Responses from legislation proponents — Report 5 of 2019[1]

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THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: SB19-001033

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Ian,

Thank you for your correspondence of 31 July 2019 requesting further information on the *Australian Crime Commission Regulations 2018*.

I have attached my response to the Parliamentary Joint Committee on Human Rights' Scrutiny Report 2 of 2019 and Scrutiny Report 3 of 2019, and a copy of the Australian Criminal Intelligence Commission's information handling protocol, as requested.

Yours sincerely

PETER DUTTON 11/08/19

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1. INTRODUCTION

1.1 On 1 July 2016, the Australian Criminal Intelligence Commission (ACIC)[1] was established with the merger of the Australian Crime Commission (ACC) and the CrimTrac Agency. The purpose of this merger was to strengthen Australia's ability to combat the unprecedented national security threat and stop criminals exploiting emerging opportunities and perceived gaps in law enforcement information through utilisation of the collective information and intelligence holdings of Australian law enforcement agencies in support of those agencies' functions.

1.2 The ACIC is uniquely equipped as Australia's national criminal intelligence agency with investigative and information delivery functions. Our role includes reducing serious and organised crime threats of most harm to Australians and the national interest and providing national policing information systems and services.

1.3 To perform our role and achieve our purpose, we work closely with national and international partners to:

- collect, correlate, analyse and disseminate criminal information and intelligence
- maintain a national database of criminal information and intelligence
- provide and maintain national information capabilities and services to support
- policing and law enforcement
- provide strategic criminal intelligence assessments and advice on national
- criminal intelligence priorities
- conduct investigations and intelligence operations into federally relevant criminal
- activity which may include the use of coercive powers such as examinations
- provide nationally coordinated criminal history checks
- support the production of crime and justice research to provide insights into responses to crime in collaboration with the Australian Institute of Criminology

1.4 The ACIC is subject to a robust accountability framework to ensure that it uses its statutory powers set out in the *Australian Crime Commission Act 2002* (Cth) (ACC Act) responsibly, effectively and in accordance with the law.

1.5 The ACIC is not subject to the *Privacy Act 1988* (Privacy Act). The ACIC's exemption from the Privacy Act is long standing and has been subject to a number of reviews[2]. The exemption reflects the need to balance an individual's right to privacy with the public interest in combating organised crime, and the tension between the exercise of the ACIC's unique coercive information-gathering powers and compliance with the Privacy Act. It also recognises the substantial protection currently afforded to sensitive information held by the ACIC including secrecy provisions, legislative restrictions on disclosure of ACIC information, examiner's confidentiality directions imposed by ACIC examiners, and comprehensive external oversight of the ACIC's activities.

1 The Australian Crime Commission is also known as the Australian Criminal Intelligence Commission (ACIC). The *Australian Crime Commission Act 2002* (Cth) and the regulations under that Act set out the legal foundation for the ACC/ACIC, including how the agency may be named as well as the functions, responsibilities and powers of the agency, its Chief Executive Officer, Board, examiners and members of staff. The acronym ACIC is used in this document to refer to the ACC except in terms incorporating the acronym ACC that are defined in that form in the Act.

2 See Part 37 of the ALRC Report 108 *For Your Information: Australian Privacy Laws & Practice* esp. para 37.45.

1.6 Schedule 1 to the Privacy Act contains the Australian Privacy Principles (APPs). The APPs set out the standards, rights and obligations that apply to Commonwealth agencies and private sector organisations in the handling, use and management of personal information.

1.7 This Information Handling Protocol[3] (the Protocol) outlines the ACIC's approach to managing personal information and gives effect to its commitment to act in accordance with the APPs wherever reasonably consistent with the effective performance of its statutory functions.

2. GENERAL PRINCIPLES

2.1 The ACIC holds three distinct categories of information which include personal information:

- criminal information and intelligence;
- national policing information (NPI); and
- administrative information - information relating to staff and other corporate matters.

2.2 The ACIC has internal policies and standard operating procedures that govern the management and security of information in accordance with the Protective Security Policy Framework. This Protocol, together with these internal policies and procedures, outlines the manner in which the ACIC manages personal information and ensures that, to the extent that is reasonably compatible with the effective performance of its functions, it complies with the APPs. To the extent the APPs are not compatible with ACIC functions, the ACIC will deal with personal information in a way that is reasonably necessary for the effective performance of those functions.

2.3 The ACIC has consulted with the OAIC in developing this Protocol.

3. COLLECTION OF PERSONAL INFORMATION

3.1 The ACIC has access to a number of investigative and other lawful tools for the purposes of performing its functions[4]. Personal information collected under these functions includes:

- information contributed to the ACIC's custodianship by, or for the use of, agencies with enforcement-related functions for the purposes of maintaining a national database[5] of criminal information and intelligence and for the purposes of providing systems and services relating to NPI; and
- criminal information and intelligence actively collected (including by the use of coercive powers, where appropriate) under the ACIC's general intelligence function (s7A(a) or for the purposes of operations/investigations authorised by the Board.

3.2 The ACIC may lawfully collect personal information about an individual from that individual or from a third party, and with or without the individual's consent, as part of its investigative and intelligence functions or its NPI functions. The ACIC does not notify an individual on whom it collects personal information for these functions of any of the matters set out in APP 5.

3.3 The ACIC will, if necessary, collect personal information from anonymous sources but the value of such information may be reduced by the lack of a verifiable source.[6] The ACIC will retain unsolicited personal information that has value as criminal information or intelligence.

3 This protocol is released under section 60 of the ACC Act to inform the public about the performance of the ACIC's functions. It does not address information held by the Australian Institute of Criminology which is not governed by the ACC Act.

4 A number of these are available to traditional policing agencies, but a number are not (e.g. ACC Act powers). A number are intrusive and in accordance with relevant legislation require warrants or other authorisations. Consistent with legislative and common law protections, information concerning how these techniques are employed by the ACIC and which ones are used in any particular circumstances, is not publicly released.

5 The ACIC may provide a database service via interconnected facilities between the data holdings of contributing agencies rather than receiving such data into a single database operated by the ACIC.

6 APP2 – Anonymity and pseudonymity.

3.4 The ACIC collects personal information as part of its National Police Checking Service. Accredited bodies collect and provide personal information to the ACIC on behalf of individuals and are authorised to apply for police checks on an applicant's behalf. Accredited bodies are required to deal with the personal information in accordance with the Privacy Act under contractual obligations with the ACIC. The processes by which the ACIC collects information for this purpose are lawful and well publicised and the nature of the processes, such as the consent based provision of personal information by the individual, do not leave room for unfair practices in collecting the information. [7]

3.5 The ACIC also collects personal information as part of the normal communication processes relating to the functions and activities of the agency, and personal information relating to corporate service functions.

4. USE AND DISCLOSURE OF PERSONAL INFORMATION

4.1 The ACIC may use or disclose information where it is permissible to do so under the ACC Act and other applicable legislation.[8]

4.2 ACC information is subject to the information protection provisions of the ACC Act which provide controls on the dissemination of any information in the ACIC's possession or acquired by members of staff in the course of their duties.

4.3 Section 51 of the ACC Act prohibits the ACIC CEO and staff, Board members and examiners, from recording, divulging or communicating to any person any information acquired by reason of, or in the course of, the performance of duties under the ACC Act, except where to do so is for the purposes of a relevant Act[9] or otherwise in connection with the performance of the person's duties under a relevant Act. Section 51 continues to apply even after the ACIC CEO and staff, Board members and examiners may have left the ACIC.

4.4 Breach of this secrecy provision is an offence punishable on conviction by imprisonment for a maximum of two years, a fine not exceeding 120 penalty units, or both.

4.5 The primary mechanism by which the ACIC discloses personal information in its possession to other government agencies (including foreign law enforcement agencies) is in accordance with section 59AA of the ACC Act. Disclosure may occur if the ACIC CEO, or delegate, considers it appropriate, disclosing the information is relevant to a permissible purpose (defined in s 4(1) of the ACC Act), and the disclosure would not be contrary to a Commonwealth, state or territory law.

4.6 The primary mechanism by which the ACIC discloses personal information to private sector bodies is in accordance with section 59AB of the ACC Act. Disclosure may occur if the ACIC CEO or delegate satisfy a number of additional statutory tests from those identified in s 59AA that take into account amongst other things safety of a person and prejudice to fair trial in disclosing information. Private sector bodies must also be prescribed by the regulations and must undertake in writing not to use or disclose that information except for the purpose for which it was shared with it. These provisions include additional statutory protections around disclosure of personal information and places obligations on recipients in receiving that information which, if breached, can lead to criminal charges.

> The Board or the CEO may publish bulletins for the purpose of informing the public about the performance of the ACIC's functions, but must not do so if such disclosure could prejudice the safety or reputation of a person, or prejudice the fair trial of a person if the person has been charged with an offence or such a charge is imminent.[10]

4.7 There are special rules under the ACC Act that apply to the disclosure of information from a nationally coordinated criminal history check. This information may be disclosed to the person to whom it relates and to an accredited body.

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8 APP6 - Use or disclosure of personal information.

9 According to the ACC Act, the term 'relevant Act' means the ACC Act, a law of a State under which the ACIC performs a duty or function, or exercises a power, in accordance with section 55A of the *ACC Act, the Law Enforcement Integrity Commissioner Act 2006* (Cth) or regulations under that Act, or the *Parliamentary Joint Committee on Law Enforcement Act 2010* (Cth) or regulations under that Act.

10 s60 of the ACC Act.

4.8 The ACIC has internal procedures for disclosure of ACIC information which evaluate compliance with source legislative restrictions as well as the ACC Act requirements and requirements for the handling of classified material under the Commonwealth's Protective Security Policy Frame work.

4.9 In addition to the general legislative restrictions on disclosure identified above, the disclosure of NPI is further restricted, by requiring ACIC Board approval before disclosure is made to a government body that is not prescribed in the ACC Act or Regulations as a recipient of NPI. [11]

5. DATA QUALITY & RETENTION

5.1 The nature of ACIC criminal intelligence is such that the accuracy of the information may be contestable. The ACIC takes reasonable steps to assess the reliability of source and other information in its criminal intelligence products and applies a rating prior to disclosure. However, the ACIC cannot guarantee the accuracy, completeness, relevance or currency of criminal intelligence.[12]

5.2 NPI is collected from a number of prescribed agencies who directly input information (including personal information) into or facilitate access via NPI systems or via automated systems uploads. The contributing agency is responsible for ensuring information can be lawfully provided to the ACIC. The ACIC does not alter, modify, validate or remove the information received from police agencies or prescribed agencies in NPI systems without the express consideration and agreement of the contributing agency.

