

Chapter 1¹

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 21 to 24 June 2021;
- legislative instruments registered on the Federal Register of Legislation between 11 to 24 June 2021;² and
- one legislative instrument previously examined which the committee is seeking a further response.³

1.2 The committee has deferred its consideration of one bill from this period, namely the Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 9 of 2021*; [2021] AUPJCHR 81.

2 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.

3 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 [F2021L00727].

Further response required

1.3 The committee seeks a further response from the relevant minister with respect to the following legislative instrument.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 [F2021L00727]¹

Purpose	This legislative instrument extends the human biosecurity emergency period for a further three months until 17 September 2021
Portfolio	Health and Aged Care
Authorising legislation	<i>Biosecurity Act 2015</i>
Last day to disallow	This instrument is exempt from disallowance (see subsections 475(2) and 477(2) of the <i>Biosecurity Act 2015</i>)
Rights	Life; health; freedom of movement; equality and non-discrimination; privacy

1.4 The committee requested a response from the minister in relation to the legislative instrument in [Report 8 of 2021](#).²

Extension of the human biosecurity emergency period

1.5 On 18 March 2020 the Governor-General declared that a human biosecurity emergency exists regarding the listed human disease 'human coronavirus with pandemic potential', namely COVID-19.³ Sections 475 and 476 of the *Biosecurity Act 2015* (Biosecurity Act) allow the Governor-General to make, and extend, the human biosecurity emergency period for a period of up to three months if the Minister for Health is satisfied of certain criteria. During a human biosecurity emergency period, sections 477 and 478 of the Biosecurity Act allow the Minister for Health to determine

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 [F2021L00727], *Report 9 of 2021*; [2021] AUPJCHR 82.

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2020* (23 June 2021), pp. 2-12.

3 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 [F2020L00266] was made pursuant to section 475 of the *Biosecurity Act 2015*.

emergency requirements, or give directions, that he or she is satisfied are necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australian territory or part of Australian territory. A person who fails to comply with an emergency requirement or direction may commit a criminal offence, punishable by imprisonment for a maximum of five years, or 300 penalty units, or both.

1.6 This instrument extends the human biosecurity emergency period for a further three months until 17 September 2021, unless further extended by the Governor-General. The effect of this instrument is that any determinations made under section 477 of the Biosecurity Act that are still in effect will continue to apply for the duration of the human biosecurity emergency period (unless revoked earlier).⁴ These include:

- mandatory pre-departure COVID-19 testing and mask wearing for passengers and aircrew travelling on an international flight to Australia;⁵
- restrictions on cruise ships entering Australian territory or ports;⁶
- a ban on Australian citizens or permanent residents from leaving Australia as a passenger on an outgoing aircraft or vessel unless otherwise exempted;⁷ and
- restrictions on the trade of retail outlets at international airports.⁸

Summary of initial assessment

Preliminary international human rights legal advice

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

1.7 The extension of the human biosecurity emergency period, and the consequent extension of the mandatory pre-departure testing and mask wearing, restrictions on cruise ships, overseas travel ban, and restrictions on the trade of retail outlets at international airports, for a further three months, engages a number of human rights. As the measures are intended to prevent the spread of COVID-19, which

4 Explanatory statement, p. 3.

5 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements – Incoming International Flights) Determination 2021 [F2021L00061].

6 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Determination 2020 [F2020C00809].

7 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2021C00358].

8 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Retail Outlets at International Airports) Determination 2020 [F2020C00725].

has the ability to cause high levels of morbidity and mortality, the instrument may promote the rights to life and health.⁹ The right to life requires States parties to take positive measures to protect life.¹⁰ The United Nations (UN) Human Rights Committee has stated that the duty to protect life implies that States parties should take appropriate measures to address the conditions in society that may give rise to direct threats to life, including life threatening diseases.¹¹ The right to health requires that States parties shall take steps to prevent, treat and control epidemic diseases.¹² With respect to the COVID-19 pandemic specifically, the UN Human Rights Committee has expressed the view that 'States parties must take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction'.¹³

1.8 However, extending the biosecurity emergency period, and thereby continuing to enliven the various powers under the Biosecurity Act and extending existing determinations, is likely to engage and limit a number of rights, including the rights to freedom of movement, equality and non-discrimination and the right to a private life. The right to freedom of movement encompasses the right to move freely within a country, including all parts of federal States, and the right to leave any country, including a person's own country.¹⁴ It encompasses both the legal right and practical ability to travel within and leave a country and includes the right to obtain the necessary travel documents to realise this right.¹⁵ The freedom to leave a country may not depend on any specific purpose or the period of time the individual chooses to stay outside the country, meaning that travelling abroad and permanent emigration are both protected.¹⁶ Insofar as the effect of the instrument is the continued prevention of Australian citizens and permanent residents from travelling outside Australia (unless an exemption applies) and cruise ships from entering Australian territory or Australian ports (unless an exemption applies), the right to move freely

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

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

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

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

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

14 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].

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

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

within a country and the right to leave the country, including for travelling abroad, is limited.

