



# Parliamentary Joint Committee on Human Rights

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Human rights scrutiny report

Report 13 of 2021

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# Table of contents

<b>Membership of the committee .....</b>	<b>ii</b>
<b>Committee information .....</b>	<b>vii</b>
<b>Chapter 1—New and continuing matters .....</b>	<b>1</b>
<b>Bills</b>	
Electoral Legislation Amendment (Voter Integrity) Bill 2021 .....	2
National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021 .....	10
<b>Legislative instruments</b>	
Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 2) Determination 2021 [F2021L01463] .....	22
Defence (Prohibited Substances) Determination 2021 [F2021L01452] .....	27
<b>Bills and instruments with no committee comment .....</b>	<b>32</b>



## Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee's functions are to examine bills, Acts and legislative instruments for compatibility with human rights, and report to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation for compatibility with the human rights set out in seven international treaties to which Australia is a party.<sup>1</sup> The committee's *Guide to Human Rights* provides a short and accessible overview of the key rights contained in these treaties which the committee commonly applies when assessing legislation.<sup>2</sup>

The establishment of the committee builds on Parliament's tradition of legislative scrutiny. The committee's scrutiny of legislation seeks to enhance understanding of, and respect for, human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, most rights may be limited as long as it meets certain standards. Accordingly, a focus of the committee's reports is to determine whether any limitation on rights is permissible. In general, any measure that limits a human right must comply with the following limitation criteria: be prescribed by law; be in pursuit of a legitimate objective; be rationally connected to (that is, effective to achieve) its stated objective; and be a proportionate way of achieving that objective.

Chapter 1 of the reports include new and continuing matters. Where the committee considers it requires further information to complete its human rights assessment it will seek a response from the relevant minister, or otherwise draw any human rights concerns to the attention of the relevant minister and the Parliament. Chapter 2 of the committee's reports examine responses received in relation to the committee's requests for information, on the basis of which the committee has concluded its examination of the legislation.

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1 International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

2 See the committee's [Guide to Human Rights](#). See also the committee's guidance notes, in particular [Guidance Note 1 – Drafting Statements of Compatibility](#).





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

### 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 18 and 28 October 2021;
- legislative instruments registered on the Federal Register of Legislation between 5 and 27 October 2021;<sup>2</sup> and

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 or further information from the relevant minister.

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, *New and continuing matters, Report 13 of 2021*; [2021] AUPJCHR 129.

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>.

## Bills

### Electoral Legislation Amendment (Voter Integrity) Bill 2021<sup>1</sup>

<b>Purpose</b>	This bill seeks to amend the <i>Commonwealth Electoral Act 1918</i> and <i>Referendum (Machinery Provisions) Act 1984</i> to require voters to present identification documentation or an attestation from another enrolled person in order to cast an ordinary vote during the pre-polling period and on polling day
<b>Portfolio</b>	Special Minister of State
<b>Introduced</b>	House of Representatives, 28 October 2021
<b>Rights</b>	Right to take part in public affairs; equality and non-discrimination

#### Requirement to provide proof of identity to cast ordinary vote

1.4 This bill seeks to amend the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* to introduce voter identification requirements for pre-poll and polling day ordinary votes. The bill provides that for each person seeking to cast a vote at an election, a voting officer must request that the person produce a proof of identity document and ask whether they have voted before in the election.<sup>2</sup> The bill provides for a number of types of identification that can be shown in hard copy or electronic form, including government issued documents, documents from financial institutions and documents from Aboriginal and Torres Strait Islander land councils or bodies.<sup>3</sup> A voting officer must not make

<sup>1</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, Electoral Legislation Amendment (Voter Integrity) Bill 2021, *Report 13 of 2021*; [2021] AUPJCHR 130.

<sup>2</sup> Proposed section 200DI(1).

<sup>3</sup> Proposed section 4AB provides that a 'proof of identity document' is any of: a current Australian driver's licence; a current Australian passport; a current Australian proof of age card; an Australian birth certificate; a notice evidencing a person's Australian citizenship; a current identification card issued by, or on behalf of, the Commonwealth or State or Territory or an authority of the Commonwealth, State or Territory (including a Medicare card, pension card or health care card); an account statement issued by a local government body, utility provider or carriage service in the last twelve months; a credit or debit card issued by an Australian financial institution, or an account statement issued by an Australian financial institution in the last twelve months; a notice of assessment in the last twelve months in respect of a year of income; a notice issued by the Electoral Commissioner notifying a person of their enrolment; a document that relates to the affairs of a particular person, that specifies the person's name and that is issued by an Aboriginal or Torres Strait Islander land council or land trust, or prescribed body corporate.

any copies or records of any identification shown.<sup>4</sup> After requesting proof of identity, a voting officer can ask questions of the voter to work out their full name or place of living, or both, and where not satisfied the voter is a particular person on the certified list of voters, the voting officer can ask additional questions about the matters on the certified list of voters to establish their identity,<sup>5</sup> for example their date of birth.<sup>6</sup>

1.5 If a person is unable to provide appropriate proof of identity, another enrolled voter would be able to attest to their identity.<sup>7</sup> The person attesting must provide their own appropriate proof of identity and complete an approved form which includes the attester's name, residential address, type of identification provided and name of the person they are attesting for.<sup>8</sup> This form can be completed with the assistance of the presiding officer or polling official, but the attester and voter must sign it.<sup>9</sup>

1.6 If a voter does not have the appropriate proof of identity and no one attests to their identity, a voting officer must inform them, during the pre-polling period, that they can cast a pre-poll declaration vote, or on polling day, that they can cast a provisional vote.<sup>10</sup> A provisional vote is a kind of declaration vote. Declaration votes are currently used for voters whose name or address cannot be found on the certified list or who have already been marked off as having voted. To cast a declaration vote, a voter fills out a separate declaration envelope at the polling centre declaring their identity and entitlement to vote. Currently, it appears that the declaration envelope requests additional details such as the person's date of birth, current permanent address, a driver's licence or passport number or confirmation of the voter's identity by another enrolled person, and signature.<sup>11</sup> Votes are then placed in the sealed declaration envelope and are subject to additional checks to verify the identity of the person casting the vote before it is admitted to the count. The process does not require the person to provide any further identification after casting the declaration vote.<sup>12</sup> Once admitted to the count, a declaration vote counts the same as an ordinary vote.

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<sup>4</sup> Proposed subsection 200DI(6).

<sup>5</sup> Proposed subsections 200DI(2)-(3).

<sup>6</sup> Explanatory memorandum, p. 4.

<sup>7</sup> Proposed subsection 200DI(4).

<sup>8</sup> Proposed paragraph 200DI(4)(b).

<sup>9</sup> Proposed subsection 200DI(7) and proposed subparagraph 200DI(4)(b)(iii).

<sup>10</sup> Proposed subsections 200DG(3) and 229(6).

<sup>11</sup> Australian Electoral Commission, *Approved form for pre-poll and absent-provisional declaration voting* (2 February 2018) available at: [https://www.aec.gov.au/about\\_aec/cea-notices/files/2018/pre-poll-absent-provisional-dec-vote.pdf](https://www.aec.gov.au/about_aec/cea-notices/files/2018/pre-poll-absent-provisional-dec-vote.pdf).

<sup>12</sup> Statement of compatibility, p. 5.

