



# Parliamentary Joint Committee on Human Rights

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Human rights scrutiny report

Report 3 of 2020

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# Membership of the committee

## Members

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Senator Patrick Dodson	Western Australia, ALP
Mr Steve Georganas MP	Adelaide, South Australia, ALP
Mr Ian Goodenough MP	Moore, Western Australia, LP
Senator Nita Green	Queensland, ALP
Ms Celia Hammond MP	Curtin, Western Australia, LP
Senator Nick McKim	Tasmania, AG
Senator Andrew McLachlan CSC	South Australia, LP
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1 The human rights committee secretariat is staffed by parliamentary officers drawn from the Department of the Senate Legislative Scrutiny Unit (LSU), which usually includes two principal research officers with specialised expertise in international human rights law. LSU officers regularly work across multiple scrutiny committee secretariats.



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## Committee information

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

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.<sup>1</sup> A description of the rights most commonly arising in legislation examined by the committee is available on the committee's website.<sup>2</sup>

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be permissible under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is permissible. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationaly connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A statement of compatibility for a measure limiting a right must provide a detailed and evidence-based assessment of the measure against the limitation criteria.

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1 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

2 See the committee's *Short Guide to Human Rights* and *Guide to Human Rights*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or draw the matter to the attention of the proponent and the Parliament on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in *Guidance Note 1*, a copy of which is available on the committee's website.<sup>3</sup>

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3 See *Guidance Note 1 – Drafting Statements of Compatibility*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)



# Chapter 1

## New and continuing matters<sup>1</sup>

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 10 and 13 February 2020; and
  - legislative instruments registered on the Federal Register of Legislation between 9 January and 5 February 2020.<sup>2</sup>

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, *New and continuing matters, Report 3 of 2020*; [2020] AUPJCHR 36.

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 bills.

### **National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020<sup>1</sup>**

<b>Purpose</b>	This bill seeks to amend the <i>National Radioactive Waste Management Act 2012</i> to establish the National Radioactive Waste Management Facility
<b>Portfolio</b>	Industry, Science, Energy and Resources
<b>Introduced</b>	House of Representatives, 13 February 2020
<b>Rights</b>	Culture; self-determination; equality and non-discrimination
<b>Status</b>	Seeking additional information

### **Specification of site for radioactive waste disposal**

1.3 The bill seeks to amend the *National Radioactive Waste Management Act 2012* (the Act) to establish a single, purpose built National Radioactive Waste Management Facility (Facility) for the disposal of radioactive nuclear waste. The bill would specify the site on which the Facility would be established and operated, which is named in the bill as Napandee, located in the district council of Kimba in South Australia (the site).

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

#### ***Rights to culture and self-determination***

1.4 The specification of the site as one where nuclear waste will be stored appears to engage and may limit the rights to culture and self-determination. The statement of compatibility states that native title rights have been extinguished at the specified site, however, 'Aboriginal heritage, either tangible or intangible, may still be present'.<sup>2</sup>

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020, *Report 3 of 2020*; [2020] AUPJCHR 37.

2 Statement of compatibility, p. 6.

1.5 The right to culture provides that people have the right to benefit from and take part in cultural life.<sup>3</sup> Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language.<sup>4</sup> The right for minority groups has both an individual and a group dimension: while the right is conferred on individuals, it must be exercised within the minority group. In the context of indigenous peoples, the right to culture includes the right for indigenous people to use land resources, including through traditional activities such as hunting and fishing, and to live on their traditional lands. The state is prohibited from denying individuals the right to enjoy their culture, and may be required to take positive steps to protect the identity of a minority and the rights of its members to enjoy and develop their culture.<sup>5</sup> A limitation on the right to culture will be permissible where it pursues a legitimate objective, is rationally connected to this objective and is a proportionate means of achieving this objective.

1.6 The right to self-determination, which is a right of 'peoples' rather than individuals, includes the right of peoples to freely determine their political status and to freely pursue their economic, social and cultural development.<sup>6</sup> This includes the right of groups within a country, such as those with a common racial or cultural identity (in the Australian context, particularly Indigenous people), to have a level of internal self-determination.

