Reflections on the 10th anniversary of the Parliamentary Joint Committee on Human Rights[1]

By Charlotte Fletcher and Anita Coles[2]

August 2022

August 2022 marks 10 years since the Parliamentary Joint Committee on Human Rights tabled its first legislative scrutiny report. In that time, 43 parliamentarians have served on the committee, which has tabled more than 100 scrutiny reports. This paper reflects on the committee's work over that period, including setting out the volume of scrutiny undertaken, and the way in which the committee worked during the COVID-19 pandemic. It also examines the ways in which the committee's processes have evolved in that time. Lastly, this paper considers the committee's impact, highlighting examples of its influence on the development of federal legislation.

Introduction

Following a recommendation of the National Human Rights Consultation Committee in 2009,[3] Australia's Human Rights Framework was launched in 2010. A key element of this Framework was the establishment by Commonwealth legislation[4] of the Parliamentary Joint Committee on Human Rights (the committee). The committee was established in early 2012 in the 43rd Parliament and tabled its first scrutiny report in August 2012. The committee, made up of five members of the House of Representatives and five Senators,[5] was designed to enhance the understanding of, and respect for, human rights in Australia, and to ensure appropriate recognition of human rights issues in legislative and policy development. It was also intended to establish a dialogue between the executive, the Parliament, and the public.[6] The powers and procedures of the committee are determined by resolution of both Houses of Parliament at the start of each Parliament.[7] The committee has now been in operation for a decade, an anniversary providing a timely opportunity to reflect on the committee's work and impact.

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[3] National Human Rights Consultation Report, 2009. Recommendation 7 recommended the establishment of a joint committee on human rights be established to scrutinise legislation.

[4] *Human Rights (Parliamentary Scrutiny) Act 2011.*

[5] *Human Rights (Parliamentary Scrutiny) Act 2011*, s 5.

[6] See, the Hon Robert McClelland MP, second reading speech to the Human Rights (Parliamentary Scrutiny) Bill 2011, House of Representatives Hansard, 30 September 2010, p. 271.

[7] For example, the most recent resolution of appointment for the committee was determined in the House of Representatives on 26 July 2022 and in the Senate on 27 July 2022, and is available on the committee's webpage.

This paper is divided into three sections, examining:

- the committee's legislative scrutiny and educative work over the past 10 years;
- case studies highlighting the type, breadth and extent of the committee's impact; and
- the committee's scrutiny work during the COVID-19 pandemic.

The work of the committee over 10 years

The committee's core function is to examine all bills and legislative instruments for compatibility with human rights.[8] On average, the committee has considered 225 bills and 1827 legislative instruments every year. In addition, the committee may examine Acts for compatibility with human rights,[9] and inquire into matters that have been referred by the Attorney-General.[10] The committee reports its findings to Parliament regularly, tabling its scrutiny reports in both the House of Representatives and the Senate. The committee also tables an Annual Report each year, as well as reports for any inquiries undertaken. In total, across 10 years, this has amounted to the tabling of:

- 124 scrutiny reports;
- eight annual reports;
- six self-initiated inquiry reports (which included calling for submissions and holding public hearings); and
- two inquiry reports into human rights matters referred to the committee by the Attorney-General.[11]

The committee also publishes an index of all bills and legislative instruments that have been the subject of substantive comment each year.[12] Further, the committee sends a regular 'scrutiny update' email to parliamentarians, their staff and subscribers when a new report has been tabled in the Parliament, highlighting key concerns and findings.[13]

The committee is supported by a small secretariat and is advised by an independent external legal adviser.[14] The secretariat is co-located with the secretariats to the Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee for the Scrutiny of Delegated Legislation. This means that, in practice, a significant degree of informal collaboration between these three legislative scrutiny committee secretariats takes place.

The committee's educative role

A key aspect of the committee's work is its educative role: enhancing the understanding of, and respect for, human rights in Australia, and facilitating the appropriate recognition of human rights issues in legislative and policy development.

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[8] *Human Rights (Parliamentary Scrutiny) Act 2011*, s 7(a). 'Human rights' is defined in the Act to mean the rights and freedoms recognised by seven core international instruments. See, s 3.
[9] See, for example, Parliamentary Joint Committee on Human Rights (PJCHR), *Ninth Report of 2013* (Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation) (19 June 2013).
[10] *Human Rights (Parliamentary Scrutiny) Act 2011*, s 7(b)–(c).
[11] These reports are all available on the committee's website.
[12] These indexes are available on the committee's website.
[13] In 2022, there were over 400 subscribers to the committee's scrutiny updates.
[14] The secretariat includes a Committee Secretary, two Principal Research Officers and a Legislative Research Officer. From 2012–2022, the committee's legal advisers have included: Emeritus Professor Andrew Byrnes, Professor Simon Rice OAM, Dr Aruna Sathanapally, and Associate Professor Jacqueline Mowbray.

When the committee was first formed, committee members played a direct role in articulating the committee's expectations in terms of the quality of statements of compatibility with human rights, including when making speeches in the Parliament,[15] in executive summaries at the beginning of scrutiny reports,[16] and writing to ministers and departments where statements of compatibility with human rights did not meet the committee's expectations.[17] The committee has also progressively published and revised practice notes (now called guidance notes) and other resources to assist its stakeholders, including:

- a practice note on the committee's expectations for statements of compatibility (first published in September 2012, and revised in September 2014 and November 2021);
- a practice note on offence provisions, civil penalties and human rights (first published in early 2014, and revised later that year); and
- the Guide to Human Rights, which gives an overview of the 25 key human rights found in the seven international human rights treaties against which the committee considers questions of human rights compatibility (first published in March 2014 and revised in June 2015).

In addition, committee members, particularly the Chairs and Deputy Chairs, have played an active role in spreading awareness of the committee's role and work, including by presenting speeches to public officials, non-government organisations and lawyers.[18]

Over time the committee continued to reiterate its expectations to ministers and departments in terms of the content of statements of compatibility (including that they should be read as stand-alone documents, provide sufficient information about the purpose and effect of proposed legislation, the operation of individual provisions and how these may impact on human rights; and include an assessment of whether the proposed legislation is compatible with human rights).[19] The responses received from proponents of legislation (usually ministers), in terms of both their tone and substance, while occasionally dismissive in the earlier part of the committee's operation, have largely improved across the decade.[20]

The committee's secretariat has often, on the committee's behalf, undertaken an educative role for those preparing statements of compatibility accompanying legislation. The committee has authorised its secretariat to engage directly with departmental officers to ask specific questions about how bills

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[15] See, for example, Mr Harry Jenkins MP, tabling speech, *House of Representatives Hansard*, 22 August 2012, p. 9511.

[16] See, for example, *First Report of 2013*, pp. xi–xii.

[17] See, for example, *First Report of 2013*, pp. xi–xii. In this executive summary, the Chair noted that the committee identified 116 legislative instruments that did not appear to raise human rights concerns but were accompanied by statements of compatibility that did not meet the committee's expectations, and so would write to the relevant ministers in an advisory capacity to provide guidance on the preparation of these statements.

[18] See the committee's website for archive of statements and speeches.

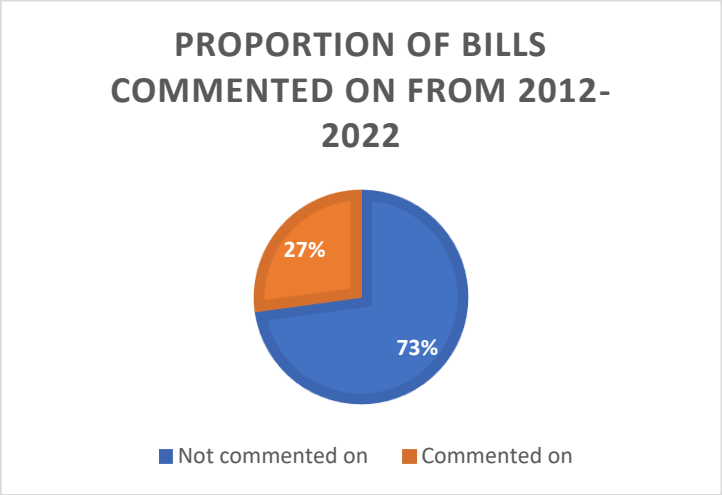
[19] This included by writing directly to minister (see, for example, *First Report of 2013*, pp. xi–xii); and by noting these concerns in tabling speeches (see, for example, *Annual Report 2014-15*. p. 24, and *Annual Report 2018*, p. 34);

[20] Contrast, for example, the tone and substance of a ministerial response received by the committee from then Minister for Industrial Relations in 2015 (PJCHR, *Twentieth Report of the 44th Parliament* (2015), 76 [2.7]) with a recent response from the Minister for Home Affairs in 2022 (PJCHR, *Report 2 of 2022* (25 March 2022), pp. 78–112). For a further consideration of the tone and substance of early responses to the committee, see Simon Rice, 'Allowing for Dissent: Opening up Human Rights Dialogue in the Australian Parliament' (pp. 99–134) in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights,* Thomas Reuters, Pyrmont, 2020.

and legislative instruments were intended to operate (and so understand their implications in terms of human rights), and to provide feedback and guidance in the drafting of statements of compatibility with human rights.[21] The secretariat has also on a number of occasions provided training to assist departmental officers in understanding human rights, the committee's expectations, and best practice when drafting statements of compatibility with human rights.