## Preliminary international human rights legal advice

### ***Rights to take part in public affairs and equality and non-discrimination***

1.7 By providing for additional identification requirements for a person to cast an ordinary vote, the bill engages and may limit the right to take part in public affairs and the right to equality and non-discrimination.<sup>13</sup> The right to take part in public affairs includes guarantees of the right of citizens to vote in elections,<sup>14</sup> and is an essential part of democratic government that is accountable to the people. The United Nations (UN) Human Rights Committee has stated that the right to vote at elections and referendums must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. States must take effective measures to ensure that all persons entitled to vote are able to exercise that right.<sup>15</sup> In this case a limit on the right to participate in public affairs may arise if a person is unable to cast a vote because of an inability to show identification or cast a declaration vote – or potentially if there is a lower voter turnout because of a perception that identification is required to vote. The right to take part in public affairs may be permissibly limited where a measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is a proportionate means by which to achieve it.

1.8 Further, as requiring proof of identity may have a disproportionate impact on particular groups who may face issues accessing identification documentation or having such documentation on them while voting (such as those who are homeless or Aboriginal or Torres Strait Islander people in remote communities), the measure engages and may limit the right to equality and non-discrimination.<sup>16</sup> This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.<sup>17</sup> 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).<sup>18</sup> Indirect discrimination occurs where 'a rule or measure

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<sup>13</sup> The bill also engages the right to privacy, however, it is noted that the statement of compatibility adequately explains how any limitation on this right is proportionate.

<sup>14</sup> 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).

<sup>15</sup> 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) [10]–[11].

<sup>16</sup> International Covenant on Civil and Political Rights, articles 2 and 26.

<sup>17</sup> 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.

<sup>18</sup> UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.<sup>19</sup> Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.<sup>20</sup>

### *Legitimate objective*

1.9 A measure may be aimed at achieving a legitimate objective if it is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. In order to demonstrate that the measures in this bill pursue legitimate objectives for the purposes of international human rights law, the statement of compatibility should provide a reasoned and evidence-based explanation of why the measures address an issue of public or social concern that is substantial and pressing enough to warrant limiting human rights.

1.10 The statement of compatibility states that the measures 'are intended to protect against voter fraud and to ensure that there is public confidence in the federal electoral system'. It states that by using identity documents this will help avoid accidental mark-offs against the wrong person, and help ensure that 'people are provided ballot papers correctly'.<sup>21</sup> The explanatory memorandum adds that the measure is intended to 'reduce the risk of electoral fraud (in the form of voter impersonation)'.<sup>22</sup> It also states that these measures were recommended by the Joint Standing Committee on Electoral Matters (JSCEM) in its reports into the conduct of the 2013, 2016 and 2019 federal elections. While the objective of protecting against voter fraud in general may be capable of constituting a legitimate objective for the purposes of international human rights law, the statement of compatibility does not address why the current laws are insufficient to achieve the stated objectives and why the measures address a pressing and substantial concern.

1.11 The JSCEM reports provide no evidence of, or concern about, a lack of public confidence in the integrity of the electoral system or any evidence of voter impersonation. The reports express some concern at multiple voting and mistakes in

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<sup>19</sup> *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'.

<sup>20</sup> UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

<sup>21</sup> Statement of compatibility, p. 5.

<sup>22</sup> Explanatory memorandum, p. 2.

marking off the wrong person. The report on the conduct of the 2013 federal election states that '18,770 multiple marks (persons marked off the electoral roll more than once) were identified, with 10,671 of these being attributable to polling official error, 2,013 being instances of electors admitting to multiple voting, and 6,000 instances remaining unresolved'.<sup>23</sup> Nevertheless, the Australian Electoral Commissioner recently stated that the level of multiple voting is 'vanishingly small',<sup>24</sup> with the level of apparent multiple marks in the 2019 election around 0.03 per cent of the total vote.<sup>25</sup> The Commissioner has also stated that of those multiple votes, the vast majority are cast by 'people over the age of 80 or people who have English as a second language issues or who are confused about the act of voting'.<sup>26</sup> As such, further information is required as to how this measure seeks to address an issue of public or social concern that is substantial and pressing enough to warrant limiting the rights to public participation and equality and non-discrimination.

### *Rational connection*

1.12 It must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective to achieve the objective being sought. The statement of compatibility does not clearly identify how the measures introduced will operate to achieve the stated objectives. In particular, no evidence has been provided as to how the measure will protect against voter fraud, and therefore increase public confidence in the electoral system. It is also not clear how voter identification requirements would be able to prevent people from voting multiple times at different locations. It is also not clear whether any modelling has been undertaken on whether the measure may impact voter turnout. Noting that the next federal election is required to be held sometime within the next year, if this measure were introduced before the election there would appear to be limited lead time to train polling officials in the new legislative requirements and educate the public on what is expected of them. As such, it is not clear if it may in fact reduce public confidence in the electoral system and discourage some voters from voting because

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<sup>23</sup> Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2013 election and matters related thereto* (April 2015) p. 112.

<sup>24</sup> Mr Tom Rogers, Australian Electoral Commissioner, *Finance and Public Administration Legislation Committee Hansard*, 23 March 2021, p. 170 and Mr Tom Rogers, Australian Electoral Commissioner, *Finance and Public Administration Legislation Committee Hansard*, 26 October 2021, p. 109.

<sup>25</sup> Mr Tom Rogers, Australian Electoral Commissioner, Australian Electoral Commission, Transcript, 6 December 2020, p. 15 in evidence to the Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2019 federal election*.

<sup>26</sup> Mr Tom Rogers, Australian Electoral Commissioner, *Finance and Public Administration Legislation Committee Hansard*, 23 March 2021, p. 170 and Mr Tom Rogers, Australian Electoral Commissioner, *Finance and Public Administration Legislation Committee Hansard*, 26 October 2021, p. 109.

of the perception that they cannot vote if they do not possess adequate identification documents. The statement of compatibility does not address how this will be managed.

### *Proportionality*

1.13 Further, 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 the measure is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective. In this respect, the bill introduces a number of safeguards that seek to ensure the ability of a person to vote. In particular, there are a number of different types of identification documentation that can be produced that the majority of voters are likely to have access to. Importantly, no voter would be denied a vote for not having an acceptable form of identification. Rather, where a voter does not have acceptable identification, another enrolled voter can attest to their identity, or they can cast a declaration vote. These are important safeguards that assist with the proportionality of the measure.

1.14 Nevertheless, there is concern about how the measure will operate in practice. As stated, requiring proof of identity may have a disproportionate impact on particular groups who may face issues accessing identification documentation or having such documentation on them when voting. A 2014 research report prepared for the NSW Electoral Commission on multiple voting and voter identification identified numerous challenges that certain groups may face in providing documentation, including people with no fixed address, people with disability, people of low-socio economic status, people from non-English speaking backgrounds, Aboriginal and Torres Strait Islander peoples and women escaping domestic violence.<sup>27</sup> The statement of compatibility does not identify that the right to equality and non-discrimination is engaged by the measure, and as such, it does not address what impact the measure will have on these groups. It is also unclear how accessible it is for some voters to cast a declaration vote, noting that it appears that there are requirements on the declaration envelope to provide additional information such as a driver's licence or passport number, and it is not clear whether a declaration vote would still be counted if not all of this information was provided.

1.15 It is also unclear whether other, less rights restrictive measures have been considered and determined to be ineffective to achieve the stated objectives. A significant number of the multiple votes identified in the JSCEM report on the conduct of the 2013 federal election were from polling official errors. The statement

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<sup>27</sup> Report prepared for the NSW Electoral Commission by Professor Rodney Smith, University of Sydney, *Multiple Voting and Voter Identification*, February 2014, pp. 20-21.

of compatibility does not identify why other measures, for example improving training for polling officials, would not be suitable to address this concern.

