



Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 3 of 2019

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PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823

Fax: 02 6277 5767

Email: human.rights@aph.gov.au

Website: http://www.aph.gov.au/joint_humanrights/

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Membership of the committee

Members

Mr Ian Goodenough MP, Chair	Moore, Western Australia, LP
Mr Graham Perrett MP, Deputy Chair	Moreton, Queensland, ALP
Ms Celia Hammond MP	Curtin, Western Australia, LP
Dr Anne Webster MP	Mallee, Victoria, Nats
Senator Nita Green	Queensland, ALP
Senator Nick McKim	Tasmania, AG
Senator David Van	Victoria, LP
Senator Patrick Dodson	Western Australia, ALP
Senator Claire Chandler	Tasmania, LP

Secretariat¹

Ms Anita Coles, Committee Secretary
Ms Zoe Hutchinson, Principal Research Officer
Dr Kate Mitchell, Principal Research Officer
Mr Andrew McIntyre, Senior Research Officer
Ms Stephanie Lum, Legislative Research Officer

External legal adviser

Dr Jacqueline Mowbray

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.² A description of the rights most commonly arising in legislation examined by the committee is available on the committee's website.³

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 justified 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 justifiable. 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.

2 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).

3 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

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or else draw the matter to the attention of the proponent on an advice-only basis.⁴

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.⁵

4 The committee generally takes an exceptions based approach to its substantive examination of legislation.

5 See *Guidance Note 1 – Drafting Statements of Compatibility*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

Chapter 1

New and continuing matters¹

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament, or restored to the notice paper, between 2 July and 25 July 2019 (consideration of 12 bills from this period has been deferred);² and
 - legislative instruments registered on the Federal Register of Legislation between 7 February and 4 June 2019 (consideration of one legislative instrument from this period has been deferred).³

1 This section can be cited as: Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 3 of 2019*; [2019] AUPJCHR 57.

2 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration.

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>.

Response required

1.2 The committee previously reported on and sought advice in relation to the **National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019**⁴ which has been reintroduced in the same terms. As that advice has not been received, the committee reiterates its initial request for advice as outlined in [Report 2 of 2019](#).

1.3 The committee also previously reported on and sought advice from relevant ministers, which had not been received at the time of the dissolution of the 45th Parliament, in relation to the following legislative instruments:

- Australian Crime Commission Regulations 2018 [F2018L01780]
[Report 2 of 2019](#), pp. 2-13
- Civil Aviation Safety Amendment (Part 91) Regulations 2018 [F2018L01783]
[Report 2 of 2019](#), pp. 22-26
- Fair Work Amendment (Casual Loading Offset) Regulations 2018 [F2018L01770]
[Report 2 of 2019](#), pp. 57-60
- Social Security (Assurances of Support) Amendment Determination 2018 (No. 2) [F2018L01831]
[Report 2 of 2019](#), pp. 83-89

1.4 Noting that these legislative instruments remain in force, the committee reiterates its initial request for advice from the relevant minister as outlined in the relevant reports.

1.5 Further, the committee seeks a response from the relevant minister with respect to the following bills and instruments.

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

Criminal Code Amendment (Agricultural Protection) Bill 2019¹

Purpose	Seeks to amend the <i>Criminal Code Act 1995</i> (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
Status	Seeking additional information

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

1.6 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 service² 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, could cause detriment to a primary production business.⁴ If convicted, an offender is liable to imprisonment for 12 months.⁵

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Criminal Code Amendment (Agricultural Protection) Bill 2019, *Report 3 of 2019*; [2019] AUPJCHR 58.

2 'Carriage service' is defined in section 7 of the *Telecommunications Act 1997* to mean 'a service for carrying communications by means of guided and/or unguided electromagnetic energy'.

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.

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.

Right to freedom of expression and freedom of assembly

1.7 As acknowledged in the statement of compatibility, 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 The right to freedom of expression includes the freedom to impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.⁷

1.8 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 (including, for example, sending an email to others suggesting that they join a sit-in at a local abattoir).⁸ The right to freedom of assembly protects individuals and groups organising and participating in peaceful protest and other forms of collective activity in public,⁹ and includes the right to choose a location for a peaceful assembly within sight and hearing of their target audience.¹⁰ The statement of compatibility does not address the right to freedom of assembly, and it is not clear on the information provided the extent to which the bill limits the rights of people to organise and participate in lawful peaceful protests in publicly accessible locations.¹¹

1.9 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

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

7 International Covenant on Civil and Political Rights (ICCPR), article 19(2).

8 This is an example provided in the explanatory memorandum as to the proposed operation of the offence provision. See Explanatory Memorandum (EM), p. 13

9 ICCPR, article 21. See *Popova v. Russian Federation*, United Nations (UN) Human Rights Committee Communication No.2217/2012 (2018) [8.3].