The committee's scrutiny of bills

Over its 10-year span, the committee has examined a total of 2,254 bills and commented on 602 (27 per cent). Overall, the committee has considered that three-quarters of bills do not raise human rights concerns requiring the committee's comment. This is because the bills may not have engaged any human rights, may have promoted rights, may have limited rights but it appeared these were permissible limits, and/or raised only marginal human rights concerns.

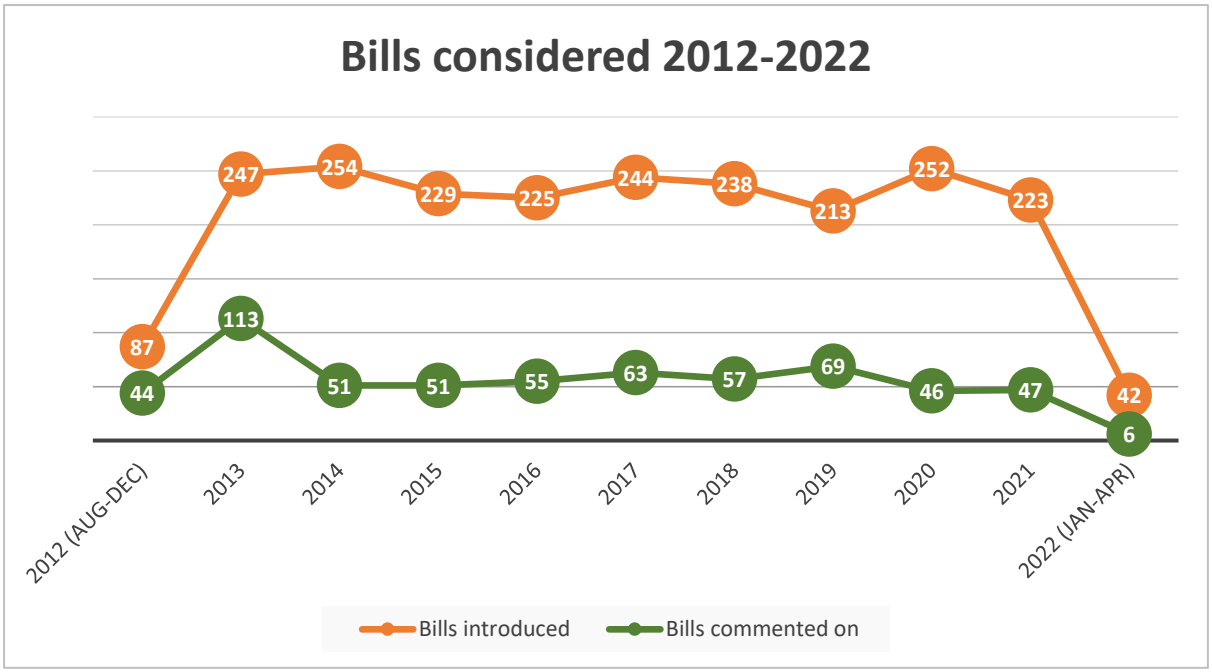


The committee generally comments substantively on a bill where it raises human rights concerns or questions, typically by seeking further information from the proponent of the legislation (usually the minister).[22] The threshold for when the committee will formally comment on a bill has evolved over time, gradually shifting towards a higher threshold. To some extent, this shift reflects an increased awareness by departments and proponents of legislation of the committee's expectations when drafting statements of compatibility with human rights (and their knowledge and understanding of relevant human rights and how a proposed measure may engage them). It also appears to reflect a change in the committee's approach to reporting. In its earlier years it focused largely on improving awareness and understanding of the committee's expectations regarding statements of compatibility.[23] As such, while in the first half of its existence the committee often raised more minor human rights issues on the basis that the statement of compatibility was considered inadequate, in more recent years it has focused its reports on legislation where there appear to be some significant human rights questions to be addressed.[24]

The following chart shows the numbers of bills introduced into the Parliament from the time the committee commenced its work in August 2012 to April 2022 (at the end of the 46th Parliament). It

[21] The committee authorised the secretariat to undertake this work from 2012-13, 2018-19 and from 2021 to present. See, for example, *Annual Report 2018*, p. 36; and *Annual Report 2021* (forthcoming).
[22] The committee takes the same approach in respect of delegated legislation, which is discussed further below.
[23] See for example the Chair's (Senator Dean Smith's) tabling speech in February 2014 in relation to the *Second Report of the 44th Parliament*: "Regrettably, the committee notes that some of the statements of compatibility accompanying bills and instruments considered in this Second Report have fallen short of the committee's expectations…Where further information is required to determine these questions, the committee will write to the sponsor of the legislation, in a spirit of constructive dialogue, to request clarification".
[24] Note, since 2019 the committee's reports have indicated that where the committee has not commented on a bill, this may be 'notwithstanding that the statement of compatibility accompanying the bill may be inadequate', see *Report 3 of 2019* onwards.

shows that the numbers of bills introduced each year (shown in orange) tends to remain fairly steady, with an average of 236 new bills being introduced each year.[25] The apparent low number of bills in 2012 and 2022 are because these two time periods are less than six months.



The green line indicates the numbers of bills that the committee commented on in its scrutiny reports that year. Of note:

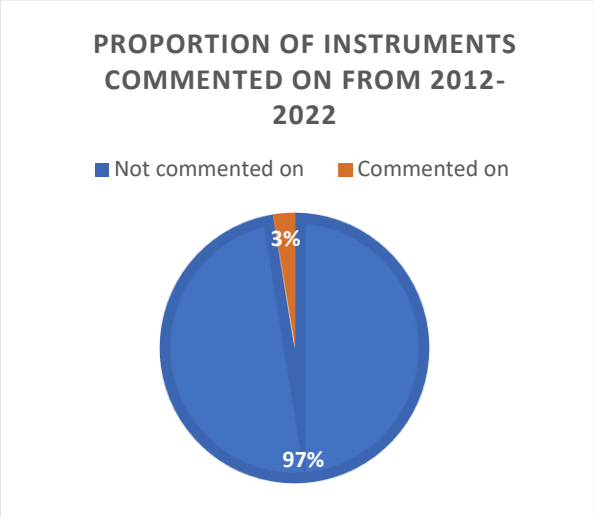
- In 2012 and 2013, the committee commented on a significant proportion of new bills.[26] This is because the committee initially wrote up a greater proportion of bills in order to explain what the bills did (even where there were no human rights concerns), to fulfil its educative role and to establish the role of the committee in the parliament.
- From 2014 to 2021 (inclusive), the number of bills the committee commented on remained fairly steady. The spike in the number of bills written up by the committee in 2019 (69) in spite of the drop in the numbers of bills introduced that year (213), is largely attributable to the re-introduction of bills after the 2019 federal election. The committee had previously raised human rights concerns about a number of bills which lapsed because they had not been passed by the end of the Parliament. When those bills (whether in identical or substantially similar form) were re-introduced after the election, the committee reiterated its earlier comments.[27] This had the effect that those re-introduced bills were nevertheless considered to have been subject to substantive committee comment, hence the apparent spike in the numbers of bills considered in 2019.

[25] Bills are only introduced when Parliament is sitting which takes place for 18-20 weeks each year on average.
[26] The committee commented on the following percentage of bills each year: in 2012, 50 per cent; in 2013, 46 per cent; in 2014, 20 per cent; in 2015, 22 per cent; in 2016, 24 per cent; in 2017, 26 per cent; in 2018, 24 per cent; in 2019, 32 per cent; in 2020, 18 per cent; in 2021, 21 per cent; and in 2022, 14 per cent (at the end of the 46th Parliament).
[27] See, *Report 3 of 2019*, pp. 15–16; *Report 4 of 2019*, p. 10; and *Report 5 of 2019*, p. 15. These reports state that 'The committee reiterates its views as set out in its previous reports on the following bills. These bills have been reintroduced in relevantly substantially similar terms to those previously commented on'.

The committee's scrutiny of legislative instruments

In addition to its consideration of bills, the committee examines all legislative instruments (that is, legislation made by the executive under the authority of an existing Act).[28] Legislative instruments usually take effect from the day after registration on the Federal Register of Legislation (FRL).[29] Legislative instruments are made continuously (including outside of parliamentary sitting days and, in some instances, during the caretaker period when elections are called), because the source of authority (an Act) already exists.[30] Delegated legislation may be either disallowable (meaning that either House of Parliament can veto it within certain timeframes) or exempt from disallowance. Until July 2021, the PJCHR was the only parliamentary committee empowered to routinely scrutinise exempt delegated legislation.[31]

Over the past 10 years, the committee has examined more than 18,000 legislative instruments, commenting on 466 (an average of 3 per cent overall). The committee does not comment on the vast majority of delegated legislation as it often does not engage, or only marginally engages, human rights. For example, commonly seen legislative instruments routinely provide for a range of matters that raise no human rights concerns, including: new statements of principles specifying whether a particular medical condition may be connected to military service;[32] determining the characteristics of coins;[33] establishing total allowable catches of



[28] Delegated legislation is law made by a person or body other than Parliament (such as the Governor-General, a minister or official), under authority granted to that person or body by the Parliament. Delegated legislation has the same force of law as an Act of Parliament. Individual pieces of delegated legislation are known by a variety of names, such as regulations, rules, or determinations; however, they are broadly termed 'legislative instruments'. More information about delegated legislation and how it operates is available on the Australian Parliament House website.