1.16 Further information is required in order to assess the compatibility of this measure with the rights to take part in public affairs and equality and non-discrimination, and in particular:

- (a) what evidence exists that demonstrates that protecting against voter fraud and ensuring public confidence in the federal electoral system is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the rights to participate in public affairs and equality and non-discrimination;
- (b) how would voter identification requirements be effective to prevent people from voting multiple times at different locations;
- (c) whether any modelling has been undertaken to assess whether this measure is likely to impact voter turnout;
- (d) what information is required from voters casting a declaration vote and, where the voter does not provide all the requested information, how this will impact the counting of their vote;
- (e) whether the measure is likely to have a disproportionate impact on particular groups, and if so, how such differential treatment is based on reasonable and objective criteria; and
- (f) whether consideration has been given to alternative, less rights restrictive ways of achieving the stated objectives, such as greater training of polling officials to reduce inadvertent mistakes.

### **Committee view**

**1.17 The committee notes that this bill seeks to introduce identification requirements for voters to cast pre-poll and polling day ordinary votes. Voters would be required to show an appropriate proof of identity document, have another enrolled voter attest to their identity, or cast a declaration vote in place of an ordinary vote.**

**1.18 The committee notes that as a matter of law, no voter will be denied a vote for not having an appropriate form of identification or attestation, as they would be able to cast a declaration vote. However, these additional requirements imposed before a voter can cast their vote engages and may limit the right to take part in public affairs and the right to equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.**

**1.19 The committee notes that while this measure seeks to protect against voter fraud, reduce inadvertent mistakes and ensure public confidence in the federal electoral system, it is unclear whether the measure addresses a pressing and**



substantial concern such as to amount to a legitimate objective for the purposes of international human rights law. Questions also remain as to whether the measure will effectively achieve its objectives; whether the measure will disproportionately impact particular groups; and whether alternative, less rights restrictive approaches have been considered.

1.20 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 [1.16].

## National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021<sup>1</sup>

<b>Purpose</b>	<p>This bill seeks to amend the <i>National Disability Insurance Scheme Act 2013</i> to:</p> <ul style="list-style-type: none"> <li>• provide for the Participant Service Guarantee that will legislate timeframes and engagement principles for how the National Disability Insurance Agency (NDIA) undertakes key administrative processes;</li> <li>• provide administrative amendments in relation to changing participant plans;</li> <li>• clarify eligibility for psychosocial disability;</li> <li>• allow the NDIA to make direct payments on behalf of participants; and</li> <li>• remove redundant references and rule-making powers used during the NDIS transition phase</li> </ul>
<b>Portfolio</b>	National Disability Insurance Scheme
<b>Introduced</b>	House of Representatives, 28 October 2021
<b>Rights</b>	Rights of persons with disability

### Variation or reassessment of a participant's plan

1.21 This bill seeks to amend the *National Disability Insurance Scheme Act 2013* (the Act) to allow the plan of a participant in the National Disability Insurance Scheme (NDIS) to be varied or reassessed. This could occur on the Chief Executive Officer's (CEO) own initiative or on request of the participant.<sup>2</sup>

1.22 Specifically, the bill would allow the CEO to vary a participant's plan (except the participant's statement of goals and aspirations) if the variation is: a change to the statement of participant supports in the circumstances prescribed by the NDIS rules; a correction of a minor or technical error; or of a kind prescribed by the NDIS

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021, *Report 13 of 2021*; [2021] AUPJCHR 131.

2 Schedule 1, item 23, proposed section 47A and item 24, proposed sections 48 and 49.

rules.<sup>3</sup> Each variation must be prepared with the participant.<sup>4</sup> In varying participant supports, the CEO would be required to have regard to a number of factors, including the participant's statement of goals and aspirations; any relevant assessments; and the principle that a participant should manage their plan to the extent that they wish to do so.<sup>5</sup> The CEO must also be satisfied of the criteria relating to reasonable and necessary supports under section 34 of the Act. The bill would allow the CEO to make a variation to a participant's plan that is different from the variation requested by the participant.<sup>6</sup>

1.23 Regarding reassessment of a participant's plan, the bill would allow the CEO to conduct a reassessment of a plan at any time.<sup>7</sup> The outcome of a reassessment would either be a complete reassessment; a variation of the plan; or the preparation of a new plan.<sup>8</sup> The CEO would also be required to reassess the participant's plan before the reassessment date and in any circumstances specified in the plan.<sup>9</sup>

1.24 The bill further provides that the NDIS rules may set out matters to which the CEO must have regard in deciding whether to vary or reassess a participant's plan on their own initiative or in making a decision about variation or reassessment of a plan on request of the participant.<sup>10</sup> In addition, where the participant requests a variation or reassessment, the bill sets out the timeframes in which the CEO must make a decision and the notice requirements in relation to that decision.<sup>11</sup>

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

### ***Rights of persons with disability***

1.25 There are various measures in this bill that would promote or facilitate the realisation of some of Australia's obligations under the Convention on the Rights of

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3 Schedule 1, item 23, proposed subsection 47A(1).

4 Schedule 1, item 23, proposed subsection 47A(1).

5 Schedule 1, item 23, proposed subsection 47A(3).

6 Schedule 1, item 23, proposed subsection 47A(9).

7 Schedule 1, item 24, proposed subsection 48(1).

8 Schedule 1, item 24, proposed subsection 48(7).

9 Schedule 1, item 24, proposed sections 49 and 49A.

10 Schedule 1, item 23, proposed subsection 47A(6); item 24, proposed subsection 48(5).

11 Schedule 1, item 23, proposed subsection 47A(4) and (8); item 24, proposed subsections 48(3), (4), (6) and (8).

Persons with Disabilities.<sup>12</sup> However, by allowing the CEO to vary or reassess a participant's plan on the CEO's own initiative and without the participant's consent, this measure engages and may limit the rights of persons with disability. In particular, where a participant's supports are reduced or adversely changed as a result of the CEO varying or reassessing the participant's plan, the measure engages and may limit the rights to health and an adequate standard of living, as well as the rights of persons with disability (as outlined below in paragraph [1.26]). The right to health is the right to enjoy the highest attainable standard of physical and mental health.<sup>13</sup> It is a right to have access to adequate health care as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food, and a healthy environment).<sup>14</sup> The right to an adequate standard of living requires that States parties take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in their jurisdiction.<sup>15</sup>

1.26 Under the Convention on the Rights of Persons with Disabilities, Australia also has a number of specific obligations that may be engaged and limited by this measure, including to:

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- 12 For example, Schedule 1, items 11 and 12 would extend the minimum time, from 28 to 90 days, for prospective participants to provide information requested by the National Disability Insurance Agency to support an access decision before the access request is deemed to be withdrawn. This is a positive measure that would provide people with disability more time to obtain the relevant information necessary to support their application to access the NDIS. See also schedule 2, items 2 and 3, which would remove qualifying language from the Act and insert a new guiding principle that states '[p]eople with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity'. These amendments would bring the general principles under the Act into closer alignment with the Convention on the Rights of Persons with Disability. Schedule 2, items 18–20, would also clarify that for the purposes of subsection 24(1) of the Act (which sets out the disability criteria for access to the NDIS), impairments to which a psychosocial disability is attributable, and that are episodic or fluctuating, may be taken to be permanent. This appears to be a positive measure insofar as it may provide greater access to the NDIS for people with psychosocial disability.
  - 13 International Covenant on Economic, Social and Cultural Rights, article 12(1).
  - 14 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).
  - 15 International Covenant on Economic, Social and Cultural Rights, article 11. See also, UN Human Rights Committee, *General Comment No. 3: Article 2 (Implementation at a national level)*.

- provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons;<sup>16</sup>
- take appropriate steps to safeguard and promote the realisation of the right to an adequate standard of living and social protection without discrimination on the basis of disability;<sup>17</sup>
- take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of the right to live and participate in the community, including by ensuring that persons with disabilities have the opportunity to choose their place of residence; have access to a range of in-home, residential and other community support services; and that general community services and facilities are available on an equal basis and responsive to the needs of persons with disabilities;<sup>18</sup>
- take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;<sup>19</sup> and
- refrain from engaging in any act or practice that is inconsistent with the Convention and to ensure that public authorities and institutions act in conformity with the Convention, which includes respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons with disability.<sup>20</sup>

1.27 Further, to the extent that this measure is applied to children with disability, it would also engage and may limit the rights of the child. Children have special rights under international human rights law taking into account their particular vulnerabilities.<sup>21</sup> Children's rights are protected under a number of treaties, including the Convention on the Rights of the Child and the Convention on the Rights of

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16 Convention on the Rights of Persons with Disabilities, article 25.

17 Convention on the Rights of Persons with Disabilities, article 28.

18 Convention on the Rights of Persons with Disabilities, article 19.

19 Convention on the Rights of Persons with Disabilities, article 20.

20 Convention on the Rights of Persons with Disabilities, articles 3 and 4.

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

Persons with Disabilities. All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds.<sup>22</sup>

1.28 Australia has obligations to progressively realise the above social and economic rights, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. To the extent that this measure results in a participant's supports being reduced and, as a consequence, may deprive a participant of the full enjoyment of the above rights, this measure may be considered retrogressive. 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. In this context, the United Nations (UN) Committee on Economic, Social and Cultural Rights has stated that '[t]here is a strong presumption of impermissibility of any retrogressive measures taken in relation to the [Covenant rights]' and where retrogressive measures are deliberately taken, states have 'the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the [Covenant] rights' and in the context of the full use of the maximum available resources.<sup>23</sup> Similarly, the Committee on the Rights of Persons with Disabilities has stated that the duty of progressive realisation entails a presumption against retrogressive measures and states are 'obliged to demonstrate that such measures are temporary, necessary and non-discriminatory'.<sup>24</sup> It further observed that 'States parties are prohibited from taking retrogressive measures with respect to the minimum core obligations of the right to live independently within the community'.<sup>25</sup>

1.29 The statement of compatibility does not acknowledge that the above rights may be engaged and limited by this specific measure and thus does not assess the compatibility of this measure with these rights.

#### *Legitimate objective and rational connection*

1.30 Any limitation on the above rights must pursue a legitimate objective, namely, one that is necessary and addresses an issue of public or social concern that

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22 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also Convention on the Rights of Persons with Disabilities, article 7; International Covenant on Civil and Political Rights, articles 2 and 26.

23 UN Committee on Economic, Social and Cultural Rights, *General Comment 13: The right to education* (1999) [45].

24 UN Committee on the Rights of Persons with Disabilities, *General Comment on article 19: Living independently and being included in the community* (2017) [43]–[44].

25 UN Committee on the Rights of Persons with Disabilities, *General Comment on article 19: Living independently and being included in the community* (2017) [45].

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'.<sup>26</sup> This means that the only legitimate objective in the context of 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'.<sup>27</sup>

1.31 It is noted that the statement of compatibility does not identify the objective sought to be achieved by allowing a participant's plan to be varied or reassessed on the CEO's own initiative, although the explanatory materials provide some information as to the general objective being pursued by the bill. The explanatory memorandum states that the amendments in the bill seek to reduce the administrative burden for participants, their families and carers, and strengthen the person-centred focus of the NDIS.<sup>28</sup> The explanatory materials note that the bill seeks to give effect to several recommendations made in the 2019 Independent Review of the Act, including recommendations 20 and 21 in relation to this measure.<sup>29</sup> In this regard, the explanatory memorandum notes that the inability to

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26 See International Covenant on Economic, Social and Cultural Rights, article 4. It is noted that while the Convention on the Rights of Persons with Disabilities contains no general limitation provision, the general limitation test under international human rights law is applicable, noting that many rights in the Convention on the Rights of Persons with Disabilities are drawn from the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights.

27 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.

28 Explanatory memorandum, p. 2.

29 Statement of compatibility, p. 59; explanatory memorandum, p. 20. See David Tune, *Review of the National Disability Insurance Scheme Act 2013: Removing Red Tape and Implementing the NDIS Participant Service Guarantee*, December 2019, pp. 135 and 140. Recommendation 20 stated: 'The NDIS Act is amended to introduce a new Category D rule making power that sets out the matters the NDIA must consider when deciding whether to undertake an unscheduled plan review'. Recommendation 21 stated: 'The NDIS Act is amended to introduce a new Category D rule making power giving the NDIA the ability to amend a plan in appropriate circumstances'.

amend a plan without creating a new plan or requiring a plan reassessment was a key frustration for participants, so to address this frustration, this measure seeks to improve the administration of the NDIS, and deliver improved participant experiences.<sup>30</sup>

1.32 While the explanatory materials provide some information regarding the context of these proposed amendments, further information is required as to the specific objective being pursued by allowing a participant's plan to be varied or reassessed on the CEO's own initiative—in particular, how it promotes general welfare, noting that a limitation which disproportionately impacts a vulnerable group may not necessarily meet the definition of promoting 'general welfare',<sup>31</sup> as well as a reasoned and evidence-based explanation of why the measure addresses a substantial and pressing concern. This information is also relevant to assessing whether the proposed limitation on rights has a rational connection to (that is, effective to achieve) the objective sought to be achieved.

#### *Proportionality*

1.33 In assessing proportionality, it is necessary to consider a number of factors, including whether the proposed measure is sufficiently circumscribed and accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and whether there is the possibility of oversight and the availability of review.

1.34 As currently drafted, the measure confers a broad discretionary power on the CEO to initiate a variation or reassessment of a participant's plan. While the bill sets out the requirements that the CEO must comply with in varying a participant's supports, the matters to which the CEO must have regard in deciding whether to vary a plan on their own initiative are to be set out in the NDIS rules. The explanatory memorandum provides some examples of circumstances in which it may be appropriate for a variation to be initiated by the CEO. These include:

- to correct a technical mistake made by the National Disability Insurance Agency (NDIA) found after the plan has been agreed;
- if a participant requires crisis or emergency funding as a result of a significant change to their supports;

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30 Explanatory memorandum, p. 20.

31 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.



