

Chapter 1

New and continuing matters¹

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 4 and 6 February 2020; and
 - legislative instruments registered on the Federal Register of Legislation between 4 December 2019 and 8 January 2020.²

1 This section can be cited as Parliamentary Joint Committee on Human Rights, *New and continuing matters, Report 2 of 2020*; [2020] AUPJCHR 29.

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

Response required

1.2 The committee seeks a response from the relevant minister with respect to the following instrument.

Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019 [F2019L01656]¹

Purpose	This instrument amends the <i>Aviation Transport Security Regulations 2005</i> to establish new categories of security controlled airports, and provide for new security screening thresholds for air services.
Portfolio	Home Affairs
Authorising legislation	<i>Aviation Transport Security Act 2004</i>
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 4 February 2020). Notice of motion to disallow must be given by 23 March 2020 in the House of Representatives and by 12 May 2020 in the Senate ²
Rights	Privacy; freedom of movement
Status	Seeking additional information

Expanded use of body scanners in Australian airports

1.3 These regulations amend the way in which Australian airports, and aircraft, are categorised for security purposes. This would have the effect of permitting the use of advanced security screening measures, including body scanners, at domestic airports.

1.4 The *Aviation Transport Security Regulations 2005* (the primary regulations) currently provide for seven categories of security controlled airport, which are defined in relation to the weight of the aircrafts operating from them.³ The amending regulations repeal those categories, providing instead for three tiers of

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019 [F2019L01656], *Report of 2020*; [2020] AUPJCHR 30.

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

3 Section 3.01B.

security controlled airport, and a category of 'designated airport'.⁴ The four categories are not defined in the amending regulations, and it would appear that the Secretary of the Department of Home Affairs may assign a particular security controlled airport to one of these categories,⁵ having regard to a range of matters.⁶ The regulations also amend the definition of an aircraft which must be subject to security screening.⁷

1.5 The statement of compatibility explains that the effect of this revised airport security tier classification, and revised aircraft screening threshold, would be that a 'small number of airports and aircraft' which were not previously security screened will now be security screened.⁸ The statement of compatibility explains that these measures will see a number of additional measures to strengthen security, 'including the use of body scanners for domestic flights'.⁹

Preliminary international human rights legal advice

Right to privacy and freedom of movement

1.6 The implementation of advanced security screening at airport security screening areas, in particular the use of body scanners, engages the right to privacy. This is because such scanners produce an image of a person's body, and may reveal objects contained under a person's clothing, or within a person's body. The right to privacy includes the right to personal autonomy, and physical and psychological integrity.¹⁰ The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the

4 Schedule 1, Item 3, section 3.01B.

5 *Aviation Transport Security Act 2004*, subsection 28(6).

6 Aviation Transport Security Regulations 2005, section 3.01C. The Secretary may consider: whether the airport is a designated airport; whether an international air services operates to or from the airport; whether aircraft operate regular public transport operations or open charter operations to or from the airport; whether the design of the existing terminal will prevent the airport operator from complying with particular screening requirements; and a number of other matters.

7 See Schedule 2, item 5, amendments to regulation 4.02.

8 Statement of compatibility, p. 5.

9 Statement of compatibility, p. 6. Subsection 44(3A) of the *Aviation Transport Security Act 2004* provides that equipment which may be used for screening may include body scanning equipment, metal detection equipment, and explosive trace detection equipment.

10 International Covenant on Civil and Political Rights (ICCPR), article 17; Convention on the Rights of the Child, article 16; and Convention on the Rights of Persons with Disabilities, article 22. The UN Human Rights Committee has explained, for example, that personal and body searches must be accompanied by effective measures to ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. See, 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), [8].

measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to that objective. In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards.¹¹

1.7 As a person who does not agree to undergo a body scan at an airport would be prevented from proceeding through the airport and boarding a flight,¹² and cannot pass the screening point for 24 hours after the refusal,¹³ the expansion of the use of body scanners also engages and limits the right to freedom of movement. This includes the right to move freely within a country for those who are lawfully within the country, and to leave the country.¹⁴ The right may be subject to permissible limitations in particular circumstances, including where it is necessary and proportionate to achieve the objectives of protecting the rights and freedoms of others, national security, public health or morals, and public order. Measures that limit the right to freedom of movement must also be rationally connected and proportionate to these legitimate objectives.