[29] See section 12, *Legislation Act 2003*.

[30] For example, on 11 April 2022, the Governor-General issued a proclamation proroguing the parliament and dissolving the House of Representatives, officially bringing an end to the 46th Parliament. During two months of the subsequent election period, between 12 April and 12 July 2022, 142 legislative instruments were registered.

[31] Since 16 June 2021, the Senate Standing Committee on Delegated Legislation has the authority to routinely scrutinise exempt delegated legislation Senate standing order 23(4A). This followed an own-motion inquiry into exempt delegated legislation. *Inquiry into the exemption of delegated legislation from parliamentary oversight, Final Report* (16 March 2021), recommendation 10.

[32] For example, Statement of Principles concerning Graves disease (Reasonable Hypothesis) (No. 7 of 2022) [F2022L0008]. As new conditions are progressively recognised as potentially being related to services rendered, new legislative instruments are continuously made under the authority of the *Veterans' Entitlements Act 1986*. For example, of the 34 legislative instruments registered between 24 December 2021 and 5 January 2022, 20 were statements of principles related to various diseases and medical conditions.

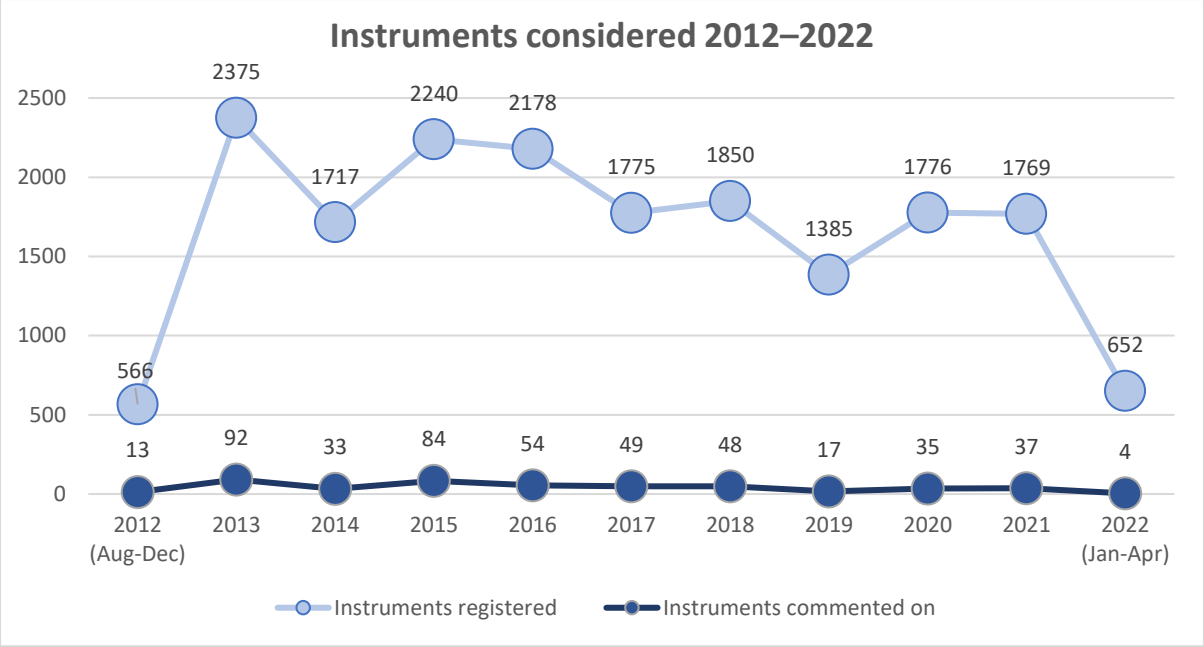
[33] For example, Currency (Australian Coins) Amendment (2022 Royal Australian Mint No. 2) Determination 2022 [F2022L00309].

certain fish;[34] listing new threatened and endangered species;[35] and establishing and amending accounting standards.[36] Nevertheless, the committee is required to examine each legislative instrument.[37]

Because of this large volume, the committee has always taken an exceptions-based approach to reporting on legislative instruments, and it has experimented with different ways by which to make clear what instruments have been considered in each reporting period. For the first two years of operation, the committee published a list of all legislative instruments that had been considered at the end of each report (including those that raised no human rights concerns).[38] This practice ceased in August 2014, with reports thereafter simply referring to legislative instruments 'received' within a particular date range ('received' meaning provided to the secretariat by the Office of Parliamentary Counsel).[39] Some commentators expressed concern that this reduced the transparency around what legislative instruments had been considered.[40] This issue was resolved in February 2018 when references to legislative instruments 'received' between a particular period were replaced by reference to legislative instruments 'registered on the Federal Register of Legislation' between a particular date range.[41] This method allows for the full list of legislative instruments considered by the committee during that period to be generated via the FRL website.[42]

The following chart shows the numbers of legislative instruments registered on the FRL from August 2012 to June 2022. As indicated by the light blue line, the numbers of legislative instruments registered has fluctuated from year-to-year. The dark blue line indicates the number of instruments the committee has commented on in its scrutiny reports each year.

[34] For example, Torres Strait Fisheries Tropical Rock Lobster (Total Allowable Catch) Amendment Determination (No. 1) 2022 [F2022L00300].
[35] For example, List of Threatened Species Amendment (Tarennoidea wallichii (304)) Instrument 2021, [F2022L00426].
[36] For example, Accounting Standard AASB 2022-1 Amendments to Australian Accounting Standards – Initial Application of AASB 17 and AASB 9 – Comparative Information, [F2022L00398].
[37] As with the scrutiny of bills, in practice, this function is delegated to the committee secretariat, who bring to the committee's attention any legislative instruments that appear to raise human rights concerns.
[38] See, for example, *First Report of 2013* (February 2013), pp. 161–177.
[39] *Tenth Report of the 44th Parliament* (Bills introduced 7–17 July 2014; Legislative Instruments received 21 June–25 July 2014) (26 August 2014).
[40] See, George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights', *Monash University Law Review*, vol. 41, no. 2, 2015, pp. 469–507; and Daniel Reynolds and George Williams, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime' (pp. 67–98) in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights,* Thomas Reuters, Pyrmont, 2020.
[41] *Report 2 of 2018*, Chapter 1, and all reports since that time.
[42] The committee's reports include an explanation of how to find the relevant legislative instruments under consideration – namely, to identify which legislative instruments have been scrutinised by the committee during a specific time 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.



Of note:

- In 2013, the committee commented on a relatively large proportion of legislative instruments (3.8 per cent).[43] As was the case with bills at the time, this is because the committee initially wrote up a greater proportion of legislative instruments in order to explain what the instruments did (even where there were no human rights concerns), to fulfil its educative role and to establish the role of the committee in the Parliament.
- In 2019, the committee commented on a comparatively small percentage of legislative instruments (1.2 per cent).[44] This is likely attributable, in part, to the 2019 federal election period, during which the committee did not exist and so no scrutiny reports were tabled,[45] and the fact that the committee tabled only six scrutiny reports overall during 2019.

The timeliness of the committee's reports

The committee seeks to conclude its assessment of bills while they are still before the Parliament, and its assessment of legislative instruments within the timeframe for disallowance (usually 15 sitting days),[46] where applicable. This ensures that its technical assessment of the compatibility of legislation with international human rights law is available to parliamentarians to inform their consideration of proposed legislation and motions proposing to disallow legislative instruments. However, there is no procedural requirement that provides that bills cannot pass before the committee has reported on a particular bill, and the varying speeds with which bills proceed through both chambers is beyond the committee's control. Further, while the committee seeks to complete its consideration of legislative

[43] The committee commented on the following percentage of legislative instruments each year: in 2012, 50 per cent; in 2013, 2.3 per cent; in 2014, 3.9 per cent; in 2015, 1.9 per cent; in 2016, 3.7 per cent; in 2017, 2.8 per cent; in 2018, 2.6 per cent; in 2019, 1.2 per cent; in 2020, 2 per cent; in 2021, 2.1 per cent; and in 2022, 1.1 per cent (at the end of the 46th Parliament).