- if the participant requests a change to the type of plan management and after an appropriate risk assessment;
- a minor change in supports; or
- to implement an Administrative Appeals Tribunal decision.<sup>32</sup>

1.35 The explanatory memorandum states that the purpose of a plan variation is to make minor or technical changes to a participant's plan or in circumstances prescribed in the relevant NDIS Rules. It notes that this would typically occur where the variation does not require a reduction or significant increase to the level of NDIS funding and the intention is that any variation would benefit the participant.<sup>33</sup>

1.36 Regarding a reassessment of a participant's plan, the bill provides that the CEO may conduct a reassessment on their own initiative at any time and the matters to which the CEO must have regard in deciding whether to conduct a reassessment of a plan on their own initiative are to be set out in the NDIS rules. The explanatory memorandum states that the NDIS rules will ensure consistency in decision-making about whether to reassess or vary a plan, noting there would be an ability to vary parts of a plan as well as reassess the whole plan.<sup>34</sup> Unlike a plan variation, the bill does not specify any requirements that the CEO must comply with in reassessing a plan. The explanatory memorandum states that a reassessment would occur where a participant has undergone a significant change in circumstances requiring a change in the level of support they need, or a participant otherwise requires significant additional funding to a range of existing supports.<sup>35</sup>

1.37 If the NDIS rules clearly set out the circumstances in which the CEO may initiate a plan variation or reassessment, this may assist with the proportionality of the measure. However, without knowing the detail to be contained in the NDIS rules, it is not possible to conclude that the measure would be sufficiently circumscribed. It is noted that international human rights law jurisprudence states that laws conferring discretionary powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.<sup>36</sup> This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights.

1.38 Further, while the explanatory memorandum states that 'it is intended' that the CEO would exercise their power to vary a participant's plan in a manner that

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32 Explanatory memorandum, p. 20.

33 Explanatory memorandum, p. 20.

34 Explanatory memorandum, p. 23.

35 Explanatory memorandum, p. 21.

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

benefits the participant and typically, this would not involve a reduction in NDIS funding or the participant's supports, this intention is not reflected in the text of the bill itself. As a matter of legislative interpretation, it appears that the CEO may initiate a plan variation that may result in a reduction in a participant's supports. It is not clear from the explanatory memorandum whether the NDIS rules will specify the circumstances in which the CEO must *not* initiate a plan variation, for example, where it would result in the reduction of supports or would otherwise be detrimental to the participant.

1.39 As to safeguards, the measure requires that a plan variation be prepared with the participant, even where the variation is initiated by the CEO or where the variation is different from the one requested by the participant.<sup>37</sup> The explanatory memorandum notes that as the participant must be involved in a plan variation, no variation can occur without a participant's prior knowledge.<sup>38</sup> This may assist with the proportionality of the measure to the extent that it would ensure that participants are consulted on decisions that affect them. This is particularly important given Australia's general obligation under the Convention on the Rights of Persons with Disabilities to closely consult with and actively involve persons with disabilities, including children with disabilities, regarding decision-making processes concerning issues relating to people with disability.<sup>39</sup>

1.40 However, the strength of this safeguard is dependent on how the consultation process operates in practice. While the bill provides that the participant must be involved in a plan variation, neither the bill nor the explanatory materials contain any operational detail as to how the participant will be involved—for example, will the participant be notified of the CEO's intention to initiate a plan variation prior to the CEO initiating the variation process; will the participant genuinely be able to influence the outcome of the CEO's decision to vary a plan, noting that the participant's consent is not required to vary their plan; will the participant be able to access support, if desired, to effectively participate in the consultation process; what weight will be given to the participant's will and preferences; and will the participant's consent be sought as the objective of the consultation process. As noted above, relevant in this regard is the general obligation

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37 Explanatory memorandum, pp. 20–21.

38 Explanatory memorandum, p. 22.

39 Convention on the Rights of Persons with Disabilities, article 4(3). See also UN Committee on the Rights of Persons with Disabilities, *General Comment no. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention* (2018). At [21], the Committee stated that to “closely consult with and actively involve” persons with disabilities through their representative organizations is an obligation under international human rights law that requires the recognition of every person’s legal capacity to take part in decision-making processes based on their personal autonomy and self-determination’.

under the Convention on the Rights of Persons with Disabilities to closely consult and actively involve persons with disability and the general principle of respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons with disability.<sup>40</sup> In this context, the UN Committee on the Rights of Persons with Disabilities has emphasised that participation must be meaningful, with due weight given to the views of persons with disabilities so that such views and the results of consultations are reflected in the decisions adopted.<sup>41</sup> It further noted that 'States parties have an obligation to ensure the transparency of consultation processes, the provision of appropriate and accessible information and early and continuous involvement'.<sup>42</sup>

1.41 Another consideration is whether there are alternative less rights restrictive measures that may achieve the same objective.<sup>43</sup> Noting the intention that the CEO would only initiate a plan variation where it involves minor changes that would benefit a participant, it is not clear why the bill does not specifically circumscribe the CEO's powers in this way and why the participant's consent is not required for a plan variation, particularly where the variation would change their supports. It would appear that a less rights restrictive way of achieving the objective may be to require the consent of the participant to vary their plan and limiting the CEO's power to vary a participant's plan on their own initiative to variations that would benefit the

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40 Convention on the Rights of Persons with Disabilities, articles 3 and 4(3). It is noted that the general obligation under article 4(3) is critical for the implementation of other rights under the Convention, including the right to live independently and be included in the community (article 19) and the right to an adequate standard of living (article 28). See UN Committee on the Rights of Persons with Disabilities, *General Comment no. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention* (2018) [67]–[93].

41 UN Committee on the Rights of Persons with Disabilities, *General Comment no. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention* (2018) [3], [4], [15] and [48]. The Committee further noted that 'States parties should guarantee that [the views of persons with disabilities] are not only heard as a mere formality or as a tokenistic approach to consultation'.

42 UN Committee on the Rights of Persons with Disabilities, *General Comment no. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention* (2018) [43].

43 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)]. The UN Committee on Economic, Social and Cultural Rights indicated that relevant in assessing the reasonableness and proportionality of the proposed limitation is whether the limitation is the only way to achieve the stated purpose and whether there are alternative measures that do not seriously limit rights.

participant (noting that the CEO would have the power to initiate a reassessment where more significant changes are required).

1.42 Finally, the bill would make the CEO's decision to: vary or not vary a participant's plan; not vary and not reassess a plan; and not conduct a reassessment of a plan, a reviewable decision under the Act.<sup>44</sup> The bill would also require the CEO to provide reasons for any reviewable decision.<sup>45</sup> The explanatory memorandum states that a person affected by the decision may seek internal merits review of such a decision, and make a subsequent application to the Administrative Appeals Tribunal for external review if the issue has not been resolved by internal merits review.<sup>46</sup> Access to internal and external review of the CEO's decision in relation to plan variation or reassessment and the provision of reasons for such a decision would likely serve as an important safeguard and would assist with the proportionality of this measure.

1.43 Noting that the statement of compatibility did not address the extent to which this measure may engage and limit a number of human rights, further information is required to assess the human rights compatibility of this measure, in particular:

- (a) what is the specific objective being pursued by enabling the CEO to vary or reassess a participant's NDIS plan on their own initiative, and how does this promote general welfare;
- (b) why is the CEO's power to vary a participant's plan not limited to changes that would benefit the participant;
- (c) why is the participant's consent not required for a plan variation or reassessment;
- (d) in relation to the requirement to involve the participant in a plan variation:
  - (i) will the participant be notified of the CEO's intention to initiate a plan variation prior to the CEO initiating the variation process;
  - (ii) will the participant genuinely be able to influence the outcome of the CEO's decision to vary a plan;
  - (iii) to what extent is the participant's consent an objective of the consultation process, and what weight will be given to the participant's will and preferences;

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44 Schedule 1, item 39.

