Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is available on the committee's website.[1]

Australian Crime Commission Regulations 2018 [F2018L01780][2]

Purpose	Remakes the Australian Crime Commission Regulations 2002 in their entirety to set out the powers and functions of the Australian Criminal Intelligence Commission (ACIC). This includes the conferral of powers and functions under state laws on the ACIC and its staff, and powers to collect, use and disclose certain information
Portfolio	Home Affairs
Authorising legislation	*Australian Crime Commission Act 2002*
Last day to disallow	15 sitting days after tabling (tabled Senate and House of Representatives 12 February 2019)
Rights	Privacy; liberty; fair trial and fair hearing; effective remedy; life; prohibition against torture and cruel, inhuman and degrading treatment
Previous reports	Report 2 of 2019 and Report 3 of 2019
Status	Concluded examination

2.3 The committee first requested a response from the minister on the Australian Crime Commission Regulations 2018 (2018 Regulations) in *Report 2 of 2019*.[3] As that response had not been received at the time of the dissolution of the

1 See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human rights, [instrument name], *Report 5 of 2019*; [2019] AUPJCHR 79.

3 Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 2-13.

45th Parliament, the committee reiterated its initial request for advice in *Report 3 of 2019*.[4] The full initial human rights analysis is set out in *Report 2 of 2019* at pp. 2-13.[5]

Conferral of powers under state laws

2.4 Section 55A of the *Australian Crime Commission Act 2002* (ACC Act) provides Commonwealth legislative authority for the conferral by the states[6] of certain duties, functions and powers on the Australian Criminal Intelligence Commission (ACIC),[7] members of its board or staff, or a judge of the Federal Court or the Federal Circuit Court. These may include duties, functions or powers specified in regulations.

2.5 Section 14 and Schedules 4, 5 and 6 of the 2018 Regulations prescribe provisions of state laws for the purposes of section 55A, including:

- under section 14(1), duties, functions and powers provided in 34 provisions of state and territory Acts and regulations specified in Schedule 4,[8] which may be conferred on the ACIC; and
- under section 14(2), duties, functions and powers provided in 803 provisions of state and territory Acts and regulations specified in Schedule 5,[9] which may be conferred on the Chief Executive Officer (CEO) of the ACIC, ACIC staff, or members of the ACIC board.

2.6 In each instance, the duty, function or power may be conferred on the ACIC, its staff or members of its board for the purposes of, or in relation to, investigating or undertaking of intelligence operations relating to a relevant criminal activity,[10]

4 Parliamentary Joint Committee on Human Rights, *Report 3 of 2019* (30 July 2019) p. 2.

5 Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 85-89 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_2_of_2019.

6 'State' is defined in section 4 of the *Australian Crime Commission Act 2002* (ACC Act) to include the Australian Capital Territory and the Northern Territory.

7 In 2016, the Australian Crime Commission and CrimTrac were merged to form the Australian Criminal Intelligence Commission. Pursuant to section 7(1A) of the ACC Act and section 8 of the 2018 Regulations, the Australian Crime Commission may also be known as the Australian Criminal Intelligence Commission, the ACIC, or the ACC.

8 See Schedule 4, Part 1 (items 1-3); Part 2 (items 1-4); Part 3 (items 1-3); Part 4 (items 1-8); Part 5 (items 1-6); Part 6 (items 1-4); Part 7 (items 1-2) and Part 8 (items 1-4).

9 See Schedule 5, Part 1 (items 1-70); Part 2 (items 1-95); Part 3 (items 1-44) Part 4 (items 1 - 130); Part 5 (items 1-84); Part 6 (items 1-124); Part 7 (items 1-128); and Part 8 (items 1-128).

10 'Relevant criminal activity' is defined in section 4 of the ACC Act as 'any circumstances implying, or any allegations, that a relevant crime may have been, may be being, or may in future be, committed against a law of the Commonwealth, of a State or of a Territory.' 'Relevant crime' means serious and organised crime, indigenous violence or child abuse.

insofar as the activity is, or includes, an offence against a state law (whether or not that offence has a federal aspect).

Multiple rights: committee's initial analysis

2.7 In its initial assessment, the committee noted that a number of the provisions in Schedules 4 and 5 to the 2018 Regulations, allowing the conferral of powers, functions and duties under state laws on the ACIC, its staff and its board, may engage the right to privacy, the right to liberty, the right to a fair trial and a fair hearing, or the right to an effective remedy, and may engage other human rights. This is because the measures relate to matters such as criminal intelligence operations, use of assumed identities by law enforcement personnel, use of surveillance devices, witness protection and spent convictions.

2.8 The committee therefore sought the advice of the minister as to the human rights engaged by sections 14(1) and (2) and Schedules 4 and 5 of the 2018 Regulations. The committee also requested 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 rights will only be exercisable where accompanied by the conferral of corresponding duties and safeguards in the relevant state law.

Minister's response[11]

> *Prohibition on arbitrary or unlawful interference with privacy*
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> …
>
> 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

11 The minister's response to the committee's inquiries was received on 16 August 2019. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

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 legislations 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

…

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

…

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

….

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.[12] 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 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

…

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

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

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
- 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.

Committee comment

Right to privacy

2.9 The committee thanks the minister for this response and notes the advice as to the legitimate objective of the measure: that it is intended to assist the ACIC to effectively investigate criminal activities and gather intelligence about crime impacting Australia.

2.10 The committee also notes the minister's advice as to safeguards surrounding the measure. In particular, the committee notes the advice that surveillance device warrants may only be granted under certain state legislation if strict legislative requirements are met. For example, that the Chief Executive Officer of the ACIC must be satisfied that there are reasonable grounds for issuing a warrant, taking into account a range of matters including the nature and gravity of the relevant criminal conduct and the availability of other means of obtaining the necessary information.[13] The committee also notes the advice regarding the additional safeguards that apply in relation to the exercise of any power or function under state or territory law.[14]

2.11 The safeguards set out in the minister's response assist the proportionality of the measures, and may be capable of ensuring that powers and functions under the listed state and territory legislation are not exercised in a manner that disproportionately limits the right to privacy. However, it remains unclear whether *all* of the powers and functions under all the conferred laws are accompanied by sufficient safeguards. The committee notes the minister's advice that 'most' legislation pertaining to surveillance devices requires consideration of the extent to which the privacy of a person is likely to be affected, and that 'similar restrictions' to the examples provided apply to the disclosure or receipt of information under other state and territory legislation. In the absence of further information about the safeguards in place under *all* prescribed state and territory laws, it is not possible to fully assess whether the 2018 Regulations impose only proportionate limitations on the right to privacy.

13 *Surveillance Devices Act 2016* (SA), subsection 15(1).

14 For example, the requirement for the ACIC Board to consent to the performance of the relevant duty, function or power, the requirement for the ACIC to report to Commonwealth, state and territory ministers, and oversight by the Commonwealth Ombudsman.

Right to an effective remedy

2.12 The committee notes the minister's advice that state and territory legislation listed in the 2018 Regulations confers on the ACIC various duties to indemnify certain persons against civil and/or criminal liability in certain circumstances. The committee notes the advice that it is vital that persons who participate in covert operations are provide with adequate protection. The committee notes the advice that participants in controlled operations are not permitted to engage in abuses of human rights, 'except as authorised by or under Australian domestic law'. The committee also notes the advice that the provisions prescribed by the 2018 Regulations do not indemnify participants from conduct causing death, serious injury or which involves the commission of a sexual offence.

2.13 The committee further notes the minister's advice that persons affected by the administrative actions of the ACIC may lodge a complaint with the Commonwealth Ombudsman, and ACIC staff are bound by Commonwealth anti-discrimination legislation, so such complaints may be made with the Australian Human Rights Commission, and if not resolved, an enforceable remedy, such as an apology or compensation, may be sought from a federal court.

2.14 While noting the safeguards outlined in the minister's response, the committee remains concerned about the breadth of the indemnities that are conferred under the relevant state and territory legislation. For example, the *Police Powers (Controlled Operations) Act 2006* (Tas) provides that participants in a controlled operation are not criminally responsible, or subject to civil liability, for authorised conduct if the conduct 'does not involve the participant engaging in any conduct that *is likely* to' cause death, serious injury or involve the commission of a sexual offence.[15] However, it appears that if a person died, or was seriously injured, as a result of the indemnified person's conduct, but this was not a 'likely' outcome of that conduct, the affected person or their family may not be able to seek redress, even if, in practice, their human rights were violated.

2.15 The committee notes the right to an effective remedy requires state parties to ensure access to an effective remedy for violations of human rights.[16] An 'effective remedy' may take a variety of forms, such as prosecutions of suspected perpetrators or compensation for victims of abuse. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), state parties must comply with the fundamental obligation to provide a remedy that is effective.[17] The committee notes that the possibility to complain to the Ombudsman

15 *Police Powers (Controlled Operations) Act 2006*, sections 18 and 19, italics added.

16 International Covenant on Civil and Political Rights, article 2(3).

17 See UN Human Rights Committee, *General Comment 29: States of Emergency (Article 4)* (2001) [14].

would not appear to satisfy the international law obligation to provide an effective remedy.