5.3 Where the ACIC appropriately, in accordance with its powers under the ACC Act, collects bulk datasets in furtherance of its intelligence and investigation functions. The ACIC will only retain such information where it is necessary to do so for the performance of its functions, after being satisfied that, in the circumstances, the level of interference with individuals' rights to privacy (both of entities of interest and entities included in the datasets of no apparent intelligence or investigation interest) is justified by the expected value of intelligence or investigation outcomes to be derived from retaining the dataset.

5.4 Where the ACIC collects personal information from staff members, or from individuals under its National Police Checking Service, the ACIC will take all reasonable steps to ensure that information is accurate, up-to-date and complete.

6. STORAGE AND SECURITY OF PERSONAL INFORMATION

6.1 The ACIC deals with a diverse range of sensitive and classified information as part of its core business and is experienced in ensuring information is appropriately handled and secured. The ACIC has extensive (classified) policies and procedures that govern the security of all ACC information, including personal information. These include policies governing information and records management, information disclosure and information security.

6.2 Information held in/accessed via ACIC systems is protected from loss, unauthorised access, use, modification or disclosure through established data security measures. Data security measures include physical and system access restrictions, password protections, data encryption, and audit trails of user access to systems.

6.3 The ACIC complies with the Protective Security Policy Framework and the Information Security Manual and has an extensive integrity framework that protects the ACIC against misuse of ACC information and mitigates corruption risks that include unauthorised access and disclosure of information held by the ACIC.[13]

11 Section 59AA(1B) of the ACC Act
12 APP10 - Quality of personal information .
13 APP11 - Security of personal information.

7. DESTRUCTION AND DE-IDENTIFICATION OF INFORMATION

7.1 Identifying the threat picture from serious and organised crime involves analysis of information over time and often with a broad collection of information from a range of sources. There is generally a requirement for the ACIC to retain criminal information and intelligence subject to contrary lawful requirements. Retained information provides ongoing references required to support intelligence and also provides a baseline for later review, comparative analysis, and amendment. The ACIC adheres to the requirements of the *Archives Act 1983* (Cth) (Archives Act) and other legislation that prescribes requirements for retention and destruction of information such as the *Telecommunications (Interception and Access) Act 1979* (Cth) and *Surveillance Devices Act 2004* (Cth).

7.2 Any request for correction of data will be referred to the contributing agency for consideration in accordance with their statutory obligations.

8. OVERSIGHT

8.1 The ACIC is subject to a robust accountability framework. Should an individual have a complaint about how the ACIC deals with their personal information, in addition to avenues of access under the FOI Act and depending on the nature of that complaint, the ACIC's conduct can be examined by:

- **the Commonwealth Ombudsman** – who can investigate complaints about the ACIC's actions and decisions to see if they are wrong, unjust, unlawful, discriminatory or just plain unfair;
- **the Integrity Commissioner** – who can investigate allegations of corrupt activity by current and former staff of the ACIC, and
- **the Parliamentary Joint Committee on Law Enforcement** – whose role is to monitor and review the ACIC's performance.

Australian Crime Commission Regulations 2018

Conferral of powers under state laws

1.28 The measures appears to engage and limit a number of human rights. The preceding analysis raises questions as to whether the measures are compatible with international human rights law.

1.29 The committee notes that the minister responsible for administering the 2002 Regulations undertook to provide an assessment of whether the measures are compatible with human rights when the regulations were remade. However, no such assessment is included in the statement of compatibility to the 2018 Regulations.

1.30 Accordingly, and consistent with the committee's previous consideration of the measures, the committee requests the minister's advice as to:

- **the human rights engaged by sections 14(1) and (2) and Schedules 4 and 5 of the 2018 Regulations; and**

- **where those measures engage and limit human rights:**

    - **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**

    - **how the measure is effective to achieve (that is, rationally connected to) a legitimate objective; and**

    - **whether the measure is proportionate to achieving that objective (including whether there are any less rights-restrictive means of achieving the objective and the availability of any relevant safeguards).**

1.31 The committee also requests the minister's advice as to whether it would be feasible to amend the 2018 Regulations to require that any state powers conferred on the ACIC or its personnel which limit human right will only be exercisable where accompanied by the conferral of corresponding duties and safeguards in the relevant state law.

Duties, functions and powers conferred on the ACC, certain persons and bodies by State laws

For the purposes of subparagraphs 55A(2)(b)(ii) and (d)(ii) of the *Australian Crime Commission Act 2002* (ACC Act), subsection 14(1) and Schedule 4 of the *Australian Crime Commission Regulations 2018* (2018 Regulations) prescribe the duties, functions and powers provided in State or Territory laws that are conferred on the Australian Criminal Intelligence Commission (ACIC).

As set out under Schedule 4 of the 2018 Regulations, the duties, powers and functions that have been conferred on the ACIC primarily pertain to:

- the indemnity of officers, issuing agencies and authorised persons exercising conferred State or Territory powers during controlled operations or whilst using assumed identities
- the indemnity of participants in controlled operations against civil liabilities and from criminal responsibility, and
- receiving and recording information, including in relation to confidential information and the use of surveillance devices.

As such, subsection 14(1) and Schedule 4 of the 2018 Regulations engage the prohibition on arbitrary or unlawful interference with privacy, and the right to an effective remedy.

For the purposes of subparagraphs 55A(4)(b)(ii) and 5(b)(ii) of the ACC Act, subsection 14(2) and Schedule 5 of the 2018 Regulations prescribe the duties, functions and powers provided in State or Territory laws that are conferred on specified bodies and persons, being members of ACIC staff, the Board of the ACIC or the ACIC CEO.

As set out in Schedule 5 of the 2018 Regulations, the duties, powers and functions that have been conferred on members of ACIC staff, or the ACIC Board or the ACIC CEO primarily pertain to:

- duties and powers associated with authorising assumed identities, including the power to apply for an entry to be lodged with the relevant births, deaths and marriages authority of a State or Territory
- powers to apply for surveillance device warrants under State or Territory legislation
- duties and powers associated with authorising controlled operations, including duties to act in good faith and comply with lawful directions
- duties to report on controlled operations to State or Territory agencies, including corruption commissions, the ombudsman or the director of public prosecutions, and
- powers to grant and cancel witness identity protection certificates, including duties to consider certain information in making such decisions.

Prohibition on arbitrary or unlawful interference with privacy

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) provides that:

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
(2) Everyone has the right to the protection of the law against such interference or attacks.

Although the United Nations Human Rights Committee (UNHRC) has not defined 'privacy', the term is broadly understood to encompass freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. As discussed below, the 2018 Regulations do not have the effect of intruding into privacy on an unwarranted or unreasonable basis.

The term 'unlawful' means that no interference can take place except as authorised under domestic law. As the duties, powers and functions that are conferred on the ACIC under subsection 14(1) and Schedule 4 of the 2018 Regulations are provided for in State or Territory laws and constitute domestic laws, any impact they have on a person's privacy will not be 'unlawful'. Additionally, the term 'arbitrary' means that any imposition on privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. In this context, the UNHRC has interpreted 'reasonableness' to imply that any interference with privacy must be proportionate to the end sought and be necessary in the particular circumstances of the case. Whilst Article 17 of the ICCPR does not stipulate the purposes for which the right to privacy may be limited, the purposes of national security, public order and the protection of the rights and freedoms of others may be legitimate objectives for which such limitations are necessary.

These measures are intended to assist the ACIC in achieving its key functions under section 7A of the ACC Act which include to:

- collect, correlate, analyse and disseminate criminal information and intelligence and to maintain a national database of that information and intelligence
- undertake, when authorised by the Board, intelligence operations, and
- investigate, when authorised by the Board, matters relating to federally relevant criminal activity.

Without conferral of these powers under subsections 14(1)-(2) and Schedules 4 and 5, the ACIC would be restricted in its ability to effectively investigate criminal activities and to gather intelligence about crime impacting Australia. These powers contribute to the legitimate objective of enabling the ACIC to inform, and contribute to, national strategies to combat national security threats, amongst other things. Through the use of these state and territory powers in limited circumstances, usually in accordance with an ACIC Board approval for a special investigation or special intelligence operation, the ACIC is able to provide law enforcement agencies with a more comprehensive national picture of criminal intelligence. By collecting criminal intelligence, including through the lawfully authorised use of assumed identities and controlled operations, and disseminating this information, the ACIC also assists law enforcement agencies in continuing to protect the public order and the rights and freedoms of others by enhancing Australia's national ability to respond to and disrupt the activities of serious and organised crime groups that impact the safety and security of Australian communities.

As an example, in paragraph 1.24 of its Report, the Committee notes that the right to privacy, including respect for the privacy of the person's home, workplace and correspondence, is engaged and limited by the South Australian *Surveillance Devices Act 2016* (SA SDA). The SA SDA confers a number of intrusive powers on the CEO of the ACIC and ACIC staff. However, the ACIC notes that although these powers limit the right to privacy such a limitation is not arbitrary. This is because surveillance device warrants can only be applied for and granted if strict legislative requirements are met. For example, under subsection 15(1) of the SA SDA the chief officer of the ACIC must be satisfied that there are reasonable grounds for issuing the surveillance device (tracking) warrant, taking into account a range of matters including, amongst other things, the nature and gravity of the criminal conduct to which the investigation relates, and the availability of alternative means of obtaining information. Generally speaking, in addition to the other requirements, most legislation pertaining to surveillance devices also requires consideration of the extent to which the privacy of a person is likely to be affected. Furthermore, these powers are primarily accessed during the course of the ACIC undertaking an investigation into a federally relevant criminal activity, as authorised by the ACIC Board.

Further, in paragraph 1.25 of its Report, the Committee cites the power to receive 'confidential information' under the *First Home Owner Grants Regulations 2000* (WA) (FHOG Regulations) as an example of a limitation on the prohibition on interference with privacy. However, 'confidential information' under the FHOG Regulations may be disclosed to the ACIC only in connection with the investigation or prosecution of a criminal offence, pursuant to subsection 65(3) of the *First Home Owner Grant Act 2000* (WA). Similar restrictions apply in relation to the disclosure or receipt of information under other state and territory legislation

As such, whilst the duties, functions and powers conferred on the ACIC under provisions of state and territory laws engage and limit the right to privacy, the limitations are not unlawful or arbitrary in the circumstances. The use of conferred powers, duties and functions are proportionate and necessary to achieve the legitimate objectives of protecting public order, national security and the rights and freedoms of citizens, through the investigation of federally relevant criminal activity.