45 Schedule 1, item 40; explanatory memorandum, p. 16.

46 Explanatory memorandum, p. 25.

- (iv) will there be guidance to assist the CEO in effectively involving the participant in any decisions and processes that affect them; and
  - (v) will the participant be able to access support, if desired, to effectively participate in the consultation process.
- (e) what other safeguards, if any, accompany the measure to ensure that any limitation on rights is proportionate; and
- (f) has consideration been given to alternative, less rights restrictive measures.

### **Committee view**

**1.44** The committee notes that this bill would allow an NDIS participant's plan to either be varied or reassessed on the CEO's own initiative or on request of the participant. The matters to which the CEO must have regard in deciding whether to vary or reassess a participant's plan on their own initiative are to be set out in the NDIS rules.

**1.45** The committee notes that a number of the measures in the bill would promote or facilitate the realisation of some of Australia's obligations under the Convention on the Rights of Persons with Disabilities. However, the committee notes that allowing the CEO, on their own initiative and without the participant's consent, to vary or reassess a participant's plan, engages and may limit a number of rights. In particular, where a participant's supports are reduced or adversely changed as a result of the CEO varying or reassessing the participant's plan, the measure would engage and may limit the rights to health and an adequate standard of living, as well as the rights of persons with disability, including the right to live independently and be included in the community. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

**1.46** The committee notes that the statement of compatibility did not acknowledge that this measure may engage and limit these rights and so does not provide an assessment as to the compatibility of this measure with these rights. The committee considers there are questions as to the objective being pursued by this measure and whether it is a proportionate means of achieving this objective, particularly as much of the detail is to be included in the as yet unmade NDIS rules.

**1.47** 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 [1.43].

## Legislative Instruments

### Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 2) Determination 2021 [F2021L01463]<sup>1</sup>

<b>Purpose</b>	This legislative instrument establishes an automatic exemption for fully vaccinated Australian citizens and permanent residents to depart Australian territory, provided they meet the specified criteria from 1 November 2021
<b>Portfolio</b>	Health
<b>Authorising legislation</b>	<i>Biosecurity Act 2015</i>
<b>Last day to disallow</b>	This instrument is exempt from disallowance (see subsections 44(3) and 477(2) of the <i>Biosecurity Act 2015</i> )
<b>Rights</b>	Freedom of movement, private life, equality and non-discrimination

#### Exemption to the overseas travel ban

1.48 Since 25 March 2020, Australian citizens and permanent residents have been prohibited from leaving Australian territory unless they have an exemption.<sup>2</sup> This has been declared by the Minister for Health using emergency powers under the *Biosecurity Act 2015* intended to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australia. A person who fails to comply with this requirement may be subject to a criminal offence, punishable by imprisonment for a maximum of five years, or 300 penalty units, or both.<sup>3</sup>

1.49 The Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 2) Determination 2021 (the determination) sets out an exemption from the ban from 1 November 2021 for persons who have completed a course of a COVID-19 vaccination at least seven days prior to travelling, and can show evidence of this.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 2) Determination 2021 [F2021L01463], *Report 13 of 2021*; [2021] AUPJCHR 132.

2 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2021C00819].

3 *Biosecurity Act 2015*, subsection 479(3).

1.50 In addition, there already exists the power for officials to grant an exemption, in writing, from the travel ban in 'exceptional circumstances', which can be demonstrated by 'providing a compelling reason for needing to leave Australian territory'.<sup>4</sup> The determination removes the requirement that the exemption must be in writing for two groups, namely: for children under 12 years of age on the date of travel; and persons who have evidence that they are listed on the Australian Immunisation Register as having a medical contraindication to COVID-19 vaccines. As a result, exemptions from the travel ban could be given orally.

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

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

1.51 The committee has considered the human rights issues raised by the overseas travel ban on a number of occasions,<sup>5</sup> most recently stating there is a risk that the longer these emergency powers continue, the less likely it is to be considered a temporary measure and the more likely it is to constitute a significant interference with rights, and emphasising the importance that it be accompanied by sufficient safeguards.<sup>6</sup> By adding an automatic exemption from the travel ban for vaccinated travellers, the measure promotes the right to freedom of movement and the right to a private life, by allowing a greater number of people to leave Australia without the need to apply for an exemption. The right to freedom of movement encompasses the right to move freely within a country, and the right to leave any country, including a person's own country.<sup>7</sup> The right to a private life prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.<sup>8</sup> A private life is linked to notions of personal autonomy and human dignity, and includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

1.52 Applying the automatic exemption from the travel ban only to vaccinated travellers engages the right to equality and non-discrimination.<sup>9</sup> This right provides

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4 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [[F2021C00819](#)], section 7.

5 See Parliamentary Joint Committee on Human Rights, [Report 5 of 2020](#) (pp. 19-21); [Report 7 of 2020](#) (pp. 7-10); [Report 12 of 2020](#) (pp. 6- 14); [Report 6 of 2021](#) (pp. 2-7); [Report 8 of 2021](#) (pp. 2-12 and pp. 39-56); and [Report 12 of 2021](#) (pp. 79-104).

6 See Parliamentary Joint Committee on Human Rights, [Report 12 of 2021](#) (pp. 79-104).

7 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].

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

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

that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.<sup>10</sup> Discrimination occurs if a measure is directed towards, or exclusively or disproportionately affects, people with a particular protected attribute.<sup>11</sup> These protected attributes 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. Vaccination status is not one of these protected attributes, so treating unvaccinated persons differently, by only exempting vaccinated travellers from the travel ban, does not constitute direct discrimination under international human rights law.

1.53 However, 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. If there are groups who are unable to get vaccinated, such as on the basis of their age or disability,<sup>12</sup> limiting the exemption to only those who are vaccinated may indirectly discriminate against these groups. However, differential treatment will not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.<sup>13</sup>

1.54 In this case, those under the age of 12 years are not currently eligible to receive the COVID-19 vaccination, and there are some people who have a recognised medical contraindication to the COVID-19 vaccines<sup>14</sup> on the basis of their pre-existing impairment. For these groups there is no automatic exemption from the travel ban,

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10 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.

11 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2].

12 If there were evidence of certain groups having lower rates of vaccination, for example, on the basis of vaccine availability in certain locations; lower rates among certain minority groups; or because of religious views, this might constitute indirect discrimination on the basis of a protected attribute, such as residence, race or religion. However, as noted above, differential treatment will not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

13 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

14 See Australian Technical Advisory Group on Immunisation (ATAGI), *Clinical guidance on use of COVID-19 vaccine in Australia in 2021*, version 7.0, 19 August 2021.



and as such they may be disproportionately affected by the ban on the basis of their age or disability. This determination provides, in relation to these groups, that they may be granted an exemption from the travel ban without the need for officials to set out the exemption in writing. However, they must still demonstrate that they have a compelling reason for needing to leave Australia. This is not something that vaccinated travellers must demonstrate.

1.55 The explanatory statement does not explain why those who are unable to get vaccinated on the basis of age or disability are not automatically exempted from the travel ban, and as there is no statement of compatibility<sup>15</sup> accompanying the determination, no information is provided as to how this differential treatment is based on reasonable and objective criteria such that it is reasonable, necessary and proportionate.

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

- (a) why there is no automatic exemption from the travel ban for people who are unable to receive a COVID-19 vaccination on the basis of their age or disability (such as children under 12 years old and those who have a recognised medical contraindication to the vaccine);
- (b) in practice, how will the exemption process likely work for these groups, including whether they could get the exemption on the day of travel, and what recourse would they have were an exemption not granted; and
- (c) how excluding these groups from the automatic exemption process is compatible with the right to equality and non-discrimination.