10 *Severinets v Belarus*, UN Human Rights Committee Communication No.2230/2012 (2018) [8.5].

11 The definition of agricultural land is broad and 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. The current Draft Human Rights Committee Comment No.37 on the Right to Peaceful Assembly notes that 'assemblies' can happen on publicly or privately owned property, provided the property is publicly accessible. It also states that while the interests of private owners must be given due weight, such interests may be limited if participants have no other reasonable ways to convey their message to their target audience: see Draft General Comment on Article 21 (Right of Peaceful Assembly) prepared by the Rapporteur, Christof Heyns at [15] and [64], <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].

limitations must be prescribed by law, be rationally connected to (that is, effective to achieve) and proportionate to the objective of the measure.¹²

1.10 The statement of compatibility states that the purpose of the new offence is to 'protect the rights of Australian farmers and prevent harm to public order and public health from property offences incited by the use of a carriage service'.¹³ It also states that the use of a carriage service to communicate or share material with the intention that trespass may occur 'has the potential to contaminate food safety, breach biosecurity protocols and cause distress to members of the community'.¹⁴ The statement also states that incitement of property offences on agricultural land has the potential to affect the rights of Australian farmers to feel safe on their properties¹⁵ and that the bill promotes the overarching goals of the International Covenant on Civil and Political Rights (ICCPR) relating to 'freedom from fear' and fostering conditions whereby 'everyone may enjoy his civil and political rights'.¹⁶

1.11 It would have been useful if the statement of compatibility had provided more particularised evidence of the precise nature of the threat posed by those using carriage services to incite trespass, and why current laws (for example, laws relating to trespass) are insufficient to achieve the stated objectives.¹⁷ However, 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.

1.12 Criminalising the use of a carriage service to incite trespass may also be capable of effectively achieving these objectives (that is, rationally connected to the objectives), however it would have been useful if the statement of compatibility had provided information about this.

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

13 SOC, p. 6.

14 SOC, pp. 5-6.

15 SOC, p. 6.

16 SOC, p. 5.

17 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]. See also the Committee's *Guidance Note 1: Drafting Statements of Compatibility* (December 2014), which states that the committee's usual expectation is that the statement of compatibility provides a detailed and evidence-based assessment of the pressing and substantial concern the measures seek to address so as to demonstrate that the measure pursues a legitimate objective for the purposes of international human rights law.

1.13 A key question is whether the limitation on these rights is proportionate to the objectives sought to be achieved. In particular, the existence of adequate and effective safeguards is relevant to assessing proportionality. In this respect, there are several safeguards in the bill that may protect the right to freedom of expression and assembly. This includes an exemption 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.¹⁸ The explanatory memorandum explains that this exemption is intended to exempt *bona fide* journalism from the offence,¹⁹ and the second reading speech noted that the conduct that may be covered by the defence would include a journalist publishing 'a story that listed the locations of farms with "questionable" farming practices' provided that the journalist does not suggest that activists should use the information to facilitate farm trespass. However, the bill does not define what is in the 'public interest' and the journalist bears the evidential burden²⁰ to establish the disclosure was in the public interest and that the journalist was acting in a professional capacity (which is also undefined).²¹

1.14 There is also an exemption for certain public interest disclosures such as disclosure in accordance with the *Public Interest Disclosure Act 2013* (PID Act).²² The explanatory memorandum explains that this exemption is intended to clarify that the proposed offence doesn't apply to 'whistleblowers' who make protected disclosures of information relating to instances of animal cruelty on agricultural land under whistleblowing laws.²³ While this is an important safeguard, the UN Special Rapporteur on Human Rights Defenders has questioned the adequacy of the public interest disclosure framework under the PID Act from a human rights perspective, noting that 'many potential whistleblowers will not take the risk of disclosing because of the complexity of the laws, severity and scope of the penalty, and extremely hostile approach by the Government and media to whistleblowers'.²⁴

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

19 EM, p. 13.

20 Which requires the defendant to raise evidence that suggests a reasonable possibility that the matter exists or does not exist, section 13.3 of the *Criminal Code Act 1995*.