Legitimate objective and rational connection

1.8 The statement of compatibility explains that the implementation of 'advanced security screening' (including the use of body scanners) increases safety to the travelling public, and will assist to 'mitigate the threat of non-metallic improvised explosive devices and other weapons, which walk-through metal detectors cannot detect'.¹⁵ Increasing safety for the travelling public appears capable of constituting a legitimate objective for the purposes of international human rights law. However, insufficient information has been provided to establish that enhancing airport security screening measures to include the use of body scanners would be rationally connected to (that is, effective to achieve) those objectives. The statement of compatibility states that the absence of body screening requirements at domestic airports increases the threat from non-metallic improvised explosive devices and other weapons.¹⁶ However, it does not provide any information about how body scanners would address that risk. This is a relevant consideration noting that the

11 Legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted. See, *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

12 Aviation Transport Security Regulations 2005, section 4.03A.

13 Aviation Transport Security Regulations 2005, section 4.03A.

14 International Covenant on Civil and Political Rights, article 12.

15 Statement of compatibility, p. 6.

16 Statement of compatibility, p. 6.

efficacy of body scanners in detecting non-metallic explosive devices and other weapons has previously been called into question.¹⁷

Proportionality

1.9 It is also unclear whether the use of body scanners at domestic airports would constitute a proportionate limitation on the right to privacy or the right to freedom of movement. The *Aviation Transport Security Act 2004* (the Act) requires that a body scanner must only produce a gender-neutral generic image from which the person cannot be identified.¹⁸ While this is an important safeguard, it remains unclear what exactly would be displayed on the device screen to a security screening officer where a person has undergone a body scan. For instance, it may be that an image which does not indicate a person's gender would nevertheless reflect a person's body weight; reveal a physical disability; or reveal the presence of personal health equipment such as a pacemaker, colostomy bag, or prosthesis. Further, there is evidence to suggest that the presence of some items on a person, such as a turban or wig, may increase instances of 'false positive' body scanning test results,¹⁹ which may require persons to undergo additional security screening measures at airports.²⁰ In addition, it may be that body scans may conflict with certain religious practices and beliefs, including those which require modesty.²¹

1.10 As to access to images generated by a body scanner, the Act provides that body scanning equipment must not store or transmit an image of the person which has been produced, or personal information about the person.²² This serves as an important safeguard on the right to privacy as it assists in restricting access to the digital images. However, it would appear that there is nothing in the legislation

17 See, for example, House Standing Committee on Infrastructure and Communications, *Advisory Report on the Aviation Transport Security (Screening) Bill 2012*, pp. 7-8.

18 Aviation Transport Security Act, subsection 44(3B).

19 See, for example, United States Government Accountability Office, *Report to Congressional Requesters: Advanced Imaging Technology – TSA needs additional information before procuring next-generation systems* (March 2014), p. 14, which discusses the increase in false positive body scan results where individuals had a high body mass index, or were wearing a wig or turban.

20 See, National LGBTI Health Alliance, *Submission to the Senate Standing Committee on Rural and Regional Affairs and Transport inquiry into airport and aviation security* (lapsed), pp. 2-3, which noted an example of a transgender person whose prosthetic was detected during a body scan, resulting in them being required to undergo further security screening, including removal of the prosthetic onto a tray.

21 See, for example, Colleen Deal, 'Faith or Flight: A Religious Dilemma', *Journal of Air Law and Commerce*, vol. 76, no. 3, 2011, pp. 525-558. See also, European Union Agency for Fundamental Rights, *The use of body scanners: 10 questions and answers*, July 2010, pp. 4-6.