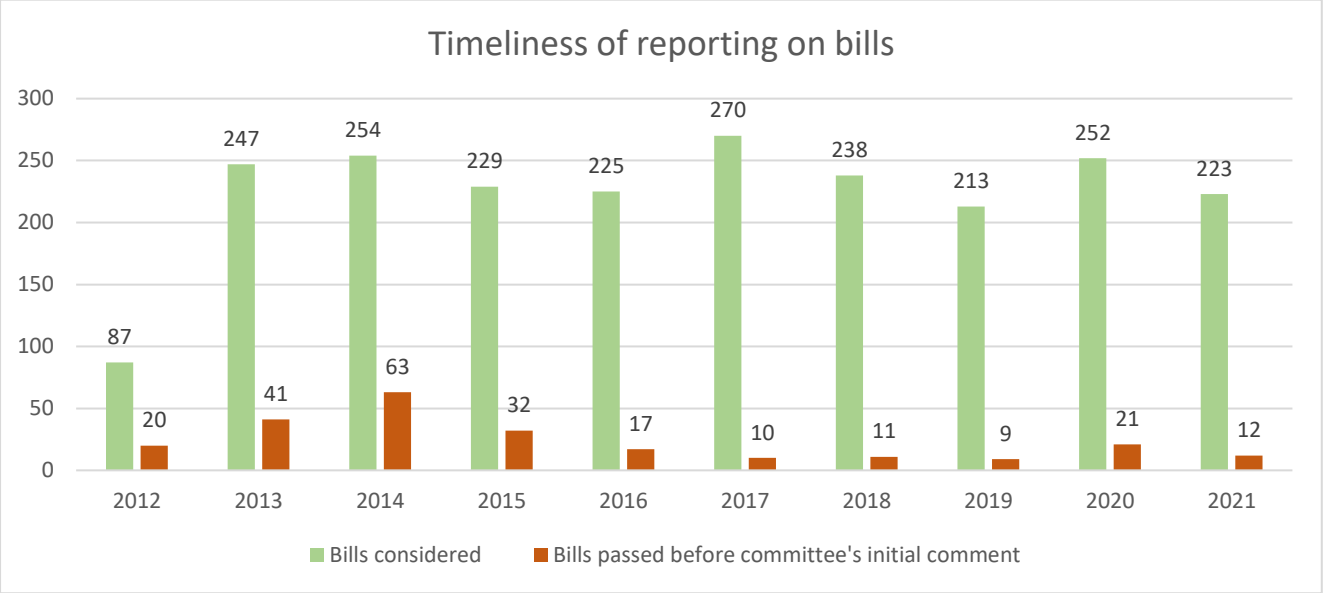
[44] Note, the committee's six scrutiny reports that year only examined legislative instruments registered on the FRL between 9 November 2018 and 19 September 2019. See, *Report 1 of 2019*, p. 1 and *Report 6 of 2019*, p. 1.

[45] The 46th Parliament was prorogued on 1 April 2019, and the 46th Parliament commenced on 2 July 2019.

[46] Some legislative instruments may have different periods of disallowance if so specified by its enabling legislation. If a notice of motion to disallow a legislative instrument is lodged, this extends the disallowance period usually by a further 15 sitting days, see *Legislation Act 2003*, section 42.

instruments within their period of disallowance, legislative instruments can become law immediately, and 20 per cent of legislative instruments are exempt from disallowance.

The following chart illustrates the timeliness of the committee's report on bills.[47] The data in green sets out the number of bills the committee has considered each year, and the data in orange shows the number of bills that had already passed the Parliament at the time the committee published its initial comment.



Of note:

- Between 2012 and 2015 (inclusive) there were some delays in the committee's reporting on bills. In 2014 in particular, 24.8 per cent of bills had passed before the committee had published its initial comment.[48]
- From 2016 to 2021 (inclusive) the timeliness of the committee's reporting on bills improved significantly. In 2019 in particular, just 4.2 per cent of bills (9 bills) passed before the committee had published an initial comment.[49]
- The spike in the number of bills that had passed before the committee's initial comment in 2020 (21 bills, or 8.3 per cent) is largely attributable to legislation which was passed in response to the COVID-19 pandemic, much of which passed both houses of Parliament the day it was introduced.[50]
- Since 2016, the committee has consistently reported on more than 90 per cent of all bills while they remained before the parliament.

[47] Note, this paper does not graph the timeliness of the committee's reporting on legislative instruments over 10 years owing to the significant volume of instruments considered.
[48] As the chart shows, the percentage of bills that had passed before the committee's initial comment were: in the six months of 2012, 23 per cent; in 2013, 16.6 per cent; in 2014, 24.8 per cent; and in 2015, 14 per cent.
[49] The percentage of bills that had passed before the committee's initial comment were: in 2016, 7.5 per cent; in 2017, 3.7 per cent; in 2018, 4.6 per cent; in 2019, 4.2 per cent; in 2020, 8.3 per cent; and in 2021, 5.4 per cent.
[50] Of the 24 bills that passed before the committee's final comment in 2020, 15 passed both Houses of Parliament on the same day they were introduced, and all passed both Houses within seven calendar days of their introduction.

The committee's capacity to report in a timely way has depended on several factors from time to time. These include the speed of legislative passage, the committee's own work practices, and the timeliness of ministerial responses.

Speed of legislative passage

At times, the volume of legislation introduced, and the speed with which it is passed, has meant that the committee is unable to complete its reports before legislation is passed. On some occasions it has been impossible for the committee to consider bills before they pass the Parliament. This was particularly the case in relation to bills responding to the COVID-19 pandemic, which often passed on the day they were introduced, or within a day or two of introduction.[51] Of the 24 bills that passed before the committee's final comment in 2020, 15 passed both Houses of Parliament on the same day they were introduced, and all passed both Houses within seven calendar days of their introduction.

Evolving committee work practices

Some aspects of the committee's work practices have also contributed to its timeliness. In its first eight years, the committee generally met only in person during joint sitting weeks, and would meet in the second week of back-to-back sittings where these occurred. This meant that bills that had been introduced in the first sitting week were not able to be fully reviewed before the committee's meeting in the second week (especially where they were complex and may have had complicated human rights implications), because this would require their review within one day of their introduction. Consideration of such bills was often deferred, a practice which attracted some criticism.[52] In addition, consideration of private members' bills would often also be deferred because they were not given priority in terms of internal review as such bills rarely pass the Parliament.[53] Ultimately, the committee would often resolve not to comment on many deferred bills once they had been appropriately reviewed. With respect to legislative instruments, the committee historically reported on many instruments where the period for disallowance had already passed. Overall, the committee's timeliness in respect of reporting on both bills and legislative instruments has prompted some criticism.[54]

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[51] For example, the Assistance for Severely Affected Regions (Special Appropriation) (Coronavirus Economic Response Package) Bill 2020, Australian Business Growth Fund (Coronavirus Economic Response Package) Bill 2020 and Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Bill 2020 were introduced into the House of Representatives on 23 March 2020, passing both Houses that day. Similarly, the Privacy Amendment (Public Health Contact Information) Bill 2020 was introduced into the House of Representatives on 12 May 2020 and passed both Houses two days later, meaning that the committee had no time to consider these bills or comment on them before they passed.

[52] For example, Daniel Reynolds and George Williams, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime' (pp. 67–98) in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights,* Thomas Reuters, Pyrmont, 2020, at p. 95.

[53] Of the 653 private members' bills and private senators' bills introduced into the Australian Parliament since 1901, only 30 have been passed into law.

[54] See, for example, Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights*, Thomas Reuters, Pyrmont, 2020, including Adam Fletcher, 'Human Rights Scrutiny in the Federal Parliament: Smokescreen or Democratic Solution' (pp. 31–63), and Daniel Reynolds and George Williams, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime' (pp. 67–98). For example, Professor Williams and Daniel Reynolds have argued(at p. 75) that in the period between August 2017 to December 2020, half of the committee's comments were not available until after the bill or disallowance period had passed. However, this figure does not appear to be correct, and the combination of statistics relating to bills and legislative instruments seems to have considerably skewed the final numbers. Between August 2017–December 2020, of the 106 instances where the

