals may have accessibility issues, for example because of language barriers or the requirement to discuss and provide evidence for potentially sensitive matters, such as domestic violence. In addition, it is not clear whether there is the possibility of oversight and the availability of review in relation to decisions not to grant an exemption for the waiting period.

1.61 Another consideration in assessing proportionality is whether there are less rights restrictive alternatives available to achieve the stated objective.[47] It is not clear that applying a four-year waiting period to access social security payments for all new

44 Statement of compatibility, pp. 16–17.

45 Statement of compatibility, p. 16. The payments include parenting payment, jobseeker payment and youth allowance, and where applicable, family tax benefit parts A and B and carer allowance.

46 Statement of compatibility, p. 17. This means that this cohort of visa holders will continue to be subject to the rules in place prior to 2019, including a two-year waiting period for working age payments and concession cards, and no waiting period for family payments and carer allowance.

47 In *Trujillo Calero v Ecuador*, in assessing the reasonableness and proportionality of the measure, the UN Committee on Economic, Social and Cultural Rights considered whether the limitation was the only way to achieve the stated purpose and whether there were alternative measures that do not seriously limit rights: *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [17.1], [23(c)].

migrants would necessarily be the least rights restrictive way of achieving the broader objective of ensuring a 'sustainable, fair and needs-based welfare payment system'.[48] This is particularly so for new migrants who live in economic precarity but do not qualify for an exemption. For example, in the case of paid parental leave, it would seem that newly arrived migrant women, subject to the waiting period, who earn a low income will not have access to paid parental leave (unless an exemption applies), whereas other women in Australia who earn up to $151,350 will have access to paid parental leave.[49] In this regard, it does not appear that the measure would necessarily target those most in need. Regarding earlier extensions of the waiting period for access to paid parental leave, the committee has raised concerns that restricting access to paid maternity leave may ultimately exacerbate inequalities experienced by women subject to the waiting period and noted that it was not clear that extending the waiting period represented the least rights restrictive approach.[50]

1.62 A further consideration is the extent of any interference with human rights. The greater the interference, the less likely the measure is to be considered proportionate. In this case, the statement of compatibility notes that the waiting period primarily applies to new migrants settling in Australia under the skilled and family streams of Australia's migration program.[51] The statement of compatibility states that these migrants are well placed to support themselves and their families through existing resources, employment or family support.[52] However, the statement of compatibility also acknowledges that the financial impact of this measure on affected individuals will depend on their circumstances and the payments they would otherwise have received. It is noted that extending the waiting period may not substantially limit the rights of some recent migrants, insofar as they may have access to adequate financial support outside of the social security system to meet their basic needs. However, for those migrants who experience economic precarity and do not qualify for a waiting period exemption, there appears to be a risk that the measure would significantly interfere with their rights and their ability to meet their basic needs as well as those of their children.

Concluding remarks

1.63 Insofar as the measure further restricts access to social security payments for newly arrived migrants and has a disproportionate impact on certain groups, particularly women, it engages and limits the rights to social security, adequate

48 Statement of compatibility, p. 24.

49 For eligibility criteria for paid parental pay see Services Australia, *Meeting the income test*, 1 July 2021, https://www.servicesaustralia.gov.au/individuals/services/centrelink/parental-leave-pay/who-can-get-it/meeting-income-test (accessed 5 August 2021).

50 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) p. 159.

51 Statement of compatibility, p. 15.

52 Statement of compatibility, p. 15.

standard of living, health, maternity leave and equality and non-discrimination as well as the rights of the child. To the extent that an extended waiting period may operate as a deterrent or barrier to newly arrived migrants bringing members of their family to join them in Australia, the measure may also engage and limit the right to protection of the family. These rights may be subject to permissible limitations where the limitation pursues a legitimate objective (one which, where an economic, social and cultural right is in question, is solely for the purpose of promoting the general welfare in a democratic society), is rationally connected to that objective and is a proportionate means of achieving that objective.

1.64 The objectives of ensuring a financially sustainable social security system and targeting those most in need may be capable of constituting legitimate objectives, although some questions remain in this regard, and the measure appears to be rationally connected to the stated objectives. As regards proportionality, the measure contains a broad range of exemptions to the four-year waiting period, which may operate as an important safeguard, providing some flexibility to treat different cases differently. However, the effectiveness of this safeguard will depend on how the exemptions process operates in practice. It is also unclear whether there is access to review of decisions not to grant an exemption and whether the measure represents the least rights restrictive approach.

1.65 In order to assess the compatibility of this measure with international human rights law, further information is required, in particular:

(a) noting the disproportionate impact on certain groups, particularly women, how does the measure promote general welfare for the purpose of constituting a legitimate objective under international human rights law;

(b) since 2018, how many individuals have been subject to the newly arrived resident's waiting period and of those individuals, how many have made applications for exemptions and of those applications, how many have been granted or denied;

(c) what assistance, if any, is provided to migrants subject to the waiting period to help them to understand and navigate the waiting period exemptions process;

(d) what review and oversight mechanisms are available in relation to decisions not to grant an exemption for the waiting period;

(e) how is the measure the least rights restrictive approach to achieving the stated objectives; and

(f) have alternative measures been considered rather than restricting access to social security payments in the context of Australia's use of its maximum available resources, and if so, why are those alternative measures not appropriate.

Committee view

1.66 The committee notes that this bill seeks to standardise the newly arrived resident's waiting period for social security payments by applying a consistent four-year waiting period across all relevant payments and concession cards (including low income health care card and commonwealth seniors health card).

1.67 The committee notes that insofar as the measure further restricts access to social security payments for newly arrived migrants and has a disproportionate impact on certain groups, particularly women, it engages and limits the rights to social security, adequate standard of living, health, maternity leave and equality and non-discrimination as well as the rights of the child. The committee further notes that to the extent that an extended waiting period may operate as a deterrent or barrier to newly arrived migrants bringing members of their family to join them in Australia, the measure may also engage and limit the right to protection of the family. These rights may be subject to permissible limitations where it is demonstrated it is reasonable, necessary and proportionate.

1.68 The committee considers the objectives of ensuring a financially sustainable social security system and targeting those most in need may be capable of constituting legitimate objectives, although some questions remain as to whether this measure would, in practice, promote general welfare for the purpose of international human rights law. Regarding proportionality, the committee notes that while the measure appears to be accompanied by an important safeguard, notably the broad range of exemptions to the waiting period, questions remain as to whether this safeguard is sufficient in practice and whether there are less rights restrictive alternatives.

1.69 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 seeks the minister's advice as to the matters set out at paragraph [1.65].

Legislative Instruments

Australian Immunisation Register Amendment (National Immunisation Program Vaccines) Rules 2021 [F2021L00925][1]

Purpose	This legislative instrument requires vaccination providers to report the administration of National Immunisation Program vaccines to the Australian Immunisation Register from 1 July 2021.
Portfolio	Health
Authorising legislation	*Australian Immunisation Register Act 2015*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 3 August 2021). Notice of motion to disallow must be given by 18 October 2021[2]
Rights	Health; privacy

Expansion of requirement to report vaccine information

1.70 This legislative instrument provides that, from 1 July 2021, registered vaccination providers must report all National Immunisation Program vaccines administered in Australia to the Australian Immunisation Register (AIR). Currently, only COVID-19 and influenza vaccinations must be recorded on the register.[3] This instrument has the effect that a higher number of vaccinations—over 30 from childhood to adulthood, depending on individual circumstances—must now be reported to the AIR.[4] Failure to comply with these reporting requirements is subject to a civil penalty of up to 30 penalty units for each failure to report.[5]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Immunisation Register Amendment (National Immunisation Program Vaccines) Rules 2021 [F2021L00925], *Report 10 of 2021*; [2021] AUPJCHR 95.