1.7 The statement of compatibility states that the bill engages the right to culture because the development of the Facility on the specified site may impinge on the freedom of people to engage in certain cultural practices on that land. However, it states that it is unlikely that the right is directly affected as the specified site is privately owned and used for agricultural purposes and that there are currently no identified registered places or objects of cultural significance for Aboriginal people on the specified site.<sup>7</sup> It also states that should a culturally significant finding be made on the specified site in the future, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) will operate to provide protections for cultural heritage or archaeologically significant sites or artefacts. However, if the site is being used to store radioactive waste, it is unclear how the EPBC Act will operate to ensure appropriate protection for cultural heritage.

1.8 The statement of compatibility also states that the right to self-determination is engaged by the bill, but seems to state that the local

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3 Article 15 of the International Covenant on Economic, Social and Cultural Rights.

4 Article 27 of the International Covenant on Civil and Political Rights.

5 See, UN Human Rights Committee, *General Comment No. 23: The rights of minorities* (1994).

6 Articles 1 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. See, UN Committee on the Elimination of Racial Discrimination, *General Recommendation 21 on the right to self-determination* (1996).

7 Statement of compatibility, p. 9.

community near the area of the site, which would appear to include non-Indigenous persons, constitute the relevant group for the purposes of the right. It states that the nomination for the site was strongly supported by the 'broader community', although opposed by the Board of the Barngarla Determination Aboriginal Corporation.<sup>8</sup> However, while the right to self-determination includes the right of every citizen to take part in the conduct of public affairs at any level,<sup>9</sup> it needs to be considered in the context of other international obligations, particularly the rights to culture and non-discrimination and the rights of indigenous peoples under international law.<sup>10</sup>

1.9 In addition, in determining whether any limits on the rights to culture and self-determination are permissible under international human rights law, it is necessary to consider the extent to which relevant groups have been consulted. As part of its obligations in relation to the rights to culture and self-determination, Australia has an obligation to consult with indigenous peoples in relation to actions which may affect them.<sup>11</sup> This should protect the right of indigenous peoples to 'influence the outcome of decision-making processes affecting them, which is 'not a mere right to be involved in such processes or merely to have their views heard'.<sup>12</sup> The principles contained in the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) are also relevant. The Declaration provides context as to how human rights standards under international law apply to the particular situation of indigenous peoples. The Declaration affirms the right of indigenous peoples to self-determination<sup>13</sup> and to have their culture respected, including the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, and have access in privacy to their religious and cultural sites.<sup>14</sup> While the Declaration is not

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8 Statement of compatibility, p. 6.

9 See article 25 of the International Covenant on Civil and Political Rights.

10 Committee on the Elimination of All Forms of Racial Discrimination, *General Recommendation 21: Right to self-determination*, 1996, paras [4]–[5].

11 The UN Human Rights Council has recently provided guidance on the right to be consulted, as part of its Expert Mechanism on the Rights of Indigenous Peoples, stating that 'states' obligations to consult with indigenous peoples should consist of a qualitative process of dialogue and negotiation, with consent as the objective' and that consultation does not entail 'a single moment or action but a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up', see UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) paras [15]–[16].

12 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) paras [15]–[16].

13 UN Declaration on the Rights of Indigenous Peoples, article 3.

14 UN Declaration on the Rights of Indigenous Peoples, article 11 and 12.

included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides clarification as to how human rights standards under international law, including under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Cultural and Social Rights, apply to the particular situation of indigenous peoples.<sup>15</sup>

1.10 The statement of compatibility states that the land was voluntarily nominated by its owners and that:

[a]ll people who may be affected by the location and operation of the Facility were invited to express their views about the potential impact of the proposed Facility on them. Many people in the local community engaged closely with the Government on the proposal. The level of engagement and local community support is evidenced in the outcome of a community ballot (conducted by the Australian Electoral Commission), which took place over a five-week period from Thursday 3 October to Thursday 7 November 2019. The question posed to members of the community was: "Do you support the proposed National Radioactive Waste Management Facility being located at one of the nominated sites in the community of Kimba?"