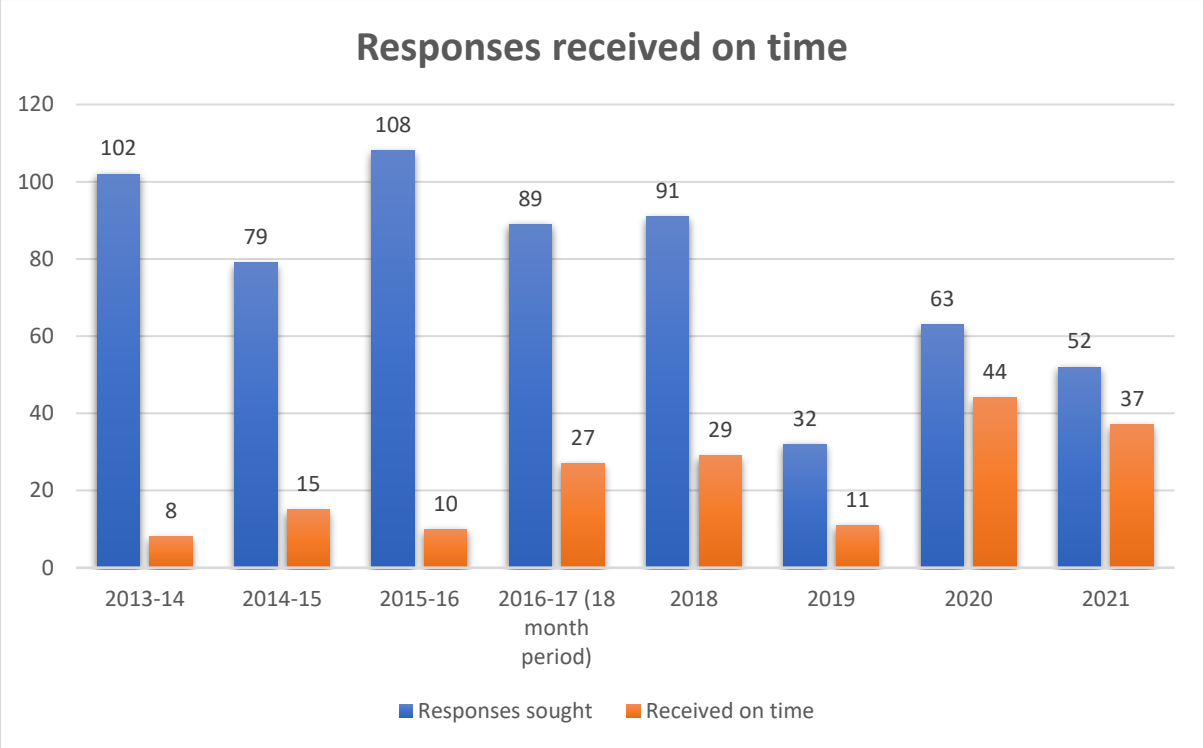
However, in the 46th Parliament, since the onset of the COVID-19 pandemic, the committee resolved to meet and table its scrutiny reports both within and outside of parliamentary sittings. This has meant that it can report in a more timely way, and that the committee only occasionally needs to defer the consideration of bills in cases where there is no time to consider them and they raise potentially significant human rights concerns. In 2021, 203 of the 223 bills introduced (91 per cent) were still before the parliament when the committee published its final comments, meaning that its advice was available to parliamentarians to consider while a bill remained before the Parliament. Further, since 2021 the committee has reviewed all legislative instruments, and commented on relevant instruments, within the disallowance period.[55]

Ministerial responses

A further factor influencing the committee's capacity to conclude its consideration of legislation in a timely manner is the receipt of responses from the proponent of legislation in the time provided. Where the committee has written to the relevant minister to seek information before concluding its advice to Parliament, it has always stipulated a deadline by which it expects a response to be provided (typically two weeks, with discretion for the secretariat to provide extensions of time if feasible). Although there is no legal or procedural requirement that a minister provide the response within this period, the timeliness of responses from ministers has improved dramatically in recent years. The following chart sets out the numbers of requests made by the committee for a response (shown in blue) compared with the number of responses which were received within the time provided (in orange).

committee concluded there were human rights concerns with a bill or legislative instrument, 27 per cent of instances occurred after the bill or disallowance period had passed. However, the figures differ markedly in relation to bills compared to legislative instruments. For bills, 87 per cent of the committee's comments were available before the bill passed (out of 60 bills, 52 were on time, 8 out of time), whereas in relation to legislative instruments, 54 per cent of comments were made before the disallowance period ended (25 instances within the disallowance period, 21 instances after the disallowance period had ended).

[55] For further information, see *Annual Report 2020,* p. 17.



Of note:

- In 2012-13 the committee did not report on the number of responses it had received, and as such this time period is not included in the chart.
- Until 2018, committee reports identified whether a response was on time or late depending on the initial requested date and did not include data on whether responses were received on time where extensions had been granted. Responses received after the initial requested date, even where an extension had been granted, were considered late.[56] Nevertheless, a trend of increased timeliness of responses is apparent, with more than 30 per cent of all responses received on time from 2016-17 to 2019, and more than 70 per cent of responses received on time in 2020-21.[57]
- In 2018, the committee transitioned to reporting on its work according to calendar, rather than financial, year. As such, the 2016-17 time period covers 18 months from July 2016 to December 2017.
- The high number of late responses received in 2018 can be largely attributable to single report entries dealing with numerous legislative instruments.[58]
- In 2019, there is a drop in the number of bills both introduced and attracting committee comment. This is because a federal election was held, which impacted the number of bills introduced that year, and the number of scrutiny reports the committee could table. Further,

[56] See, *Annual Report 2018*, para [3.57].
[57] 2012-13, 7.8 per cent; 2014–15, 19 per cent; 2015–16, 9.2 per cent; 2016–17, 30 per cent; 2018, 32 per cent; 2019, 34 per cent; 2020, 70 per cent; and 2021, 71 per cent.
[58] In 2018, a response relating to nine instruments made under the *Autonomous Sanctions Act 2011* was late. Although it related to only one report entry, it was counted as late nine times. As it also required a further response which was also late, it was counted again as late an additional nine times. Similarly, the five various park management plans made under the *Environment Protection and Biodiversity Conservation Act 1999* were counted as 5 late responses although they refer to only one report entry. See, *Annual Report 2018*, para [3.54].

the committee did not seek a response in relation to many of the bills commented on because they were being re-introduced. The committee merely reiterated its earlier comments.

- From September 2019, the committee resolved to only comment substantively on private members' bills where information suggested that they would proceed to further stages of debate. This contributed to the reduction in the number of requests for responses from that year.

The timeliness (and fulsomeness) of responses to the committee is the responsibility of individual proponents of legislation. However, this trend of significantly increased responsiveness arguably reflects that the legitimacy of the committee's processes—its role, questions, and advice to Parliament—appears to have gradually gained acceptance by parliamentarians, as the committee has progressively established itself. Consequently, the necessity for ministers to engage with the committee's processes by responding substantively to its questions in a timely way—while not universal—appears to have progressively become the expected norm.[59] As noted, since 2016, the committee's comments on new bills have been available for parliamentarians to consider while a bill is before the Parliament in over 90 per cent of cases, and since 2020, 100 per cent of legislative instruments have been considered within the disallowance period.

The committee's impact

Assessing impact

Assessing the committee's impact is important in understanding whether the committee has been effective in achieving its aims. The committee's core legislated function is to examine all bills and legislative instruments for compatibility with human rights.[60] When the Human Rights (Parliamentary Scrutiny) Bill was introduced in 2010, the then Attorney-General the Hon Robert McClelland stated that the new committee was 'designed to improve parliamentary scrutiny of new laws for consistency with Australia's human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development'.[61] The then Shadow Attorney-General, the Hon George Brandis QC, while disagreeing on the definition of 'human rights', noted that expanding parliamentary scrutiny of legislation from a human rights point of view 'has the advantage of locating greater emphasis on human rights at the heart of the political system itself'.[62] Mr Graham Perrett MP, who would go on to become a long-serving committee member, stated that the committee would 'have a very powerful gate-keeping and scrutiny role', helping to ensure that Australian laws reflect human rights obligations, and 'tighten[ing] the parliament's focus on human rights'.[63] When the committee was formally established in 2012, inaugural Chair Mr Harry Jenkins MP, stated that the committee had been established 'as part of a concerted effort to enhance the understanding of, and

[59] Contrast, for example, the substance of a ministerial response received by the committee from then Minister for Industrial Relations in 2015 (PJCHR, *Twentieth Report of the 44th Parliament*, 76 [2.7]) with a recent response from the then Minister for Home Affairs in 2022 (*Report 2 of 2022*, pp. 78–112).
[60] *Human Rights (Parliamentary Scrutiny) Act 2011*, s 7(a). 'Human rights' is defined in the Act to mean the rights and freedoms recognised by seven core international instruments. See, s 3.
[61] The Hon Robert McClelland, second reading speech, *House of Representatives Hansard* (30 September 2010), p. 271.
[62] The Hon George Brandis QC, second reading debate, *Senate Hansard* (25 November 2011), p. 9661.
[63] Mr Graham Perrett MP, second reading debate, *House of Representatives Hansard* (22 November 2010), p. 3239.

respect for, human rights issues and to ensure the appropriate recognition of human rights in the legislative process'.[64]

Numerous commentators have considered the extent of the committee's impact when measured against certain factors. For example, Professor George Williams and Daniel Reynolds have twice, in 2015 and 2020, analysed the impact of the committee, gauging it in terms of its deliberative, legislative and media impacts, and its impact on judicial output.[65] Dr Laura Grenfell and Dr Sarah Moulds have analysed the extent of the committee's success by reference to: the adequacy of time to conduct formal parliamentary scrutiny; the attributes of particular committees that lead to greater legislative influence; the power and willingness of committees to facilitate public input; a culture of respect for the value of formal parliamentary scrutiny including rights scrutiny; and the generation of a rights discourse in parliamentary debates.[66]

Several studies have considered that there are many challenges associated with assessing the practical 'effectiveness' of parliamentary committees more broadly.[67] As Meg Russell and Megan Benton have observed in the British context, 'much of Parliament's influence is subtle, largely invisible and frequently even immeasurable'.[68] In the Australian context, Dr Sarah Moulds has recently considered the capacity for Australian parliamentary committees to have a hidden influence on the development of legislation, not necessarily remedying rights concerns, but in a rights-enhancing manner.[69]

This paper does not traverse the ground already trodden by others in attempting to define the yardstick by which a parliamentary committee may be considered to be effective. Rather, it highlights some specific examples of the committee's impact, some of which is acknowledged, some unacknowledged, and some being examples of the hidden influence on the development of legislation. These examples help to demonstrate that the committee's impact is most readily apparent where:

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[64] Mr Harry Jenkins MP, tabling statement, *House of Representatives Hansard* (12 June 2012) p. 7176.
[65] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights', *Monash University Law Review*, vol. 41, no. 2, 2015, pp. 469–507, and Daniel Reynolds and George Williams, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime' (pp. 67–98) in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights,* Thomas Reuters, Pyrmont, 2020.
[66] Laura Grenfell and Sarah Moulds, 'The role of Committees in Rights Protection in Federal and State Parliament in Australia', *UNSW Law Journal,* vol 41, no. 1, 2018, pp. 40–79 (see p. 44).
[67] See, Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years', *Australasian Parliamentary Review,* vol. 33, no. 1, 2018, pp. 72–107 who cites: Carolyn Evans and Simon Evans, 'Evaluating the Human Rights Performance of Legislatures', *Human Rights Law Review,* vol. 6, 2006 (pp. 545, 551, 545, 570); Meg Russell and Meghan Benton, 'Assessing the Impact of Parliamentary Oversight Committees: the select committees in the British House of Commons', *Parliamentary Affairs*, vol. 66, 2013 (pp. 772, 766); Aileen Kavanagh, 'The Joint Committee on Human Rights: a Hybrid Breed of Constitutional Watchdog', in Murray Hunt, Hayley J. Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Oxford, Hart Publishing, 2015 (p. 115); Malcolm Aldon, 'Rating the Effectiveness of Parliamentary Committee Reports: the Methodology', *Legislative Studies*, vol. 15, no. 1, 2000 (p. 22); and Geoffrey Lindell, 'How (and Whether?) to Evaluate Parliamentary Committees – from a Lawyer's Perspective', *About the House* 2005 (p. 55).
[68] Meg Russell and Megan Benton 'Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches'. Paper presented at the PSA Legislative Studies Specialist Group Conference, London, United Kingdom, 24 June 2009, cited in Murray Hunt, Hayley J Hooper and Paul Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Oxford, Hart Publishing, 2015, p. 131.
[69] Sarah Moulds, *Committees of Influence: Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia*, Springer Singapore Pte. Limited, 2020.

- its comments have been explicitly acknowledged and addressed in re-drafted legislation and explanatory materials;
- its advice has been raised in parliamentary debates and motions, media commentary, or other committee inquiries; and
- its in-depth public inquiries into legislation (which include engagement with civil society, the public, and academia) have resulted in significant legislative change and media coverage.

Some of these case studies demonstrate that it can often be challenging to identify the committee's impact on face value, without very close monitoring of the progress of legislation over time, or a detailed knowledge of its passage through both chambers of Parliament. This can often be because while aspects of the committee's concerns may in fact be addressed by amendments or future legislation or policy, the committee's role and influence in causing those amendments to be made is not always explicitly acknowledged. In such instances, the committee may have an important impact on the re-drafting of legislation, but without any specific acknowledgment given as to the role of the committee.

It is noteworthy that many of these case studies highlight the committee's impact on the development of legislative instruments, despite them being a small part of the committee's work. One reason for legislative instruments constituting such a considerable portion of the 'success stories' arising from the committee's work may be because officials can fairly readily amend or re-make legislative instruments and their explanatory statements , meaning that changes in response to the committee's comments are more likely. On the other hand, once bills are introduced to Parliament, changes are often less likely.

As the following seven case studies demonstrate, the committee's impact is most readily apparent where its influence has been explicitly acknowledged in terms of: decisions to amend legislative instruments and bills; mentions in debates and motions in the parliamentary chambers; and references in submissions to other parliamentary committees, and the reports and recommendations of other parliamentary committees.

For example, since 2019, the committee has twice resolved to inquire into legislative instruments (by calling for submissions and holding hearings) as part of its normal scrutiny function. Both inquiries have had tangible impacts.

Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019[70]

The legislative instrument

This legislative instrument made under the authority of the *Aged Care Act 1997,* regulated the use of physical and chemical restraints in aged care.[71]

The process

The instrument was registered on the FRL on 2 April 2019, taking effect from 1 July. In May and July, the committee received correspondence from Human Rights Watch and the Office of the Public Advocate (Victoria) asking it to consider numerous human rights concerns in relation to the

[70] See, Inquiry webpage.
[71] Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 [F2019L00511].

instrument.[72] In July 2019 the committee resolved to inquire into the instrument, holding a public hearing and receiving 17 submissions.

To ensure that the instrument remained open to disallowance during the inquiry (and therefore subject to parliamentary control), on 16 September 2019 on behalf of the committee, Senator Nick McKim lodged a protective notice of motion to disallow the instrument in the Senate. This extended the period by which the instrument was subject to disallowance by a further 15 sitting days. The committee published its inquiry report on 13 November 2019.

The findings

The committee recommended that the use of restraints in residential aged care facilities be better regulated, including by exhausting alternatives to restraint; taking preventative measures and using restraint as a last resort; obtaining or confirming informed consent; improving oversight of the use of restraints; and having mandatory reporting requirements for the use of all types of restraint.[73]

The impact of the inquiry

The committee's inquiry and findings received stakeholder coverage → Numerous stakeholders published articles highlighting the committee's inquiry and findings,[74] and Human Rights Watch highlighted the inquiry in its in civil society submission to the United Nations as part of Australia's third Universal Periodic Review in 2021.[75]

The government responded formally to the committee's inquiry → The government welcomed the committee's inquiry, indicating in-principle support for all of the majority recommendations.[76]

The legislative instrument was amended → In response to the committee's report, the government introduced amendments to the Quality of Care Principles to make it clear that restraint must be used as a last resort, refer to state and territory laws regulating consent and require a review of the first 12 months operation of the new law.[77] This review, finalised in December 2020, made several recommendations, including to clarify consent requirements, strengthen requirements for alternative strategies, require an assessment of the need for restraint in individual cases and for monitoring and reviewing the use of restraint.[78]

The Royal Commission into Aged Care Quality and Safety recommended consideration of the committee's findings → The Royal Commission considered the use of restrictive practices. The final report of the Counsel Assisting the Commission recommended new requirements for regulating the use of restraints and that this should be informed by three things, one of which was the committee's 2019 inquiry report.[79]

New legislation was subsequently introduced → Following the Royal Commission's recommendations, legislation was introduced that provides that restraints may only be used in aged care facilities: as a last resort; after considering all alternative strategies; to the extent necessary and proportionate; in the least restrictive form and for the shortest time; and after informed

[72] See, Inquiry webpage.

[73] PJCHR, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (13 November 2019), recommendation 2, pp. 54–55.

[74] See, for example, Matt Woodley, 'Restraint in aged care a last resort: RACGP President', *Royal Australian College of General Practitioners,* 20 August 2019; and Human Rights Watch, ' Australia: Royal Commission Finds Aged Care Horrors', 4 November 2019.

[75] Human Rights Watch, *Submission to the Universal Periodic Review of Australia*, July 2020.

[76] Government response.

[77] Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019.

[78] Australian Healthcare Associates, *Independent review of legislative provisions governing the use of restraint in residential aged care: Final report*, December 2020.

[79] Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect – Volume 3A, The New System*, 2021, recommendation 17, pp. 109–110.

consent is given. It also provided that the use of a restrictive practice must be monitored and reviewed.[80]

ParentsNext: examination of Social Security (Parenting payment participation requirements - class of persons) Instrument 2021[81]

The legislative instrument

The instrument, made under the authority of the *Social Security Act 1991*, specified the class of persons subject to compulsory participation in the ParentsNext program (which may require that a person: attend playgroups; complete further education and training; or address non-vocational barriers to employment such as through counselling or health appointments).[82] A failure to attend these appointments without a reasonable excuse could result in the person's parenting payments being suspended and, if there was a persistent failure, reduced or cancelled.

The process

The committee tabled its initial consideration of this instrument in *Report 2 of 2021* on 24 February 2021, seeking a response from the minister.[83] The minister provided the committee with further information on 11 March, including advising the committee that 18 per cent of participants in the ParentsNext program are Indigenous, one-third of all participants have had their parenting payments suspended for an average of five days, and 1,072 participants have had their payments cancelled. Based on this additional information, the committee resolved to undertake a short inquiry into the instrument, seeking evidence from key stakeholders on the human rights implications of the instrument.[84]

To extend the period by which the instrument was subject to parliamentary control, Senator Pat Dodson, on behalf of the committee, lodged a protective notice of motion to disallow the instrument in the Senate on 11 May 2021.[85] This extended the period by which the instrument was subject to disallowance by a further 15 sitting days (to 11 August). The committee received 39 submissions and held a public hearing in June 2021, taking evidence from a range of community organisations, peak bodies, academics and the Department of Education, Skills and Employment. It tabled its final report on 4 August 2021.[86]

The findings

The committee's report contained an extensive consideration of the key issues raised by witnesses and submitters regarding how the ParentsNext program operated in practice. It also contained an in-depth analysis of the compatibility of the measure with human rights, including an analysis of the requirements of the rights to social security and an adequate standard of living. The committee recommended that a class of persons not be prescribed for the purposes of paragraph 500(1)(ca) of the *Social Security Act 1991*, or alternatively recommended a number of amendments if ParentsNext were to remain compulsory.