1.9 The application of the travel ban to Australian citizens and permanent residents may limit the right to equality and non-discrimination, as the measure treats some people differently from others on the basis of nationality. The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, including on the grounds of nationality.¹⁷ The measures may also limit the right to a private life as the restriction of movement and trade involves interference with a person's private life. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.¹⁸ This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.¹⁹

1.10 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and is proportionate to that objective. In the context of the COVID-19 pandemic, the UN Human Rights Committee has indicated that implementing emergency and temporary measures may be necessary to protect the rights to life and health. It acknowledged that such 'measures may, in certain circumstances, result in restrictions on the enjoyment of individual rights guaranteed by the Covenant'.²⁰ Where such restrictions are necessary, they should be 'only to the extent strictly required by the exigencies of the public health situation' and pursue the 'predominant objective' of restoring 'a state of normalcy'.²¹ The sanctions imposed in connection with any emergency and temporary measures must also be proportionate in nature.²² Noting the UN Human Rights Committee's advice and the evolving situation of the COVID-19 pandemic, it is important to periodically assess the necessity and proportionality of each extension of the human biosecurity emergency period and the consequent extension of the relevant emergency powers. Regular assessment of emergency measures that restrict rights will help to ensure that they are only to the

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

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

19 The United Nations Human Rights Committee further explains that this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons: *General Comment No. 16: Article 17* (1988).

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

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

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

extent strictly necessary and pursue the predominant objective of restoring a state of normalcy.

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

- (a) whether there are effective safeguards or controls over each of these measures, including the possibility of monitoring and access to review;
- (b) in relation to the exemption process under the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020, since the outward travel ban was imposed:
 - (i) how many applications for exemptions have been made and of those, how many have been granted or denied;
 - (ii) what are the main reasons why exemption applications have been granted and the main reasons why exemptions have been denied;
 - (iii) what are the top 20 countries where exemptions have been granted for travel, and what are the top 20 countries where exemptions have been denied for travel;
 - (iv) what is the basis for not applying the 'exceptional circumstances' individual exemption criteria to Papua New Guinea and India, and has any assessment been made as to whether this will have a disproportionate effect on persons on the basis of nationality;
 - (v) what controls are there over the decisions made by departmental officers to grant or not grant exemptions, and are there any internal review processes over such decisions; and
- (c) whether there are any other less rights restrictive ways to achieve the stated objectives.

Committee's initial view

1.12 These measures which are designed to prevent the spread of COVID-19, promote the rights to life and health, but may also limit the right to freedom of movement, equality and non-discrimination and the right to a private life.

1.13 As there was no statement of compatibility accompanying this instrument, questions remained as to whether all of the measures were reasonable, necessary and proportionate, and so the committee sought the minister's advice as to the matters set out at paragraph [1.11].

1.14 The full initial analysis is set out in [Report 8 of 2021](#).

Minister's response²³

1.15 The minister advised:

Governor-General's extension to the human biosecurity emergency period

The extension of the human biosecurity period is necessary to ensure the Minister for Health can continue to exercise the emergency powers under the *Biosecurity Act 2015* (Act) to determine requirements or give directions necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australia.

The committee has previously noted that if the temporary measures were to be extended multiple times, the cumulative time period in which the measures could be in effect could be significant. The Governor-General agreed to extend the human biosecurity emergency period for a further three months until 17 September 2021, a decision that was informed by specialist medical and epidemiological advice provided by the Australian Health Protection Principal Committee (AHPPC) and the Chief Medical Officer. The AHPPC advised that the international COVID-19 situation continues to pose an unacceptable risk to public health and therefore the extension of the emergency period is an appropriate response to that risk to ensure the protection of the right to life and the right to health.

Determinations made under section 477 of the Act

In your report you note that it is necessary to periodically assess the necessity and proportionality of each extension of the human biosecurity emergency period and relevant emergency powers. Before determining an emergency requirement, I must be satisfied under section 477(4) of the Act the requirement is likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined, the requirement is appropriate and adapted to achieve the purpose for which it is to be determined, the requirement is no more restrictive or intrusive than is required in the circumstances, the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances and the period during which the requirement is to apply is only as long as is necessary.

These tests set by the legislation intrinsically ensure that each requirement is directed to a health need and is a necessary, appropriate, adapted and proportionate response to that health need. I have reviewed these tests and each of the requirements every time that I have recommend an extension of the emergency period.

23 The minister's response to the committee's inquiries was received on 19 July 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Concluding comments

International human rights legal advice

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

1.16 The minister advised that an extension of the biosecurity period for a further three months until 17 September 2021 was agreed to by the Governor-General following advice received from the Australian Health Protection Principal Committee and the Chief Medical Officer as the international COVID-19 situation continues to pose an unacceptable risk to public health. The minister also advised that before determining an emergency requirement, he must be satisfied that certain matters set out in the legislation are met. These matters ensure that each requirement is directed to a health need and is a necessary, appropriate, adapted and proportionate response to that health need.