### **Committee view**

**1.57 The committee notes this determination provides an exemption from the overseas travel ban for persons who have completed a course of a COVID-19 vaccination at least seven days prior to travelling and can show evidence of this. It also removes the requirement that exemptions for those who can provide a compelling reason for needing to leave Australian territory, be in writing, if it relates to children under 12 or those with recognised medical contraindication to the COVID-19 vaccines.**

**1.58 The committee considers that by adding an automatic exemption from the travel ban for vaccinated travellers, the measure promotes the right to freedom of movement and the right to a private life, by allowing a greater number of people to leave Australia without the need to apply for an exemption.**

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15 As this legislative instrument is exempt from disallowance, it is not required under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* to include a statement of compatibility.

**1.59** The committee notes that the right to equality and non-discrimination applies to those with a protected attribute recognised under international human rights law, such as race, sex, nationality or disability. The committee considers that a person's vaccination status, or opposition to vaccination, is not a protected attribute, and as such, treating unvaccinated persons differently, by only exempting vaccinated travellers from the travel ban, does not constitute direct discrimination against unvaccinated persons. The committee notes that as there are some people who are currently ineligible to receive a COVID-19 vaccination (children aged under 12 and a small number with recognised medical contraindications to the vaccines), not providing an automatic exemption from the travel ban for these groups may constitute indirect discrimination on the basis of age or disability. The committee notes that differential treatment will not constitute unlawful discrimination if it is based on reasonable and objective criteria.

**1.60** As there is no statement of compatibility accompanying this determination,<sup>16</sup> further information is required to fully assess the human rights compatibility of this measure. Given the human rights implications of legislative instruments dealing with the COVID-19 pandemic, the committee reiterates<sup>17</sup> that it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility.

**1.61** 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 determination, and as such seeks the minister's advice as to the matters set out at paragraph [1.56].

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16 The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9, provides that only legislative instruments subject to disallowance under the *Legislation Act 2003* require a statement of compatibility. As this legislative instrument is exempt from disallowance it is not required by law to be accompanied by a statement of compatibility.

17 The committee first stated this in Parliamentary Joint Committee on Human Rights, *Report 5 of 2020: Human rights scrutiny of COVID-19 legislation*, 29 April 2020. The committee also wrote to all ministers advising them of the importance of having a detailed statement of compatibility with human rights for all COVID-19 related legislation in April 2020 (see media statement of 15 April 2020, available on the committee's [website](#)).

## Defence (Prohibited Substances) Determination 2021 [F2021L01452]<sup>1</sup>

<b>Purpose</b>	This instrument revises the types of substances for which members of the Australian Defence Force may be tested
<b>Portfolio</b>	Defence
<b>Authorising legislation</b>	<i>Defence Act 1903</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the House of Representatives on 25 October 2021). Notice of motion to disallow must be given by 4 <sup>th</sup> sitting day in 2022 in the House of Representatives <sup>2</sup>
<b>Rights</b>	Work, privacy, equality and non-discrimination

### Drug testing of Australian Defence Force members

1.62 Part VIIIA of the *Defence Act 1903* (the Act) provides for the drug testing of Australian Defence Force (ADF) members. It provides that the Chief of the Defence Force (the Chief) may, by legislative instrument, determine that a substance, or a substance included in a class of substances, is prohibited.<sup>3</sup> A defence member or defence civilian<sup>4</sup> (an ADF member) can be tested for the presence of any prohibited substance,<sup>5</sup> and if they test positive the Chief must invite them to give a written statement of reasons as to why their service should not be terminated.<sup>6</sup> The Chief 'must' terminate the person's service if they do not give such a statement within the

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Defence (Prohibited Substances) Determination 2021 [F2021L01452], *Report 13 of 2021*; [2021] AUPJCHR 133.

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 *Defence Act 1903*, section 93B.

4 *Defence Act 1903*, section 93 defines 'defence civilian' as having the same meaning as in the *Defence Force Discipline Act 1982*. Section 3 of the *Defence Force Discipline Act 1982* defines 'defence civilian' as meaning a person (other than a defence member) who with the authority of an authorized officer, accompanies a part of the Defence Force that is outside Australia, or on operations against the enemy, and has consented to subject themselves to Defence Force discipline.

5 *Defence Act 1903*, section 94.

6 *Defence Act 1903*, section 100.

period specified in the notice, or having considered the statement, the Chief is of the opinion that the service should be terminated.<sup>7</sup>

1.63 This determination specifies the substances that are prohibited under this regime. It lists nine specific types of drugs, but also lists substances in eight classes under the World Anti-Doping Code International Standard Prohibited List 2021 (World Anti-Doping list) and substances listed in three schedules in the 2021 Poisons Standard. The classes of drugs specified under the World Anti-Doping list are broad and the list states that these include:

- (a) anabolic agents: which may be found in medications used for the treatment of e.g. male hypogonadism;
- (b) peptide hormones, growth factors, related substances, and mimetics: which may be found in medications used for the treatment of e.g. anaemia, male hypogonadism and growth hormone deficiency;
- (c) hormone and metabolic modulators: which may be found in medications used for the treatment of e.g. breast cancer, diabetes, infertility (female) and polycystic ovarian syndrome;
- (d) stimulants: which may be found in medications used for the treatment of e.g. anaphylaxis, attention deficit hyperactivity disorders (ADHD) and cold and influenza symptoms;
- (e) narcotics: which may be found in medications used for the treatment of e.g. pain, including from musculoskeletal injuries; and
- (f) glucocorticoids: which may be found in medications used for the treatment of e.g. allergy, anaphylaxis, asthma and inflammatory bowel disease.<sup>8</sup>

1.64 In addition, Schedules 4, 8 and 9 of the 2021 Poisons Standard<sup>9</sup> are included in the determination to be prohibited substances. These schedules include a long list of prescription-only medication, controlled substances and prohibited substances.

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

### ***Rights to work and privacy***

1.65 Determining a broad list of substances that can lead to the termination of an ADF member's service unless they can provide sufficient reasons not to have their

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7 *Defence Act 1903*, section 101.

8 World Anti-Doping Code International Standard Prohibited List 2021, p. 2.

9 The determination specifies in section 5 that 'Poisons Standard mean the Poisons Standard June 2021, as in force on 1 June 2021', although it is noted that this standard is no longer in force, as it appears it has been replaced by the Poisons Standard October 2021 [F2021L01345].

service terminated, engages and limits the right to work. The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.<sup>10</sup> This right must be made available in a non-discriminatory way.<sup>11</sup>

1.66 Further, requiring ADF members to provide reasons for why they have taken a particular prohibited substance, which may require them to specify particular medical conditions they are receiving treatment for, engages and limits the right to a private life. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home, which includes a requirement that the state does not arbitrarily interfere with a person's private and home life.<sup>12</sup> A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

1.67 The rights to work and a private life 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.

1.68 In addition, as ADF members with certain attributes or medical conditions may be more likely to be required to take prohibited substances (e.g. people with intersex variations and those people transitioning genders are more likely to undergo hormone replacement therapy, and females are more likely to be receiving treatment for polycystic ovarian syndrome), the measure also engages the right to equality and non-discrimination,<sup>13</sup> including the rights of persons with disability.<sup>14</sup> The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.<sup>15</sup> The right to equality encompasses both 'direct'

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

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

12 The UN 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).

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

14 See the Convention on the Rights of Persons with Disability.

15 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.

discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).<sup>16</sup> 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, such as sex, gender or disability.<sup>17</sup> Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.<sup>18</sup>

1.69 However, the statement of compatibility accompanying the determination states that it engages no human rights, and as such it provides no information as to what the objective is in prohibiting these substances and how the measure is proportionate to achieve the stated objective. The explanatory statement also provides no information as to why the specific substances are included as banned substances, stating only that the purpose is to update the substances for which members of the ADF may be tested. It does not explain why it is necessary to have such a broad list of prohibited substances. In particular, it is unclear why all substances banned by a sporting code (being the World Anti-Doping list) need to be banned for all ADF members at all times. It is unclear if it is considered that these drugs will enhance an ADF member's physical performance, affect their performance, or interfere with military discipline. It is also not clear if there are any safeguards in place for persons with ongoing medical conditions, including the amount of detail that is required to be provided to explain why medication is being taken.