Other rights

2.16 The committee notes the minister's advice that the right to life and the prohibition on torture and cruel, inhuman and degrading treatment or punishment are 'positively engaged' by the controlled operations provisions in the state and territory legislation prescribed by the 2018 Regulations, and makes no further comment on this matter.

2.17 The committee also notes the minister's advice as to the legislative safeguards that ensure authorised conduct would not constitute entrapment.[18] As such, the committee notes the advice that the 2018 Regulations do not engage or limit the right to fair trial or fair hearing rights, and makes no further comment on this matter.[19]

Finally, the committee notes the minister's advice that the 2018 Regulations relate primarily to different investigative methods, and do not provide powers of arrest or detention, and so do not engage the right to security of the person and freedom from arbitrary detention.

2.18 The committee thanks the minister for this response. The committee notes that the 2018 Regulations confer coercive powers under numerous state and territory laws on the Australian Criminal Intelligence Commission. While some of these laws may contain sufficient safeguards to protect the right to privacy, in the absence of further information about relevant safeguards for all prescribed state and territory laws, it is not possible to fully assess whether the 2018 Regulations impose only proportionate limits on the right to privacy.

2.19 The committee is concerned that the 2018 Regulations, in conferring powers that indemnify participants in covert operations from criminal and civil liability, may not provide for an effective remedy should a person's human rights be violated.

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18 The minister's response notes that this safeguard is set out in paragraph 15GI(2)(f) of the *Crimes Act 1914* (Cth), paragraph 14(d) of the *Crimes (Controlled Operations) Act 2004* (Vic), and paragraph 4(2)(d) of the *Criminal Investigation (Covert Operations) Act 2009* (SA), as well as other equivalent state and territory legislation. Of particular relevance to the committee's initial assessment, this safeguard is also set out in paragraph 10(2)(g) of the *Police Powers (Controlled Operations) Act 2006* (Tas).

19 In this respect, the minister's response notes that the European Court of Human Rights has noted that undercover operations do not, of themselves, engage or limit the right to fair trial if there are 'clear, adequate and sufficient procedural safeguards' in place to differentiate permissible law enforcement conduct from entrapment. See *Ramanauskas v Lithuania (No. 2)*, European Court of Human Rights Application No. 55146/14 [52]-[54].

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

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

2.21 Section 4 of the ACC Act defines 'ACC information' as information that is in the ACIC's possession. Section 15 and Schedule 7 of the 2018 Regulations prescribe seven international organisations to which ACC information may be disclosed, in accordance with section 59AA of the ACC Act.[20]

2.22 1Section 17 and Schedule 9 of the 2018 Regulations prescribe 131 bodies corporate and 38 classes of body corporate to whom ACC information may be disclosed, in accordance with section 59AB of the ACC Act.

2.23 Section 4 of the ACC Act defines 'national policing information' as information that is collected by the Australian Federal Police, a state police force, or a body prescribed by regulations, and that is of a kind prescribed by regulations.[21] In this respect, national policing information is a limited subset of ACC information.

2.24 Section 6(1) and Schedule 1 of the 2018 Regulations prescribe 40 bodies that collect national policing information. Section 6(2) and Schedule 2 prescribe, as the kind of information that is national policing information, information held under, or that relates to the administration of, 23 databases and electronic systems. Section 16 and Schedule 8 of the 2018 Regulations prescribe six organisations to which national policing information may be disclosed by the CEO of the ACIC without approval by the ACIC board,[22] in addition to organisations specified in the ACC Act.[23]

20 These include the European Monitoring Centre for Drugs and Drug Addiction; the European Police Office, the Financial Action Task Force; the Edgmont Group of Financial Intelligence Units; the International Criminal Police Organisation (INTERPOL); the International Narcotics Control Board; and the United Nations Office on Drugs and Crime.

21 The explanatory memorandum to the Australian Crime Commission Amendment (National Policing Information) Bill 2015 (NPI Bill) indicates (at p. 4) that the definition of 'national policing information' in the ACC Act is designed to capture all information that was collected, held and disseminated by CrimTrac prior to the merger of CrimTrac and the Australian Crime Commission. Submissions to the inquiry by the Senate Standing Committee on Legal and Constitutional Affairs indicate that this may include individuals' criminal records, DNA profiles of offenders, details of missing persons and fingerprint and palm images. See Senate Standing Committee on Legal and Constitutional Affairs, Australian Crime Commission Amendment (National Policing Information) Bill 2015 [Provisions] (March 2016), p. 2.

22 These include the Attorney-General's Department; the Department of Finance; the New Zealand Police; the Crime and Corruption Commission of Queensland; the Independent Commission Against Corruption of New South Wales; and the Victorian Institute of Forensic Medicine.

Right to privacy: committee's initial analysis

2.25 As ACC information and national policing information may include private, confidential and personal information, the collection, use and disclosure of such information engages and limits the right to privacy. The committee has considered the powers to collect, use and disclose ACC information and national policing information on a number of occasions.[24] In doing so, the committee has found that there are a number of safeguards in place that may ensure the measures would impose only proportionate limitations on the right to privacy.

2.26 However, the committee has found it difficult to thoroughly assess the proportionality of the measures without the detail of an ACIC information-handling protocol (the protocol).[25] The committee therefore requested that a copy of the protocol be provided to the committee.

Minister's response

2.27 The minister advised:

> 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

Committee comment

2.28 As outlined in its initial analysis, the committee welcomes the inclusion in the statement of compatibility to the 2018 Regulations of a detailed assessment of whether the powers to collect, use and disclose ACC information and national policing information are compatible with the right to privacy. The committee also notes that the statement of compatibility identifies a number of relevant safeguards, which may assist to ensure that the measures do not disproportionately limit that right. A number of these safeguards are also identified in the protocol.[26]

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23 Section 59AA of the ACC Act provides for the disclosure of information in the ACIC's possession by its CEO. Section 59AA(1B) provides that the CEO of the ACC must obtain the approval of the board before disclosing national policing information to a body that is not listed in sections 59AA(1B)(a) to (f), or prescribed by the regulations.

24 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 30-32; *Report 8 of 2016* (9 November 2016) pp. 72-74; *Report 3 of 2018* (27 March 2018) pp. 57-62; *Report 4 of 2018* (8 May 2018) pp. 124-129.

25 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) p. 133.

26 See Australian Criminal Intelligence Commission, *Information Handling Protocol* at: https://www.acic.gov.au/sites/default/files/information_handling_protocol.pdf?v=1556762207, [4.1]-[4.9].

2.29 However, the committee is concerned that there is no specific limit in the protocol on the length of time for which the ACIC may retain personal information. Rather, the protocol states that there is generally a requirement for the ACIC to retain information subject to contrary lawful requirements.[27] The protocol further states that the ACIC 'adheres to…legislation that prescribes requirements for retention and destruction of information', including the *Archives Act 1983*, the *Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 2004*.[28] If such legislation prescribes time limits on retaining information and requirements for the destruction of information and documents, this may be a relevant safeguard.[29] However, the committee notes that the *Archives Act 1983* provides for the preservation of archival resources of the Commonwealth, including giving the public a right of access to Commonwealth records that are more than 30 years old, and actively prohibits the destruction of such information.[30] While it provides limited safeguards to exempt personal affairs from public access,[31] it is not clear whether this would apply to ACIC information. In addition, it appears that the requirements under those Acts may not apply to all information in the ACIC's possession; in particular, it may not apply to information actively collected by the ACIC under its general intelligence-gathering functions, in which case, it is unclear what the policy is under the protocol for the retention of such data.

2.30 Additionally, the protocol's data retention policy does not appear to distinguish between information relating to persons who have been convicted of a criminal offence, and those that may be suspects, persons of interest or witnesses. This raises concerns that the measures may not be appropriately circumscribed. The committee considers that a more appropriate approach may be to apply separate data retention policies to different classes of information, based on considerations such as the persons to whom the information relates (for example, offenders or suspects), its relevance to an investigation or a prosecution, and the likely impacts on individuals' privacy.

2.31 The committee is also concerned that the protocol does not appear to specify in detail the kind of personal information that is collected and retained by the ACIC. It only notes that information held by the ACIC falls into three categories:

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27 Australian Criminal Intelligence Commission, *Information Handling Protocol*, [7.1].

28 Australian Criminal Intelligence Commission, *Information Handling Protocol*, [7.1].

29 For example, section 150 of the *Telecommunications (Interception and Access) Act 1979* provides that information obtained by accessing a stored communication, which is in the possession of a criminal law enforcement agency (including the ACIC) must be destroyed 'forthwith' if it is not likely to be required in connection with a criminal investigation or prosecution.

30 See *Archives Act 1983*, sections 24–29.

31 See *Archives Act 1983*, section 33(1)(g).

criminal information and intelligence, national policing information, and administrative information.[32] The type of information collected by the ACIC will be particularly relevant to the extent of any interference with the right to privacy. For example, the retention of DNA samples or other biometric information may result in more substantial interference with the right to privacy, and stricter safeguards may be required in relation to this type of data.