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 Pursuant to the Australian Immunisation Register Amendment (Reporting) Rules 2021 [F2021L00133].

4 Vaccinations set out on the Australian Immunisation Register at 1 July 2021 can be found here: https://www.health.gov.au/sites/default/files/documents/2020/09/national-immunisation-program-schedule-for-all-people.pdf [accessed 5 August 2021].

5 *Australian Immunisation Register Act 2015*, subsections 10A(5) and 10B(3).

1.71 Vaccination providers must report: the person's Medicare number (if applicable), name, contact details, date of birth, and gender; the provider number, name and contact details of the person who administered the vaccines; and the brand name, dose number and batch number, and date of administration.[6]

International human rights legal advice

Rights to health and privacy

1.72 In increasing the ability for the government to enhance the monitoring of vaccine-preventable diseases, and contributing to enriched monitoring and statistics on health related issues, this measure appears to promote the right to health. The right to health is the right to enjoy the highest attainable standard of physical and mental health.[7] It is a right to have access to adequate health care as well as to live in conditions which promote a healthy life (such as access to safe drinking water, housing, food, and a healthy environment).[8]

1.73 However, in requiring vaccination providers to provide personal information about individuals who receive vaccinations (including both children and adults), the measure also appears to limit the right to privacy. 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.[9] The right to privacy 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 where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.74 In assessing whether the measure seeks to achieve a legitimate objective, the statement of compatibility states that this measure will assist in the objective of protecting the health of individuals and the community by enhanced monitoring of vaccine preventable diseases, and standardise the quality of information in the AIR that records vaccines administered, contributing to enriched monitoring and providing invaluable statistics on health-related issues.[10] This would appear to constitute a

6 Australian Immunisation Register Rule 2015, section 9.

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

8 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [4]. See also, *General Comment No. 12: the right to food (article 11)* (1999); *General Comment No. 15: the right to water (articles 11 and 12)* (2002); and *General Comment No. 22: the right to sexual and reproductive health* (2016).

9 International Covenant on Civil and Political Rights, article 17. International human rights law also recognises the right of children to be free from arbitrary or unlawful interferences with their privacy. See, Convention on the Rights of the Child, article 16.

10 Statement of compatibility, p. 7.

legitimate objective for the purposes of international human rights law and the measure appears rationally connected to that objective.

1.75 When considering whether a limitation on a right is proportionate to achieve the stated objective, it is necessary to consider, among other things, the extent the measure interferes with the right to privacy. The greater the interference, the less likely the measure is to be proportionate. In this regard, this measure significantly expands the information required to be reported to the AIR (from the currently two types of vaccines required to be reported). A person may receive over 30 vaccines from childhood and throughout their adult life (depending on their individual circumstances) under the National Immunisation Program, which will all now be required to be reported to the AIR.

1.76 It is also necessary to consider whether there are sufficient safeguards in place to protect the right to privacy and whether there are other less rights restrictive ways to achieve the stated objective. In this regard, the statement of compatibility notes that vaccination providers have the capacity to decline to report where they consider it would be likely to pose a risk to the health or safety of an individual to do so.[11] This has the capacity to serve as a privacy safeguard, depending on the extent to which it is utilised.

1.77 The statement of compatibility also states that the information required to be provided is subject to the secrecy provisions in the *Australian Immunisation Register Act 2015* (AIR Act), which control the use and disclosure of information stored on the AIR and who can use and disclose this information.[12] It also states that existing privacy provisions in the AIR Act regulate the uploading of personal information or of 'relevant identifying information' for the purposes of including such information in the AIR. Section 23 of the AIR Act provides that it is an offence for a person to record, disclose or use protected information (including personal information) obtained, or derived, under the Act, unless they are authorised to do so. A person is authorised to record, disclose or use protected information if they do so in order to include the information on the Register or to otherwise perform functions under the AIR Act, to disclose the information to a court or coroner, or where authorised to do so under another law.[13] However, the AIR Act also includes a broad power for the minister (or their delegate) to authorise a person to use or disclose protected information for a specified purpose where satisfied 'it is in the public interest' to do so.[14] While making it an offence to record, use or disclose protected information helps to safeguard the right to privacy, it is not clear why it is necessary that the AIR Act includes a broad discretionary power

11 Statement of compatibility, p. 7.

12 Statement of compatibility, p. 7.

13 *Australian Immunisation Register Act 2015*, section 22.

14 *Australian Immunisation Register Act 2015*, subsection 22(3).

enabling the disclosure of the personal vaccination information of Australians to 'any person', for any specified purpose, so long as it is considered to be in the (undefined) 'public interest'. The minister has previously advised that an assessment of whether a disclosure is in the public interest 'generally requires the decision maker to consider a range of relevant factors', which could include the impact of such a disclosure on the privacy of an affected individual.[15]

1.78 As set out in an earlier analysis of related legislation (which provided for the mandatory reporting of COVID-19 and influenza vaccinations to the AIR),[16] empowering the minister to disclose protected information to 'a person' rather than 'a specified class of person', appears to enable disclosure without specifying or limiting the recipients of the information. While the minister has previously advised that it was not his intention (at that time) to use this power to authorise the disclosure of information regarding COVID-19 vaccinations, as a matter of law the minister is empowered to, at any time, disclose personal information regarding a person's vaccination status to any person for any purpose, as the minister considers it to be in the public interest to do so. Expanding the number of vaccinations required to be reported to the AIR means that this power may now be exercised with respect to a much larger volume of information.

1.79 It is difficult to assess the privacy implications of requiring vaccination providers to report information relating to National Immunisation Register vaccinations to the AIR without knowing the extent to which such information may be disclosed or the purposes for which it may be used. However, noting the existing broad ministerial discretion to authorise the disclosure of this information to any person for any purpose if it is considered to be in the public interest to do so, there is a risk that expanding the range of personal information that may be so disclosed may impermissibly limit the right to privacy.

Committee view

1.80 The committee notes that this legislative instrument requires vaccination providers to report the administration of all National Immunisation Program vaccines to the Australian Immunisation Register from 1 July 2021. The committee notes that there are currently over 30 vaccines on the National Immunisation

15 See minister's response, Parliamentary Joint Committee on Human Rights, *Report 4 of 2021* (31 Mary 2021), Australian Immunisation Register Amendment (Reporting) Bill 2020 and Australian Immunisation Register Amendment (Reporting) Rules 2021 [F2021L00133], pp. 10–11.

16 Parliamentary Joint Committee on Human Rights, *Thirty-Second Report of the 44th Parliament* (1 December 2015) p. 53; and *Report 4 of 2021* (31 Mary 2021), Australian Immunisation Register Amendment (Reporting) Bill 2020 and Australian Immunisation Register Amendment (Reporting) Rules 2021 [F2021L00133].

Program (depending on a person's circumstances), from when a person is a child through to adulthood.

1.81 The committee notes this will enable the government to enhance its monitoring of vaccine preventable diseases, and monitor vaccination coverage across Australia. The committee considers that in increasing the ability for the government to enhance the monitoring of vaccine preventable diseases, this measure promotes the right to health.