21 See Agricultural Protection Bill, Schedule 1, item 2, new section 474.46(2). The reverse evidential burden also engages and limits the right to the presumption of innocence.

22 Agricultural Protection Bill, Schedule 1, item 2, new section 474.46(3).

23 EM, p. 13.

24 Michel Forst, *End of mission statement by United Nations Special Rapporteur on the situation of human rights defenders Visit to Australia*, 18 October 2016, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E..> See also *Report of the Special Rapporteur on the situation of human rights defenders on his mission to Australia*, A/HRC/37/51/Add.3 (2018) [28]-[35].

1.15 In addition to the matters raised above, there are broader questions as to whether the safeguards are sufficient to ensure that any limitations on freedom of expression and assembly are proportionate. First, 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. Further, 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). 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.

1.16 In addition, in order to be proportionate, restrictions on freedom of expression and assembly should not be overly broad.²⁵ While the offence is limited to circumstances where a person 'intends' to incite another person to trespass,²⁶ and the explanatory memorandum explains that the intent element would avoid criminalising situations where a person 'inadvertently encourages trespass',²⁷ questions remain as to the potential breadth of the offence. 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.²⁸ 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 each case but that 'the inclusion of a disclaimer on a website would not, of itself, be conclusive'.²⁹

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

26 Under the Criminal Code, a person has intention with respect to conduct if he or she means to engage in that conduct, a person has intention with respect to a circumstance if he or she believes that it exists or will exist, and a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events: see Criminal Code, section 5.2.

27 EM, p. 11.

28 EM, p. 11.

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

1.17 Further, the requirement that an offender be reckless as to whether detriment may be caused means that it is irrelevant whether any detriment to a primary production business actually occurs.³⁰ That is, an offence may still be committed in circumstances where the use of the carriage service to communicate material leads to trespass but does not result in any threat to public order, public health or the rights of others, such as contamination of food safety or breach of biosecurity protocols. Similarly, the explanatory memorandum indicates that an offence may still be committed in circumstances where the material disseminated by an offender is already publicly available (including from government websites, online maps or a news report).³¹ In addition the term 'trespass' is not defined and is intended to take its common law meaning,³² which means the offence would apply even where the relevant trespass is not criminal in nature, but would give rise to a civil action. This potentially broad scope of the offence raises questions as to whether the measure as drafted is sufficiently circumscribed. Further information as to the intended scope of the proposed offence and the safeguards to protect freedom of expression and assembly would assist in assessing proportionality.

1.18 Finally, the availability of less rights restrictive approaches is also relevant to whether the measure is a proportionate limitation on human rights. However, the statement of compatibility does not address why less rights restrictive approaches would not be reasonably available.

Committee comment

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

- **the extent to which the right to freedom of assembly is engaged and limited by the measure and, if so, whether such limitations are permissible; and**
- **whether the limitations on these rights are proportionate to the objectives sought to be achieved, including:**
 - **whether the proposed offence and its potential application is sufficiently circumscribed;**
 - **whether the safeguards included in the bill are sufficient for the purposes of international human rights law (including whether the proposed defences for journalists and whistleblowers sufficiently**

30 EM, p. 12.

31 EM, p. 11.

32 EM, p. 11.

protect the rights to freedom of expression and assembly, noting the concerns raised above); and

- **whether there are other, less rights restrictive, measures reasonably available to achieve the stated objectives.**

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	Agriculture and Water Resources
Authorising legislation	<i>Fisheries Management Act 1991</i>
Last day to disallow	15 sitting days after tabling (tabled House of Representatives and Senate 2 April 2019)
Rights	Privacy; life; torture, cruel, inhuman and degrading treatment or punishment
Status	Seeking additional information

Collection and disclosure of information

1.20 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.² Part 10, Division 2 of the regulations prescribe the type of personal identifiers that can be required to be produced, including fingerprints, photographs, samples of handwriting, audio recordings and iris scans. 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.³

1.21 Section 103 of the regulations also 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 that AFMA may disclose this information, including personal information, to certain entities if satisfied of particular matters. This includes disclosure of information to foreign countries or foreign government agencies where AFMA is satisfied that the information relates to a function of that entity. It also includes disclosure to a person

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Fisheries Management Regulations 2019 [F2019L00383], *Report 3 of 2019*; [2019] AUPJCHR 59.

2 *Fisheries Management Act 1991*, schedule 1A, section 8.