1.17 The preliminary analysis noted that the control and prevention of the entry and spread of COVID-19 is likely a legitimate objective for the purposes of international human rights law. It noted that insofar as the instrument seeks to protect public health and the rights and freedoms of others and given the ongoing risk of people at sea and overseas contracting COVID-19, these measures appear to be rationally connected to that objective.²⁴ However, the preliminary analysis raised questions as to the proportionality of the instrument. In particular, questions were raised as to: whether the discretion to grant an exemption is sufficiently circumscribed and exercised in a manner that is compatible with human rights; whether there are sufficient controls over the measure, including the possibility of monitoring and oversight; and whether there are other less rights restrictive ways to achieve the objective being pursued.²⁵

1.18 The minister's response did not address the specific concerns raised. As such, without further information it is not possible to fully assess the human rights implications of this instrument.

24 See, Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020) pp. 7–10; *Report 12 of 2020* (15 October 2020) pp. 6–13; *Report 14 of 2020* (26 November 2020) pp. 71–81.

25 The United Nations Human Rights Committee has stated that '[w]here possible, and in view of the need to protect the life and health of others, States parties should replace COVID-19-related measures that prohibit activities relevant to the enjoyment of rights under the Covenant with less restrictive measures that allow such activities to be conducted, while subjecting them as necessary to public health requirements, such as physical distancing': *Statement on derogations from the Covenant in connection with the COVID-19 pandemic* (2020) [2(b)].

Committee view

1.19 The committee thanks the minister for this response. The committee notes that this instrument extends the human biosecurity emergency period for a further three months until 17 September 2021, which has the effect that the following determinations will continue in operation until the end of the human biosecurity emergency period:

- **mandatory pre-departure COVID-19 testing and mask wearing for passengers and aircrew travelling on an international flight to Australia;**
- **restrictions on cruise ships entering Australian territory or ports;**
- **a ban on Australian citizens or permanent residents from leaving Australia as a passenger on an outgoing aircraft or vessel unless otherwise exempted; and**
- **restrictions on the trade of retail outlets at international airports.**

1.20 As the committee has previously stated when these determinations were originally introduced, these measures, which are designed to prevent the spread of COVID-19, promote the rights to life and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires Australia takes steps to prevent, treat and control epidemic diseases.

1.21 The committee notes that these measures may also limit the right to freedom of movement, equality and non-discrimination and the right to a private life. In light of the unprecedented nature of the COVID-19 pandemic and the necessity for States to confront the threat of widespread contagion with emergency and temporary measures, the committee acknowledges that such measures may, in certain circumstances, restrict human rights. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.22 The committee notes with some disappointment that the minister's response did not answer the committee's specific questions. In order to fully assess the compatibility of the instrument with international human rights law, the committee reiterates its request that the minister provide specific advice as to:

- (a) whether there are effective safeguards or controls over each of these measures, including the possibility of monitoring and access to review;**
- (b) in relation to the exemption process under the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020, since the outward travel ban was imposed:
 - (i) how many applications for exemptions have been made and of those, how many have been granted or denied;****

- (ii) what are the main reasons why exemption applications have been granted and the main reasons why exemptions have been denied;**
- (iii) what are the top 20 countries where exemptions have been granted for travel, and what are the top 20 countries where exemptions have been denied for travel;**
- (iv) what is the basis for not applying the 'exceptional circumstances' individual exemption criteria to Papua New Guinea and India, and has any assessment been made as to whether this will have a disproportionate effect on persons on the basis of nationality;**
- (v) what controls are there over the decisions made by departmental officers to grant or not grant exemptions, and are there any internal review processes over such decisions.**

Bills and instruments with no committee comment¹

1.23 The committee has no comment in relation to the following bills which were introduced into the Parliament between 21 and 24 June 2021. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:²

- Coronavirus Economic Response Package Amendment (Ending Jobkeeper Profiteering) Bill 2021;
- Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021;
- Customs Amendment (Banning Goods Produced By Forced Labour) Bill 2021;
- Customs Amendment (2022 Harmonized System Changes) Bill 2021;
- Customs Tariff Amendment (2022 Harmonized System Changes) Bill 2021;
- Education Services for Overseas Students Amendment (Cost Recovery and Other Measures) Bill 2021;
- Education Services for Overseas Students (Registration Charges) Amendment Bill 2021;
- Education Services for Overseas Students (TPS Levies) Amendment Bill 2021;
- Family Assistance Legislation Amendment (Child Care Subsidy) Bill 2021;
- Financial Sector Reform (Hayne Royal Commission Response - Better Advice) Bill 2021;
- Independent National Security Legislation Monitor Amendment Bill 2021;
- No Domestic Covid Vaccine Passports Bill 2021;
- Ransomware Payments Bill 2021;
- Repatriation of Defence Data Bill 2021;
- Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021;
- Tertiary Education Quality and Standards Agency (Charges) Amendment Bill 2021; and
- Treasury Laws Amendment (2021 Measures No. 5) Bill 2021.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 9 of 2021*; [2021] AUPJCHR 83.

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.

1.24 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 11 and 24 June 2021.³ The committee has determined not to comment on the legislative instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

3 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.