1.82 The committee also notes that requiring vaccination providers to provide personal information about individuals who receive vaccinations also appears to limit the right to privacy. The committee considers that monitoring information about vaccination coverage in order to identify health-related issues constitutes a legitimate objective for the purposes of international human rights law and the measure is rationally connected to that objective. In relation to proportionality, the committee notes that while the legislation provides safeguards regarding collection, use and disclosure of personal information, there is some risk that the existing broad ministerial discretion to disclose personal information to any person and for any purpose if it is considered to be 'in the public interest' to do so, may not sufficiently safeguard the right to privacy.

Suggested action

1.83 As previously recommended,[17] the committee considers the proportionality of this measure may be assisted were subsection 22(3) of the *Australian Immunisation Register Act 2015* amended to provide that:

- **(a) the minister's power to disclose protected information is to 'a specified class of persons' rather than 'a person';**
- **(b) specific, and limited, purposes for disclosure are set out in the legislation; and**
- **(c) in authorising disclosure the minister must have regard to the extent to which the privacy of any person is likely to be affected by the disclosure.**

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

17 Parliamentary Joint Committee on Human Rights, *Report 4 of 2021* (31 Mary 2021), Australian Immunisation Register Amendment (Reporting) Bill 2020 and Australian Immunisation Register Amendment (Reporting) Rules 2021 [F2021L00133], p. 13.

Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021 [F2021L01068][1]

Purpose	This legislative instrument removes the automatic exemption for Australian citizens and permanent residents ordinarily resident in a country other than Australia, such that a person will no longer be able to rely on an automatic exemption to travel overseas where they ordinarily reside in a country other than Australia
Portfolio	Health
Authorising legislation	*Biosecurity Act 2015*
Last day to disallow	This instrument is 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

Removal of automatic exemption to leave Australia

1.85 An existing Biosecurity determination prohibits Australian citizens or permanent residents from travelling outside Australia unless an exemption is granted to them. A person who fails to comply may commit a criminal offence (punishable by imprisonment for a maximum of 5 years or 300 penalty units).[2] This legislative instrument removes an automatic exemption from this ban for Australian citizens and permanent residents ordinarily resident in a country other than Australia.[3] Persons who would previously have been able to rely on this automatic exemption are now required to apply to the Australian Border Force (ABF) Commissioner or an ABF employee for an exemption, and to demonstrate a compelling reason for needing to leave Australian territory.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021 [F2021L01068], *Report 10 of 2021*; [2021] AUPJCHR 96.

2 *Biosecurity Act 2015*, section 479.

3 Schedule 1, item 2 repeals paragraph 6(1)(a) of the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020.

4 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020, section 7.

Preliminary international human rights legal advice

Rights to life; health; freedom of movement; equality and non-discrimination; and privacy

1.86 The repeal of the automatic exemption for Australian citizens and permanent residents ordinarily resident in a country other than Australia (which allowed them to return to Australia and then return to their usual country of residence without seeking an exemption from the travel ban) engages a number of human rights. As the measure is intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, the instrument may promote the rights to life and health.[5] The right to life requires States parties to take positive measures to protect life.[6] The United Nations (UN) 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.[7] The right to health requires that States parties shall take steps to prevent, treat and control epidemic diseases.[8] With respect to the COVID-19 pandemic specifically, the UN Human Rights Committee has expressed the view that 'States parties 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'.[9]

1.87 However, the measure is also likely to engage and limit a number of other human rights, including the rights 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.[10] 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.[11] 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

5 International Covenant on Civil and Political Rights, articles 6 (right to life) and 12 (right to health).

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

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

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

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

10 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].

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

travelling abroad and permanent emigration are both protected.[12] Insofar as the effect of the instrument is that Australian citizens and permanent residents ordinarily resident in a country other than Australia will now only be able to leave Australia where they can demonstrate a compelling reason to do so, the right to leave a country (as an aspect of the right to freedom of movement) is limited.

1.88 The amendments may also limit the right to equality and non-discrimination, as the measure treats some people differently from others on the basis of nationality. The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, including on the grounds of nationality.[13] The measures may also limit the right to a private life as the restriction on movement and trade involves interference with a person's private life. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[14] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.[15]

1.89 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and is proportionate to that objective.

1.90 In the context of the COVID-19 pandemic, the UN Human Rights Committee has indicated that implementing emergency and temporary measures may be necessary to protect the rights to life and health. It acknowledged that such 'measures may, in certain circumstances, result in restrictions on the enjoyment of individual rights guaranteed by the Covenant'.[16] Where such restrictions are necessary, they should be 'only to the extent strictly required by the exigencies of the public health situation' and pursue the 'predominant objective' of restoring 'a state of normalcy'.[17] The sanctions imposed in connection with any emergency and temporary measures must also be proportionate in nature.[18]

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

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

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

15 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).

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

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

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

1.91 There is no statement of compatibility assessing the engagement of these rights (noting that one is not legally required, as this instrument is exempt from disallowance).[19] As such, no assessment as to compatibility with human rights has been provided. With respect to the objective of the measure, the explanatory statement states that the automatic exemption was implemented to enable Australian citizens and permanent residents ordinarily residing in a country other than Australia to leave Australian territory to return to their ordinary place of residence. It states that since the commencement of the overseas travel ban in March 2020, those persons have had substantial time in which to take action under the exemption.[20] It further states that:

> The exemption was not intended to enable frequent travel between countries. Further, as repatriation flights continue, it will be critical to manage the numbers of people leaving Australia with the intention of returning in the near future to ensure flight and quarantine availability is prioritised for individuals who have been stranded overseas for some time. The amendment will reduce the pressure on Australia's quarantine capacity, reduce the risks posed to the Australian population from COVID-19, and assist in returning vulnerable Australians back home.[21]

1.92 Seeking to reduce the risks posed to the Australian population from the spread of COVID-19 is likely to constitute a legitimate objective. However, the extent to which limiting the circumstances in which a person may leave Australia would be effective to achieve that is not clear. No information is provided as to how many Australian citizens and permanent residents ordinarily residing in a country other than Australia have entered and left Australia multiple times since March 2020. It is also unclear how limiting the circumstances in which a person may leave Australia (such as, to return to their home in another country after having travelled to Australia) would be effective to protect the Australian community from the spread of COVID-19, noting that those already in Australia would have been required to quarantine when first arriving. Further, it is not clear how often discretionary exemptions are granted by the ABF under section 7 of the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements)

19 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

20 Explanatory statement, pp. 1-2.

21 Explanatory statement, p. 2.

Determination 2020, meaning that the safeguard value of this alternative mechanism for leaving Australia cannot be assessed.[22]

1.93 In order to assess the compatibility of this instrument with international human rights law, further information is required as to:

(a) since its commencement, how many times has an Australian citizen or permanent resident ordinarily resident in a country other than Australia relied on an automatic exemption under paragraph 6(1)(a) of the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 to leave Australia;

(b) in how many cases have people who left Australia pursuant to an automatic exemption under paragraph 6(1)(a) subsequently returned to Australia, and for what reasons;

(c) how is it effective to achieve the stated intention of reducing the risk of COVID-19 in Australia, to prevent a person from leaving Australia; and

(d) whether there are any other less rights restrictive ways to achieve the stated objectives.

Committee view

1.94 The committee notes that this instrument removes the automatic exemption from the existing overseas travel ban for Australian citizens and permanent residents ordinarily resident in a country other than Australia. As such, those Australians who ordinarily live overseas will no longer be able to automatically leave Australia if they come back to visit, and will instead need to apply for an exemption, demonstrating a compelling reason to leave Australia.