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

conducting research where that research is related to AFMA's functions or objectives.⁴

Right to privacy

1.22 By authorising the collection and disclosure of information including identifying and personal information, the measure engages and limits the right to privacy.⁵ 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. The statement of compatibility accompanying the bill acknowledges that the right is engaged and limited by the bill.⁶

1.23 The right to privacy may be subject to permissible limitations which are prescribed by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective, and be rationally connected to (that is, effective to achieve) and proportionate to that objective. 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.⁷ However, questions arise 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.

1.24 In relation to whether there are appropriate safeguards to protect personal privacy, 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. However, 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 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,

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

5 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).

6 Statement of compatibility (SOC), pp. 3-4.

7 SOC, pp. 3-4.

8 APP 9; APP 6.2(b).

or on behalf of, an enforcement body.⁹ Therefore, further information is required as to the operation of the specific safeguards in the Privacy Act to determine whether that Act effectively safeguards the right to privacy in these circumstances.

1.25 Further, while the disclosure of information to other Australian government agencies may be subject to the Privacy Act, in relation to disclosures to international organisations, it is unclear what safeguards are in place to protect the right to privacy, including in relation to on-disclosure, once information is disclosed overseas. It is for this reason that whether there are effective safeguards in place prior to any disclosure overseas is of particular importance in considering whether the measures are proportionate. However, disclosure under sections 99 and 104 of the regulations do not appear to be accompanied by any explicit requirement to consider the impact on an individual's privacy prior to disclosure. This is of particular concern noting that the scope of the information subject to collection and disclosure may be highly sensitive and include biometric data such as fingerprints and photographs.

1.26 More generally, the grounds for disclosure under sections 99 and 104 are relatively broad and would allow for disclosure of personal information in a range of circumstances to a range of recipients, including foreign governments or researchers. This raises concerns as to whether the scope of these provisions is overly broad. The statement of compatibility indicates that there are some policies that require information disclosed to researchers to be de-identified. While such policies may be relevant, they provide a lesser degree of protection than legal safeguards as they can be amended or changed at any time. It is unclear why the regulations themselves do not include a requirement that such information be de-identified before being sent to researchers. Finally, the statement of compatibility does not address whether there are sufficient safeguards in relation to the storage, retention and use of what may be sensitive personal information. Accordingly, further information is required in order for the committee to complete its examination as to the compatibility of the measures with the right to privacy.

Committee comment

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

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

9 APP 6.2(e).

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

1.28 The right to life imposes an obligation on state parties to protect people from being killed by others or from identified risks.¹⁰ 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 of an offence to which the death penalty applies.¹¹

1.29 As such, 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. This issue was not addressed in the statement of compatibility and so no assessment of the compatibility of the measures with the right to life is provided. Accordingly, it is unclear the extent to which disclosure of identifying or personal information in the circumstances of the regulations may provide assistance in the investigation of crimes that could result in the death penalty overseas.

1.30 In addition, 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. Under international law the prohibition on torture is absolute and can never be subject to permissible limitations.¹² The statement of compatibility also does not acknowledge that the disclosure of information overseas may have implications for the prohibition on torture, or cruel, inhuman, or degrading treatment or punishment, and so does not provide an assessment of whether the measures are compatible with these obligations.

1.31 The committee has previously raised concerns regarding the human rights compatibility of powers allowing for information sharing overseas.¹³ It has noted the

10 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.

11 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].

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

13 See, for example, Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 78-80; *Report 2 of 2019* (2 April 2019) pp 12-13; *Report 5 of 2017* (14 June 2017) pp. 39-41; *Report 8 of 2017* (18 August 2017) pp. 83-91.

importance of ensuring there are adequate and effective safeguards in place to protect the right to life and right not to be subjected to torture, or cruel, inhuman, or degrading treatment or punishment. Of particular relevance is whether there are 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. The process for authorising disclosures and the scope of personal information that may be disclosed is also relevant to the compatibility of the measures with these rights.