90.41 percent of eligible voters responded to the ballot, with a total of 734 formal votes. Of those who responded, 452 (61.58 percent) voted yes.<sup>16</sup>

1.11 However, it is not clear from the statement of compatibility whether relevant Indigenous groups were consulted, in the way required by international human rights law, in choosing the location of the site. In particular, it is not clear what percentage of the local community that voted in support of the site nomination were members of relevant Indigenous groups. The only information provided in the statement of compatibility as to consultation with Indigenous groups is that the process leading up to selecting a site 'involved extensive consultation and information sharing with local communities, Traditional owners and others', but that the Board of the Barngarla Determination Aboriginal Corporation stated its opposition to the proposal.<sup>17</sup> In fact,

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15 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp. 122-123.

16 Statement of compatibility, p. 6.

17 Statement of compatibility, p. 6.

it would appear that the Board of the Barngarla Determination Aboriginal Corporation may not have been able to participate in the community ballot.<sup>18</sup>

1.12 As such, further information is required in order to assess the engagement and compatibility of the measure with the rights to culture and self-determination, in particular:

- what percentage of those who were eligible to vote in the community ballot were Indigenous;
- what other consultation was held specifically with relevant Indigenous groups and what was the level of support for the site specification; and
- once the radioactive waste facility is operational, if culturally significant findings are made on the site in future, how the *Environment Protection and Biodiversity Conservation Act 1999* would operate to ensure appropriate protection for cultural heritage.

### Committee view

**1.13 The committee notes that the bill would enable the establishment of a national radioactive waste management facility at a specified location in South Australia. The committee notes the legal advice that as the site may have cultural significance for First Nations people the bill engages and may limit the right to culture and self-determination. In order to assess whether the bill engages and limits these rights the committee seeks the minister's advice as to the matters set out at paragraph [1.12].**

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### Acquisition of additional land for expansion of site

1.14 The bill also provides that the regulations may prescribe additional land that is required to expand the specified site for the establishment and operation of the Facility, or the minister may make a notifiable instrument to specify additional land to provide all-weather access to the site.<sup>19</sup> It provides that if such land is prescribed, all rights and interests in the land are acquired by the Commonwealth or

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18 The Board took an action against the District Council of Kimba in the Federal Court of Australia, see *Barngarla Determination Aboriginal Corporation RNTBC v District Council of Kimba* [2019] FCA 1092. The case was brought claiming a contravention of the *Racial Discrimination Act 1975* (Cth), (RDA), on the basis that the Council's resolution of the franchise of the ballot led to the exclusion of members of the Aboriginal Applicant group who are holders of native title in the Council area but did not satisfy the eligibility criteria. The Court held that the Board of the Barngarla Determination Aboriginal Corporation did not establish contraventions of the RDA and the case was dismissed.

19 See Schedule 1, item 15, proposed new sections 19A and 19B.

extinguished and freed and discharged from all other rights and interests.<sup>20</sup> This would appear to include the extinguishment of native title.

1.15 Before prescribing additional land the minister must be satisfied that consultation is undertaken, by inviting (through publication in a newspaper) each person with 'a right or interest in the land' to comment and taking such comments into account.<sup>21</sup> The bill provides that these consultation requirements are taken to be an exhaustive statement of the requirements of the natural justice hearing rule.<sup>22</sup>

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

### ***Rights to self-determination, culture and equality and non-discrimination***

1.16 The ability to compulsorily acquire additional land, which could lead to all rights and interests in that land being extinguished (including any native title), appears to engage and may limit the rights to culture, self-determination and equality and non-discrimination. The rights to culture and self-determination are set out above at paragraphs [1.5] to [1.6]. The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights).<sup>23</sup> Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.<sup>24</sup>

1.17 The United Nations Committee on the Elimination of Racial Discrimination (CERD Committee) has said that Australia's historically 'racially discriminatory land practices have endured as an acute impairment of the rights of Australia's indigenous communities' and that 'the land rights of indigenous peoples are unique and encompass a traditional and cultural identification of the indigenous peoples with their land that has been generally recognized'.<sup>25</sup> It has found that the extinguishment of native title raises concerns as to Australia's compliance with the International

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20 See Schedule 1, item 15, proposed new subsections 19A(4) and 19B(3).