1.95 The committee notes that as the measure is intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, the instrument may promote the rights to life and health. However, the committee notes that the measure is also likely to engage and limit a number of rights, including the rights to freedom of movement, equality and non-discrimination and the right to a private life. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

22 Further information has been sought as to how often these exemptions are given, and how they operate in practice. See, Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 [F2021L00727], *Report 8 of 2021* (23 June 2021) pp. 2-12; and *Report 9 of 2021* (4 August 2021), pp. 2-10.

1.96 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 legislative instrument, and as such seeks the minister's advice as to the matters set out at paragraph [1.93].

Migration Amendment (Merits Review) Regulations 2021 [F2021L00845][1]

Purpose	This legislative instrument increases the fee for certain applications to the Administrative Appeals Tribunal from $1,826 to $3,000. The fee applies to applications for review of decisions relating to visas other than protection visas, and includes decisions in relation to sponsorships and nominations
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 3 August 2021). Notice of motion to disallow must be given by 18 October 2021[2]
Rights	Fair hearing; prohibition against expulsion of aliens without due process

Increased tribunal application fees

1.97 These regulations increase the fee for applications to the Administrative Appeals Tribunal (AAT) for review of decisions relating to visas (other than protection visas) from $1,826 to $3,000.[3] The new fee is subject to annual increase, from 1 July 2022, consistent with existing legislated indexation arrangements.[4] The fee increase applies to applications for Part 5 reviewable decisions under the *Migration Act 1958* (Migration Act), including decisions to refuse to grant a non-citizen a visa and decisions to cancel a visa held by a non-citizen, as well as decisions in relation to sponsorships and nominations.[5]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Merits Review) Regulations 2021 [F2021L00845], *Report 10 of 2021*; [2021] AUPJCHR 97.

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

3 Schedule 1, item 1. Subparagraph 504(1)(a)(i) of the *Migration Act 1958* authorises the regulations to make provision for the charging of fees payable in connection with the review of decisions made under the Act or the *Migration Regulations 1994*.

4 Schedule 1, item 3.

5 Decisions under the *Migration Act 1958* that are Part 5 reviewable decisions are set out in section 388 of the *Migration Act 1958* and regulation 4.02 of the *Migration Regulations 1994*. See statement of compatibility, p. 3.

Preliminary international human rights legal advice

Right to a fair hearing and prohibition against expulsion of aliens without due process

1.98 Increasing the application fee for review of migration decisions in the AAT by 64 per cent for decisions regarding the determination of a person's existing rights (for example, cancellation of a visa) appears likely to engage and may limit the right to a fair hearing.[6] The right to a fair hearing provides that in the determination of a person's rights and obligations in a 'suit at law', everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[7] This right encompasses the right to equality before courts and tribunals, which guarantees parties equal access and equality of arms, and requires parties to be treated without any discrimination.[8]

1.99 One dimension of the right to a fair hearing is the right of access to justice.[9] The cost of engaging in legal processes in the determination of one's rights and obligations under law is, in turn, a component of the right of access to justice. The United Nations (UN) Human Rights Committee has stated that the imposition of fees on parties to legal proceedings which would de facto prevent their access to justice might give rise to issues under the right to a fair hearing.[10] The findings of comparable jurisdictions are also relevant in this context. In this regard, the European Court of Human Rights has found that the amount of the fees assessed in light of the particular circumstances of a case (including the applicant's ability to pay them) and the phase of the proceedings at which that restriction has been imposed, are material in determining whether a person has enjoyed the right of access to justice and had a fair

6 For a discussion on the committee's previous comments in relation to increases to court fees for migration matters see Parliamentary Joint Committee on Human Rights, Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020 [F2020L01416], *Report 15 of 2020* (9 December 2020) pp. 2–5; *Report 1 of 2021* (3 February 2021) pp. 103–111.

7 International Covenant on Civil and Political Rights, article 14. The right to a fair hearing applies where domestic law grants an entitlement to the persons concerned: see, *Kibale v Canada* (1562/07) [6.5]. The term 'suit at law' relates to the determination of a right or obligation, and not to proceedings where a person is not contesting a negative decision (for example, a decision to refuse to give a worker a promotion would not necessitate a determination of a matter in which the person had an existing entitlement): see, *Kolanowski v Poland* (837/98) [6.4].

8 UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007) [8].

9 See, United Nations Development Programme, *Programming for Justice: Access for All (a practitioner's guide to a human rights-based approach to access to justice)* (2005).

10 See, UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007) [11]; and *Lindon v Australia*, Communication No. 646/1995 (25 November 1998) [6.4].

hearing.[11] As these regulations significantly increase the application fees for review of migration decisions in the AAT, this may have the effect that, in cases where an individual is unable to afford the filing fee for review of a visa decision involving the determination of their existing rights, their right to a fair hearing may be limited.[12]

1.100 In relation to applications for review of decisions regarding refusal to grant a visa, the measure may also engage and limit the prohibition against expulsion of aliens without due process.[13] This right is protected by article 13 of the International Covenant on Civil and Political Rights, which provides that an alien may be expelled only in accordance with a decision made under law and must be allowed to submit reasons against their expulsion and to have their case reviewed by a competent authority, and be represented for the purpose of that review. The UN Human Rights Committee has indicated that the guarantees in article 14 (the right to a fair hearing) do not generally apply to expulsion or deportation proceedings, but the procedural guarantees of article 13 are applicable to such proceedings.[14] In the context of this measure, increasing application fees for review of decisions to refuse to grant a non-citizen in Australia a visa (the consequence of which would be expulsion or deportation), would engage and may limit article 13.[15] The UN Human Rights

11 *Kreuz v Poland*, European Court of Human Rights, Application No. 28249/95 (2001) [60]. In *Kijewska v Poland*, European Court of Human Rights, Application No. 73002/01 (2007) at [46], the court considered that the refusal by a court to reduce a fee for lodging a civil claim may constitute a disproportionate restriction on an applicant's right of access to a court, and be in breach of article 6 of the European Convention on Human Rights. Further, in *Ciorap v Moldova*, European Court of Human Rights, Application No. 12066/02 (2007) at [95], the court considered that the nature of the complaint or application in question was a significant consideration in determining whether refusing an application for waiver of court fees was a breach of article 6 (in this case, the applicant had sought to lodge a complaint about being force-fed by authorities while detained in prison).

12 To the extent that the effect of this instrument may be to limit a person's ability to challenge a visa decision, the consequence of that decision being the person's deportation from Australia, the measure may also engage and limit a number of other rights, including the rights to protection of the family and the child (if family members are separated and children are affected by the decision); and freedom of movement (if cancellation of a visa prevents a person from re-entering and remaining in Australia as their own country).

13 It is noted that this measure will not affect the full fee exemption for a review of a bridging visa decision that resulted in an individual being placed in immigration detention. See statement of compatibility, p. 5. Thus, article 13 would only be engaged in the context of this measure in relation to individuals who have been refused the grant of a visa but may remain in the community on a bridging visa pending removal.

14 UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [17].

15 Sections 189, 196 and 198 of the *Migration Act 1958* require an unlawful non-citizen (individuals who do not have a valid visa) to be detained and kept in immigration detention until they are: granted a visa (such as a temporary bridging visa pending removal from Australia) or removed from Australia as soon as reasonably practicable.