Right to an effective remedy

Article 2(3)(a) of the ICCPR provides that any person whose recognised rights or freedoms have been 'violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.' The UNHRC has interpreted the right to an effective remedy as encompassing an obligation for perpetrators of human rights abuses to be brought to justice and for reparation to be provided to victims of human rights abuses, as appropriate.

State and territory legislation listed in Schedule 4 of the 2018 Regulations confers on the ACIC various duties in relation to the indemnification of certain persons of civil and/or criminal liability incurred in certain circumstances. For instance, under some assumed identity legislation, the

ACIC must indemnify an issuing agency or officer for any liability incurred because of something they have done to comply with the request or direction, such as producing evidence of an assumed identity. There are similar duties in relation to controlled operations which have conferred on the ACIC under various state and territory legislation.

The use of controlled operations and assumed identities is an important investigative tool for law enforcement agencies. In the absence of legislation indemnifying participants, covert operatives would have to work without the assurance that they would not be prosecuted for conduct committed within the scope of an authorisation for a controlled operation. Given the importance of this investigative tool it is vital that operatives and/or civilians who participate in such dangerous work, such as infiltrating serious and organised criminal groups, are provided with adequate protections. Nonetheless, whilst there is a duty to indemnify participants and certain other persons, persons partaking in authorised controlled operations and investigations into federally relevant criminal activity are not permitted to engage in abuses of human rights, except as authorised by or under domestic Australian law. The provisions prescribed in Schedule 4 of the 2018 Regulations do not authorise the ACIC to violate human rights, or to commit human rights abuses, and do not remove the availability of all mechanisms through which a person may lodge a complaint about the ACIC. For example, the controlled operations provisions authorise participants to engage in some pre-approved and defined controlled conduct, but does not indemnify them from conduct causing death, serious injury or which involves the commission of a sexual offence against any person.

Additionally, there are rigorous legislative requirements for the application and grant of an authority of controlled operations and/or use of assumed identities. An authority for a controlled operation may only be granted if the authorising officer of a law enforcement agency is satisfied on reasonable grounds of matters that have been specified in the legislation. For example, a matter that may be specified for grant of controlled operations includes a requirement that the operation not be conducted in such a way that a person is likely to commit an offence the person would not otherwise have intended to commit, amongst other matters. An example of the kinds of matters specified for the grant of assumed identities includes a requirement that the chief officer be satisfied on reasonable grounds that the risk of abuse of the assumed identity by the authorised person is minimal. Therefore, a person will not be indemnified for conduct that is not authorised by the relevant authority.

Persons affected by the administrative actions of the ACIC are also entitled to lodge a complaint with the Commonwealth Ombudsman, pursuant to the *Ombudsman Act 1976*. The ACIC also has half yearly and yearly reporting requirements to the Commonwealth Ombudsman in relation to its use of controlled operations. The Australian Commission for Law Enforcement Integrity also maintains independent oversight of the ACIC, and has responsibility for investigating allegations of corruption by members of ACIC staff.

As Commonwealth officers, ACIC staff are also bound by Commonwealth anti-discrimination legislation, including the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. Individuals are entitled to lodge a complaint with the Australian Human Rights Commission (AHRC), who can investigate potential breaches of human rights and, if appropriate, attempt conciliation or make other recommendations for action. Individuals may also seek an enforceable remedy from a federal court, such as an apology or compensation, if the individual's complaint is not resolved by the AHRC.

As such, the limitation on the right to an effective remedy by these provisions are reasonable, necessary and proportionate because they further the legitimate objectives of protecting the public order, national security and the rights and freedoms of citizens, by providing the appropriate level of protection to persons who put themselves at risk.

Right to life and the prohibition on torture and cruel, inhuman and degrading treatment

Article 6(1) of the ICCPR provides that every human has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life. The Second Optional

Protocol to the ICCPR, to which Australia is a party, obliges States parties to abolish the death penalty.

Article 7 of the ICCPR also provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This prohibition is also articulated in article 3(2) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

The right to life and the prohibition on torture and cruel, inhuman and degrading treatment or punishment are rights from which no derogation is permitted.

Schedules 4, 5 and 6 of the 2018 Regulations confer various state and territory duties, functions and powers on the ACIC in relation to (amongst other things) the grant or refusal of authorities in relation to controlled operations, the power to engage in certain controlled conduct and more. These provisions may engage the right to life and the prohibition on torture, cruel, inhuman or degrading treatment or punishment. However, as already noted above, participants engaging in controlled conduct are not authorised to engage in abuses of human rights, except as authorised by or under domestic Australian law. For example, the controlled operations provisions authorise participants to engage in limited criminal activity, but does not indemnify participants for conduct causing death, serious injury or which involves the commission of a sexual offence against any person.

Therefore, the right to life and prohibition on torture, cruel, inhuman or degrading treatment or punishment are positively engaged by the controlled operation provisions in the various state and territory legislation, to the extent that those provisions do not authorise or indemnify participants for conduct that results in abuse of those human rights.

Fair trial and fair hearing rights

Article 14 of the ICCPR provides that every person has a right to 'a fair and public hearing' and extensive fair hearing rights, including minimum guarantees in the determining criminal charges brought against a person. The UNHRC has stated that the right to a fair trial and fair hearing rights may be limited in strict circumstances.

In paragraph 1.13 of its Report, the Committee notes that the right to a fair trial and fair hearing encompass notions of the fair administration of justice and prohibits the use of investigatory techniques that incite individuals to commit a criminal offence. In doing so, the Committee cited the European Court of Human Rights (ECtHR) case *Ramanauskas v Lithuania*, iterating that the ECtHR has consistently held that entrapment violates a person's right to a fair trial.

In the context of its Report, the Committee is referring to the use of investigatory techniques in controlled operations, raising concerns that controlled operations derogate fair trial and fair hearing rights. However, it should be noted that the ECtHR held in *Ramanauskas v Lithuania (No. 2)* that an undercover operation does not, in itself, engage or limit the right to a fair trial if there are 'clear, adequate and sufficient procedural safeguards' in place to differentiate permissible law enforcement conduct apart from entrapment.[1] Controlled operations are a valuable tool for investigating organised criminal activity, as such operations enable law enforcement officers to infiltrate criminal organisation and to target those in the higher echelons of those organisations.

Legislation that authorises the ACIC to use such investigatory techniques also contains safeguards. An authority to conduct a controlled operation cannot be granted unless an authorising officer is satisfied on reasonable grounds that the controlled operation will not be conducted in such a way that a person is likely to be induced to commit an offence that the person would not otherwise have intended to commit. For example, such safeguards are contained in paragraphs 15GI(2)(f) of the *Crimes Act 1914* (Cth), 14(d) of the *Crimes*

[1] *Ramanauskas v Lithuania (No. 2)*, European Court of Human Rights Application No. 55146/14 (20 February 2018) [52]-[54].

Controlled Operations) Act 2004 (Vic) and 4(2)(d) of the *Criminal Investigation (Covert Operations) Act 2009* (SA), as well as other equivalent state and territory legislation.

Such provisions have been designed to ensure that a controlled operation does not involve conduct that would constitute entrapment, occurring where a person is induced to commit an offence that they would not otherwise have intended to commit. Therefore, the provisions contained in the 2018 Regulations that pertain to controlled operations do not engage or limit the right to a fair trial or fair hearing rights, as there are sufficient safeguards in place to govern the use of these investigatory techniques.

Right to security of the person and freedom from arbitrary detention

Article 9(1) of the ICCPR provides that every person 'has the right to liberty and security of person' and that no person 'shall be subjected to arbitrary arrest or detention.'

In paragraph 1.12 of its Report, the Committee states that the right to liberty and security of the person is a procedural guarantee, and persons shall not be subjected to arrest or detention, except in accordance with lawfully established procedures. Schedules 4, 5 and 6 of the 2018 Regulations primarily pertain to different investigative methods, including the use of controlled operations, assumed identities and surveillance devices, and do not provide powers of arrest or detention. As such, the 2018 Regulations do not engage or limit the right to security of the person and freedom from arbitrary detention.

Amending the 2018 Regulations

The Committee has requested consideration as to whether it would be feasible to amend the 2018 Regulations to provide that the powers conferred on the ACIC, or on certain persons or bodies, under State and Territory laws may only be exercisable where corresponding duties and safeguards are also conferred by the relevant State or Territory law.

The ACIC considers amendments to the 2018 Regulations are not required because corresponding duties and safeguards have already been conferred by relevant state and territory laws. Some examples include:

- Item 74 of Part 6 of Schedule 5, prescribing the *Police Powers (Surveillance Devices) Act 2006* (Tas), which imposes a duty on a member of the staff of the ACIC to inform the chief officer if the use of a surveillance device is no longer necessary, and
- Item 41 of Part 7 of Schedule 5, prescribing the *Crimes (Controlled Operations) Act 2008* (ACT), which imposes a duty on the CEO to be satisfied of certain matters in section 10 of that Act, including that an operation will not be conducted in a way that a person is likely to be induced to commit an offence against a law if that person would not have otherwise committed that offence.

Furthermore, as these powers are only used when absolutely necessary, such as to assist state and territory partner agencies in an investigation into serious and organised crime, this safeguards against the arbitrary use of such powers.

Importantly, powers conferred by state and territory legislation can only be used by the ACIC and certain other persons, such as members of staff of the ACIC, if the Board has consented to the performance of the duty, function or power, pursuant to subsections 55A(3) and (4) of the ACC Act. Thus, state and territory legislation cannot automatically have effect to authorise the ACIC to undertake an investigation and/or operation if the further step of consent by the Board has not been obtained.

Additional safeguards include that:

- the ACIC reports to the Commonwealth, state and territory ministers in accordance with relevant legislative requirements

- the ACIC reviews the ongoing necessity for each authorised member of staff to continue to use an assumed identity
- the Commonwealth Ombudsman conducts regular mandatory reviews of ACIC records in relation to controlled operations and use of surveillance devices, amongst other things
- the ACIC is also required to submit regular reports to the Commonwealth Ombudsman
- the Commonwealth Ombudsman in turn has extensive powers to examine the ACIC and
- the ACIC is subject to external oversight by agencies such as the Commonwealth Ombudsman, Australian Commission for Law Enforcement Integrity and the Inspector-General for Intelligence and Security.

Collection, use and disclosure of 'ACC information' and 'national policing information'

1.50 The preceding analysis indicates that there are a range of safeguards on the disclosure of ACC information and national policing information that may assist to ensure that the measures operate in a manner that is compatible with the right to privacy.

1.51 The committee welcomes the inclusion of a detailed assessment of the compatibility of the measures with the right to privacy in the statement of compatibility to the 2018 Regulations, consistent with the Minister for Law Enforcement and Cyber Security's previous undertaking.