22 Aviation Transport Security Act, subsection 44(3C).

prohibiting a photograph being taken and transmitted of the image from the scanning device's screen.²³

1.11 Further, the statement of compatibility provides that 'most persons will be required to pass through a body scanner',²⁴ but does not explain how people would be selected, whether randomly or on the basis of reasonable suspicion. In addition, it does not appear that alternative security screening processes would be available to a person who does not wish to submit to a body scan. The primary regulations provide that where a person is required to be screened by body scanning equipment at a screening point, and they refuse to be screened, a screening officer must not allow them to pass through the screening point within 24 hours after that person has refused to be screened, unless they have subsequently been screened.²⁵ It is not clear why, for example, individuals cannot elect to undergo a physical search or 'pat down' as an alternative to a body scan. Information about whether alternative security screening measures are available would assist in an assessment of the proportionality of the measures, noting that under international human rights law the ability to provide sufficient flexibility to treat different cases differently is relevant to considering whether a limitation on rights may be proportionate.

1.12 In order to assess whether the regulations, in providing for the expansion of the use of body scanners at domestic airports constitute a permissible limitation on the rights to privacy and freedom of movement, further information is required as to:

- the nature of the image that would be produced by the body scanners which would be used in domestic airports (the provision of an example image would be most useful to illustrate this);
- evidence of the effectiveness of body scanner devices in detecting non-metallic improvised explosive devices and other weapons, including those which walk-through metal detectors cannot detect, and whether other existing security screening processes, including pat-downs, could also detect such devices and weapons;
- whether an individual who does not wish to undergo a body scan can request to undergo an alternative to the security screening procedure, and if not, why not (noting the importance of treating different cases differently when rights are limited); and

23 For example, it is not clear that it would be an offence for a security screening officer to photograph the screen of a body scanning machine. Subsection 44(4) of the *Aviation Transport Security Act 2004* provides that regulations made under section 44 may prescribe penalties for offences against those regulations. However, no such offences relating to the use of body scanners are evident in the *Aviation Transport Security Regulations 2005*.

24 Statement of compatibility, p. 6.

25 *Aviation Transport Security Regulations 2005*, section 4.03A.

- what safeguards are in place to ensure that photographs are not taken of the digital images produced on the display screens of body scanner devices in airports.

Committee view

1.13 The committee notes that the instrument establishes new categories of security controlled airports, and provides for new security screening thresholds for air services, which would have the effect of expanding the use of body scanners at domestic airports. The committee notes the legal advice that this engages and may limit the rights to privacy and freedom of movement. The committee seeks the minister's advice as to the matters set out at paragraph [1.12].

Advice only¹

1.14 The committee notes that the following private senator's bill appears to engage and may limit human rights. Should the bill proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill:

- Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Advice Only, *Report 2 of 2020*; [2020] AUPJCHR 31.

Bills and instruments with no committee comment¹

1.15 The committee has no comment in relation to the following bills which were introduced into the Parliament between 4 and 6 February 2020. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:²

- Paid Parental Leave Amendment (Flexibility Measures) Bill 2020;
- Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020;
- Treasury Laws Amendment (2019-20 Bushfire Tax Assistance) Bill 2020; and
- Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020.

1.16 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 4 December 2019 and 8 January 2020.³ This includes the Autonomous Sanctions (Designated and Declared Persons – Democratic People’s Republic of Korea) Continuing Effect Declaration and Designation Instrument 2019 [F2019L01572]. The committee has considered the human rights compatibility of similar instruments on a number of occasions.⁴ As this legislative instrument does not appear to designate or declare any individuals who are within Australia’s jurisdiction, the committee makes no comment in relation to this specific instrument.

1.17 The committee has reported on one legislative instrument registered between 4 December 2019 and 8 January 2020 earlier in this chapter. The committee

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 2 of 2020*; [2020] AUPJCHR 32.

2 Inclusion in the list is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

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

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

has determined not to comment on the remaining instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.