21 Schedule 1, item 15, proposed new subsections 19A(3) and 19B(2) and section 19C.

22 Schedule 1, item 15, proposed new subsection 19C(4).

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

24 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) para. [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

25 Committee on the Elimination of Racial Discrimination (CERD), Decision 2(54) on Australia, UN doc CERD/C/54/Misc.40/Rev.2, 18 March 1999.

Convention on the Elimination of All Forms of Racial Discrimination.<sup>26</sup> In 2017, the CERD Committee expressed concern 'about information that extractive and development projects are carried out on lands owned or traditionally owned by Indigenous Peoples without seeking their prior, free and informed consent' and recommended that Australia 'ensure that the principle of free, prior and informed consent is incorporated into the *Native Title Act 1993* and in other legislation as appropriate, and fully implemented in practice'.<sup>27</sup>

1.18 The statement of compatibility acknowledges that the bill engages the right to equality and non-discrimination as the site for the Facility 'is home to a diverse local community'. But it states that it is 'sometimes necessary to treat people differently to achieve equality'.<sup>28</sup> However, while the UN Human Rights Committee has confirmed that positive measures may be 'necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group', such measures must be aimed at correcting conditions which prevent or impair the enjoyment of the right to culture.<sup>29</sup> Further, while 'special measures', which allow for differential treatment are possible under the International Convention on the Elimination of All Forms of Racial Discrimination, these must be taken to advance the enjoyment of human rights for certain groups.<sup>30</sup> The statement of compatibility does not make it clear how enabling additional land to be acquired that may result in the extinguishment of native title (or the specification of a site for radioactive waste) could be said to advance the enjoyment of Indigenous peoples' rights.

1.19 If additional land around the site is required to establish and operate the Facility or to provide all-weather access, the bill would allow this to be prescribed by a legislative or notifiable instrument. All rights and interests in that land would then be acquired by the Commonwealth or extinguished. It is not clear from the explanatory materials if the additional land for the expansion of the site (the

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26 Committee on the Elimination of Racial Discrimination (CERD), Decision 2(54) on Australia, UN doc CERD/C/54/Misc.40/Rev.2, 18 March 1999.

27 UN Committee on the Elimination of Racial Discrimination, Concluding Observations of the committee on the Elimination of Racial Discrimination: Australia, UN Doc CERD/C/AUS/CO/18-20 (2017) paras [21]-[22].

28 Statement of compatibility, p. 7.

29 UN Human Rights Committee, *General Comment No. 23(50): Article 27 (rights of minorities)* (1994) para. [6.2].

30 Article 1(4) of the Convention on the Elimination on all Forms of Racial Discrimination. See also UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination*, 24 September 2009, CERD/C/GC/32.



boundaries of which are specified in the bill) currently has native title rights attaching. The statement of compatibility states that the bill enables the minister to exclude rights or interests, including native title, from being acquired if necessary to establish and operate all-weather road access for the facility.<sup>31</sup> The explanatory statement states that should all-weather road access be necessary 'it may not be necessary to acquire all rights and interests (for example, native title rights and interests...)'.<sup>32</sup>

1.20 However, while it may not be necessary in all instances to extinguish native title, it appears that the bill would enable native title to be extinguished, without the consent of the traditional owners. It is therefore not clear how the rights to culture, self-determination and equality and non-discrimination would be protected in such instances. It is also noteworthy that the bill provides that the minister could prescribe additional land for all-weather access by way of a 'notifiable' instrument, rather than a legislative instrument. Notifiable instruments are not subject to any form of parliamentary oversight (such as disallowance).<sup>33</sup> No explanation is given in the explanatory materials as to why the prescription of additional land would be by way of a notifiable, rather than legislative, instrument.