2.32 Additionally, it appears that the ACIC may retain and disclose inaccurate information about a person (noting that the ACIC 'cannot guarantee the accuracy, completeness, relevance or currency of criminal intelligence').[33] While the protocol provides that a person may make a request for the correction of their data, this appears to relate only to information provided to the ACIC by another agency.[34] It is unclear whether a person may have their personal information corrected where the information was directly collected by the ACIC.[35] Also unclear is whether an individual would be aware that they may request correction of their personal information (noting that the ACIC is not required to notify a person that personal information has been collected).[36]

2.33 A final, related concern is the availability of effective oversight and review mechanisms. The protocol states that where a person has a complaint about how the ACIC deals with their personal information, the conduct of the ACIC may be examined by the Commonwealth Ombudsman, the Integrity Commissioner and the Parliamentary Joint Committee on Law Enforcement (PJCLE). This is in addition to 'avenues of access' available under the *Freedom of Information Act 1982*.[37] While these mechanisms are relevant to the proportionality of the measures, the committee remains concerned that they may not be effective safeguards in practice. In this respect, the committee notes that the Ombudsman, the Commissioner and the PJCLE are only empowered to consider and investigate complaints, review the ACIC's performance and make recommendations to government. None of the listed entities are able to override the decisions of the ACIC in relation to the handling of personal information or issue directions to its staff.

2.34 The committee thanks the minister for providing a copy of the Australian Criminal Intelligence Commission's (ACIC) information handling protocol.

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32 Australian Criminal Intelligence Commission, *Information Handling Protocol*, [2.1].

33 Australian Criminal Intelligence Commission, *Information Handling Protocol*, [5.1].

34 Australian Criminal Intelligence Commission, *Information Handling Protocol*, [7.2].

35 The protocol states that personal information collected in the course of the ACIC's functions includes information contributed to the ACIC by agencies with enforcement-related functions, as well as information actively collected under the ACIC's general intelligence functions. See Australian Criminal Intelligence Commission, *Information Handling Protocol*, [3.1].

36 Australian Criminal Intelligence Commission, *Information Handling Protocol*, [3.2].

37 Australian Criminal Intelligence Commission, *Information Handing Protocol*, [8.1].

2.35 The committee notes that the measures in the 2018 Regulations are intended to assist the ACIC in collecting personal information relating to criminal and policing matters, and therefore engage the right to privacy. While there are a number of relevant safeguards in the *Australian Crime Commission Act 2002* regarding the use and disclosure of such information, the committee is concerned, as set out above, that the information handling protocol may not adequately protect the right to privacy.

2.36 As such, the committee considers the collection and retention of such information risks disproportionately interfering with the right to privacy. The committee draws these human rights concerns to the attention of the minister and the Parliament.

Right to life and the right to freedom from torture and cruel, inhuman or degrading treatment or punishment: committee's initial analysis

2.37 1As noted above, the 2018 Regulations prescribe seven international organisations to which ACC information may be disclosed, in accordance with section 59AA of the ACC Act.[38] By authorising the disclosure of ACC information overseas to specified bodies, the measure may engage the right to life, insofar as it could result in a person being investigated or prosecuted for an offence to which the death penalty applies.

2.38 A related issue raised by the measures is that the sharing of ACC information overseas may result in a person being subjected to torture or cruel, inhuman or degrading treatment or punishment. Under international law, the prohibition on torture is absolute and can never be limited.[39]

2.39 The committee's initial analysis noted that the statement of compatibility does not recognise that the disclosure of ACC information may have implications for these rights. Accordingly, the statement provided no assessment of whether the measures are compatible with those rights.

2.40 The committee therefore sought the advice of the minister as to the compatibility of the measures with the right to life and the right to freedom from torture or cruel, inhuman or degrading treatment or punishment (including the existence of any relevant safeguards or guidelines).

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38 These include the European Monitoring Centre for Drugs and Drug Addiction; the European Police Office, the Financial Action Task Force; the Edgmont Group of Financial Intelligence Units; the International Criminal Police Organisation (INTERPOL); the International Narcotics Control Board; and the United Nations Office on Drugs and Crime.

39 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, article 4(2); UN Human Rights Committee, *General Comment 20: Article 7* (1992) [3].

Minister's response

2.41 The minister advised:

> 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.

Committee comment

2.42 The committee notes the minister's advice regarding the restrictions on the disclosure of information set out in the ACC Act, and that these ensure that the ACIC CEO turns their mind to a number of relevant matters before sharing information overseas, including whether sharing the information could result in the investigation and prosecution of an offence to which the death penalty applies. The committee also notes the minister's advice that, where ACC information is national policing information, the ACIC CEO must act in accordance with the policies and directions of the ACC Board in deciding whether to disclose the information.

2.43 The committee further notes the minister's advice that the ACIC cooperates with the Australian Federal Police (AFP) under its national guidelines on providing assistance in death penalty and potential torture or cruel, inhuman or degrading treatment or punishment situations. The committee also notes the advice that all ACIC staff are required to take account of government policy on assisting foreign countries which retain the death penalty when considering whether to disclose information to foreign entities.

2.44 The committee considers that, in practice, the safeguards outlined in the minister's response may be capable of ensuring that the ACIC does not share information overseas in circumstances where a person may be exposed to the death penalty or to torture or to cruel, inhuman or degrading treatment or punishment. In this respect, the committee welcomes the advice that the ACIC does not disclose information to foreign entities in circumstances where a person may be prosecuted for an offence to which the death penalty applies.

2.45 However, in relation to the restrictions in paragraphs 59AA(1)(f)-(h) of the ACC Act, the committee remains concerned that the ACIC CEO has considerable discretion as to whether to disclose information to the international organisations listed Schedule 7 of the 2018 Regulations. In particular, the committee notes that there is no express requirement under the ACC Act for the ACIC CEO to consider whether the disclosure of information may expose a person to the death penalty or potential torture. The ACC CEO is only required to consider whether the disclosure of information is 'appropriate'. The committee further notes that there is no express prohibition in Australian law on sharing information in such circumstances. In the absence of such a prohibition, it is unclear that the requirement for the disclosure of information to comply with Commonwealth and state and territory laws would always operate as an effective safeguard in practice.

2.46 As to the disclosure of national policing information, the requirement to comply with policies and directions of the ACC Board may assist in ensuring that

information is not disclosed in circumstances where a person may be exposed to the death penalty or to torture. However, it is unclear whether these policies and directions will contain additional safeguards (for example, a prohibition on disclosing information where to do so may expose a person to the death penalty or to torture). In this respect, it would have been useful had the minister's response included copies of any relevant policies or directions or, at a minimum, a description of their content.

2.47 Further, it is unclear that the AFP guidelines referred to by the minister would be sufficient to ensure that information is not disclosed in circumstances where a person may be exposed to the death penalty or to torture. The committee has previously examined these guidelines and noted that neither set of guidelines prohibits the sharing of information in such circumstances. The committee has also pointed to a number of other deficiencies in the guidelines. For example, that exposure to the death penalty is only one of a number of factors that an AFP officer must consider before disclosing information overseas, and that requests for information (or other assistance) only require escalation to a senior manager where the relevant AFP officer is aware of relevant risks.[40]

2.48 More broadly, the committee notes that discretionary or administrative safeguards, such as those set out in the AFP guidelines, are unlikely of themselves to be sufficient to ensure that a person is not exposed to the death penalty or to torture. This is because such safeguards are less stringent than the protection of statutory processes and may be amended or removed at any time.

2.49 The committee thanks the minister for this response. The committee notes that the 2018 Regulations prescribe seven international organisations to which the Australian Criminal Intelligence Commission (ACIC) may disclose information it holds. The committee is concerned that, while it is open to the Chief Executive Officer (CEO) of the ACIC to consider the risk of sharing this information with an international body before disclosure, there is no specific requirement that the CEO must be satisfied that disclosing such information would not lead to a risk of exposure to the death penalty or to torture, cruel, inhuman or degrading treatment or punishment.

2.50 In order to assist in ensuring the compatibility of the 2018 Regulations with the right to life and the right to freedom from torture and cruel, inhuman or degrading treatment or punishment, the committee recommends that the minister and the ACIC consider developing guidelines or amendments to the relevant legislation to require that, before disclosing information to an international organisation, the ACIC must be satisfied that the disclosure will not expose a person to a risk of the death penalty or to torture, cruel, inhuman or degrading treatment or punishment.