1.52 However, in order to conclude its assessment of the compatibility of the measures with the right to privacy, it would be useful for the committee to be able to consider the detail of the information-handling protocol subject to its development. The committee therefore requests that a copy of the protocol be provided to the committee.

Consistent with the undertakings provided to Parliament following the merger of the Australian Crime Commission and CrimTrac, the ACIC has developed an information handling protocol. The protocol is available at: https://www.acic.gov.au/privacy. A copy of the protocol has been provided to the Committee, attached to this response.

1.60 The preceding analysis raises questions as to whether the measures are compatible with the right to life and the prohibition on torture and cruel, inhuman and degrading treatment or punishment.

1.61 Accordingly, the committee seeks the minister's advice as to the compatibility of the measures with these rights (including the existence of any relevant safeguards or guidelines).

Disclosing ACC information to certain international bodies

For the purposes of paragraph 59AA(1)(d) of the ACC Act, section 15 and Schedule 7 of the 2018 Regulations prescribe certain international bodies to whom ACC information may be disclosed, being:

- European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)
- European Police Office (Europol)
- Financial Action Task Force (FATF)
- The Egmont Group of Financial Intelligence Units
- The International Criminal Police Organization – INTERPOL
- The International Narcotics Control Board
- United Nations Office on Drugs and Crime

As required by paragraph 59AA(1)(d), these international bodies are bodies that have functions relating to law enforcement or intelligence gathering. The Committee has raised

concerns as to whether these provisions engage the right to life, or the prohibition on torture or cruel, degrading or inhuman treatment.

Right to life and prohibition on torture and cruel, inhuman or degrading treatment

Pursuant to article 6(1) of the ICCPR, every person has the inherent right to life and no person shall be arbitrarily deprived of their life, rights which are to be protected by law. The CAT and Article 7 of the ICCPR further provide that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The right to life and the prohibition on torture are non-derogable rights, meaning that it is not permissible for these rights to be limited or restricted under any circumstance.

The 2018 Regulations do not amend or modify the requirements for disclosing ACC information under subsection 59AA(1) of the ACC Act. Prior to disclosing ACC information to an international body prescribed under section 15 and Schedule 7 the 2018 Regulations, paragraphs 59AA(1)(f)-(h) provide that ACIC CEO may only disclose information if:

- the CEO considers it appropriate to disclose the information, and
- the CEO considers that the information is relevant to a permissible purpose (as defined in section 4 of the ACC Act), and
- disclosing the ACC information would not be contrary to a law of the Commonwealth, a State or a Territory that would otherwise apply.

Bodies to which the ACIC may disclose 'ACC information' include agencies that have responsibility for law enforcement, intelligence gathering and security of a foreign country. The ACIC may also disclose 'ACC information' to an international body that has functions relating to law enforcement or gathering intelligence or bodies that are prescribed in the Regulations, or an international judicial body prescribed the regulations.

Further, if the ACC information is also national policing information, subsection 59AA(1A) of the ACC Act requires the ACIC CEO to act in accordance with any policies determined and directions given by the ACC Board, in making a decision as to whether to disclose the information under subsection 59AA(1) of the ACC Act.

The disclosure requirements set out under paragraphs 59AA(1)(f)-(h) of the ACC Act ensure that the ACIC CEO turns his or her mind to the necessity of sharing the information with the international body, including the circumstances in which the disclosure of the information will occur and the lawfulness of the disclosure under Australian law. Specifically, paragraph 59AA(1)(f) of the ACC Act provides that the ACIC CEO must consider it appropriate to share the information with an international body. This provision enables the ACIC CEO to consider a range of factors and potential consequences in determining whether it would be appropriate to share information with an international body, including if the information could lead to the investigation and prosecution of an offence punishable by corporal punishment in a foreign jurisdiction.

The ACIC does not disclose information to foreign agencies which relate to offences that may have been committed and could be prosecuted in the foreign country where the offence is punishable by the death penalty. The ACIC cooperates with the Australian Federal Police (AFP) under the *AFP National Guidelines on international police-to-police assistance in death penalty situations* and the *AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment*, where the AFP are involved in the matter. All ACIC staff are required to take account of government policy on assisting foreign countries which retain the death penalty when considering possible disclosure of information to foreign agencies, international bodies and their officials.

The Hon Michael McCormack MP

Deputy Prime Minister
Minister for Infrastructure, Transport and Regional Development
Leader of The Nationals
Federal Member for Riverina

Ref: MC19-003942

29 AUG 2019

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your email of 31 July 2019 on behalf of the Parliamentary Joint Committee on Human Rights (Committee) and its request for clarification on matters relating to the Civil Aviation Safety Amendment (Part 91) Regulations 2018 (CASR), in particular the discretion for the pilot in command of an aircraft to refuse carriage of the assistance animal of a person with a disability. I support the right of an individual who requires the support of an assistance animal to have the animal with them on-board the aircraft, so long as it is safe to do so.

The Committee's request raises two issues with section CASR 91.620. Firstly, the rights of persons with a disability to access on an equal basis the physical environment, including transportation; and secondly, the right of persons to equality and non-discrimination, including for persons with a disability.

Accessibility rights

CASR 91.620 creates a scheme for the safety regulation of the carriage of assistance animals. When the provision commences, it will replace the current scheme in regulation 256A of the Civil Aviation Regulations 1988 that reflects the same policy as CASR 91.620. In particular, CAR 256A(8) provides:

> *An animal must not be carried on an aircraft if carrying the animal would be likely to affect a person on the aircraft in a way that may affect adversely the safety of the aircraft.*

The CASR provision has been redrafted by the Office of Parliamentary Counsel in the active voice, to create a clearly accountable person (the pilot in command) and to update the provision to more modern language, but is otherwise intended to achieve the same outcome as CAR 256A.

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Both CAR 256A and CASR 91.620 are directed to achieving a legitimate objective, being the management of risk that the carriage of an assistance animal could compromise the safety of the aircraft. The Civil Aviation Safety Authority (CASA) has identified two separate categories of risk related to the carriage of assistance animals. Firstly, risks related to the animal's behaviour, and secondly, risks related to the animal's physical characteristics.
The risks related to the animal's behaviour are based on an untrained animal being introduced into the aircraft cabin and the possible situations that may occur. Safety risks identified in relation to an assistance animal's behaviour include:

- the animal shows aggression to passengers, crew or other animals;
- the animal's excreta or fluids interferes with safety-related aircraft systems, such as electrical wiring; and/or
- the animal's behaviour distracts crew from performing safety-related responsibilities, for example because the animal is disruptive by virtue of being in an unusual situation.

The risks related to the animal's physical characteristics are based on how particular aspects of an animal may affect the safety of passengers and the aircraft. It is important to note that these risks would vary depending on the individual animal. Safety risks identified in relation to an assistance animal's physical characteristics include:

- the animal may become a dangerous projectile during flight;
- the size of the animal adversely affects the execution of emergency evacuation procedures;
- the location of the animal on the aircraft adversely affects the execution of emergency evacuation procedures; and/or
- the animal's physical characteristics (e.g. claws) may damage the aircraft or its equipment to adversely affect safety (puncturing an emergency slide).

The level of risk may be associated with the size, type or configuration of the particular aircraft, noting that Part 91 of CASR applies to aircraft operations generally, and not only to airline operations. In practice, common risks may be mitigated by standard measures such as the provision of evidence that an animal has been properly trained, for example through state or territory assistance animal training certification. Procedures may also require the provision of absorbent mats. Similarly, risks related to the location and restraint of an assistance animal may be capable of management in particular circumstances. CASA would generally expect airline operators to have procedures and facilities to manage relevant risks in the vast majority of cases.

However, existing CAR 256A and the future CASR 91.620 contemplate that some or all of these risks may not be able to be managed in particular circumstances by providing for the non-carriage of animals in the interests of safety. This is considered a necessary residual outcome to ensure safety objectives are met, and noting that a pilot's options for managing safety risk are greatly reduced once a flight has commenced. Consistent with much of the aviation safety regulatory framework, the precautionary principles are applied to ensure that risk management focuses on pre-flight decisions to minimise safety risks during flight.

In the case of CASR 91.620, the pilot in command is granted the discretion to refuse carriage, consistent with the pilot in command's overall responsibility for ensuring that the final disposition of the aircraft will not result in an unsafe situation – see CAR 224 and CASR 91.215. The pilot in command is the appropriate repository of the discretion since that role has overarching visibility of all aspects of the operation of the aircraft and is ultimately in command of the aircraft once the flight has commenced. The pilot in command is therefore best placed to make determinations on whether carriage of an assistance animal will adversely affect the safety of any particular flight.

The Australian Government does not consider that it is either reasonably practicable or desirable to specifically prescribe circumstances in which the pilot in command's discretion should, or should not, be exercised. The Government considers that any such provision would constitute regulatory overreach in light of the knowledge of the pilot in command with respect to any particular flight. Overly prescriptive requirements in this area is very likely to result in the refusal to carry assistance animals in circumstances where no safety risk exists, and the carriage of assistance animals in circumstances where safety may be adversely affected by that carriage.

The measure, in conjunction with guidance material under development for CASR Part 91, is intended to be effective in ensuring that safety objectives in relation to the carriage of assistance animals are met, while avoiding any unnecessary limitation on the rights of passengers seeking carriage of assistance animals. In this regard, the Government considers that the expression of the discretion conferred on the pilot in command, and the linkage to the reasonable belief that carriage of an assistance animal may adversely affect the safety of an aircraft, is a proportionate measure to achieve the stated safety objective in the residual range of cases where safety risks cannot be managed while carrying an assistance animal.

Right to equality and non-discrimination

For the reasons stated above, it is the Government's view that CASR 91.620, reflecting the policy in existing CAR 256A:

- provides for differential treatment of persons with a disability travelling with an assistance animal based on the criteria that the pilot in command has formed a reasonable view that carriage of the animal may adversely affect the safety of the aircraft.
- the criterion is reasonable and objective because it is based on an objective test of the reasonableness of the pilot in command's belief of what is required to ensure the safety of the aircraft during flight, having regard to the pilot's expert opinion that is based on his or her training and experience.
- the differential treatment, if it occurs following the exercise of the pilot in command's discretion, will be effective to serve the legitimate purpose of ensuring the safety of air navigation.
- the conferral of the discretion on the pilot in command is proportionate to the objective because:
    - the pilot in command is best placed to manage the safety of an aircraft in flight;
    - an enforceable power to refuse carriage of an assistance animal is necessary to ensure the pilot in command's decision is authoritative;

- it is neither practicable or desirable to attempt to exhaustively prescribe specific circumstances in which the pilot in command of an aircraft must refuse carriage of an assistance animal; and
- the breadth of the discretion reflects the precautionary principle that underpins many aspects of aviation safety regulation, noting the very limited ability of a pilot in command to manage a risk after commencement of a flight.