1.70 Further information is required in order to assess the compatibility of this measure with the rights to work, a private life, and equality and non-discrimination, in particular:

- (a) what is the legitimate objective sought to be achieved by prohibiting the substances in this determination;

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

17 *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'.

18 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

- (b) why it is considered necessary to include a broad list of prohibited substances, including banned substances developed in the context of sport; and
- (c) what, if any, safeguards exist to ensure that any limitation on rights is proportionate, particularly for persons with ongoing medical conditions. In particular, where a person has a medical condition that requires the taking of any of these prohibited substances, what level of detail are they required to provide to their employer as to why they are taking this substance and whether they are required to explain this each time the substance is detected.

### **Committee view**

**1.71** The committee notes this determination provides that the Chief of the Defence Force (the Chief) may, by legislative instrument, determine that a substance is prohibited. If an Australian Defence Force member tests positive for a prohibited substance, the Chief must invite them to give a written statement of reasons as to why their service should not be terminated. The committee notes that the determination specifies the substances that are prohibited, which includes nine specific types of drugs, but also lists substances in eight classes under the World Anti-Doping Code International Standard Prohibited List 2021 and substances listed in three schedules in the 2021 Poisons Standard.

**1.72** The committee notes that determining a broad list of substances that can lead to the termination of an ADF member's service unless they can provide sufficient reasons not to have their service terminated, engages and limits the right to work and the right to privacy. The committee further notes that the measure may have a disproportionate effect on ADF members with certain attributes or medical conditions who may be more likely to be required to take prohibited substances, and so may limit the right to equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

**1.73** The committee notes that the statement of compatibility does not recognise that any human rights are engaged and as such provides no information as to the compatibility of the measure with human rights.

**1.74** 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 instrument, and as such seeks the minister's advice as to the matters set out at paragraph [1.70].

## Bills and instruments with no committee comment<sup>1</sup>

1.75 The committee has no comment in relation to the following bills which were introduced into the Parliament between 18 and 28 October 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:<sup>2</sup>

- Aged Care Amendment (Making Aged Care Fees Fairer) Bill 2021;
- Climate Change (National Framework for Adaptation and Mitigation) Bill 2021;
- Climate Change (National Framework for Adaptation and Mitigation) (Consequential and Transitional Provisions) Bill 2021;
- Coal Prohibition (Quit Coal) Bill 2021;
- Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021;
- Corporations Amendment (Meetings and Documents) Bill 2021;
- Electoral Legislation Amendment (Assurance of Senate Counting) Bill 2021;
- Electoral Legislation Amendment (Contingency Measures) Bill 2021;
- Financial Accountability Regime Bill 2021;
- Financial Sector Reform (Hayne Royal Commission Response No. 3) Bill 2021;
- Financial Services Compensation Scheme of Last Resort Levy Bill 2021;
- Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2021;
- Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2021;
- Migration Amendment (Temporary Visa Extensions and Reinstatements) Bill 2021;
- National Health Amendment (Enhancing the Pharmaceutical Benefits Scheme) Bill 2021;

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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 13 of 2021*; [2021] AUPJCHR 134.

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.



- National Redress Scheme For Institutional Child Sexual Abuse Amendment (Funders Of Last Resort And Other Measures) Bill 2021;
- Offshore Electricity Infrastructure (Consequential Amendments) Bill 2021;
- Offshore Petroleum And Greenhouse Gas Storage Amendment (Stopping PEP11) Bill 2021;
- Offshore Petroleum (Laminaria And Corallina Decommissioning Cost Recovery Levy) Bill 2021;
- Protecting Pensioners from the Cashless Debit Card Bill 2021;
- Privacy (Covid Check-in Data) Bill 2021;
- Spam Amendment (Unsolicited Political Communications) Bill 2021;
- Statute Law Amendment (Prescribed Forms) Bill 2021;
- Superannuation Guarantee (Administration) Amendment Bill 2021;
- Telstra Corporation and Other Legislation Amendment Bill 2021;
- Treasury Laws Amendment (Enhancing Superannuation Outcomes For Australians And Helping Australian Businesses Invest) Bill 2021;
- Treasury Laws Amendment (Laminaria and Corallina Decommissioning Cost Recovery Levy) Bill 2021;
- Unsolicited Political Communications Legislation Amendment Bill 2021; and
- Veterans' Affairs Legislation Amendment (Exempting Disability Payments From Income Testing and Other Measures) Bill 2021.

1.76 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 5 and 27 October 2021.<sup>3</sup> The committee has reported on two legislative instruments from this period earlier in this chapter. The committee has determined not to comment on the remaining instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

1.77 The committee notes that this registration period includes the Autonomous Sanctions (Designated and Declared Persons—Myanmar) Amendment (Continuation of Effect) Instrument 2021 [F2021L01407]. The committee has considered the human

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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>.

rights compatibility of similar instruments on a number of occasions.<sup>4</sup> As this legislative instrument does not appear to designate or declare any individuals who are likely to be currently within Australia's jurisdiction, the committee makes no comment in relation to this specific instrument at this time.

***Private members' and senators' bills that may limit human rights***

1.78 The committee notes that the following private members' and senators' bills appear to engage and may limit human rights. Should these bills proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill:

- Australian Federal Integrity Commission Bill 2021 (member's bill);
- Australian Federal Integrity Commission Bill 2021 (senator's bill);
- Commonwealth Electoral Amendment (Disclosure of Political Donations) Bill 2021;
- COVID-19 Vaccination Status (Prevention of Discrimination) Bill 2021;
- Commonwealth Electoral Amendment (Stop the Lies) Bill 2021; and
- Social Media (Basic Expectations and Defamation) Bill 2021.

**Dr Anne Webster MP**

**Chair**

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4 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 8 of 2021* (23 June 2021) pp. 27-35; *Report 10 of 2021* (25 August 2021) pp. 117-128; *Report 2 of 2019* (2 April 2019) pp. 112-122; *Report 6 of 2018* (26 June 2018) pp. 104-131. See also *Report 4 of 2018* (8 May 2018) pp. 64-83; *Report 3 of 2018* (26 March 2018) pp. 82-96; *Report 9 of 2016* (22 November 2016) pp. 41-55; *Thirty-third Report of the 44th Parliament* (2 February 2016) pp. 17-25; *Twenty-eighth Report of the 44th Parliament* (17 September 2015) pp. 15-38; *Tenth Report of 2013* (26 June 2013) pp. 13-19; *Sixth Report of 2013* (15 May 2013) pp. 135-137.