40 See, for example, Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 83-91.

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

Civil Aviation Safety Amendment (Part 91) Regulations 2018 [F2018L01783][1]

Purpose	Amends the Civil Aviation Safety Regulations 1998 to substitute a new Part 91 – General Operating and Flight Rules
Portfolio	Infrastructure, Regional Development and Cities
Authorising legislation	*Civil Aviation Act 1988*
Last day to disallow	15 sitting days after tabling (tabled Senate and House of Representatives 12 February 2019)
Rights	Rights of persons with disabilities (accessibility and personal mobility); equality and non-discrimination
Previous report	Report 2 of 2019
Status	Concluded examination

2.52 The committee first requested a response from the minister on the Civil Aviation Safety Amendment (Part 91) Regulations 2018 (the regulations) in *Report 2 of 2019*.[2] As that response had not been received at the time of the dissolution of the 45th Parliament, the committee reiterated its initial request for advice in *Report 3 of 2019*.[3] The full initial human rights analysis is set out in *Report 2 of 2019* at pp. 22-26.[4]

Power to refuse carriage of assistance animals on board aircraft

2.53 Section 91.620(3) of the regulations provides that the operator or pilot in command of an aircraft for a flight may refuse to carry an 'assistance animal' (within the meaning of the *Disability Discrimination Act 1992*) in the aircraft if the operator or pilot reasonably believes that 'carriage of the animal for the flight may have an

1 This entry can be cited as: Parliamentary Joint Committee on Human rights, [instrument name], *Report 5 of 2019*; [2019] AUPJCHR 80.

2 Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 22-26.

3 Parliamentary Joint Committee on Human Rights, *Report 3 of 2019* (30 July 2019) p. 2.

4 Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 22-26 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_2_of_2019.

adverse effect on the safety of air navigation'.[5] Section 91.620(3) has effect despite anything in the *Disability Discrimination Act 1992*.[6]

Rights of persons with disabilities and right to equality and non-discrimination: committee's initial analysis

2.54 As noted in the committee's previous analysis, by permitting the operator or pilot in command of an aircraft to refuse carriage to assistance animals, which in turn could limit access by people with disabilities to civil aviation, the measures engage the right to equality and discrimination for people with disabilities who are accompanied by assistance animals. That is, it engages the right to equality and non-discrimination on the basis of disability.

2.55 Article 9 of the Convention on the Rights of Persons with Disabilities (CRPD) requires States to take appropriate measures to provide persons with disabilities with access, on an equal basis, to transportation. States must take account of the diversity of persons with disabilities, including recognising that some persons with disabilities may require human or animal assistance to enjoy full accessibility.[7] Article 20 of the CRPD further requires States to take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by facilitating access by persons with disability to forms of live assistance and intermediaries.[8]

2.56 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). 'Discrimination' under the ICCPR encompasses a distinction based on a personal attribute, including on the basis of disability,[9] which has either the purpose ('direct' discrimination) or the effect ('indirect' discrimination) of adversely affecting human rights.[10] This right is also enshrined in articles 3(b), 4 and 5 of the CRPD, insofar as it relates to the right of

5 'Assistance animal' is defined in section 9 of the *Disability Discrimination Act 1992* as a dog or other animal that is accredited under certain state and territory laws, accredited by a prescribed animal training organisation, or trained to assist a person with disability and trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

6 Part 91 Regulations, section 91.620(4).

7 See UN Committee on the Rights of Persons with Disability, *General Comment No. 2: Article 9: Accessibility* (2014), [29].

8 Convention on the Rights of Persons with Disabilities (CRPD), article 20(b).

9 The prohibited grounds are colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation: UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

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

persons with disabilities. In that context, the right includes ensuring that all appropriate steps are taken to ensure that reasonable accommodation of persons with disabilities is provided.[11]

2.57 The committee therefore sought the advice of the minister as to the compatibility of the measure with the rights of persons with disability under Articles 9 and 20 of the Convention on the Rights of Persons with Disabilities, and with the right to equality and non-discrimination.

Minister's response[12]

2.58 The minister advised:

> *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.
>
> 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:

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11 Article 5(3). 'Reasonable accommodation' is defined in article 2 of the CRPD, and means necessary and appropriate modification and adjustments not imposing an undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

12 The minister's response to the committee's inquiries was received on 29 August 2019. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

- 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.

Committee comment

2.59 The committee thanks the minister for this response and notes the minister's advice that these provisions are intended to cover residual circumstances where standard measures and procedures that already exist may not adequately manage and minimise safety risks.

2.60 The committee notes the minister's advice that the pilot in command has the discretion to refuse carriage of an assistance animal as it is the pilot who has the overall responsibility for ensuring that the final disposition of the aircraft will not result in an unsafe situation and who has visibility over all aspects of the operation of the aircraft. The committee notes the advice that the pilot in command is therefore best placed to make determinations about whether the carriage of an assistance animal will adversely affect the safety of a particular flight. The committee notes the advice that it is neither practicable nor desirable to attempt to exhaustively prescribe specific circumstances in which a pilot in command must refuse carriage of an assistance animal, and that doing so is likely to result in both the refusal to carry assistance animals in circumstances where no safety risks exists and also the carriage of assistance animals in circumstances where safety may be adversely affected.

2.61 The committee also notes the advice that, in practice, common risks may be mitigated by standard measures such as the provision of evidence that an animal has been properly trained, or by management of the location and restraint of an assistance animal, and that CASA 'would generally expect airline operators to have procedures and facilities to manage relevant risks in the vast majority of cases'. However, the committee notes that this 'expectation' that airlines will have relevant

procedures in place, is not required under the regulations themselves. While noting the reasons for the breadth of the discretion given to the pilot to refuse to allow the carriage of assistance animals, the committee is concerned that as this provision overrides the requirements of the *Disability Discrimination Act 1992*, there is a risk that in practice an assistance animal may be refused carriage even where any risks it poses could have been adequately managed, had the airline had appropriate procedures in place.

2.62 The committee considers that it would be appropriate for the information provided by the minister to be included in the statement of compatibility, noting the importance of that document as the starting point for determining the compatibility of the human rights engaged.

2.63 The committee thanks the minister for this response. The committee appreciates the vital importance for pilots in command of an aircraft to ensure the safety of the flight. However, the committee notes that the regulations would allow a pilot to refuse to carry an assistance animal, with no corresponding requirement that the airline have existing procedures to seek to safely manage any risks posed by such animals.

2.64 In such circumstances, and as the regulations override any requirement in the *Disability Discrimination Act 1992*, the committee is concerned that the regulations may not adequately protect the rights of persons with disabilities. The committee considers it may be appropriate if the regulations were amended to include a requirement that airlines have guidelines in place, to assist pilots, regarding management of any risks posed by the carriage of assistance animals.

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

Criminal Code Amendment (Agricultural Protection) Bill 2019[1]

Purpose	Seeks to amend the *Criminal Code Act 1995* (Cth) to introduce two new offences relating to the incitement of trespass or property offences on agricultural land
Portfolio	Attorney-General
Introduced	House of Representatives, 4 July 2019
Rights	Freedom of expression; freedom of assembly
Previous report	Report 3 of 2019
Status	Concluded examination

2.66 The committee requested a response from the Attorney-General in *Report 3 of 2019*, and its full initial human rights analysis is set out at *Report 3 of 2019*, pp. 3-9.[2]

Using a carriage service with intent to incite another person to trespass

2.67 The bill seeks to amend the *Criminal Code Act 1995* (Criminal Code) to provide that a person commits an offence if the person uses a carriage service to transmit, make available, publish or otherwise distribute material with the intention of inciting another person to trespass on agricultural land.[3] The offender must be reckless as to whether the trespass of the other person on the agricultural land, or any conduct engaged in by the person while trespassing on the agricultural land,

1 This entry can be cited as: Parliamentary Joint Committee on Human rights, Criminal Code Amendment (Agricultural Protection) Bill 2019, *Report 5 of 2019*; [2019] AUPJCHR 81.

2 Parliamentary Joint Committee on Human Rights, *Report 3 of 2019* (30 July 2019) pp. 4-9 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_3_of_2019.

3 Criminal Code Amendment (Agricultural Protection) Bill 2019 (Agricultural Protection Bill), Schedule 1, item 2, new section 474.46. 'Agricultural land' is defined in new section 473.1 to mean land in Australia that is used for a primary production business, and it is immaterial whether part of the land is used for residential purposes or part of the land is used for a business that is not a primary production business. 'Primary production business' is defined to capture a range of businesses, including farming businesses, such as chicken farms and piggeries, businesses operating an abattoir or an animal saleyard and businesses operating a fruit processing facility or growing fruit, vegetables and crops.

could cause detriment to a primary production business.[4] If convicted, an offender is liable to imprisonment for 12 months.[5]

Right to freedom of expression and assembly: committee's initial analysis

2.68 As noted in the committee's previous analysis, the bill engages and limits the right to freedom of expression by criminalising the use of a carriage service to transmit, make available, publish or otherwise distribute material.[6] Further, the bill may also engage the right to freedom of assembly by criminalising conduct which may incite another person to trespass on agricultural land.[7] The rights to freedom of expression and assembly may be limited if it can be demonstrated that it is necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Additionally, such limitations must be prescribed by law, be rationally connected to (that is, effective to achieve) and proportionate to the objective of the measure.[8]

2.69 The committee focused its concerns on the proportionality of the measure and whether adequate and effective safeguards exist. The committee raised concerns about the adequacy of these safeguards, the potential breadth of the offence and whether the measure as drafted is sufficiently circumscribed, and whether less rights restrictive approaches were available.

2.70 The committee sought the advice of the Attorney-General as to the compatibility of the proposed offence 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.