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[80] Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 (now Act) and related legislation. See also Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021.

[81] See, *Report 2 of 2021*, and inquiry report.

[82] Social Security (Parenting payment participation requirements - class of persons) Instrument 2021 [F2021L00064].

[83] See, *Report 2 of 2021*.

[84] See, inquiry webpage.

[85] *Senate Hansard*, 11 May 2021, p. 2363.

[86] See, committee report.

The impact

The committee's inquiry received substantial media coverage → The evidence presented to the committee, and its findings, received media and stakeholder coverage.[87]

A motion to disallow two sections of the instrument was debated and voted on → On completion of its inquiry, the committee resolved to withdraw its notice of disallowance, leaving the issue of disallowance to the Parliament. However, Senator Pat Dodson took the opportunity to take over the disallowance notice in his personal capacity (and not as a committee member). This motion to disallow was moved on 11 August 2021 (the final day to disallow the instrument). Senator Dodson spoke to the motion, stating:

> The committee's unanimous findings are that there is a considerable risk that the compulsory participation in the ParentsNext program impermissibly limits human rights, including the rights of the child, and that the program's financial sanctions mean that a considerable portion of parents are unable to meet their basic needs and those of their children. They are strong findings that cannot be ignored. The committee's unanimous recommendation was that the ParentsNext program be made voluntary for parents of children under the age of six. In seeking to disallow this instrument, Labor is giving effect to this bipartisan recommendation.[88]

Senator Rachel Siewert (Australian Greens) also spoke to the motion, arguing that the evidence presented in this inquiry and previous inquiries indicated that the benefits of the program did not outweigh its immediate and long-term harms, and noting that the committee had found that it limited human rights.[89] The motion was subsequently put to a vote. The Senate was equally divided, with 16 ayes and 16 noes.[90] As such, the question was negatived and the two sections of the instrument were not disallowed.[91] At the dissolution of the 46th Parliament on 11 April 2022, no government response to the committee's inquiry had been received.

Further commentary by parliamentarians → Several parliamentarians circulated media releases about the committee's findings, and the vote seeking to disallow elements of the instrument.[92]

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[87] For example: Luke Henriques-Gomes, ''Punitive and flawed' ParentsNext program should not be expanded, experts warn', *Guardian Australia,* 24 May 2021; Australian Human Rights Commission, 'Commission welcomes ParentsNext Inquiry recommendations', 5 August 2021; Jacqueline Maley, ''Unable to meet basic needs': ParentsNext program suspended a third of parents' payments', *Sydney Morning Herald*, 11 August 2021; Asher Wolf, 'Did the government learn nothing from the robodebt fiasco?', *Canberra Times*, 1 September 2021; Lucy Dean, ''Humiliating': How Centrelink 'traps' women in violence relationships', *Yahoo Finance,* 7 September 2021; Deb Tsorbaris, 'Child poverty is a policy choice', *Pro Bono Australia*, 18 October 2021; and Terese Edwards, 'A close encounter with justice for the ParentsNext program', *Economic Justice Australia*, 22 February 2022.

[88] Senator Pat Dodson, disallowance debate, *Senate Hansard* (11 August 2021) p. 4733.

[89] Senator Rachel Siewert, disallowance debate, *Senate Hansard* (11 August 2021) p. 4736.

[90] Note, this vote was held during the COVID-19 pandemic, when many Senators were attending Parliament remotely. Those Senators attending remotely were permitted to speak to motions (as Senator Dodson did), but only those physically present in the chamber were permitted to vote.

[91] Senate Journals, 46th Parliament (11 August 2021) pp. 3908–3909.

[92] See, Senator Rachel Siewert (Australian Greens), press release (12 August 2021); and Ms Meryl Swanson MP (Federal Member for Paterson), press release, 30 August 2021.

In the following case study, the human rights concerns raised by the committee were addressed by amendments made to a bill following its re-introduction in the new Parliament:

Crimes Legislation (Police Powers at Airports) Bills 2018 and 2019[93]

The bill

This bill (now Act) amended the *Crimes Act 1914* to introduce new powers at major airports, including the power for constables and protective service officers (PSOs) to give directions to persons to provide identification documents, move-on (including vacating the airport), or stop (including directing them not to take a flight).

The process

The bill was introduced into the House of Representatives on 12 September 2018. It was referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) the following day for inquiry and report. The PJCHR reported on the bill on 16 October 2018, raising concerns that the proposed powers for constables and PSOs to give directions for persons at major airports to provide identification, move-on, or stop, limited several human rights, particularly the right to assembly.[94] The PJCIS reported on 13 February 2019, raising similar concerns and recommending that the bill be amended to ensure that the move-on powers did not interfere with the right to peaceful assembly, or give police the ability to use the powers to disrupt or quell a protest that is peaceful and does not disrupt the safe operation of an airport. The bill lapsed at the dissolution of Parliament on 11 April 2019.

The bill was re-introduced at the commencement of the next Parliament, on 4 July 2019, and the reintroduced bill included a provision making it clear that the powers provided that safeguarding the 'public order and safe operation' of a major airport does not apply, by itself, to persons 'exercising their right to lawfully engage in advocacy, protest, dissent or industrial action'. The PJCHR briefly reported on this new bill and welcomed the changes that addressed its earlier concerns (shared by the PJCIS).

The impact

The committee's concerns were addressed in subsequent amendments to the bill → In the Second Reading Speech to the Crimes Legislation Amendment (Police Powers at Airports) Bill 2019, the Minister for Home Affairs, and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, noted that the bill had been considered by numerous parliamentary committees, and that the amendments incorporated were consistent with the views expressed by the PJCHR.[95]

The committee's comments informed parliamentary debate on the bill → Senator Nick McKim (Australian Greens) drew extensively on the committee's comments, in voicing opposition to the bill.[96]

[93] See *Report 11 of 2018*, *Report 12 of 2018*, and *Report 4 of 2019*.

[94] See also, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11/18*, p. 15.

[95] The Hon Peter Dutton MP, second reading speech, *House of Representatives Hansard*, 4 July 2019, p. 294, and the Hon David Coleman MP, speech, *House of Representatives Hansard*, 12 September 2019, pp. 2771–2772.

[96] Senator Nick McKim, speech, *Senate Hansard*, 19 September 2019, pp. 2699–2702.

There have also been instances in which the PJCHR's comments on a bill have influenced other Senate committees (and their submitters) conducting a concurrent inquiry into the legislation:

Data Availability and Transparency Bill 2020 (2022)[97]

The bill

This bill (now Act) sought to establish a legislative framework to: facilitate the sharing of public sector data held by Commonwealth bodies with accredited entities; facilitate controlled access to such data; and establish a National Data Commissioner.

The process

The bill was introduced into the House of Representatives on 9 December 2020 (the second last sitting day of the year). In the first parliamentary sitting week of 2021, the bill was referred to the Senate Standing Committee on Finance and Public Administration for inquiry and report by 29 April 2021.

On 24 February 2021, the PJCHR tabled a detailed initial consideration of the bill, seeking further information from the minister in response to 10 specific questions about the compatibility of various provisions with the right to privacy.[98] The committee published its final consideration of the bill on 31 March, taking into consideration the additional information provided by the minister. The committee advised Parliament that it retained concerns that the proposed scheme may not constitute a proportionate means by which to achieve its stated objectives, and recommended specific amendments to improve the bill's compatibility with the right to privacy. The Senate Standing Committee on Finance and Public Administration tabled its inquiry report one month later, dedicating an entire chapter of its report to the PJCHR's consideration of the bill.[99] It likewise recommended that consideration be given to whether amendments could be made to the bill, or further clarification added to the explanatory memorandum, to provide additional guidance regarding privacy protections, particularly in relation to the de-identification of personal data.[100]

The impact

The committee's analysis directly informed a concurrent bill inquiry → the committee's technical analysis of the bill featured extensively in the Senate Standing Committee on Finance and Public Administration's inquiry, informing the development of one of its recommendations.

The committee's comments were referenced in debate on the bill → The Minister for Employment, Workforce, Skills, Small and Family Business noted that the committee's comments (and those of other committees) had been carefully considered, and amendments had been introduced in response.[101]

Numerous amendments to the bill were introduced in the House of Representatives → As passed by both Houses in March 2022, the bill contained 251 government amendments that were partly in response to concerns raised by the committee. The supplementary explanatory memorandum stated that the amendments clarify and strengthen privacy protections, and include several privacy enhancing measures, including data minimisation requirements and a starting position that data shared under the Scheme must not include personal information unless an exception applies.[102] In particular, the 2022 bill introduced a general complaints division, which allows members of the

[97] See *Reports 2 and 4 of 2021*.
[98] *Report 2 of 2021*, pp. 16–17.
[99] Senate Standing Committee on Finance and Public Administration, *Inquiry into Data Availability and Transparency Bill 2020 [Provisions] and Data Availability and Transparency (Consequential Amendments) Bill 2020 [Provisions]* (April 2021), pp. 35-45.
[100] See inquiry report, p. 78.
[101] The Hon Sturt Robert MP, speech, *House of Representatives Hansard*, 30 March 2022, p. 1264.
[102] Data Availability and Transparency Bill, supplementary explanatory statement.

general public to make complaints to the Commissioner about the operation and administration of the Scheme. This amendment reflects the committee's recommendation that a mechanism be established to enable the Commissioner to consider complaints from individuals with respect to the Scheme.