I am advised that CASA, as part of the development of the new regulations, met with the Disability Discrimination Commission to informally discuss CASR 91.620. The Commission did not raise any objections in relation to the provision.

Thank you again for your correspondence and I trust this is of assistance to the Committee.

Yours sincerely

Michael McCormack

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

MC19-009678

20 AUG 2019

Mr Ian Goodenough MP
Chair of the Parliamentary Joint Committee on Human Rights
Member for Moore
Parliament House
CANBERRA ACT 2600

Dear ~~Chair~~ Ian

Thank you for your correspondence of 31 July 2019 relating the Parliamentary Joint Committee on Human Rights' (the committee) consideration of the Criminal Code Amendment (Agricultural Protection) Bill 2019 and the Fair Work Amendment (Casual Loading Offset) Regulations 2018.

I appreciate the important work that the committee performs in the consideration of bills and legislation for compatibility with international human rights standards, and I appreciate the time you have taken to bring these matters to my attention.

Please find attached responses to the Committee's consideration of the above bill and regulations.

Thank you again for bringing the Committee's concerns to my attention.

Yours sincerely

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

Encl.
Attachment A - Response to Request by the Parliamentary Joint Committee on Human Rights - Fair Work Amendment (Casual Loading Offset) Regulations 2018

Attachment B - Response to Request by the Parliamentary Joint Committee on Human Rights - Criminal Code Amendment (Agricultural Protection Bill) 2019

Attachment A
Response to request by the Parliamentary Joint Committee on Human Rights

FAIR WORK AMENDMENT (CASUAL LOADING OFFSET) REGULATIONS 2018

Compatibility with the right to just and favourable conditions of work

Committee comment

The preceding analysis indicates that the measure engages and may limit the right to just and favourable conditions of work.

The committee seeks the advice of the minister as to the compatibility of the measure with this right, including:

- **the legitimate objective the measure seeks to address;**
- **whether the measure is rationally connected to that objective; and**
- **whether the measure is proportionate to the legitimate objective of the measure.**

The *Fair Work Amendment (Casual Loading Offset) Regulations 2018* (the Amending Regulations) are compatible with and do not limit the right to just and favourable conditions of work expressed in Article 7 of the *International Covenant on Economic and Social Rights.*

The purpose of the Amending Regulations is to provide declaratory clarification of existing legal and equitable general law rights of employers to offset payments of identified casual loading amounts where a person makes a subsequent claim to be paid one or more National Employment Standards (NES) entitlements. Given that the Amending Regulations do no more than articulate the current general law principles in relation to offsetting, they do not alter any employee's conditions of work to their disadvantage. It will remain a matter for a court to determine whether a casual loading may be taken into account in any particular factual circumstances.

Workpac Pty Ltd v Skene

On 16 August 2018, the Full Court of the Federal Court of Australia handed down its decision in *Workpac Pty Ltd v Skene* [2018] FCAFC 131 (*Skene*). The Full Federal Court decided that an employer engaging an employee as a casual and paying a casual loading does not necessarily mean that an employee will be a casual employee for the purposes of the NES. The Full Federal Court's decision means that such an employee is to be regarded as a full-time or part-time employee (as applicable), and relevantly entitled to NES entitlements that a full-time or part-time employee receives.

A key concern following the *Skene* decision is the potential for 'double-dipping' of entitlements. Where an employee has been employed on the basis that the person is a casual employee (including having received a casual loading that compensates for the non-accrual and payment of NES entitlements), but during all or some of the employment period, the person was an employee other than a casual employee for the purposes of the NES, the person is thus entitled to NES entitlements for which the casual loading may have been paid to compensate.

Where such an employee has clearly received an identifiable loading in lieu of any NES entitlement and consistent with existing general law principles in relation to offsetting, an employer could generally be expected to seek to have that loading taken into account (or 'offset') against any subsequently claimed NES entitlement. The prima facie right of 'offset' in these circumstances is one that already exists under the general law.

Amending Regulations

The Amending Regulations pursue the legitimate objective of providing clear guidance about when a claim for offsetting may be made, noting that it remains a matter for a court to determine whether a casual loading payment may be taken into account in any particular factual circumstances. The law in this area is complex, drawing on common law as well as equitable principles, and the Amending Regulations is rationally connected to that objective as it distils these principles into one clear and easy to understand provision that will assist employers and employees to understand when a claim for offsetting may be made.

Specifically, and consistent with general law principles, new regulation 2.03A of the *Fair Work Regulations 2009* (the Principal Regulations) applies if all of the following pre-conditions in subregulation 2.03A(1) are met:

(a) a person is employed by an employer on the basis that they are a casual employee;
(b) the employer pays the person an amount (typically known as a casual loading) that is clearly identifiable as an amount paid to compensate the person for not having one or more relevant NES entitlements during the employment period;
(c) during all or some of the employment period, the person was in fact an employee other than a casual employee for the purposes of the NES; and
(d) the person makes a claim to be paid an amount in lieu of one or more of the relevant NES entitlements, that is, the person claims NES entitlements (such as to accrue, take and be paid for annual leave) that a person other than a casual is entitled to (i.e. an ongoing full-time or part-time employee).

When all of these criteria are met, it is possible that a person is making a claim for relevant NES entitlements on top of the identifiable casual loading they have already received in lieu of those NES entitlements.

Subject to the criteria in subregulation 2.03A(1) being met, new subregulation 2.03A(2) provides that an employer may make a claim to have the casual loading amount taken into account in determining any amount payable by the employer to the person in lieu of one or more relevant NES entitlements. To be clear, this subregulation does not create any new rights – it is included for the avoidance of doubt and is merely declaratory of the existing law whereby an employer may make such a claim.

The Amending Regulations do not disturb the common law meaning of a 'casual', 'full-time' or 'part-time' employee. Further, the Amending Regulations do not limit or expand an employer's right to make a claim, and do not create any new rights; rather they are for the avoidance of doubt.

The 'clearly identifiable' casual loading and proportionality

The Committee has sought specific additional information about what may constitute a 'clearly identifiable' casual loading and whether this is proportionate to the legitimate objective of providing clear guidance about when a claim for offsetting may be made.

The Full Federal Court in *Skene* at paragraph 147 contemplated that an employer may make a claim to offset a casual loading in an appropriate case. The Amending Regulations, consistent with this authority, requires that an amount (i.e. a casual loading) must be 'clearly identifiable' as an amount paid to compensate the person for not having relevant NES entitlements.[1] Note 2 to subregulation 2.03A(1) provides examples of where it may be clearly identifiable that a casual loading is paid to compensate for not having one or more relevant NES entitlements.

The requirement that there must be a 'clearly identifiable' casual loading reflects the current position under the general law and thus is proportionate to the legitimate objective of providing guidance about when a claim for offsetting may be made. It is not possible to provide a comprehensive statement and examples of what may constitute a 'clearly identifiable' casual loading and it will remain a matter for a court to determine whether a casual loading may be taken into account in any particular factual circumstances.

It is also not the case that the Amending Regulations could be relied on by employers to produce evidence 'after the fact' to facilitate them establishing that a clearly identifiable casual loading had been paid to a relevant employee. Recognising that it will ultimately be a matter for a court to determine, it is difficult to see how a document produced 'after the fact' could be relied upon, in the absence of other corroborating and contemporaneous evidence, to demonstrate payment of a clearly identifiable casual loading in relation to a prior employment period.

[1] Regulation 2.03A(1)(b).

Attachment B
Response to request by the Parliamentary Joint Committee on Human Rights

CRIMINAL CODE AMENDMENT (AGRICULTURAL PROTECTION) BILL 2019

Compatibility with the rights to freedom of expression and assembly

Committee comment

The committee seeks the minister's advice as to the compatibility of the proposed offence of using a carriage service with intent to incite another person to trespass with the rights to freedom of expression and assembly, in particular:

- **the extent to which the right to freedom of assembly is engaged and limited by the measure and, if so, whether such limitations are permissible; and**
- **whether the limitations on these rights are proportionate to the objectives sought to be achieved, including:**
- **whether the proposed offence and its potential application is sufficiently circumscribed;**
- **whether the safeguards included in the bill are sufficient for the purposes of international human rights law (including whether the proposed defences for journalists and whistleblowers sufficiently protect the rights to freedom of expression and assembly, noting the concerns raised above); and**
- **whether there are other, less rights restrictive, measures reasonably available to achieve the stated objectives.**

As the committee has identified, the Criminal Code Amendment (Agricultural Protection) Bill 2019 (the Bill) engages the rights to freedom of expression under Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and freedom of assembly under Article 21 of the ICCPR.

Article 19 provides that everyone shall have the right to freedom of expression and this right includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". Article 21 provides that "the right of peaceful assembly shall be recognised".

To the extent the right to freedom of assembly is limited by the Bill, this limitation is permissible and appropriate

The right to freedom of assembly is fundamental to ensuring the public's ability to engage with political issues. However, it is not an absolute or unfettered right. Article 21 recognises that restrictions "imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the right and freedoms of others" may be justified in some circumstances.

The engagement of the Bill with the right to freedom of assembly is very limited. The Bill creates offences that restrict the use of a carriage service to incite trespass or property damage on agricultural land. In effect, the Bill would restrict the right to freedom of assembly only to the extent that the assembly would constitute trespass. It does not otherwise restrict assembly, or the organising of assembly, where that assembly is lawful.

Furthermore, it is doubtful whether assembly on private property without the property owner's consent would be considered "peaceful assembly", given this would likely already constitute criminal conduct under existing state and territory laws. There is no general right to assembly on private property without the property owner's consent.

Noting the limited impact of the Bill on the right to freedom of assembly, I consider that to the extent that the Bill restricts freedom of assembly, this restriction is appropriate and justified. Consistent with the limitation under Article 21, the offences in the Bill are intended to protect the rights of Australian farmers and to prevent harm to public order and public health from property offences incited by the use of a carriage service. Unlawful assembly on agricultural land affects the rights of Australian farmers and their families to feel safe on their properties. It also risks harm to public health through the contamination of food and the breach of biosecurity protocols. Criminalising the use of a carriage service to transmit materials, with the intention to incite trespass, damage property or commit theft on agricultural land is a reasonable and proportionate measure to uphold conformity with existing laws, protect the rights of farmers, and protect public health.