4 Agricultural Protection Bill, Schedule 1, item 2, new section 474.46(1)(d).

5 The Agricultural Protection Bill also seeks to introduce a further offence of using a carriage service for inciting property damage, or theft, on agricultural land which is liable to imprisonment for 5 years: see Schedule 1, item 2, new section 474.47.

6 Statement of Compatibility (SOC), p. 6.

7 The statement of compatibility does not address the right to freedom of assembly.

8 UN Human Rights Committee, Ge*neral Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36].

Attorney-General's response[9]

2.71 The Attorney-General advised:

> 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

9 The Attorney-General responded to the committee's comments in a letter received on 20 August 2019. The response is available in full on the committee's scrutiny reports page at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

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.

<u>The proposed offence and its potential application is sufficiently circumscribed</u>

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 whistle blowers.

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.

Committee comment

2.72 The committee thanks the Attorney-General for this response and notes the advice that 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'. As noted in its initial analysis, the committee considers that the protection of public order, public health and the rights of others are capable of constituting legitimate bases under international human rights law on which the rights to freedom of expression and assembly may be limited.[10]

2.73 The committee notes the Attorney-General's advice that '[t]he engagement of the Bill with the right to freedom of assembly is very limited' and 'would restrict [it] only to the extent that the assembly would constitute trespass.' The committee also notes the Attorney-General's advice that 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'. However, the committee notes that the

10 The committee reiterates its earlier comments, that further information about the specific threat posed by this conduct and why current laws are insufficient to deter this threat would have been useful. The UN Human Rights Committee has stated that when a State party invokes one of the legitimate grounds for restricting freedom of expression, it must demonstrate in specific and individualised fashion the precise nature of the threat. UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [35].

offence would apply even where the relevant trespass is not criminal in nature, but would give rise to a civil action, and agricultural land is defined very broadly in the bill to include land accessible by the public.[11] The committee notes that the right to peaceful assembly can extend to assemblies on privately owned property, where the property is publicly accessible, particularly when the location of the assembly is significant to enabling participants to convey their message to their target audience.[12]

2.74 The committee notes the Attorney-General's advice that the offences in the bill are appropriately circumscribed, as the bill is not intended to create new forms of criminal conduct that are not already found in Australian law, as trespass is already subject to state and territory laws. However, the committee notes that the penalty for inciting trespass under the bill significantly exceeds the penalty that applies to most forms of trespass under existing laws, particularly as the offence would apply even where the relevant trespass is not criminal in nature, but would give rise to a civil action.

2.75 In order to be proportionate, restrictions on freedom of expression and assembly should not be overly broad.[13] The committee notes the Attorney-General's advice that the bill is sufficiently circumscribed '[g]iven the high thresholds of intention and recklessness as the relevant fault elements in the proposed offences'. However, the explanatory memorandum explains that intent could be proved by references to the materials published or distributed, where relevant material may include addresses or information of a primary production business, a website link, or maps indicating the locations of primary production businesses.[14] It would appear therefore that a website which purports to raise concerns about alleged animal cruelty and includes information (such as a website link identifying the location) about farms alleged to engage in such conduct, could fall within the scope of the provision. It is not clear whether such information coupled with a disclaimer discouraging trespass would meet the threshold of 'intent' to incite trespass. The second reading speech explains that 'intent' will be based on the circumstances of

11 The definition includes land used for a primary production business, where it is immaterial where part of that land is used for a purpose that is not a primary production business: Agricultural Protection Bill, Schedule 1, item 2, new section 473.1.

12 See Draft General Comment on Article 21 (Right of Peaceful Assembly) prepared by the Rapporteur, Christof Heyns at [15] and [64] at: https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx. See also *Appleby and others v. United Kingdom*, European Court of Human Rights Application No. 44306/98 (2003) [47].

13 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [22] and [34].

14 Explanatory Memorandum, p. 11.

each case but that 'the inclusion of a disclaimer on a website would not, of itself, be conclusive'.[15]

2.76 As the High Court found in *Brown v Tasmania*,[16] uncertainty in the interpretation of particular measures can operate to deter or stifle protest activity or expression either due to the risk of errors being made by police, or uncertainty on the part of protestors as to the legality of their proposed actions. The court noted that regardless of the ultimate judicial interpretation of the law, the practical application of the legislation on the ground, and 'the likelihood of errors being made except in the clearest of cases',[17] will operate to prevent lawful protest action.[18]

2.77 The committee also notes the Attorney-General's advice that the safeguards in the bill for journalists and whistleblowers are sufficient, as the offence itself contains the 'inherently high threshold' of requiring 'an actual intention that others unlawfully trespass, cause damage or steal on agricultural land', 'which would operate as a safeguard to ensure the offence does not inadvertently capture less serious communications.' The committee notes the Attorney-General's advice that the safeguards provide exceptions to the offences contained in the bill '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' and where 'a person [is] making a disclosure under a statutory whistleblower or lawful disclosure scheme.' However, the committee remains concerned that the safeguards only protect a narrow group of people (professional journalists and statutorily-protected whistleblowers) rather than persons acting in the public interest more broadly.

2.78 The committee further notes the Attorney-General's advice that the reverse evidentiary burden that applies to the exceptions to the offences contained in the bill is appropriate for journalists as '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'. The committee further notes the Attorney-General's advice that a whistleblower will also 'generally be in a better position to lead evidence' that they are 'acting under lawful authority' than the prosecution would be to establish that they are not. However, the committee notes that the usual test for when it is appropriate to reverse the burden of proof is that the matters in question are peculiarly within the knowledge of the defendant and it

15 Attorney-General, Second Reading Speech to the Criminal Code Amendment (Agricultural Protection) Bill 2019.

16 *Brown v Tasmania* (2017) 261 CLR 328 (Kiefel CJ, Bell and Keane JJ), [37], [77] and [79]; and [117] and [118].

17 *Brown v Tasmania* (2017) 261 CLR 328 (Kiefel CJ, Bell and Keane JJ), [77].

18 *Brown v Tasmania* (2017) 261 CLR 328 (Kiefel CJ, Bell and Keane JJ), [77] and [151].

would be significantly more difficult for the prosecution to prove.[19] Whether a journalist was acting in the public interest would not appear to be a matter peculiarly within their knowledge. The committee reiterates its concern that the safeguards are framed as defences for which the alleged offender carries the evidential burden, rather than as an element of an offence to be proved by the prosecution (for example, by providing the offence would only be committed if the offender, in distributing the material, was not acting in the public interest).

2.79 These matters collectively raise questions as to whether the bill, as currently drafted, may potentially act as a disincentive to persons or civil society organisations from acting in the public interest, resulting in a possible 'chilling effect' on freedom of expression and assembly.

2.80 The committee thanks the Attorney-General for this response. The committee considers the offence of using a carriage service with intent to incite another to trespass, as currently drafted, raises concerns regarding the right to freedom of association and expression, due to the restrictive impact it may have on lawful protest activity or expression.

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

19 Attorney-General Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 50.

Fair Work Amendment (Casual Loading Offset) Regulations 2018 [F2018L01770][1]

Purpose	Seeks to allow an employer to make a claim to have casual employment loading taken into account in determining any amount payable by the employer to a person in lieu of one or more of the National Employment Standards entitlements
Portfolio	Jobs and Industrial Relations
Authorising legislation	*Fair Work Act 2009*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives and Senate 12 February 2019)
Rights	Just and favourable conditions of work
Previous reports	Report 2 of 2019 and Report 3 of 2019
Status	Concluded examination

2.82 The committee first requested a response from the minister on the Fair Work Amendment (Casual Loading Offset) Regulations 2018 [F2018L01770] (the regulations) in *Report 2 of 2019*.[2] As that response had not been received at the time of the dissolution of the 45th Parliament, the committee reiterated its initial request for advice in *Report 3 of 2019*.[3] The full initial human rights analysis is set out in *Report 2 of 2019* at pp. 57-60.[4]

Casual loading offset

2.83 The regulations amend the *Fair Work Regulations 2009* to provide that, to avoid doubt, an employer may make a claim to have 'casual employment loading' taken into account in determining any amount payable by the employer to the

1 This entry can be cited as: Parliamentary Joint Committee on Human rights, Fair Work Amendment (Casual Loading Offset) Regulations 2018 [F2018L01770], *Report 5 of 2019*; [2019] AUPJCHR 82.

2 Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 57-60.

3 Parliamentary Joint Committee on Human Rights, *Report 3 of 2019* (30 July 2019) p. 2.

4 Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 85-89 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_2_of_2019.

person in lieu of one or more of the relevant National Employment Standards (NES) entitlements.[5]

Right to just and favourable conditions of work: committee's initial analysis

2.84 The committee's initial analysis noted that, to the extent the regulations relate to an employee's entitlement to paid leave (for example, paid personal leave or annual leave), the measure engages and may limit the right to just and favourable conditions of work. The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to rest, leisure and reasonable limitation of working hours and periodic holidays with pay.[6]

2.85 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to just and favourable conditions of work.

Minister's response[7]

2.86 The minister advised:

> 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

5 The National Employment Standards are minimum employment entitlements that must be provided to all employees, for example relating to maximum weekly hours, personal/carer's leave and annual leave: see Part 2-2 of the *Fair Work Act 2009*.