1.21 The bill provides there must be consultation with each person who has a 'right or interest' in the land before additional land is acquired. However, it is not clear whether this only includes those who have a current right (for example, native title), or anyone who may have cultural ties to the land. In addition, the bill provides that the consultation requirements set out in the bill, which require the minister to invite persons by publishing the invitation in a daily newspaper and a local newspaper (if any), are taken to be an exhaustive statement of the natural justice hearing rule. The explanatory materials do not provide any justification for this exclusion of the natural justice hearing rule, or any information about the impact of this exclusion.

1.22 As such, further information is required in order to assess the engagement and compatibility of the measure with the rights to culture, self-determination and equality and non-discrimination, in particular:

- whether the additional land for the expansion of the site (the boundaries of which are specified in the bill) currently has native title rights attaching;
- whether the bill would enable native title rights to be extinguished without the full, free and informed consent of native title holders, and if so, how the

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31 Statement of compatibility, p. 6.

32 Explanatory memorandum, p. 16.

33 Noting that section 42 of the *Legislation Act 2003* provides that only legislative instruments are subject to disallowance, not notifiable instruments.

rights to culture, self-determination and equality and non-discrimination will be protected;

- whether the requirement to consult with anyone with a 'right or interest' in the land includes those who may have cultural ties to the land (but not native title);
- why the consultation requirements set out in the bill are taken to be an exhaustive statement of the rules of natural justice, and what this means in practice;
- why the bill enables the minister to make a notifiable instrument to prescribe additional land for all-weather access to the site (which is not subject to any form of parliamentary oversight); and
- if native title is extinguished without the full, free and informed consent of the traditional owners, what remedies are available to affected persons for any contravention of their rights to culture, self-determination and equality and non-discrimination.

### **Committee view**

**1.23 The committee notes that the bill would enable additional land to be acquired or extinguished to allow for the expansion of the site or to provide all-weather access to the site. The committee notes the legal advice that as the site may have cultural significance for First Nations people and as native title may be extinguished by these provisions, the bill appears to engage and may limit the rights to culture, self-determination and equality and non-discrimination. In order to assess whether the bill engages and limits these rights the committee seeks the minister's advice as to the matters set out at paragraph [1.22].**

## National Vocational Education and Training Regulator Amendment (Governance and Other Matters) Bill 2020<sup>1</sup>

<b>Purpose</b>	This bill seeks to amend the <i>National Vocational Education and Training Regulator Act 2011</i> to: <ul style="list-style-type: none"> <li>• revise the governance of the National VET Regulator;</li> <li>• establish the National Vocational Education and Training Regulator Advisory Council; and</li> <li>• provide information sharing arrangements in relation to information collected by the National Centre for Vocational Education Research</li> </ul>
<b>Portfolio</b>	Education, Skills and Employment
<b>Introduced</b>	House of Representatives, 13 February 2020
<b>Right[s]</b>	Privacy
<b>Status</b>	Seeking additional information

### Information sharing

1.24 Schedule 2 of the bill enables the National Centre for Vocational Education Research (NCVER) to disclose information collected in accordance with the 'Data Provision Requirements' to a number of bodies. The explanatory memorandum states that under the Data Provision Requirements a registered training organisation is required to collect student information and disclose that information to NCVER.<sup>2</sup> It states that this information will usually be collected at enrolment and will include personal information and potentially sensitive information (such as disability status).<sup>3</sup>

1.25 The information may be disclosed to the relevant Department; another Commonwealth authority; a State or Territory authority that deals with, or has responsibility for, matters relating to vocational education and training (VET); and a VET regulator. It may be disclosed to these bodies 'for the purposes of that body'.<sup>4</sup> It may also be disclosed to a person engaged by the NCVER to conduct research on its

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Vocational Education and Training Regulator Amendment (Governance and Other Matters) Bill 2020, *Report 3 of 2019*; [2019] AUPJCHR 38.