The proposed offence and its potential application is sufficiently circumscribed

The offences in the Bill, with respect to how they engage with the rights to freedom of expression and assembly, are appropriately circumscribed.

The Bill is not intended to create new forms of criminal conduct that are not already found in Australian law. Trespass, property damage and theft are already subject to state and territory criminal laws. State and territory laws also contain incitement offences that would extend liability to those who incite others to commit these offences. The purpose of the Bill is to provide consistent national offences and penalties for the misuse of carriage services, in particular the internet, to incite others to commit these offences on agricultural land. The Bill does not in any way change the scope of existing state and territory offences for the relevant physical conduct, and these will apply in the same way as they always have to those that actually enter property and cause harm.

As highlighted above, the Bill limits the right to freedom of assembly only to the extent that it restricts a person from using a carriage service to organise people to assemble on agricultural land where that assembly would constitute trespass.

As outlined in the explanatory memorandum to the Bill, to the extent that the Bill limits the right to freedom of expression, that limitation is reasonable, necessary and proportionate to the objective of protecting public health and the rights of Australian farmers. Given the limited nature of the restriction on communication imposed by the Bill—limiting communications that are intended to incite criminal conduct— I consider that the Bill could not reasonably be described as an impermissible limitation on the right to freedom of expression.

Incitement is a well-established criminal law concept and a common ancillary offence. The purpose of incitement is to extend criminal liability to those who intend that others engage in criminal conduct. Although the concept of incitement does not require the offence being incited to actually occur, it does require proof that the person doing the inciting intended it to. This is a high threshold, which ensures inadvertent, accidental, negligent and even reckless acts of encouragement are not captured.

The committee noted the additional requirement under the proposed section 474.46 trespass offence, that a person be reckless as to whether the trespass of the other person could cause detriment to a primary production business. Although lower than intention or knowledge, recklessness is nevertheless a high threshold. It requires a person to be aware of a substantial risk that the result will occur, and having regard to the circumstances known to the person, it is unjustifiable to take the risk by engaging in the relevant conduct.

Given the high thresholds of intention and recklessness as the relevant fault elements in the proposed offences, I am satisfied that the scope of the Bill is sufficiently circumscribed.

The safeguards included in the Bill are sufficient

It is difficult to conceive of circumstances where the legitimate activities of journalists and whistleblowers could involve an actual intention that others unlawfully trespass, cause damage or steal on agricultural land. As I have noted above, intention is an inherently high threshold which would operate as a safeguard to ensure the offence does not inadvertently capture less serious communications. In addition, given the Bill creates consistent national offences and does not create new forms of criminal conduct, it does not encroach further than existing offences into the activities of journalists or whistleblowers.

However, express exemptions have been included in the Bill to put beyond doubt that such activities will not be captured by the new offences. While any defendant would bear the evidential burden in relation to these exemptions, the legal burden of proof would remain with the prosecution. A defendant would merely need to raise evidence that suggests a reasonable possibility that the exception would apply to their circumstances, before the prosecution would need to disprove the same beyond reasonable doubt.

I note further that the exemptions would only be engaged in the event where there is a question as to whether the defendant is a bona fide journalist or whistleblower. In practice, the Prosecution Policy of the Commonwealth would likely exclude bona fide journalists and whistleblowers before proceedings were even commenced where this exemption would clearly be available.

Accordingly, I consider the framing of the primary offence, together with the express exemptions detailed below, provide sufficient protection for the purposes of international human rights law.

Subsections 474.46(2) and 474.47(2)—Journalism

Subsections 474.46(2) and 474.47(2) provide exceptions to their associated offences (which are found in subsections 474.46(1) and 474.47(1) respectively) where the material relates to a news report, or a current affairs report, that is in the public interest and is made by a person working in a professional capacity as a journalist.

The explanatory memorandum to the Bill highlights that this exception puts beyond doubt that bona fide journalism is not captured by the offences. It is intended that persons involved at any stage of bona fide journalism are not captured by the offence. The term 'journalist' remains undefined and left to its ordinary meaning, ensuring it can be considered in the context of each case and avoiding the risk of a rigid statutory definition being outdated or inappropriately narrow in certain cases.

With regard to the reversal of the evidential burden, the defendant would likely be better placed to raise evidence that they are working in a professional capacity as a journalist and that the conduct in question relates to this employment. For example, details of an individual's employment situation and the work they undertake in this capacity would be within their knowledge, as would their reasons as to why the report is to be published. As expressed above, any defendant would merely need to raise evidence that suggests a reasonable possibility that the exemption would apply, and this would also be considered in line with the Prosecution Policy of the Commonwealth.

Subsections 474.46(3) and 474.47(3)—Whistleblowers

Subsections 474.46(3) and 474.47(3) provide exceptions to their associated offences (which are found in subsections 474.46(1) and 474.47(1) respectively) where, as a result of the operation of a law of the Commonwealth, a State or a Territory, the person is not subject to any civil or criminal liability for that conduct. As discussed in the explanatory memorandum to the Bill, this is primarily intended to ensure that a person making a disclosure under a statutory whistleblower or lawful disclosure scheme is not subject to the offence; and is intended to cover all scenarios where a disclosure is exempt from criminal or civil penalty.

While the defence of lawful authority (section 10.5 of the Criminal Code) may already apply to any whistleblowers in relation to disclosures permitted under Commonwealth law, it does not provide protection for people whose disclosures might be permitted or justified under relevant State or Territory laws. There are no general defences in the Criminal Code that would provide protection where State or Territory laws might exclude criminal liability. As such it is necessary to include a broader offence-specific defence to ensure that the offence does not criminalise lawfully protected disclosures under state and territory whistleblowing laws.

The existing defence of lawful authority in section 10.5 of the Criminal Code places the evidential burden on the defendant. For consistency with this provision and the reasons discussed below, it is appropriate that the evidential burden be placed on the defendant in relation to this exception as well.

Whistleblowing regimes in Commonwealth, State and Territory jurisdictions often include protections for the discloser's identity, including from a court or tribunal. For example, section 20 of the *Public Interest Disclosure Act 2013* makes it an offence for a person to disclose identifying information about a second person who made a Public Interest Disclosure, section 21 of that Act provides that a person is not to be required to disclose (or produce) to a court or tribunal identifying information (or a document containing such information). As such, a person acting under lawful authority will generally be in a better position to lead evidence of this where the defence is relevant, than for a prosecution to disprove in every case.

No other measures reasonably available to achieve the stated objectives

The measures in the Bill seek to safeguard Australian farmers and primary production businesses from persons who uses a carriage service, such as the internet, to incite trespass, property damage and theft on agricultural land.

The purpose of the Bill is to ensure a consistent national approach, including appropriate penalties, for those that use a carriage service, such as the internet, to incite others to trespass, damage and steal property on agricultural land. Given the limited impact of the Bill on the rights to freedom of expression and assembly, I do not consider that there are less restrictive measures that would have achieved the same purpose of this legislation.

SENATOR THE HON. JONATHON DUNIAM

Assistant Minister for Forestry and Fisheries
Assistant Minister for Regional Tourism
Deputy Manager of Government Business in the Senate
Liberal Senator for Tasmania

Ref: MC19-006170

14 AUG 2019

Chair Ian Goodenough MP
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

human.rights@aph.gov.au

Dear Mr Goodenough

Thank you for your correspondence to Senator the Hon. Bridget McKenzie, Minister for Agriculture, on behalf of the Parliamentary Joint Committee on Human Rights, dated 31 July 2019, about the Fisheries Management Regulations 2019 (the Regulations). Minister McKenzie has asked me to respond as I am the assistant minister with responsibility for the matters you raise.

I provide the following to assist with the Committee's questions.

The committee seeks the minister's advice as to whether the collection and disclosure of personal information as set out in the regulations is a proportionate limitation on the right to privacy, including:

- **whether the measures are sufficiently circumscribed and are the least rights restrictive way of achieving their stated objective; and**
- **whether the measures are accompanied by adequate and effective safeguards (including with respect to the operation of the *Privacy Act 1988*, the disclosure of information overseas, and the storage, retention and use of personal information).**

In November 2005, the Australian Border Force (then the Australian Customs Service) assumed operational responsibility for the detention of illegal foreign fishers under the provisions of the *Fisheries Management Act 1991*. As a result, Australian Border Force (ABF) collects, records, retains and holds personal identifying data relating to suspected illegal foreign fishers in Part 10 of the Regulations. The transfer of this responsibility to the Australian Customs Service at that time was considered fit for purpose from an operational and capacity perspective and has continued to the present day.

In practice, AFMA does not hold personal identifying data from illegal foreign fishers of relevance to Part 10 of the Regulations. As such information is not held by AFMA, it cannot be disseminated by AFMA to third parties. In the event that the ABF was to seek authorisation from AFMA on the release of personal identifying data that ABF had collected, any release would be subject to the terms and conditions placed on it by the ABF. In addition, AFMA would require the ABF to place conditions on the release of the information that included a limitation on the further release of the data without AFMA's express consent.

With regard to Sections 103 and 104 of the Regulations, it is important to note that the collection of a range of maritime domain information is required in order for AFMA to fulfil its statutory functions, specifically in relation to law enforcement and the administration of government programs. Some of this information is sensitive and can include personal information. A level of flexibility as to what data can be collected by AFMA is necessary to ensure timely management responses and enforcement activity.

Sections 103 and 104 provisions do not include the fine scale personal data described under Part 10 of the Regulations, which only relates to illegal foreign fishers detained in Australia. As a matter of context, personal data collected under Section 103 and disclosed under Part 104 to a government entity is a rare occurrence, and generally includes copies of documentation found on board foreign fishing vessels during the course of a boarding and inspection.

Further, fishing vessels may be used in the commission of a range of criminal offences and in some cases the information collected by AFMA during such inspections may support action under the purview of other government entities. Any request to AFMA for the provision of such information is closely scrutinised by an AFMA delegate of the *Fisheries Management Act 1991,* before a decision to release the information is made. These safeguards are consistent with the government principles around sound decision making.

Processes are undertaken to analyse and determine whether the disclosure is within AFMA's delegated authority and whether the requested information is part of AFMA's data holdings. AFMA makes an assessment of the entity's compliance with related international treaties or agreements, including internationally-agreed vessel boarding and inspection regimes. This may extend to the Vienna Convention, as well as regional fisheries agreements. Consideration is also given as to whether the treaty or agreement makes reference to the need for the implementation of national laws, policies or procedures. Any information provided is stored, managed, used and made available in accordance with relevant security standards and data sharing protocols and/or in accordance with the national laws of the country to whom that information is furnished. These arrangements are typically reciprocal in nature and place similar provisions on Australia to minimise the risk of unauthorised use or disclosure.