6 International Covenant on Economic and Social Rights, article 7.

7 The minister's response to the committee's inquiries was received on 20 August 2019. The response is discussed below and is available in full on the committee's website at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

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 person is employed by an employer on the basis that they are a casual employee;
- the employer pays the person an amount (typically known as a casual loading) that is dearly identifiable as an amount paid to compensate the person for not having one or more relevant NES entitlements during the employment period;
- 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
- 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. 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.

Committee comment

2.87 The committee thanks the minister for this response and notes the minister's advice that the regulations pursue the legitimate objective of providing clarity of the law around the 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 entitlements.

2.88 In relation to the proportionality of the measure, the committee notes the minister's explanation that the regulations provide declaratory clarification of existing legal and equitable general law rights; they do not limit or expand rights, nor do they create any new rights. The committee also notes the advice that ultimately it is for a court to determine whether a casual loading payment may be taken into account in any particular factual circumstances.

2.89 The committee thanks the minister for this response. In light of the information provided that the regulations do not create or limit any new rights but are intended to clarify existing rights, the committee has concluded its examination of the regulations.

Fisheries Management Regulations 2019 [F2019L00383][1]

Purpose	Prescribes the mechanisms by which Commonwealth fisheries are managed and regulated and provides for the collection and sharing of information to certain entities (including overseas entities)
Portfolio	Forestry and Fisheries
Authorising legislation	*Fisheries Management Act 1991*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives and Senate 2 April 2019). Notice of motion to disallow must be given in the Senate by 11 September 2019
Rights	Privacy; life; torture, cruel, inhuman and degrading treatment or punishment
Previous report	Report 3 of 2019
Status	Concluded examination

2.90 The committee requested a response on the Fisheries Management Regulations 2019 (the regulations) in *Report 3 of 2019*,[2] and the full initial human rights analysis is set out in that report.

Collection and disclosure of information

2.91 The Fisheries Management Act 1991 provides that suspected illegal foreign fishers may be detained in certain circumstances, and detainees must provide personal identifiers to authorised officers, including fingerprints, photographs, samples of handwriting, audio recordings and iris scans.[3] Part 10, Division 3 of the regulations authorises the disclosure of such identifying information to a large number of Australian government agencies and also provides that the Australian Fisheries Management Authority (AFMA) may disclose such information to Interpol, the United Nations and a range of international intergovernmental bodies.[4]

2.92 Section 103 of the regulations permits the AFMA to collect information, including in relation to possible breaches of Australian laws or laws of a foreign country, or the control and protection of Australia's borders. Section 104 provides

1 This entry can be cited as: Parliamentary Joint Committee on Human rights Fisheries Management Regulations 2019 [F2019L00383], *Report 5 of 2019*; [2019] AUPJCHR 83.

2 Parliamentary Joint Committee on Human Rights, *Report 3 of 2019* (30 July 2019) pp. 10-14.

3 *Fisheries Management Act 1991*, schedule 1A, section 8, Part 10, Division 2.

4 See, Fisheries Management Regulations 2019, Part 10, Division 3, sections 96-99 (regulations).

that AFMA may disclose this information, including personal information, to certain entities, including foreign countries or foreign government agencies, if satisfied of particular matters. It also authorises disclosure to a person conducting research where that research is related to AFMA's functions or objectives.[5]

Right to privacy: committee's initial analysis

2.93 By authorising the collection and disclosure of information including identifying and personal information, the measures engage and limit the right to privacy.[6] The initial analysis noted that the statement of compatibility provides a range of relevant information which suggests that the measures pursue a legitimate objective, namely 'deterring' and 'detecting' illegal fishers, and are rationally connected to that objective. However, questions arose in relation to the proportionality of the measures, including the adequacy of safeguards and whether the measures are only as extensive as is strictly necessary to achieve the stated objective.

2.94 The committee therefore sought the advice of the minister 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).

Assistant minister's response[7]

2.95 The assistant minister advised:

> 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

5 Regulations, Part 11, Division 3, section 104.

6 See, International Covenant on Civil and Political Rights (ICCPR), article 17; UN Human Rights Committee, *General Comment No.16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988).

7 The assistant minister's response to the committee's inquiries was received on 14 August 2019. The response is discussed below and is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

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/infonnation-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.

Committee comment

Part 10 of the regulations

2.96 The committee thanks the assistant minister for this response and in relation to Part 10 of the regulations, notes the advice that under administrative arrangements with Australian Border Force (ABF), ABF has operational responsibility for the detention of illegal foreign fishers, and as such, the collection and retention of their personal identifying data. The assistant minister states that the consequence of this administrative arrangement is that, in practice, AFMA does not hold personal identifying data from illegal foreign fishers of relevance to Part 10 of the Regulations, and therefore AFMA cannot disseminate it to third parties. The committee also notes the advice that if the ABF were to seek authorisation from the AFMA to release such data, any release would be subject to the terms and conditions placed on it by the ABF (and any required by AFMA).

2.97 However, the committee notes Part 10 of the regulations authorises the kinds of personal information that may be collected and how such information may be disclosed. As such, the ABF in collecting such information would appear to be operating under Part 10, and if the ABF seeks to disclose such information it would need to seek the AFMA's authorisation pursuant to Part 10. As such, the committee notes it is not relevant that the data is not generally held by the AFMA. As set out in the committee's initial analysis, the committee was seeking information on whether the collection and disclosure of information under Part 10 of the regulations contained adequate safeguards to ensure that the limitation on the right to privacy is proportionate. The committee notes that the assistant minister's response does not directly and specifically address whether there are appropriate safeguards in respect of the collection, retention and disclosure of such identifying information.

2.98 More generally, as noted in the committee's initial report, the statement of compatibility relevantly points to the existence of offence provisions which criminalise unauthorised use or disclosure of information and explains that the Australian Privacy Principles (APPs) and the *Privacy Act 1988* (Privacy Act) will be complied with. These are important safeguards and are relevant to the proportionality of the limitation on the right to privacy.

2.99 However, the committee's initial analysis further noted that compliance with the APPs and the Privacy Act are not a complete answer to concerns about interference with the right to privacy for the purposes of international human rights law. This is because the APPs contain a number of exceptions to the prohibition on use or disclosure of personal information for a secondary purpose, including where use or disclosure is authorised under an Australian Law,[8] which may be a broader

8 APP 9; APP 6.2(b).

exception than permitted in international human rights law. There is also a general exemption in the APPs on the disclosure of personal information for a secondary purpose where it is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.[9] The assistant minister's response does not specifically address whether the safeguards contained in the Privacy Act are sufficient in the circumstances of the regulations. In the absence of this information, it is more difficult to assess the measure as proportionate.

2.100 A further issue raised in the initial analysis was that it is unclear what safeguards are in place to protect the right to privacy, including in relation to on-disclosure, once information is disclosed to international organisations. The committee notes the assistant minister's response that the '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'. However, it is unclear whether this is required as a matter of law or even policy. This raises a concern that there may be insufficient safeguards in place prior to the authorisation of any disclosure overseas. This is of particular concern as the breadth of identifying information under Part 10 is wide and could include photographs, finger prints or iris scans.

Sections 103 and 104 of the regulations

2.101 In relation to the collection and disclosure of information under sections 103 and 104 of the regulations, the committee notes the assistant minister's advice that some of the information that may be collected under section 103 is sensitive and can include personal information, but does not include 'fine scale personal data'. The committee also notes the advice that disclosure of personal data to a government entity (which includes a foreign country) is a rare occurrence and generally only includes documents found on board foreign fishing vessels.

2.102 The committee also notes the safeguards set out in the assistant minister's response as to when such information may be disclosed, which is relevant to assessing the proportionality of the limitation on the right to privacy. In particular, the committee notes the advice that assessments are made of the entity's compliance with relevant international treaties or agreements, and if the AFMA delegate is not satisfied, it is open to them to refuse the release of the information. In particular, the committee notes the advice that a typical clause prevents the release of AFMA data to a third party without AFMA's express consent, and that specific arrangements are in place with state agencies to maintain the confidentiality of information, and in relation to foreign entities, should information be released in breach of any such caveats there are avenues for Australia to raise these matters in international forums.

9 APP 6.2(e).

2.103 Of further relevance to the proportionality of the measures, the committee notes the assistant minister's response that the AFMA also has a Privacy Policy as well as an Information Disclosure Policy.[10] The assistant minister's response explains that these policies outline how the AFMA collects, maintains, stores, uses and discloses personal information including to other entities such as research providers.

2.104 These policies and the legislative framework under the Privacy Act assist with the proportionality of the limitation imposed on the right to privacy. As noted above, it would have been useful if the assistant minister's response had specifically addressed whether the safeguards contained in the Privacy Act are sufficient in the circumstances of the regulations. In light of this information the committee makes no further comment on sections 103 and 104 of the regulations.

2.105 The committee thanks the assistant minister for this response. The committee notes that Part 10 of the regulations authorises the kinds of personal information that may be collected from detained suspected illegal foreign fishers and the circumstances in which such information may be disclosed. As such, the measure engages the right to privacy.