Committee has stated that article 13 should be interpreted in light of article 14 and encompasses 'the guarantee of equality of all persons before the courts and tribunals…and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable'.[16]

1.101 The statement of compatibility acknowledges that articles 13 and 14 may be engaged insofar as the fee increase may prevent or disincentivise individuals from seeking review by reason of their financial capacity, and without such review, they could otherwise be lawfully removed from Australia under the *Migration Act 1958*.[17] It is noted that these rights may be permissibly limited where such a limitation seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is proportionate.[18] More specifically, in the context of financial restrictions on an individual's access to a tribunal or court – a type of limitation on the right of access to justice – the European Court of Human Rights has emphasised that a restriction will not be compatible with the right 'unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved'.[19] Relevant considerations in assessing whether the financial restriction is proportionate include the individual circumstances of the case, including the applicant's ability to pay the fees, and the phase of the proceedings.[20]

1.102 The statement of compatibility states that the objective of the measure is to reduce migration related backlogs in the AAT and Federal Circuit Court (the court), thereby enhancing the decision-making capacity of both bodies and providing

16 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [17], [63]. See also UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10], where the UN Committee stated that article 13 requires that 'an alien…be given full facilities for pursuing [their] remedy against expulsion so that this right will in all circumstances of [their] case be an effective one'.

17 Statement of compatibility, pp. 4–5.

18 The due process guarantees in article 13 may be departed from, but only when 'compelling reasons of national security' so require. See also UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10]. Note that if there are compelling reasons of national security not to allow an alien to submit reasons against their expulsion, the right will not be limited. Where there are no such grounds, as is the case in relation to this measure, the right will be limited, and then it will be necessary to engage in an assessment of the limitation using the usual criteria (of necessity and proportionality).

19 *Kreuz v Poland*, European Court of Human Rights, Application No. 28249/95 (2001) [55]. See also *Podbielski and PPPU Polpure v Poland*, European Court of Human Rights, Application No. 39199/98 (2005) [63].

20 *Kreuz v Poland*, European Court of Human Rights, Application No. 28249/95 (2001) [60]. See also *Podbielski and PPPU Polpure v Poland*, European Court of Human Rights, Application No. 39199/98 (2005) [64].

individuals with a more timely service.[21] It explains that the increased fee will offset expenditure to provide additional resources to the AAT and the court to reduce the migration related backlogs that have developed as a result of significant increases in the application rates as well as the prospective increase in matters that will be heard in the court.[22] The explanatory statement further notes that the $3,000 fee is intended to strike an appropriate balance between the additional financial burden on individual applicants and the need to provide a high quality, efficient and timely review process, which will ultimately benefit all applicants for merits and judicial review.[23]

1.103 While increasing the capacity and efficiency of the AAT and the court to hear and resolve matters is an important and necessary aim, if the ultimate effect of the measure were to deny access to the AAT for those who could not afford the application fees, it is not clear that revenue raising would, in itself, constitute a legitimate objective for the purposes of international human rights law. In this regard, in considering whether a financial restriction on an individual's access to courts pursues a legitimate aim, the European Court of Human Rights has stated that:

> restrictions which are of a purely financial nature and which…are completely unrelated to the merits of an appeal or its prospects of success, should be subject to a particularly rigorous scrutiny from the point of view of the interests of justice.[24]

1.104 More generally, the UN Human Rights Committee has said that the failure to allow access to an independent tribunal in specific cases would amount to a violation of article 14 if such limitations 'are not necessary to pursue legitimate aims such as the proper administration of justice' or if the access left to a person 'would be limited to an extent that would undermine the very essence of the right'.[25] Where a tribunal fee results in the applicant desisting from their claim and the case never being heard by a tribunal, the very essence of the right of access to justice would likely be impaired and

21 Statement of compatibility, pp. 3 and 5.

22 Statement of compatibility, p. 3.

23 Explanatory statement, p. 8.

24 *Podbielski and PPPU Polpure v Poland*, European Court of Human Rights, Application No. 39199/98 (2005) [65]. In this case the European Court of Human Rights, at [66]–[69], held that 'the principal aim [of the court fees] seems to have been the State's interest in deriving income from court fees in civil cases'. It concluded that 'in the circumstances and having regard to the prominent place held by the right to a court in a democratic society, the Court considers that the judicial authorities failed to secure a proper balance between, on the one hand, the interest of the State in collecting court fees for dealing with claims and, on the other hand, the interest of the applicant in vindicating his claim through the courts…The Court therefore concludes that the imposition of the court fees on the applicant constituted a disproportionate restriction on his right of access to a court'.

25 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [18].

the right to a fair hearing may be breached.[26] Questions therefore remain whether, for those who could not afford the application fee (even a reduced rate) and as a consequence could not apply for a review of a decision, this measure may undermine the very essence of the right to a fair hearing.

1.105 As regards proportionality, the statement of compatibility states that any limitation on the right of access to justice because of financial capacity is reasonable, necessary and proportionate because of the partial fee exemption arrangements.[27] The statement of compatibility states that the Registrar of the AAT can reduce the application fee by 50 per cent if the fee would cause severe financial hardship to the review applicant, and successful applicants for review are entitled to a refund of 50 per cent of the fee.[28] It notes that this partial fee waiver would address any unintended result of the fee increase preventing or disincentivising individuals from seeking review.[29] As to the scope of the measure, the statement of compatibility notes that the fee increase does not apply to protection visas (including permanent and temporary protection visas and safe haven enterprise visas) or fast track reviewable decisions, and does not affect the existing full fee exemption for bridging visa decisions that have resulted in the individual being detained in immigration detention.[30]

1.106 The full fee exemption for individuals in immigration detention and the exclusion of protection visa decisions from the fee increase would likely assist with the proportionality of the measure, as it will ensure that some vulnerable individuals are not prevented from accessing justice because of financial disadvantage. However, questions arise as to whether the partial fee exemption is a sufficient safeguard for others. Unlike application fees for migration matters in the court, which can either be reduced or completely waived in individual cases of financial hardship, the Registrar of the AAT can only reduce the fee by 50 per cent if the fee would cause financial

26 *Kreuz v Poland*, European Court of Human Rights, Application No. 28249/95 (2001) [54], [66] and [67].

27 Statement of compatibility, p. 5.

28 Statement of compatibility, pp. 3 and 5. See *Migration Regulations 1994*, subregulation 4.13(4) and regulation 4.14.

29 Statement of compatibility, p. 5.

30 Statement of compatibility, p. 5; Explanatory statement, p. 7. There is no application fee for review of a protection (refugee) decision, unless the review is not successful, in which case the fee payable is $1,846. The fee for character related visa decisions is $962. See Administrative Appeals Tribunal, *Fees,* https://www.aat.gov.au/apply-for-a-review/migration-and-refugee/refugee/fees and https://www.aat.gov.au/apply-for-a-review/migration-and-refugee/character-related-visa-decisions/fees (accessed 9 August 2021).

hardship.[31] While a partial fee exemption may somewhat assist with proportionality, it may not be adequate in all cases, noting that for some individuals a reduced fee of $1,500 may still be prohibitive. It is also noted that there is no merits review available for fee reduction decisions.[32] In the absence of a full fee waiver and flexibility to consider the individual applicant's ability to pay the reduced fee, it is not clear that a partial fee exemption would be a sufficient safeguard, in itself, to ensure that migration applicants are not prevented from applying to the AAT for review of a decision because of associated application costs. Indeed, the jurisprudence of the European Court of Human Rights suggests that where tribunal fees are so high as to prevent an applicant from filing their claim and pursuing the matter in the tribunal, it would constitute a disproportionate restriction on their right of access to justice.[33] The potential interference with rights is also relevant in this regard. The consequences of a non-citizen not being able to challenge a visa decision due to financial disadvantage may be deportation. In such cases, the interference with rights would appear to be significant, noting that the greater the interference, the less likely the measure is to be considered proportionate.