Where necessary, AFMA uses information on the compliance history of a vessel to inform workplace health and safety risk assessments, prior to activities such as boarding and inspection on the high seas by AFMA officers. This information is provided to the delegate who may decide that the disclosure is consistent with AFMA's functions and places any necessary caveats on the data, including clearly articulating expectations or outputs arising from the data sharing arrangement.

If the delegate is not satisfied, it is open to them to refuse the release of the information. If released, the nature and extent of the caveats are commensurate with the level of sensitivity applied to the data. A typical clause prevents the release of AFMA data to a third party without AFMA's express consent. Further, any release of information is recorded on AFMA's information disclosure register. In the case of State agencies, specific agreements are in place to maintain the confidentiality of information. In the case of foreign entities, should the

information be released in breach of any caveats, it is open to Australia to formerly raise these matters in relevant international forums, such as Regional Fisheries Management Organisations, in order to seek remedial action and/or make diplomatic representations to the foreign country.

More generally, AFMA has a Privacy Policy which details AFMA's personal information management practices for all information held. This includes how it collects, maintains, stores, uses and discloses personal information. The policy also provides contact details for AFMA's Privacy Officer for requesting access to personal information, providing comment or making a complaint about AFMA's personal information management procedures.

In addition to the Privacy Policy, AFMA has an Information Disclosure Policy (https://www.afma.gov.au/about/fisheries-management-policies/information-disclosure-fisheries-management-paper). This policy provides advice on how AFMA manages information and, in particular, the release of that information to other entities such as research providers. In line with requirements under AFMA's governing legislation and the *Privacy Act 1988*, it sets out, among other things, the conditions relating to any release of data. These conditions include that the data be used only for the purposes for which it was provided, that it be only disclosed to those persons and/or agencies on a 'need to know' basis consistent with their duties, and that it not be disclosed to a third party without AFMA's prior consent. In some limited circumstances, AFMA may also commission research that involves analysing data that has not been anonymised. In such cases, strict confidentiality agreements are entered into with research providers to protect the privacy of individuals. In addition, regardless of the type of data being sought, AFMA always puts in place confidentiality agreements with researchers.

The committee seeks the minister's advice as to the compatibility with the right to life and the prohibition on torture and cruel, inhuman and degrading treatment or punishment of authorising the disclosure of identifying and personal information to foreign governments, agencies or intergovernmental organisations. In particular, the committee seeks the minister's advice as to:

- **the risk, in the regulatory context, of disclosing such information overseas and whether this could lead to prosecution of a person for an offence to which the death penalty applies or to torture or cruel, inhuman, or degrading treatment or punishment (including what is the scope of identifying and personal information which may be disclosed overseas); and**
- **the existence and content of any relevant safeguards or guidelines to ensure that information is not shared overseas in circumstances that could expose a person to the death penalty or to torture, cruel, inhuman, or degrading treatment or punishment, including:**
  - **the approval processes for authorising disclosure; and**
  - **whether there will be a requirement to decline to disclose information where there is a risk it may result in a person being tortured or subject to cruel, inhuman, or degrading treatment or punishment or prosecuted for an offence involving the death penalty.**

The Department of Agriculture considers that the risk of a fisheries offence giving rise to the death penalty or torture and other forms of cruel, inhuman or degrading treatment or punishment is likely to be very low.

As part of any assessment relating to disclosing identifying and personal information to foreign governments, agencies or intergovernmental organisations, AFMA would consider a broad range of factors. Relevant considerations may include whether the state is a party to the *International Covenant on Civil and Political Rights* (ICCPR) and its Optional Protocols,

As part of any assessment relating to disclosing identifying and personal information to foreign governments, agencies or intergovernmental organisations, AFMA would consider a broad range of factors. Relevant considerations may include whether the state is a party to the *International Covenant on Civil and Political Rights* (ICCPR) and its Optional Protocols, whether the state is a party to the *Convention against Torture* (CAT), and whether the state has provided a credible and reliable diplomatic assurance to Australia that they will not carry out the death penalty or torture and other forms of cruel, inhuman or degrading treatment or punishment against an individual. A decision to disclose identifying and personal information would be made on a case-by-case basis, and informed by the facts available at the relevant time.

Relevant considerations may include:

Whether the state is party to the *International Covenant on Civil and Political Rights* (ICCPR) and its Optional Protocols

Article 7 of the ICCPR stipulates that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. While Article 6(1) of the ICCPR enshrines the right to life, it does not prohibit the death penalty per se. Indeed, a state will only be prohibited from carrying out the death penalty in its jurisdiction if it is a party to the Second Optional Protocol of the ICCPR, aimed at abolishing the death penalty. If a state is party to the ICCPR, but has not abolished the death penalty, a sentence of death may only be imposed for the most serious crimes (Article 6(2)). As noted above, it appears unlikely that a fisheries offence would meet this threshold.

Whether the state is party to the *Convention Against Torture* (CAT)

The preamble of CAT also refers to '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. For an act to constitute torture, it must be intentionally inflicted, involve severe pain and suffering, and be inflicted for one of the purposes set out in the CAT, including to intimidate, obtain information or punish. Even if a state is not party to the CAT, it would nevertheless be bound by the prohibition of torture due to its status as a peremptory (*jus cogens*) norm of international law.

Whether the state has provided a diplomatic assurance

Foreign governments may provide Australia with diplomatic assurances that they will not carry out the death penalty or torture and other forms of CIDTP against an individual. In assessing whether such an assurance is credible and reliable, Australia should consider the personal risk faced by the individual; the human rights record of the relevant state; the content and credibility of other assurances provided by that state (including whether assurances had been given and honoured in the past); and how such assurances could be monitored or enforced.

I trust this information is of assistance to the Committee.

Yours sincerely

Jonathon Duniam

The Hon Stuart Robert MP

Minister for the National Disability Insurance Scheme
Minister for Government Services

Ref: MC19-007165

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Email: human.rights@aph.gov.au

Dear Mr Goodenough

Thank you for your correspondence of 31 July 2019 regarding the National Disability Insurance Scheme (NDIS) Amendment (Worker Screening Database) Bill 2019, as outlined in *Report 2 of 2019*.

I understand the Parliamentary Joint Committee on Human Rights' (the committee) analysis raised questions about the compatibility of the Bill with the right to privacy and the right to work and you have requested my advice on the proportionality of the limits of these rights in relation to the objectives of the Bill. Prompted by your letter I sought advice from the Department of Social Services (the department). Enclosed is a summary of the committee's concerns that have been addressed by the department.

The *Intergovernmental Agreement on Nationally Consistent NDIS Worker Screening* acknowledges the paramount consideration in worker screening is the right of people with disability to live lives free from abuse, violence, neglect and exploitation, consistent with the *United Nations Convention on the Rights of Persons with Disabilities*. Any limitation on the right to privacy or right to work are proportionate in achieving this objective.

I trust this information is of assistance to the committee.

Yours sincerely

Stuart Robert

Enc

Summary of Committee's concerns and response

The Department of Social Services (DSS) and NDIS Quality and Safeguards Commission (Commission) has provided the below information in response to the content related to the National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019 (Bill) outlined at pages 61 to 67 of *Report 2 of 2019* prepared by the Parliamentary Joint Committee on Human Rights. *Report 3 of 2019* prepared by the Parliamentary Joint Committee (the committee) on Human Rights and issued on 30 July 2019, reiterates the request for advice on the Bill.

The Bill engages the right to privacy contained in Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and the right to work contained in Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Committee Comments	**Department of Social Services and NDIS Quality and Safeguards Commission Response**
<u>Personal information in the NDIS Worker Screening Database</u> 1.246: *...[T]he committee requests the Minister's advice as to whether the limitations on those rights [privacy and work] are a proportionate means of achieving their stated objectives, including... whether the type and extent of the information on the Worker Screening Database will be appropriately circumscribed, including whether limitations on the type of information in the database will be set out in legislation (and if so, the specific provisions that apply), or will be matters of policy* 1.242: *...[N]o specific legal or administrative limits on using the information in the database (for example, procedures for de-identifying information where it is used for policy development or research) are identified in the statement of compatibility.* *Further information as to the specific*	The information to be included in the database is circumscribed by new subsection 181Y(5) of the *National Disability Insurance Scheme Act 2013* (NDIS Act) to be inserted by the Bill. New subsection 181Y(5) does not provide for the database to hold information about a person's criminal history, including convictions and charges and any other information relied on to support a decision that is made under a NDIS worker screening law in a state or territory, or information about a person's sexual identity or preferences. Such information would not be necessary for the Commission's worker screening database function, which is outlined in new subsection 181Y(1) and informed by the purposes of the database in new subsection 181Y(3). This is supported by the division of responsibilities for worker screening in Part 3 of the *Intergovernmental Agreement on Nationally Consistent NDIS Worker Screening* (IGA), under which states and territories are responsible for operating NDIS Worker Screening Units. In addition, the collection, use and disclosure of criminal history information (which is generally very sensitive) is governed by Schedule A to the IGA and arrangements between the Australian Criminal Intelligence Commission (ACIC) and states and territories. These arrangements closely limit the use and disclosure of such information. New subsection 181Y(8) enables the Minister to determine additional purposes of the database and information to be contained within the database by way of legislative instrument. An example of additional determined content of the database may be a new type of decision contemplated by NDIS worker screening law not already covered by subsection 181Y(5). Flexibility in this area will benefit the overall database as states and territories are yet to implement their NDIS worker screening laws. Additional content to be determined is necessarily limited by the NDIS Commissioner's functions and the provisions relating to the collection, use and disclosure of information under the NDIS Act. In developing any future legislative instruments for this purpose, the Minister will be required to produce a Statement of Compatibility with Human Rights. This will require the Minister to have regard to the proportionality of the additional determined purpose or information in pursing the legitimate objective. Such instrument will also be subject to disallowance.