2.106 While there appear to be some relevant administrative and other safeguards in place, Part 10 of the regulations, as currently drafted may create a risk that identifying information may be disclosed, including overseas, in circumstances that do not constitute a proportionate limit on the right to privacy.

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

Right to life and prohibition on torture and cruel, inhuman and degrading treatment or punishment: committee's initial analysis

2.108 The right to life imposes an obligation on state parties to protect people from being killed by others or from identified risks.[11] The United Nations (UN) Human Rights Committee has made clear that international law prohibits the provision of information to other countries that may be used to investigate and convict someone

10 See: https://www.afma.gov.au/about/fisheries-management-policies/information-disclosure-fisheries-management-paper.

11 International Covenant on Civil and Political Rights (ICCPR), article 6. While the ICCPR does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another state.

of an offence to which the death penalty applies.[12] As the initial analysis noted, the measures, by authorising the disclosure of identifying and personal information overseas to foreign governments and specified bodies, appear to engage the right to life.

2.109 In addition, the initial analysis stated that the sharing of personal information overseas, in circumstances relating to the investigation of offences, could risk a person being exposed to torture or cruel, inhuman or degrading treatment or punishment.

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

Assistant minister's response

2.111 The assistant minister advised:

> 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.

12 In this context, the UN Human Rights Committee stated in 2009 its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'. UN Human Rights Committee, Concluding observations on the fifth periodic report of Australia, CCPR/C/AUS/CO/5 (2009) [20].

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, in human 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 consent 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.

Committee comment

2.112 The committee notes the assistant minister's advice that the Department 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. The committee also notes the advice that as part of any assessment relating to disclosing identifying and personal information to foreign governments, agencies or intergovernmental organisations, the AFMA would consider factors such as whether the state is a party to human rights conventions and whether it has provided a credible and reliable diplomatic assurance to Australia that they will not carrying out the death penalty or commit torture or cruel, inhuman or degrading treatment or punishment. The committee also notes the minister's advice that for states that are party to the ICCPR, the death penalty may be imposed only for the most serious crimes, and it is unlikely that a fisheries offence would meet this threshold.

2.113 However, the committee notes that its broader concern is that although the identifying information was initially collected in the context of fisheries offences, there is the possibility that such identifying information could be used to assist the prosecution of a person for any number of other offences overseas. For example, it could be used to identify a person who is suspected of an offence which carries the death penalty. It could also be used to identify a person in such a way as to expose them to a risk of torture, cruel, inhuman or degrading treatment or punishment.

2.114 The committee notes that some of these discretionary considerations may be relevant to assisting in ensuring 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. However, there do not appear to be specific guidelines in place requiring that information is not shared overseas in circumstances that could expose a person to the death penalty or to torture, or cruel, inhuman, or degrading treatment or punishment.

2.115 Furthermore, while it is relevant as to whether the foreign country is a party to relevant international human rights conventions, this does not guarantee that such countries will always comply with their international obligations. More specifically, the fact that other countries also have international obligations does not absolve Australia of its responsibility not to share information overseas that could facilitate torture, cruel, inhuman degrading treatment or publishment or the application of the death penalty. That is, a contextual assessment in relation to the risks in that country which goes beyond whether a foreign country also owes human rights obligations is required. Further, in relation to a consideration of whether a state has provided a diplomatic assurance, it is noted that diplomatic assurances and

undertakings may be breached.[13] Accordingly, diplomatic assurances, which more usually arise in the context of extradition for an offence carrying death penalty, may be insufficient for compliance with Australia's human rights obligations in relation to the sharing of information overseas.

2.116 More generally, such discretionary considerations and safeguards alone are likely to be insufficient for the purpose of Australia's obligations with respect to the right to life, and the prohibition on torture, cruel, inhuman degrading treatment or publishment. This is the case particularly given that there is currently no direct prohibition under Australian Commonwealth law of sharing information in circumstances where a person may be exposed to the death penalty or to torture, cruel, inhuman or degrading treatment or publishment. This raises serious concerns about the adequacy of protections in relation to such rights.

2.117 The committee thanks the assistant minister for this response. The committee notes that, under Part 10 of the regulations, the Australian Fisheries Management Authority (AFMA) may disclose personal identifying information about detained suspected illegal foreign fishers to foreign governments, agencies or intergovernmental organisations.

2.118 The committee is concerned that there appears to be no policy or guidelines which would prohibit the AFMA from sharing information that may expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment in foreign jurisdictions. As such, the committee considers that Part 10 of the regulations may risk exposing a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment.

2.119 In order to assist the compatibility of the measure with the right to life and the prohibition on torture or cruel, inhuman or degrading treatment or punishment, the committee recommends consideration be given to developing guidelines to help ensure that information is not shared overseas in such circumstances.

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

13 For a discussion of diplomatic assurances in the context of the death penalty see, Parliamentary Joint Committee on Human Rights, *Report 5 of 2018* (19 June 2018) pp. 86-88.

National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019[1]

Purpose	Establishes a national database of information relating to worker screening for the purposes of the National Disability Insurance Scheme
Portfolio	Families and Social Services
Introduced	House of Representatives, 13 February 2019
Rights	Privacy; work
Previous reports	Report 2 of 2019 and Report 3 of 2019
Status	Concluded examination

2.121 The committee first requested a response from the minister on the National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019 in *Report 2 of 2019*.[2] As that response had not been received at the time of the dissolution of the 45th Parliament, and as the bill has been reintroduced in the same terms, the committee reiterated its initial request for advice in *Report 3 of 2019*.[3] The full initial human rights analysis is set out in *Report 2 of 2019* at pp. 61-67.[4]

NDIS Worker Screening Database

2.122 The bill seeks to establish a database (Worker Screening Database) to facilitate nationally consistent worker screening for the purposes of the National Disability Insurance Scheme (NDIS). The database would contain a record of decisions made under NDIS worker screening laws. Information on the database could be shared with certain persons or bodies for the purposes of the NDIS.[5] The database would include a range of information relating to a person's application to be an NDIS

1 This entry can be cited as: Parliamentary Joint Committee on Human rights, National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019, *Report 5 of 2019*; [2019] AUPJCHR 84.

2 Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 61-67.

3 Parliamentary Joint Committee on Human Rights, *Report 3 of 2019* (30 July 2019) p. 2.

4 Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 61-67

5 Proposed section 181Y(3). 'NDIS worker screening law' is defined in proposed section 9 as a law of a state or territory determined by the minister by legislative instrument.

worker.[6] This could include personal information within the meaning of the *Privacy Act 1988* (Privacy Act).[7]

Right to privacy and right to work: committee's initial analysis

2.123 In its initial analysis, the committee observed that by providing for the collection, use and disclosure of information (including personal information) about persons who have made an application for an NDIS worker screening check, including any previous, current or pending decisions in relation to such applications, this measure engages and limits the right to privacy.[8] To the extent that the collection, use and disclosure of information in the database may result in the exclusion of a person from employment, the measure also engages and limits the right to work.[9]

2.124 The committee sought the advice of the minister as to whether the limitations on those rights 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;
- 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; and
- any other information that may be relevant to the proportionality of the measure.

Minister's response[10]

2.125 The minister advised:

> *Personal information in the NDIS Worker Screening Database*
>
> The information to be included in the database is circumscribed by new subsection 181Y(5) of the *National Disability Insurance Scheme Act 2013*

6 Proposed section 181Y(5). Proposed section 181Y(8) would allow the minister, by legislative instrument, to determine additional purposes for the Worker Screening Database, and to determine additional information that may be included in the database.

7 Proposed section 181Y(7).

8 Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) p. 63.

9 Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) p. 64.

10 The minister's response to the committee's inquiries was received on 20 August 2019. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

(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.

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.

Access to the NDIS Worker Screening Database

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 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

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.

Committee comment

2.126 The committee thanks the minister for this response and notes the minister's advice that the type and extent of information that may be included in the database is circumscribed by the provisions of proposed new subsection 181Y(5), which does not provide for the database to hold information about a person's criminal history or about a person's sexual identity or preferences. The committee also notes the minister's advice that the collection, use and disclosure of criminal history information is governed by arrangements between the Australian Criminal Intelligence Commission and states and territories, which limit the use and disclosure of such information. The committee also notes the advice that information used for policy development, evaluation and research purposes will be de-identified.

2.127 The bill also enables the minister to determine additional purposes of the database and information to be contained by way of legislative instrument. The committee notes the minister's advice that this power would be circumscribed by the NDIS Commissioner's functions,[11] and the 'provisions relating to the collection, use and disclosure of information under the NDIS Act'. The committee also notes the minister's advice that any such addition to the purposes would be by way of a legislative instrument, and so would require the production of a statement of compatibility, and be subject to disallowance. The committee notes that should a legislative instrument be made which expands the purposes of the database, the committee would, as part of its regular scrutiny, examine it for compatibility with human rights.