Committee comment

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

1.33 In particular, the committee seeks the minister's advice as to:

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

Advice only¹

1.34 The committee reiterates its views as set out in its previous reports on the following bills. These bills have been restored to the notice paper or have been reintroduced in relevantly substantially similar terms to those previously commented on:

- Australian Cannabis Agency Bill 2018
[Report 1 of 2019](#), pp. 49-51
- Counter-Terrorism (Temporary Exclusion Orders) Bill 2019²
[Report 2 of 2019](#), pp. 38-56
- Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019³
[Report 9 of 2017](#), pp. 13-24; [Report 12 of 2017](#), pp. 113-136
- Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019
[Report 12 of 2017](#), pp. 16-24; [Report 1 of 2018](#), pp. 59-77; [Report 2 of 2018](#), pp. 97-117
- Migration Amendment (Streamlining Visa Processing) Bill 2019
[Report 1 of 2019](#), pp. 39-45; [Report 2 of 2019](#), pp. 203-212
- Migration Amendment (Strengthening the Character Test) Bill 2019
[Report 12 of 2018](#), pp. 2-22; [Report 1 of 2019](#), pp. 69-97
- Migration Legislation Amendment (Regional Processing Cohort) Bill 2019
[Report 9 of 2016](#), pp. 15-22; [Report 2 of 2017](#), pp. 85-89
- Murray-Darling Basin Commission of Inquiry Bill 2019
[Report 2 of 2019](#), pp. 131-135
- Plebiscite (Future Migration Level) Bill 2018
[Report 9 of 2018](#), pp. 20-21
- Treasury Laws Amendment (Consumer Data Right) Bill 2019
[Report 2 of 2019](#), pp. 166-168

1 This section can be cited as: Parliamentary Joint Committee on Human Rights, Advice only, *Report 3 of 2019*; [2019] AUPJCHR 60.

2 The committee had requested further information from the minister as to the human rights compatibility of the previously introduced bill. Advice addressing questions of human rights compatibility was not received before the prorogation of the 45th Parliament. The reintroduced bill passed before the committee had the opportunity to report.

3 In relation to this bill, the committee notes that while there have been a number of changes to the bill including relating to matters the committee previously commented on, these do not fully address the committee's initial concerns.

1.35 The following bills and legislative instruments raise human rights concerns that are substantively similar or related to measures the committee has previously reported on, and the committee reiterates its views as set out in those reports in relation to these bills and instruments:

- Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Relating to Terrorism Offences) Bill 2019
[Report 6 of 2018](#), pp. 24-29
- Autonomous Sanctions (Designated and Declared Persons – Ukraine) List 2019
[Report 6 of 2018](#), pp. 104-130
- Migration (Fast Track Applicant Class – Temporary Protection and Safe Haven Enterprise Visas) Instrument 2019 [F2019L00506]
[Report 8 of 2018](#), pp. 23-29 (see, also, [Report 11 of 2018](#), pp. 82-98)
- Royal Commissions Amendment (Custody of Records) Regulations 2019 [F2019L00527]
[Report 2 of 2019](#), pp. 131-135

Bills and instruments not raising human rights concerns¹

1.36 Of the bills introduced into the Parliament, or restored to the notice paper, between 2 July and 25 July 2019, the following did not raise human rights concerns² (this may be because the bill does not engage human rights, promotes human rights, and/or permissibly limits human rights):

- Aged Care Amendment (Movement of Provisionally Allocated Places) Bill 2019
- Aged Care Amendment (Staffing Ratio Disclosure) Bill 2019
- Agriculture Legislation Repeal Bill 2019
- Air Services Amendment Bill 2018
- Australian Institute of Health and Welfare Amendment (Assisted Reproductive Treatment Statistics) Bill 2019
- Australian Multicultural Bill 2018
- Australian Research Council Amendment (Ensuring Research Independence) Bill 2018
- Australian Veterans' Recognition (Putting Veterans and Their Families First) Bill 2019
- Banking Amendment (Rural Finance Reform) Bill 2019
- Broadcasting Services Amendment (Audio Description) Bill 2018
- Civil Aviation Amendment Bill 2019
- Coal-Fired Power Funding Prohibition Bill 2017
- Coal-Fired Power Funding Prohibition Bill 2019
- Commonwealth Electoral Amendment (Lowering Voting Age and Increasing Voter Participation) Bill 2018
- Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019

1 This section can be cited as: Parliamentary Joint Committee on Human Rights, Bills and instruments not raising human rights concerns, *Report 3 of 2019*; [2019] AUPJCHR 61.

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 listed bills may have been assessed as not raising human rights in substance, notwithstanding that the statement of compatibility accompanying the bill may be inadequate. Where the committee considers that a statement of compatibility is inadequate it may write to the relevant minister setting out its concerns, see Parliamentary Joint Committee on Human Rights, *Annual Report 2018*, pp. 36-37.