2 Explanatory memorandum, p. 37.

3 Explanatory memorandum, p. 38.

4 Schedule 2, item 2, proposed subsection 210A(1).

behalf, but only if the person and the NCVET satisfies any requirements that may be prescribed by the rules.<sup>5</sup>

## **Preliminary international human rights law advice**

### ***Right to privacy***

1.26 The disclosure of personal information engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life.<sup>6</sup> The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.27 The statement of compatibility recognises that the right to privacy is engaged by this measure. It states that the objective of the measure is to enable:

- the effective administration of VET, including program administration, regulation, monitoring and evaluation;
- the effective facilitation of statistics and research relating to education;
- the effective understanding of how the VET market operates, for policy, workforce planning and consumer information; and
- to allow the spectrum of individual circumstances to be considered in policy, funding and regulatory decision-making.<sup>7</sup>

1.28 To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Administrative convenience, in and of itself, is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights law. It is therefore not clear that the sharing of identifiable personal information for such purposes seeks to achieve a legitimate objective for the purposes of international human rights law.

1.29 It is also not clear that the measures would be proportionate to achieve the stated objectives. In particular, it is not clear why it is necessary to share identifiable personal information with any Commonwealth authority for the purposes of that body, noting that this does not appear to be linked to the purposes for which the information was collected (that is, relating to the provision of vocational education training). It is also not clear why the information needs to be shared in an identifiable

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5 Schedule 2, item 2, proposed subsections 210A(2) and (3).

6 Article 17, International Covenant on Civil and Political Rights.

7 Statement of compatibility, p. 8.

format, if many of the purposes of the measure are to facilitate statistics and research and understanding the VET market for the purposes of making policies, funding and regulatory decision-making.

1.30 The statement of compatibility states that the minister's power to make information safeguard rules 'adds an additional layer of protection to safeguard the disclosure of personal information', as it gives the minister the capacity to prescribe particular requirements which safeguards a person's privacy.<sup>8</sup> If information safeguard rules were made which included a number of privacy safeguards this could assist with the proportionality of the measure. However, the bill does not require that such rules be made, only that they *may* be made, and the rules would only apply to the disclosure of information to a person engaged by the NCVET to conduct research. The rules would not apply to the disclosure to any Commonwealth authority, the VET Regulator, the Department, or to a State or Territory authority dealing with VET matters.

1.31 As such, further information is required to assess whether the measure is compatible with the right to privacy, including:

- why it is necessary to disclose identifiable student data in all instances to all of the listed bodies, and whether some, or all, of the objectives of the measure could be achieved by disclosing de-identified student data;
- why it is necessary to enable the disclosure of personal information to each of the bodies listed, 'for the purposes of that body', rather than limiting the disclosure for the purposes of administering the VET sector; and
- why the bill states that the minister 'may' make information safeguard rules, rather than requiring the minister to make such rules, and why such rules would only apply to disclosure to research bodies and not the broader range of disclosures under proposed subsection 210A(1).

### **Committee view**

**1.32 The committee notes the bill seeks to permit the disclosure of personal student data to a range of bodies and for a range of purposes. The committee notes the legal advice that this engages and limits the right to privacy. In order to assess whether the bill constitutes a permissible limitation on the right to privacy the committee seeks the minister's advice as to the matters set out at paragraph [1.31].**

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8 Statement of compatibility, p. 8.

## Advice only<sup>1</sup>

1.33 The committee notes that the following senator's bill appears to engage and may limit human rights. Should this 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:

- Australian Education Legislation Amendment (Prohibiting the Indoctrination of Children) Bill 2020.

1.34 Further, the committee draws the following bills to the attention of the relevant minister on an advice only basis. The committee does not require a response to these comments.

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, Advice Only, *Report 3 of 2020*; [2020] AUPJCHR 39.

## Appropriation Bill (No. 3) 2019-2020

### Appropriation Bill (No. 4) 2019-2020<sup>1</sup>

<b>Purpose</b>	These bills seek to appropriate money from the Consolidated Revenue for services
<b>Portfolio</b>	Finance
<b>Introduced</b>	House of Representatives, 13 February 2020
<b>Rights</b>	Multiple rights: economic, social and cultural; civil and political; equality and non-discrimination
<b>Status</b>	Advice only

### Appropriation of money

1.35 These bills seek to appropriate money from the Consolidated Revenue Fund for a range of services. The portfolios, budget outcomes and entities for which these appropriations would be made are set out in the schedules to each bill.