1.107 Further, it is noted that the increased fee for review of migration decisions is significantly higher than the standard application fee for all other AAT matters ($3,000 for migration matters compared to $962 for all other matters).[34] In light of the guarantees encompassed in the right of equal access to justice and individuals' right to enjoy this right without discrimination, questions arise as to whether this measure,

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31 The committee commented on the recent increase to application fees for migration matters in the Federal Circuit Court (from $690 to $3,330). See Parliamentary Joint Committee on Human Rights, Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020 [F2020L01416], *Report 15 of 2020* (9 December 2020) pp. 2–5; *Report 1 of 2021* (3 February 2021) pp. 103–111. In relation to this legislative instrument, the Attorney-General advised the committee that the increase in fees set the application for migration matters in the FCC at the mid-point between the filing fees in the AAT and the Federal Court. By increasing the AAT application fee to $3,000, questions arise as to whether this measure will result in further increases to the FCC fees in order to achieve the objective of setting the FCC fee for migration matters at a mid-point between the AAT and the Federal Court (which is $4,885 for an appeal from the FCC or $4,895 for an appeal from the AAT).

32 Administrative Appeals Tribunal, *Migration and Refugee Division Guidelines on reduction of review application fees*, July 2015, [26] https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Reduction-of-Review-Application-Fees.pdf (accessed 10 August 2021).

33 *Kreuz v Poland*, European Court of Human Rights, Application No. 28249/95 (2001) [66]–[67].

34 Administrative Appeals Tribunal, *Fees*, https://www.aat.gov.au/apply-for-a-review/other-decisions/fees and *Apply for a review*, https://www.aat.gov.au/apply-for-a-review (accessed 9 August 2021). There is no application fee for review of decisions relating to Centrelink (first review), National Disability Insurance Scheme decisions, veterans' entitlement and military compensation, and workers compensation.

which imposes a considerably higher fee on those seeking review of migration decisions compared to other decisions (and therefore disproportionally affects migrants), may have a discriminatory effect on vulnerable groups. In the broader context of user fees for essential government services, the UN Office of the High Commissioner for Human Rights has observed that where user fees are imposed by governments, those fees must be structured 'in a manner that, at a minimum, does not prevent the poor and those of low income, as well as other vulnerable groups, from accessing basic and emergency services'.[35]

1.108 In order to assess the compatibility of this measure with the right to a fair hearing and the prohibition against expulsion of aliens without due process, further information is required as to:

(a) for those financially unable to make an application and therefore unable to access review in the AAT, is any consideration given to providing a full financial waiver of the application fees;

(b) what other safeguards, if any, would operate to assist in the proportionality of this measure for those in financial hardship;

(c) why the application fee for review of migration decisions is considerably higher than the standard application fee for all other AAT matters, and what implications does this have for the right of equal access to courts and tribunals; and

(d) whether other less rights restrictive alternatives were considered (such as raising revenue in some other way) and if so, what those alternatives are.

Committee view

1.109 The committee notes the regulations increase the fee for applications to the Administrative Appeals Tribunal (AAT) for review of decisions relating to visas (other than protection visas) from $1,826 to $3,000 (a 64 per cent increase). The increased fee applies to decisions to refuse to grant a non-citizen a visa and decisions to cancel a visa held by a non-citizen as well as decisions relating to sponsorships and nominations. To the extent that the measure has the effect of preventing some individuals in Australia from having their visa decision reviewed in the AAT due to an inability to pay the application fee, it may engage and limit the right to a fair hearing and the prohibition against expulsion of aliens without due process. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

35 UN Office of the High Commissioner for Human Rights, *Realizing Human Rights Through Government Budgets* (2017), p. 77.

1.110 The committee notes that increasing the capacity and efficiency of the AAT and Federal Circuit Court to hear and resolve matters is an important and necessary aim. However, the committee also notes that there are questions as to whether revenue raising, in the context of this specific measure, would constitute a legitimate objective for the purposes of international human rights law. Further, the committee notes that while the partial fee reduction would likely assist with the proportionality of this measure, there are questions as to whether this safeguard alone would be sufficient in all circumstances.

1.111 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 seeks the minister's advice as to the matters set out at paragraph [1.108].

Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 [F2021L01030][1]

Purpose	This legislative instrument excludes work for specified employers from being counting towards eligibility for a second or third working holiday working visa, and enables the minister to list such employers in a legislative instrument
Portfolio	Home Affairs
Authorising legislation	*Migration Act1958*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 3 August 2021). Notice of motion to disallow must be given by 18 October 2021 in both Houses[2]
Rights	Just and favourable conditions of work; privacy

Public listing of employers who may pose a risk to safety or welfare

1.112 This legislative instrument excludes work carried out for specified employers from counting towards eligibility for a second or third working holiday maker (WHM) visa.[3] It gives the minister the power to, by future legislative instrument, specify a person, partnership or unincorporated association (the employer) if satisfied that the employer, or the work, may pose a risk to the safety or welfare of a person performing the work.

1.113 A person who has held their first WHM visa in Australia may be granted a second visa if they have carried out at least three months of 'specified work' during their twelve-month stay.[4] If a person undertakes at least six months of 'specified work'

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021[F2021L01030], *Report 10 of 2021*; [2021] AUPJCHR 98.

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 There are two twelve-month visa subclasses under the WHM program: the Work and Holiday (Subclass 462) visa; and the Working Holiday (Subclass 417) visa.

4 WHM visa-holders can work in any area or industry, and there are incentives for people who have been granted such a visa to work in locations and industries specified for this purpose by the minister. Currently, depending on the visa subclass, specified work includes: construction; fishing and pearling; plant and animal cultivation; hospitality and tourism in Northern Australia; mining and tree farming and felling in regional Australia; and bushfire recovery work. See, statement of compatibility, p. 4.

while holding their second WHM visa, they are then eligible to be granted a third WHM visa.

Preliminary international human rights legal advice

Right to just and favourable conditions of work and right to privacy

1.114 By publicly listing employers that may pose a risk to the health and safety of workers, and bringing this to the attention of visa applicants and holders, and so providing potential employees with the ability to elect not to accept work from those employers, this measure may promote the right to just and favourable conditions of work. This includes the right to safe working conditions.[5] In this regard, the explanatory statement states that this amendment intends to demonstrate that 'any exploitation of migrant workers is totally unacceptable and will not be tolerated'.[6]

1.115 However, because this measure would provide for the listing of individual employers (including potentially their name and other identifying information) on a public list, on the basis that those employers pose a health and safety risk to prospective employees, it also engages and limits the right to privacy. The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.[7] The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

1.116 The statement of compatibility states that 'the new measure is intended to enhance protection for people who have been granted WHM visas by identifying employers who may pose a risk to the safety or welfare of a person'.[8] Listing employers which may pose a health and safety risk to workers in order to give prospective employees the opportunity to decide not to accept employment from them would appear likely to constitute a legitimate objective, and the measure would appear to be rationally connected to that objective.