2.128 In relation to access to information within the database, the committee notes the minister's advice that the information is provided by Worker Screening Units that are required to get applicants' consent to have the screening check outcome included in the database and disclosed to relevant persons. The committee also notes the minister's advice that employment providers cannot 'randomly' view workers within the database, the data can only be viewed to establish a worker's clearance status, and providers can access limited personal information. These are important safeguards against disproportionate limitations on the right to privacy and right to work. However, the committee notes that these limitations are not reflected in the provisions of the proposed legislation. As the minister's response notes, the National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018 inform the type of information to which NDIS providers will need access in

11 The NDIS Commissioner's functions are set out in Part 2 of the *National Disability Insurance Scheme Act 2013*.

order to fulfil their registration conditions.[12] However, the rules do not explicitly circumscribe the type of information providers can access. As such, it appears that the limitations on access to information within the database by NDIS providers would operate only as matters of policy and practice. The committee notes the limitations on access to information in the database, including restrictions on the type of information which service providers could access, may be more appropriately included in legislation, rather than left to policy.

2.129 The committee thanks the minister for this response. In light of the information provided, the committee considers the legislative limitations on the type and extent of information that may be included in the NDIS Worker Screening Database provide important safeguards against any disproportionate limit on the right to privacy and to work.

2.130 In relation to access to the database, the committee considers there appears to be restrictions that may, in practice, sufficiently safeguard against disproportionate limitations on the right to privacy. However, the committee notes that these safeguards appear to be matters of policy, rather than law. As such, the committee considers it may be appropriate that restrictions on access to the database be set out in legislation.

2.131 The committee draws this matter to the attention of the minister and the Parliament.

12 Section 18 of the National Disability Insurance Scheme (Practice Standards – Worker Screening Rules) 2018 requires NDIS providers to keep a written list of all workers who engage in risk assessed roles. This list must include the full name, date of birth and address of the person, the worker's NDIS worker screening check application number, NDIS worker screening check number, worker screening check outcome expiry date, and whether the worker's clearance is subject to any decision that has the effect that the provider may not allow the worker to engage in a risk assessed role. Section 21 states that NDIS providers must keep these records for seven years from the date the record is made.

Social Security (Assurances of Support) Amendment Determination 2018 (No. 2) [F2018L01831][1]

Purpose	Increases the assurance of support period for certain visas in line with changes to the newly arrived resident's waiting periods under the *Social Security Act 1991*
Portfolio	Families and Social Services
Authorising legislation	*Social Security Act 1991*
Last day to disallow	15 sitting days after tabling (tabled Senate and House of Representatives 12 February 2019)
Rights	Protection of the family; social security; adequate standard of living; children's rights
Previous reports	Report 2 of 2019 and Report 3 of 2019
Status	Concluded examination

2.132 The committee first requested a response from the minister on the Social Security (Assurances of Support) Amendment Determination 2018 (No. 2) (the determination) in *Report 2 of 2019*.[2] As that response had not been received at the time of the dissolution of the 45th Parliament, the committee reiterated its initial request for advice in *Report 3 of 2019*.[3] The full initial human rights analysis is set out in *Report 2 of 2019* at pp. 85-89.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human rights, Social Security (Assurances of Support) Amendment Determination 2018 (No. 2) [F2018L01831], *Report 5 of 2019*; [2019] AUPJCHR 85.

2 Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 83-89.

3 Parliamentary Joint Committee on Human Rights, *Report 3 of 2019* (30 July 2019) p. 2.

4 Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 85-89 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_2_of_2019.

Increasing the assurance of support period

2.133 The determination increases the assurance of support period for certain classes of visa from two years to four years.[5] This would appear to include classes of visas such as subclass 101 (child), subclass 102 (adoption), subclass 103 (parent) and subclass 151 (former resident). An assurance of support is a legally binding commitment by an individual or body (assurer) to financially support a migrant seeking to enter Australia on certain visa subclasses (assuree) for the duration of the assurance period, including assuming responsibility for repayment of any recoverable social security payments received by the assuree during the assurance period.[6]

Rights to protection of the family, the child and an adequate standard of living: committee's initial analysis

2.134 The committee previously noted that a measure which limits the ability of certain family members to join others in a country is a limitation on the right to protection of the family.[7] Insofar as the visa classes affected by the increased assurance period include child visas and adoption visas, the measures also engage the rights of children.

2.135 An important element of protection of the family is to ensure family members are not involuntarily separated from one another.[8] Laws and measures which prevent family members from being together will engage this right. Additionally, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration, and to treat applications by minors for family reunification in a positive, humane and expeditious manner.[9]

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5 Other types of visas are subject to shorter or longer periods which are unchanged from the previous determination: for example for certain types of visas, including the contributory parent visa, the assurance period continues to be 10 years, and for entrants entering pursuant to a community support program the assurance period continues to be 12 months. The determination provides that for remaining relative and orphan relative visas, the assurance period continues to be two years.

6 Section 1061ZZGA(a) of the *Social Security Act 1991*. Recoverable social security payments for the purpose of assurances of support include widow allowance, parenting payment, youth allowance, Austudy payment, Newstart allowance, mature age allowance, sickness allowance, special benefit and partner allowance.

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

8 Protected by the International Covenant on Civil and Political Rights (ICCPR), articles 17 and 23, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), article 10.

9 Convention on the Rights of the Child, article 3(1) and 10.

2.136 The committee's initial analysis also noted that, in circumstances where an assurer becomes liable for unforeseen expenses of the assuree (including recoverable social security payments, where applicable), extending the period of assurance may limit the right to an adequate standard of living of assurers. The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.[10]

2.137 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to protection of the family, the rights of the child and 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 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).

Minister's response[11]

2.138 The minister advised:

> *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. 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

10 ICESCR, article 11.

11 The minister's response to the committee's inquiries was received on 13 August 2019. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

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.

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.

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

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.

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

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).

Committee comment

2.139 The committee thanks the minister for this response. The committee notes the minister's advice that changes were made on 1 January 2019 to increase the waiting period for newly arrived residents for certain welfare payments and concession cards to four years, and this determination, in extending the assurance period to four years, aligns the two measures. The committee also notes the advice that this alignment is necessary to achieve the purpose of the assurance of support scheme, that is to recover payments during this waiting period, and ensures equitable treatment of assurance of support applicants. The committee also notes the minister's advice that concepts of waiting periods and providing assurances for migrant cohorts are longstanding features of the Australian social security system and make a targeted contribution to the sustainability of the welfare payments system. While it could have been useful if the minister's response had provided additional information as to how the proposed measure will ensure the sustainability of the welfare payments system, such objectives would appear capable of constituting legitimate objectives for the purposes of international human rights law.

2.140 As noted in the committee's previous analysis, a measure which limits the ability of certain family members to join others in a country is a limitation on the right to protection of the family. Insofar as the visa classes affected by the increased assurance period include child visas and adoption visas, the measures also engage the rights of children. The minister's response identifies a number of factors that go to the proportionality of the measure. Firstly, an assurance of support may be mandatory or discretionary, depending on the visa type. Visa Subclass 101 (Child) and Visa Subclass 102 (Adoption) have a discretionary assurance of support

provision, and therefore an assurer may not have to provide a monetary bond unless the Department of Human Services requests an assurance where further evidence is required to establish that the assurer can provide an adequate standard of living for the visa applicant. Further, this determination also only applies the increased

2.141 four-year assurance of support period to assurances of support given on or after 1 January 2019. The minister also explains that Family Tax Benefit payments are not recoverable under the scheme and therefore an assurer is not required to pay any Family Tax benefit received for any assuree. However, the committee notes that the minister's advice does not explain whether there are other visa types that could apply when an assurer is seeking to sponsor a dependent relative, which may be subject to mandatory requirements for assurances of support, and therefore the requirement to pay an upfront monetary bond. It is also unclear whether extending the support period from two years to four years would mean that the amount of any monetary bond would be higher (i.e. to cover a period that is twice as long). The committee is concerned that, in practice, there may be situations where an assurer subject to a monetary bond may be unable to provide such a bond and therefore unable to access family reunification, in circumstances that may not comply with their right to protection of the family.[12]

2.142 The initial analysis also noted that, in circumstances where an assurer becomes liable for unforeseen expenses of the assuree (including recoverable social security payments), extending the period of assurance may limit the right to an adequate standard of living of assurers. The committee notes the minister's advice that assurers would be liable for any debts incurred as a result of the assuree accessing social security payments, including any Special Benefit. In relation to the proportionality of the measure and the existence of adequate safeguards, the minister's response outlines that future assurers are made aware of these obligations prior to agreeing to give an assurance of support for the four-year period and if a debt is incurred, various methods of repayment which consider the assurer's financial circumstances to determinate an appropriate rate of recovery are available to ensure an assurer does not suffer financial hardship while repaying a debt. In light of this information, the committee makes no further comment on this matter.

2.143 The committee thanks the minister for this response. The committee notes that the minister's advice did not make clear which visa types are subject to a mandatory requirement to provide an upfront monetary bond, and whether the amendments made by this determination would increase the amount of any upfront bond.

12 See, ICCPR, articles 17 and 23, ICESCR, article 10.

2.144 In the absence of such information, the committee is unable to fully assess the impact the determination may have on the right to protection of the family. The committee has concluded its examination of this determination.

Mr Ian Goodenough MP

Chair