### International human rights legal advice

1.36 Proposed government expenditure to give effect to particular policies may engage and limit, or promote, a range of human rights, including civil and political rights and economic, social and cultural rights (such as the right to housing, health, education and social security).<sup>2</sup>

1.37 Australia has obligations to respect, protect and fulfil human rights, including the specific obligations to progressively realise economic, social and cultural rights using the maximum of resources available; and a corresponding duty to refrain from taking retrogressive measures (or backwards steps), in relation to the realisation of these rights.<sup>3</sup> Economic, social and cultural rights may be particularly affected by appropriation bills, because any reduction in funding for measures which realise them, such as specific health and education services, may be considered to be retrogressive with respect to the attainment of such rights and, accordingly, must be justified for the purposes of international human rights law.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Appropriation Bill (No. 3) 2019-2020 and Appropriation Bill (No. 4) 2019-2020, *Report 3 of 2020*; [2020] AUPJCHR 40.

2 Under the International Covenant on Civil and Political Rights and the International covenant on Economic, Social and Cultural Rights.

3 See, International Covenant on Economic, Social and Cultural Rights.

1.38 The statements of compatibility accompanying these bills do not identify that any rights are engaged by the bills, and state that the High Court has emphasised that because appropriation Acts do not ordinarily confer authority to engage in executive action, they do not confer legal authority to spend.<sup>4</sup> However, because appropriations are the means by which the appropriation of money from the Consolidated Revenue Fund is authorised, they are a significant step in the process of funding public services. The fact that the High Court has stated that appropriations Acts do not create rights or duties as a matter of Australian law, does not address the fact that appropriations may nevertheless engage human rights for the purposes of international law. The appropriation of funds facilitates the taking of actions which may affect both the progressive realisation of, and failure to fulfil, Australia's obligations under international human rights laws. Appropriations may, therefore, engage human rights for the purposes of international law, because reduced appropriations for particular areas may be regarded as retrogressive, or as limiting rights.

1.39 There is international guidance about reporting on the human rights compatibility of public budgeting measures.<sup>5</sup> For example, the Committee on the Rights of the Child has advised that countries must show how the public budget-related measures they choose to take result in improvements in children's rights,<sup>6</sup> and has provided detailed guidance as to implementation of the rights of the child, which 'requires close attention to all four stages of the public budget process: planning, enacting, executing and follow-up'.<sup>7</sup> It has also advised that countries should 'prepare their budget-related statements and proposals in such a way as to enable effective comparisons and monitoring of budgets relating to children'.<sup>8</sup>

1.40 Without an assessment of human rights compatibility of appropriations bills, it is difficult to assess where Australia is promoting human rights, and realising its

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4 Statements of compatibility, p. 4.

5 See, for example, UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017); South African Human Rights Commission, *Budget Analysis for Advancing Socio-Economic Rights* (2016); Ann Blyberg and Helena Hofbauer, *Article 2 and Governments' Budgets* (2014); Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (UNIFEM, 2006); and Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

6 Committee on the Rights of the Child, *General Comment No. 19 (2016) on public budgeting for the realization of children's rights (art. 4)* [24].

7 Committee on the Rights of the Child, *General Comment No. 19 (2016) on public budgeting for the realization of children's rights (art. 4)* [26].

8 Committee on the Rights of the Child, *General Comment No. 19 (2016) on public budgeting for the realization of children's rights (art. 4)* [81].



human rights obligations. For example, a retrogressive measure in an individual bill may not, in fact, be retrogressive when understood within the budgetary context as a whole. Further, where appropriation measures may engage and limit human rights, an assessment of the human rights compatibility of the measure would provide an explanation as to whether that limitation would be permissible under international human rights law.