1.117 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 a number of factors, including whether a proposed limitation is sufficiently circumscribed and accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective. It is noted that the instrument sets out that the minister can make such a listing if the minister is satisfied

5 International Covenant on Civil and Political Rights, article 22; and International Covenant on Economic, Social and Cultural Rights, articles 7 and 8.

6 Explanatory statement, p. 1.

7 International Covenant on Civil and Political Rights, article 7.

8 Statement of compatibility, p. 5.

that the employer, or the work, may pose a risk to the safety or welfare of a person performing the work. It does not set out the criteria on which the minister would make this decision. The statement of compatibility states that in making a listing the minister 'can take into account previous convictions for offences such as those relating to the safety and welfare of persons, including employees', and that this would include taking into consideration convictions that have been quashed or pardoned, and convictions for less serious offences that would usually be prohibited from use and disclosure under the Commonwealth Spent Convictions scheme.[9] No information is provided as to why convictions which have been quashed (that is, set aside by a court on the basis that the conviction was wrong) or pardoned should be taken into account. In addition, as the instrument does not set out the matters that may be taken into account, it would appear that the minister could also take into account other information, such as untested allegations of health and safety issues against an employer. This raises some questions as to the proportionality of the potential interference with the right to privacy.

1.118 The statement of compatibility states that the instrument itself will not specify why the minister has determined that an employer has been included, stating that such omission protects the employer's right to privacy.[10] However, it is noted that inclusion on this list indicates that the minister is satisfied that an employer has engaged in conduct endangering the health and safety of their workers, and as such, even though the only identifying information may be an individual's name, the effect on the right to privacy and reputation may be considerable.

1.119 The explanatory statement states that the minister would consider the full circumstances of every potential listing, including by providing a right of reply, before listing an employer in a legislative instrument.[11] This has the capacity to serve as an important safeguard; however it is not clear why the requirement to provide a right of reply (including a requirement to provide reasons for the proposed listing) is not set out in the instrument itself. Further, the explanatory statement notes that an employer cannot seek merits review of the minister's decision to list them, on the basis that their listing does not prevent them from operating or employing workers.[12] This raises questions as to the sufficiency of review options once a decision has been made to list an employer, in particular as this does not address the potential impact on the employer of their listing, including on their reputation. In addition, no information is provided as to why other, less rights restrictive alternatives (such as providing visa holders with information about how to access information about potential employers,

9 Statement of compatibility, p. 7.

10 Statement of compatibility, p. 7

11 Explanatory statement, p. 1.

12 Explanatory statement, p. 10.

rather than publicly listing employers) would be ineffective to achieve the stated objective.

1.120 In order to assess the compatibility of this instrument with the right to privacy, further information is required as to:

(a) why the instrument does not set out the factors the minister can take into account when deciding to list an employer, and why it is proposed that the minister can take into consideration convictions which have been quashed (that is, set aside by a court on the basis that the conviction was wrong) or pardoned;

(b) whether the minister could take into consideration other matters (beyond previous convictions), such as untested allegations of health and safety issues made against an employer, in deciding to list an employer;

(c) why the legislative instrument does not require that the minister must provide employers who are being considered for listing under this measure with reasons for the proposed listing, and a right of reply before such a listing is made;

(d) what mechanism, if any, could an employer use to seek review of the decision to list them, or to otherwise request the removal of their listing;

(e) why other, less rights restrictive alternatives (such as providing visa holders with information about how to access information about potential employers, rather than publicly listing employers) would be ineffective to achieve the stated objective; and

(f) what other safeguards (if any) would protect the right to privacy and reputation of employers?

Committee view

1.121 The committee notes that this legislative instrument excludes work for specified employers from being counting towards eligibility for a second or third working holiday working visa, and enables the minister to list such employers in a legislative instrument if the minister is satisfied the employer, or work, poses a risk to safety or welfare.

1.122 The committee considers that by publicly listing employers who may pose a risk to the health and safety of workers, and so providing potential employees with the information needed to elect not to accept work from them, this measure may promote the right to just and favourable conditions of work, including safe working conditions.

1.123 However, the committee considers that the listing of individual employers on a public list on the basis that they may pose a health and safety risk to prospective employees, also engages and limits the right to privacy and reputation. The committee notes that the right to privacy may be subject to permissible limitations

if they are shown to be reasonable, necessary and proportionate. The committee considers the measure seeks to achieve a legitimate objective, but questions remain as to whether the measure is sufficiently circumscribed and contains sufficient safeguards to constitute a proportionate limit on rights.

1.124 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 legislative instrument, and as such seeks the minister's advice as to the matters set out at paragraph [1.120].

National Redress Scheme for Institutional Child Sexual Abuse Amendment (2021 Measures No. 1) Rules 2021 [F2021L00990][1]

Purpose	This legislative instrument: • sets out that a redress payment can be made to a person who has been appointed by a court, tribunal or board, or under a Commonwealth, state or territory law, to manage the financial affairs of a person entitled to redress; • specifies the protected symbols used in connection with the Scheme; • allows certain universities to be declared as not State or Territory Institutions for the purpose of the Scheme; and • classifies the Police Citizens Youth Club Limited NSW as a State Institution, allowing this institution to participate in the Scheme as a participating State Institution
Portfolio	Social Services
Authorising legislation	*National Redress Scheme for Institutional Child Sexual Abuse Act 2018*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 3 August 2021). Notice of motion to disallow must be given by 18 October 2021[2]
Rights	Effective remedy; rights of the child

Participation in the National Redress Scheme for Institutional Child Sexual Abuse

1.125 The National Redress Scheme for Institutional Child Sexual Abuse (the scheme) seeks to provide remedies in response to historical failures of the Commonwealth and other government and non-government organisations to uphold human rights,

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Redress Scheme for Institutional Child Sexual Abuse Amendment (2021 Measures No. 1) Rules 2021 [F2021L00990], *Report 10 of 2021*; [2021] AUPJCHR 99.

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

including the right of every child to protection by society and the state,[3] from physical and mental violence, injury or abuse (including sexual exploitation and abuse).[4]

1.126 Subsection 111(1) of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Redress Act) provides that an institution is a 'state institution' if it is, or was, part of the state, or is, or was, a body established for public purposes by or under a law of a state. Subsection 111(2) of the Redress Act states that an institution is not a state institution if the rules prescribe this.

1.127 This legislative instrument excludes 37 universities from the definition of state institutions for the purposes of the scheme. This has the effect that those institutions may only participate in the scheme if they choose to participate as non-government institutions.[5]

International human rights legal advice

Rights of the child and right to an effective remedy

1.128 For an individual to be eligible for redress pursuant to this scheme, the relevant institution against which a claim is being made must be participating in the scheme.[6] The prescription of universities as not being state or territory institutions for the purposes of the Redress Act, means that they will not become participating institutions unless the minister is satisfied that the institutions themselves agree to participate in the scheme. Consequently, as this instrument ensures 37 universities are no longer automatically part of the redress scheme, this measure engages and may limit the rights of the child, and the right to an effective remedy. The statement of compatibility states that this measure promotes the right of the child to state-supported recovery for neglect, exploitation and abuse.[7] However, it does not identify that the prescription of these universities may engage and limit the rights of the child or the right to an effective remedy.