- Competition and Consumer Amendment (Truth in Labelling—Palm Oil) Bill 2017
- Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019
- Constitution Alteration (Water Resources) 2019
- Counter-Terrorism (Temporary Exclusion Orders) (Consequential Amendments) Bill 2019
- Customs Amendment (Immediate Destruction of Illicit Tobacco) Bill 2019
- Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017
- Environment Protection and Biodiversity Conservation Amendment (Heritage Listing for the Bight) Bill 2019
- Farm Household Support Amendment Bill 2019
- Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018
- Future Drought Fund Bill 2019
- Future Drought Fund (Consequential Amendments) Bill 2019
- Great Australian Bight Environment Protection Bill 2019
- Health Insurance Amendment (Bonded Medical Programs Reform) Bill 2019
- Higher Education Support (Charges) Bill 2019
- Higher Education Support Amendment (Cost Recovery) Bill 2019
- Intellectual Property Laws Amendment (Productivity Commission Response Part 2 and Other Measures) Bill 2019
- Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018
- Live Animal Export (Slaughter) Prohibition Bill 2019
- Live Sheep Long Haul Export Prohibition Bill 2019
- Military Rehabilitation and Compensation Amendment (Single Treatment Pathway) Bill 2019
- National Disability Insurance Scheme Amendment (Streamlined Governance) Bill 2019
- National Health Amendment (Pharmaceutical Benefits) Bill 2019
- National Rental Affordability Scheme Amendment Bill 2019
- National Sports Tribunal Bill 2019

- National Sports Tribunal (Consequential Amendments and Transitional Provisions) Bill 2019
- Nuclear Fuel Cycle (Facilitation) Bill 2017
- Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2019
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2019
- Passenger Movement Charge Amendment (Timor Sea Maritime Boundaries Treaty) Bill 2019
- Regional Forest Agreements Legislation (Repeal) Bill 2017
- Road Vehicle Standards Legislation Amendment Bill 2019
- Royal Commissions Amendment (Private Sessions) Bill 2019
- Social Services Legislation Amendment (Ending the Poverty Trap) Bill 2018
- Social Services Legislation Amendment (Overseas Welfare Recipients Integrity Program) Bill 2019
- Telecommunications Legislation Amendment (Unsolicited Communications) Bill 2019
- Tertiary Education Quality and Standards Agency Amendment Bill 2019
- Timor Sea Maritime Boundaries Treaty Consequential Amendments Bill 2019
- Treasury Laws Amendment (2018 Measures No. 2) Bill 2019
- Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2019
- Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019
- Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019
- Treasury Laws Amendment (Making Sure Multinationals Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2019
- Treasury Laws Amendment (Putting Members' Interests First) Bill 2019
- Treasury Laws Amendment (Tax Relief So Working Australians Keep More Of Their Money) Bill 2019
- Treasury Laws Amendment (Timor Sea Maritime Boundaries Treaty) Bill 2019
- Water Amendment (Indigenous Authority Member) Bill 2019

1.37 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 7 February 2019 and 4 June 2019.³ Instruments raising human rights concerns are identified earlier in this chapter. The committee has concluded that the remaining instruments (unless deferred)⁴ do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

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 Appendix 1 for a list of deferred legislation.

Chapter 2

Concluded matters

2.1 No responses were received.

Mr Ian Goodenough MP

Chair

Appendix 1

Deferred legislation¹

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Aged Care Quality and Safety Commission Amendment (Worker Screening Database) Bill 2019
- Appropriation Bill (No. 1) 2019-2020
- Appropriation Bill (No. 2) 2019-2020
- Appropriation (Parliamentary Departments) Bill (No. 1) 2019-2020
- Combatting Child Sexual Exploitation Legislation Amendment Bill 2019
- Crimes Legislation Amendment (Police Powers at Airports) Bill 2019
- Discrimination Free Schools Bill 2018
- Human Rights (Parliamentary Scrutiny) Amendment (Australian Freedoms) Bill 2019
- Human Services Amendment (Photographic Identification and Fraud Prevention) Bill 2019
- Migration Amendment (Repairing Medical Transfers) Bill 2019
- Ministers of State (Checks for Security Purposes) Bill 2019
- Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 [F2019L00511]²
- Social Security (Administration) Amendment (Cashless Welfare) Bill 2019

1 This appendix can be cited as: Parliamentary Joint Committee on Human Rights, Deferred legislation, *Report 3 of 2019*; [2019] AUPJCHR 62.

2 The committee has resolved to conduct a short inquiry into this legislative instrument. For further information see: https://www.aph.gov.au/joint_humanrights.