Committee Comments	Department of Social Services and NDIS Quality and Safeguards Commission Response
safeguards in the bill, the NDIS Act or other legislation relating to the limitations on access to information in the database would assist in assessing the proportionality of the measure.	Information on the database may be used for policy development, evaluation and research purposes. Personal information used for this purpose will be de-identified in accordance with the requirements of the Office of the Australian Information Commissioner and used for the Commission's core functions. These requirements will be addressed through standard operating procedures.
<u>Access to the NDIS Worker Screening Database</u> 1.246: *...[T]he committee requests the Minister's advice as to whether the limitations on those rights [privacy and work] are a proportionate means of achieving their stated objectives, including ... whether access to the Worker Screening Database will be appropriately circumscribed, including whether limitations on access to the database will be set out in legislation (and if so, the specific provisions that apply), or will be matters of policy.*	The National Worker Screening database maintains a register of cleared and excluded applicants and workers from all jurisdictions. The database gives effect to the agreement of governments in clause 94 of the IGA, to national portability of NDIS Worker Screening Check outcomes. The information to be held in the database is provided by Worker Screening Units in each state and territory. Those Units undertake risk assessments and clearance status of NDIS Worker Screening Check applicants. Worker Screening Units in each state and territory will be required to secure consent from the applicant to have the NDIS worker screening check outcome included in the national database and to the disclosure of their NDIS Worker Screening outcome to current and prospective employers, to the Commission, to NDIS Worker Screening Units and to third party government entities providing the screening information. Consent will also be sought to ongoing monitoring of their eligibility to maintain the clearance for the duration of the clearance, and consent to share information from law enforcement agencies and the Commission for the purposes of working with vulnerable persons screening processes. These requirements are set out in Part 5 – Application Process of IGA. Staff in 'risk-assessed roles' (those with more than incidental contact, key personnel, or roles prescribed by the NDIS Commissioner) must hold an NDIS Worker Screening Check clearance as a condition of provider registration (see the *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018* (Worker Screening Rules)). Registered providers will have access to the database in order to comply with this condition. In order to comply with this condition they must be able to access the database to establish a link to a worker and check the clearance status of an employee, or potential employee. They are also required to de-link from an individual if that worker has left their employ. For both registered and non-registered providers (including self-managed participants), the worker must provide their worker screening ID or their application ID to the provider to allow them to be able to search for the worker to establish their clearance status. Providers cannot randomly view workers. Providers will be able to access the following

Committee Comments	Department of Social Services and NDIS Quality and Safeguards Commission Response
	information: name, date of birth, worker screening ID, clearance status, eligibility to work, and expiry of clearance. As the information accessed by providers remains protected Commission information, providers are also subject to the requirements of sections 67A in subsequent use and disclosure of that information. Providers are also subject to the penalties in sections 67B, C and D.
Additional information regarding the proportionality of the measure 1.246: *...[T]he committee requests the Minister's advice as to whether the limitations on those rights [privacy and work] are a proportionate means of achieving their stated objectives, including… any other information that may be relevant to the proportionality of the measure.*	Under the IGA, a key principle is that worker screening requirements are proportional insofar as worker screening is only mandatory for workers whose role poses a significant opportunity for harm. This requirement is implemented through the Worker Screening Rules, which only require screening of workers in 'risk- assessed roles'. In addition, the Commission, Worker Screening Units and providers are subject to the Privacy Act and equivalent state and territory requirements.

Senator the Hon Anne Ruston

Minister for Families and Social Services
Senator for South Australia
Manager of Government Business in the Senate

Ref: MC19-006337

12 AUG 2019

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr ~~Goodenough~~ Ian

Thank you for your email dated 31 July 2019 regarding the *Human Rights Scrutiny Reports No. 2 and 3 of 2019*, which requested information in relation to the Social Security (Assurances of Support) Amendment Determination 2018 (No. 2).

Please find attached a response to the Committee in relation to each of the issues identified.

Thank you for raising this matter with me.

Yours sincerely

Anne Ruston

Encl

Suite MG.60, Parliament House, Canberra ACT 2600 Tel: 02 6277 7560 Email: minister@dss.gov.au

1. Background

Sustainability of the Australian welfare payments system
In the 2019-20 Commonwealth Budget, Australia's expenditure on social security and welfare is estimated to account for 36 per cent of total expenditure and will be the biggest expense in the Budget[1]. The social security and welfare function is estimated to increase by 3.6 per cent in real terms from 2019-20 to 2022-23.

The primary objective of Australia's welfare payments system is to provide financial support for individuals and families who are unable to fully support themselves. To ensure the long-term sustainability of the system, various mechanisms are in place. For example, eligibility criteria to ensure payments are provided to those most in need and waiting periods.

The concepts of waiting periods and providing assurances for migrant cohorts are both longstanding features of the Australian social security system and make a targeted contribution to the sustainability of the welfare system.

Newly Arrived Residents Waiting Period (NARWP) and Assurance of Support (AoS) scheme
The NARWP is designed to ensure that migrants are able to support themselves financially upon arrival in Australia. Under changes introduced on 1 January 2019, most migrants granted permanent residency must serve a waiting period of up to four years before they can access certain welfare payments and concession cards.

The AoS scheme is designed to work in conjunction with the NARWP to allow new migrants, with a higher likelihood of needing welfare payments during the waiting period, entry into Australia, while protecting Australian Government social security outlays.

An AoS is a legally binding commitment by the assurer to provide financial support to the assuree for the duration of the assurance period. An AoS generally requires lodgement of a monetary bond, or security, which provides a source of available funds for AoS debt recovery purposes, if recoverable social security payments are made to the assuree during the AoS period. The bond is lodged and held by the Commonwealth Bank of Australia for the entire AoS period and is released to the assurer at the end of the AoS period, with the deduction of any amount needed to repay recoverable social security payments to Centrelink.

An AoS may be mandatory or discretionary, depending on the visa type. Some visas such as Visa Subclass 101 (Child) and Visa Subclass 102 (Adoption) have a discretionary AoS provision. In this circumstance, an assessment will be made as to whether an applicant is at risk of becoming a charge on Australia's welfare system. An individual giving an assurance for a discretionary AoS is not required to provide a monetary bond.

[1] Budget Strategy and Outlook Budget Paper No. 1 2019-20, Statement 5, pg. 5-9: www.budget.gov.au/2019-20/content/bp1/download/bp1.pdf

The assurance period aligns with the NARWP and residency qualification periods for social security payments that the visa subclass is most likely to access. The assurance period is deemed to start from the date the assuree arrives in Australia, or the date the relevant visa is granted, whichever occurs later.

The Social Security (Assurances of Support) Determination 2018 (the Determination) sets out the requirements that must be met for an individual or body to be permitted to give an assurance of support, such as eligibility criteria and income requirements. These requirements provide transparent and clear criteria, which assist the Commonwealth and the assurer to assess whether they can adequately support an assuree during the assurance period.

The Social Security (Assurances of Support) Amendment Determination 2018 (No.2) (the Amendment Determination)
The Amendment Determination extends the assurance period from two years to four years for specific visa subclasses. The changes introduced in the Amendment Determination align with the amendments made by the *Social Services and Other Legislation Amendment (Promoting Sustainable Welfare) Act 2018*, to increase existing NARWPs under the *Social Security Act 1991* (the Act) for various welfare payments and concession cards.

2. Compatibility of the measure with the right to protection of the family and the rights of the child

1.307 The committee seeks the advice of the Minister as to the compatibility of the measure with these rights, including:

- **whether the measure pursues a legitimate objective for the purposes of international human rights law**
- **whether the measure is rationally connected to (that is, effective to achieve) that objective; and**
- **whether the measure is a proportionate means of achieving the stated objective.**

Response:
Changes to the NARWP were introduced on 1 January 2019, increasing the waiting period for certain welfare payments and concession cards to four years. The alignment of the AoS period with the NARWP is necessary to achieve the purpose of the AoS scheme, that is, to recover payments made during the NARWP, consistent with the assurer's commitment to provide support.

In addition, the alignment of periods ensures equitable treatment of AoS applicants in line with the relevant NARWP rules. The Amendment Determination only applies the increased four-year assurance of support period to assurances of support given on or after 1 January 2019, the commencement of the Amendment Determination. This ensures there will be no disadvantage to a person who gave an assurance (by lodging the assurance in accordance with section 1061ZZGC of the Act) prior to commencement of the Amendment Determination.

In relation to specific concerns raised by the Committee relating to Visa Subclass 101 (Child) and Visa Subclass 102 (Adoption), both of these visa subclasses have a discretionary AoS. The inclusion of a discretionary AoS on these visas allows the Department of Home Affairs to request an assurance in cases where further evidence is required to establish that the assurer can provide an adequate standard of living for the visa applicant.

Currently, Family Tax Benefit (FTB) payments are not recoverable under the AoS scheme and an assurer is not required to repay any FTB received for any assuree, including for children in Visa Subclass 101 (Child) and Visa Subclass 102 (Adoption). This arrangement continues under the new four-year AoS.

3. Compatibility of the measure with the right to an adequate standard of living

1.314 The committee seeks the advice of the minister as to compatibility of the measure with the right to an adequate standard of living, including whether assurers would be liable for the payment of any Special Benefit paid to an assuree and, if so:

- **whether the measure pursues a legitimate objective for the purposes of international human rights law**
- **whether the measure is rationally connected to that objective; and**
- **whether the measure is proportionate (including whether there are safeguards to ensure that assurers would not be subject to financial hardship if required to repay unforeseen social security payments of the assuree).**

To address the above, the Committee also requested further information on:

- **whether an assurer would be responsible for repayment of any Special Benefit if such a benefit was provided during the assurance period, and**
- **the safeguards that would apply to ensure that assurers would not suffer financial hardship as a result of having to repay such expenses.**

Response:
An AoS is a legally binding commitment by the assurer to support the assuree for the duration of the assurance period. The Determination provides clear and transparent criteria to assist the Commonwealth and the assurer to assess whether they can provide this support.

As part of the application process, the Department of Human Services ensures the assurer understands their obligations by facilitating access to interpreters and providing comprehensive guidance material. Potential assurers must meet an income test and a bond may also be required to demonstrate that they have the capacity to repay any debts incurred as a result of the assuree accessing social security payments, including Special Benefit.

These arrangements will continue under the new four-year assurance of support that applies to specific visa subclasses. This ensures that future assurers are aware of their obligations prior to agreeing to give an assurance of support and are able to support the assuree for the four-year period.

If a debt is incurred, various safeguards exist to ensure an assurer does not suffer financial hardship while repaying the debt. In the first instance, debts are recovered from the monetary bond (if any exists) lodged upon application of the AoS. If there is no bond, or if the amount of payment provided to the assuree exceeds the bond, debt recovery action will commence to recover the amount of the outstanding liability. The debt recovery action follows the same procedure as any other social security debt to the Commonwealth.

An assurer may repay the debt through various methods, including direct deductions from their social security payments, if they receive any, or through instalments directly to the Commonwealth. Under both arrangements, the amount of the deduction or instalment will consider the assurer's financial circumstances to determine an appropriate rate of recovery. The assurer may also vary the deduction or instalment amount if their circumstances change after an instalment arrangement has been entered into.

At all stages during the AoS process, a person affected by a decision under the Act has the right of appeal to a Centrelink Authorised Review Officer and the Administrative Appeals Tribunal (AAT).