1.129 Under international human rights law, the state is obliged to take all appropriate measures to protect children from all forms of violence or abuse, including sexual abuse.[8] The prescription of these institutions, and the potential for delay in securing redress for individuals making a claim in relation to them, therefore engages and may limit the right to an effective remedy, as this right exists in relation to the rights of children. International law requires that effective remedies must be available

3 Article 24 of the International Covenant on Civil and Political Rights.

4 The statement of compatibility to the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017, p. 70.

5 Explanatory statement, p. 1.

6 Redress Act, s. 107.

7 Statement of compatibility, p. 10.

8 Convention on the Rights of the Child, article 19.

to redress violations, noting that children have a special and dependent status.[9] The right to an effective remedy may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse,[10] and 'remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children'.[11] While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), state parties must comply with the fundamental obligation to provide a remedy that is effective.[12] In addition, international human rights law may require an effective remedy to be available against the state, regardless of the availability of civil remedies against other individuals and non-state actors.[13]

1.130 It is questionable whether the fact that the 37 universities prescribed under these rules operate independently of government control[14] is a sufficient basis under international human rights law to potentially exclude victims of abuse from access to the redress scheme. Unless the institutions independently (re)join the Scheme, the state may be responsible for providing redress to survivors of child sexual abuse at these educational institutions. Further, while a person may engage in civil litigation

9 See, United Nations Committee on the Rights of the Child, *General Comment No. 5 (2003): general measures of implementation of the Convention on the Rights of the Child*, [24]. This right to an effective remedy also exists in relation to individuals who are now adults, but regarding conduct which took place when they were children. Article 5(1) of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP3 CRC) provides that a communication can be submitted by any *individual.*

10 UN Human Rights Committee, *General comment No. 31* on t*he nature of the general legal obligation imposed on states parties to the Covenant* CCPR/C/21/Rev.1/Add. 13 (2004) [16]

11 UN Human Rights Committee, *General comment No. 31* on t*he nature of the general legal obligation imposed on states parties to the Covenant* CCPR/C/21/Rev.1/Add. 13 (2004) [15].

12 See UN Human Rights Committee, *General Comment No. 29 on States of Emergency* (Article 4) CCPR/C/21/Rev.1/Add.11 (2001) [14]. See also UN Committee on the Rights of the Child, *General comment No. 16 on State obligations regarding the impact of business on children's rights* CRC/C/GC/16 (2013) [30].The UN Committee on the Convention on the Rights of the Child (CRC Committee) has stressed that in cases of violence, '[e]ffective remedies should be available, including compensation to victims and *access to redress mechanisms* and appeal or independent complaint mechanisms'. See, UN Committee on the Rights of the Child, *General comment No. 13* on t*he right of the child to freedom from all forms of violence* CRC/C/GC/13 (2011) [56] (emphasis added).

13 In *Case of O'Keeffe v Ireland,* the European Court of Human Rights has held that the state itself has a positive duty to take steps to protect children from abuse and to provide an effective remedy. In this case, a victim of sexual abuse by her primary school principal took a case against the State, and the court held that 'a State cannot absolve itself from its obligations to minors in primary schools by delegating those duties to private bodies or individuals'. *Case of O'Keeffe v Ireland*, European Court of Human Rights Application no 35810/09 (2014), para. [150].

14 Explanatory statement, p. 1.

against the relevant institutions, the scheme offers a lower evidentiary burden and a high level of discretion, and therefore potentially affords a more effective remedy, particularly in historical abuse cases which may be harder to prove over time, noting also that civil litigation does not address systemic issues of redress and may not be available in all cases.[15]

1.131 As such there is some risk that exempting these 37 universities from the operation of the redress scheme, and relying on those universities voluntarily joining the scheme, may result in a victim of sexual abuse, whose rights under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child have been violated, not having access to an effective remedy.[16] In assessing the extent of such a risk it would generally be useful to know: how many people would be likely to be affected (including whether any intention to claim against the relevant institutions has been indicated); whether the institutions have indicated an intention to join the scheme voluntarily; and what time limits (if any) may apply to a decision to join.

Committee view

1.132 The committee notes that this legislative instrument prescribes 37 universities as not being state or territory institutions for the purposes of the National Redress Scheme for Institutional Child Sexual Abuse. The committee notes that, as a result, if there are persons eligible for redress pursuant to the scheme for conduct at those institutions, they will only be able to seek redress under the scheme if the institutions choose to join the scheme.

1.133 The committee considers that this measure engages and may limit the right to an effective remedy, and the rights of the child, including the right to state-supported recovery for neglect, exploitation and abuse. In this regard the committee notes that the state bears the responsibility for providing an effective remedy with respect to violations of the rights of the child. The committee considers there is some risk that exempting these 37 universities from the operation of the

15 See, for example the national legal service Knowmore's submission to the issues paper on civil litigation systems by the Royal Commission into Institutional Child Sexual Abuse: Knowmore, Submission in Response to Issues Paper 5: Civil Litigation, 17 March 2000, pp. 3-4, https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Issues%20Paper%205%20-%20Submission%20-%2017%20Knowmore.pdf, which lists the procedural and evidentiary hurdles that may restrict the chances of a successful civil claim.

16 See also, previous advice provided with respect to the prescription of 11 private schools. Parliamentary Joint Committee on Human Rights, National Redress Scheme for Institutional Child Sexual Abuse Amendment (2019 Measures No. 1) Rules 2019 [F2019L01491] and National Redress Scheme for Institutional Child Sexual Abuse Amendment (2020 Measures No. 1) Rules 2020 [F2020L00096], *Report 4 of 2020* (9 April 2020), pp. 122-130.

redress scheme, and relying on the universities voluntarily joining the scheme, may result in a victim of sexual abuse not having access to an effective remedy.

Suggested action

1.134 The committee recommends that the statement of compatibility be updated to identify that this measure engages and may limit the rights of the child and the right to an effective remedy and outline alternative remedies which victims of child sexual abuse may pursue (for example, civil litigation).

1.135 The committee draws these human rights concerns to the attention of the minister and the parliament.

Bills and instruments with no committee comment[1]

1.136 The committee has no comment in relation to the following bills which were introduced into the Parliament between 3 to 12 August 2021. 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]

- Dental Benefits Amendment Bill 2021;
- Electoral Legislation Amendment (Counting, Scrutiny and Operational Efficiencies) Bill 2021;
- Electoral Legislation Amendment (Electoral Offences and Preventing Multiple Voting) Bill 2021;
- Electoral Legislation Amendment (Political Campaigners) Bill 2021;
- Ensuring Northern Territory Rights Bill 2021;
- Export Finance and Insurance Corporation Amendment (Equity Investments and Other Measures) Bill 2021;
- Fair Work Amendment (Improving Paid Parental Leave for Parents of Stillborn Babies) Bill 2021;
- Human Rights (Targeted Sanctions) Bill 2021;
- Public Governance, Performance and Accountability Amendment (Improved Grants Reporting) Bill 2021;
- Ransomware Payments Bill 2021 (No. 2);
- Treasury Laws Amendment (2021 Measures No. 6) Bill 2021; and
- Treasury Laws Amendment (COVID-19 Economic Response No. 2) Bill 2021.

1.137 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 25 June and 4 August 2021.[3] The committee

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 10 of 2021*; [2021] AUPJCHR 100.

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.

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.

has commented on six legislative instruments from this period in this report. 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.

Private Members' and Senators' bills that may limit human rights

1.138 The committee notes that the following private members' and senators' 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:

- Human Rights (Children Born Alive Protection) Bill 2021; and
- International Human Rights and Corruption (Magnitsky Sanctions) Bill 2021.