1.41 Considering that appropriations may engage human rights for the purposes of international law, in order to assess such bills for compatibility with human rights the statements of compatibility accompanying such bills would need to include an assessment of the measures, including an assessment of:

- overall trends in the progressive realisation of economic, social and cultural rights (including any retrogressive trends or measures);<sup>9</sup>
- the impact of budget measures (such as spending or reduction in spending) on vulnerable groups (including women, First Nations Peoples, persons with disabilities and children);<sup>10</sup> and
- key individual measures which engage human rights, including a brief assessment of their human rights compatibility.

1.42 In relation to the impact of spending or reduction in spending on vulnerable groups, relevant considerations may include:

- whether there are any specific budget measures that may disproportionately impact on particular groups (either directly or indirectly); and
- whether there are any budget measures or trends in spending over time that seek to fulfil the right to equality and non-discrimination for particular groups.<sup>11</sup>

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9 This could include an assessment of any trends indicating the progressive realisation of rights using the maximum of resources available; any increase in funding over time in real times; any trends that increase expenditure in a way which would benefit vulnerable groups; and any trends that result in a reduction in the allocation of funding which may impact on the realisation of human rights and, if so, an analysis of whether this would be permissible under international human rights law.

10 Spending, or reduction of spending, may have disproportionate impacts on such groups and accordingly may engage the right to equality and non-discrimination.

## Committee view

**1.43** The committee notes that these bills seek to appropriate money from the Consolidated Revenue Fund for services. The committee notes the legal advice that proposed government expenditure to give effect to particular policies may engage and promote, or limit, a range of human rights.

**1.44** The committee acknowledges that appropriations bills may present particular difficulties given their technical and high-level nature, and as they generally include appropriations for a wide range of programs and activities across many portfolios. As such, it may not be appropriate to assess human rights compatibility for each individual measure. However, the committee considers that the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility, namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups.

**1.45** The committee considers that statements of compatibility for future appropriations bills should contain an assessment of human rights compatibility which meets the standards outlined in the committee's *Guidance Note 1* and addresses the matters set out at paragraphs [1.41] and [1.42].

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

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11 There are a range of resources to assist in the preparation of human rights assessments of budgets: see, for example, UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017) at: <https://www.ohchr.org/Documents/Publications/RealizingHRThroughGovernmentBudgets.pdf>; South African Human Rights Commission, *Budget Analysis for Advancing Socio-Economic Rights* (2016) at: <http://spii.org.za/wp-content/uploads/2018/05/2016-SPII-SAHRC-Guide-to-Budget-Analysis-for-Socio-Economic-Rights.pdf>; Ann Blyberg and Helena Hofbauer, *Article 2 and Governments' Budgets* (2014) at: <https://www.internationalbudget.org/wp-content/uploads/Article-2-and-Governments-Budgets.pdf>; Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (UNIFEM, 2006) at: <https://www.internationalbudget.org/wp-content/uploads/Budgeting-for-Women%E2%80%99s-Rights-Monitoring-Government-Budgets-for-Compliance-with-CEDAW.pdf>; Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

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

1.47 The committee has no comment in relation to the following bills which were introduced into the Parliament or restored to the *Notice Paper* between 10 and 13 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:<sup>2</sup>

- Defence Legislation Amendment (Miscellaneous Measures) Bill 2020;
- Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020;
- Farm Household Support Amendment (Relief Measures) Bill (No. 1) 2020;
- Galilee Basin (Coal Prohibition) Bill 2018;
- Statute Update (Regulations References) Bill 2020;
- Superannuation Amendment (PSSAP Membership) Bill 2020; and
- Treasury Laws Amendment (2020 Measures No. 1) Bill 2020.

1.48 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 9 January and 5 February 2020.<sup>3</sup> This includes the Autonomous Sanctions (Designated and Declared Persons – Ukraine) Amendment List 2020 [F2020L00083]. The committee has considered the human rights compatibility of similar instruments on a number of occasions.<sup>4</sup> As this legislative instrument does not appear to designate or declare any individuals who

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 3 of 2020*; [2020] AUPJCHR 41.

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.

are currently within Australia's jurisdiction, the committee makes no comment in relation to this specific instrument at this time.

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

**Senator the Hon Sarah Henderson**

**Chair**