In the following case study, the committee's comments led to a legislative instrument being replaced to seek to address its human rights concerns (and those of another scrutiny committee):

Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021[103]

The legislative instrument

This legislative instrument was registered on the FRL on 27 July 2021.[104] It excluded work for specified employers (who may pose a risk to the health and safety of workers) from counting towards eligibility for a second or third working holiday visa. It also gave the minister the power, by a future legislative instrument, to publicly list such employers in a legislative instrument if the minister is satisfied the employer, or work, poses a risk to safety or welfare.

The process

The committee initially reported on this legislative instrument on 25 August 2021, stating that specifying individual employers on a public list on the basis that they may pose a health and safety risk to prospective employees engaged and limited the right to privacy and reputation. The committee sought the minister's advice in respect of six questions, in order to establish whether the measure was sufficiently circumscribed and contained sufficient safeguards to constitute a proportionate limit on rights. The minister's response was received on 30 September, and the committee concluded its consideration in *Report 12 of 2021*, on 20 October 2021.[105]

The findings

While the committee considered that the measure pursued a legitimate objective, concerns remained regarding proportionality. In particular, noting the breadth of the minister's discretion to include employers on the list, the lack of independent merits review, the power to include individual names, and the public accessibility of the list, the committee considered the measure risked being a disproportionate limit on the right to privacy. The committee suggested a number of amendments to the legislative instrument to assist with proportionality, including that the process of making a decision to include an employer on the list be set out in the instrument, including that written reasons be provided to the employer and the employer have a right of reply. The committee also recommended that the statement of compatibility with human rights be updated to reflect the information provided by the minister.

The impact

The regulation was replaced → On 4 March 2022, the minister registered a new legislative instrument to replace this instrument.[106] The explanatory materials to the new instrument noted that 'in response to concerns raised by both the Parliamentary Joint Committee on Human Rights (PJCHR) and the Senate Standing Committee for the Scrutiny of Delegated Legislation, the Government considers it appropriate to include a procedural fairness mechanism in the Migration Regulations themselves'.[107]

[103] See, *Reports 10 and 12 of 2021*.
[104] Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 [F2021L01030].
[105] See, *Report 12 of 2021*.
[106] Migration Amendment (Subclass 417 and 462 Visas) Regulations 2022 [F2022L00244].
[107] Migration Amendment (Subclass 417 and 462 Visas) Regulations 2022 [F2022L00244], explanatory statement.

Aspects of the committee's concerns were addressed in the new regulation → The Regulation was amended to include a procedural fairness mechanism, requiring that before specifying a person, partnership or unincorporated association [as an 'excluded' employer], the minister would be required to advise that employer in writing of his/her intention to do so, and the reasons, giving them at least 28 days to make a written submission to the minister about the proposed specification.

There are also instances in which the committee's comments have explicitly been taken into consideration in the progress of bills which have been introduced into the Parliament (and the making of related legislative instruments), and the committee's role has been acknowledged:

Sydney Harbour Trust Regulations[108]

Background

In 2010 (two years before the committee was created), the Sydney Harbour Federal Trust Regulations 2001 were (re)made under the authority of the *Sydney Harbour Federation Trust Act 2001*. This instrument regulated conduct on land belonging to the Sydney Harbour Trust,[109] including establishing a blanket ban on organising or participating in a 'public assembly' (including a meeting, demonstration, or performance) on Trust land without a licence or permit. This instrument was due to cease effect (or 'sunset') on 1 October 2019. However, in September 2019, the Legislation (Deferral of Sunsetting—Sydney Harbour Federation Trust Regulations) Certificate 2019 (Certificate) was registered. This short legislative instrument deferred that earlier sunset date by two years, meaning that the legislative instrument would continue to have effect until 1 October 2021.

The process

The committee assessed the deferral of sunsetting instrument and noted that the explanatory materials accompanying it failed to acknowledge that the measure engaged any human rights.[110] The committee wrote to the Attorney-General in February 2020 asking for more information about the broad prohibition of public assemblies, and the impact on the rights to freedom of expression and assembly. The Attorney-General responded on 3 March, noting that the Regulations would be subject to a separate independent review process.[111] The committee urged the Attorney-General to give close consideration to the concerns it raised in reviewing the regulations.[112]

One year later, on 18 March 2021, the Sydney Harbour Federal Trust Amendment Bill 2021 was introduced. The explanatory memorandum accompanying the bill (now an Act) stated that the regulations that would be made under its authority were anticipated to be 'remade with minor changes to their operation'. The committee therefore wrote to the new responsible minister—the Minister for Agriculture, Water and Environment—seeking their advice as to whether the blanket

[108] Sydney Harbour Federal Trust Regulations 2001 [F2010C00261]; Legislation (Deferral of Sunsetting—Sydney Harbour Federation Trust Regulations) Certificate 2019 [F2019L01211]; Sydney Harbour Federal Trust Amendment Bill 2021; and Sydney Harbour Federation Trust Regulations [F2021L01255]. See *Reports 1 and 4 of 2020*, and *Reports 4, 5, 12 and 14 of 2021*.

[109] The Sydney Harbour Trust manages: Cockatoo Island, North Head Sanctuary in Manly, Headland Park in Mosman, Sub Base Platypus in Neutral Bay, Woolwich Dock and Parklands, the former Marine Biological Station at Watsons Bay, and Macquarie Lightstation in Vaucluse.

[110] Focusing only on the effect of the deferral instrument rather than the substantive effect of continuing the original regulation, see *Report 1 of 2020*, p. 36.

[111] *Report 4 of 2020*, pp. 100–101.

[112] *Report 4 of 2020*, p. 102.

prohibition on public assemblies was intended to be retained.[113] The minister advised that the Regulations had originally been drafted to protect the public from the hazards of un-remediated sites in the Trust, and that to address the committee's concerns it was intended for the Regulations to be amended 'to be more explicitly compatible with the right of peaceful assembly'.[114]

A new regulation was subsequently registered on 18 September 2021.[115] It provided that a public assembly is lawful without the need for Trust approval, introducing a requirement that organisers merely advise the Trust of their intention to assemble.[116]

The impact

The committee's comments on the Sydney Harbour Federal Trust Amendment Bill 2021 informed debate → Mr Josh Wilson MP (Australian Labor Party) noted the committee's comments in debate on the bill, arguing that the prohibition on public assemblies went against basic principles and was contrary to the 'recent history and tradition of Cockatoo Island'.[117]

The new Regulation altered the blanket prohibition on public assemblies → When assessing the new Regulation the committee noted that the new regulation provided that a public assembly is lawful, provided that organisers advise the Trust of their intention to assemble.[118] The committee retained some concern about the retention of a potentially broad power to prohibit peaceful public assemblies, but considered that this amendment represented a substantial improvement on the previous Regulation.[119]

The new Regulation explicitly acknowledged the committee's impact on the re-drafting → The statement of compatibility with human rights set out the committee's previous comments regarding the compatibility of the measure with the rights to freedom of expression and assembly, stating that the amendments to the Regulations were made in response to those concerns.[120]

There have been cases in which parliamentarians and submitters to other committee inquires have utilised the PJCHR's comments:

Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015[121]

The bill

This bill sought to amend the *Migration Act 1958* to allow an authorised officer to use such reasonable force as they reasonably believed necessary to protect the life, health or safety of any person in an immigration detention facility or to maintain the good order, peace or security of an immigration detention facility.

The process

The bill was introduced into the House of Representatives on 25 February 2015. It was referred to the Senate Legal and Constitutional Affairs Legislation Committee (LCA) on 5 March. On 18 March, the PJCHR reported that the use of force powers engaged and limited a number of human rights,

[113] *Report 4 of 2021*, p. 4.
[114] *Report 5 of 2021*, p. 87.
[115] Sydney Harbour Federation Trust Regulations [F2021L01255].
[116] Sydney Harbour Federation Trust Regulations 2021 [F2021L01255], s 19.
[117] Josh Wilson MP, speech, *House of Representatives Hansard*, 1 June 2021, p. 5161.
[118] Sydney Harbour Federation Trust Regulations 2021 [F2021L01255], s 19.
[119] *Report 14 of 2021* (24 November 2021), pp. 67–69.
[120] Sydney Harbour Federation Trust Regulations [F2021L01255], statement of compatibility with human rights, pp. 36–37.
[121] See *Reports 20/44* and *24/44*.

including the right to life; the prohibition against torture and cruel, inhuman or degrading treatment; the right to humane treatment in detention; and the right to freedom of assembly, and additionally noted concerns regarding proposed immunities. It set out various concerns about the lack of safeguards in the bill and sought further advice from the Minister for Immigration and Border Protection.

Submissions to the LCA inquiry closed on 7 April, and it reported on the bill on 5 June. The PJCHR published its concluding comments on the bill on 23 June. Several amendments were moved to the bill by non-government members and Senators regarding the safeguards around the use of force, and the bill lapsed on 17 April 2016 on the prorogation of the Parliament and was not re-introduced.

The impact

The committee's human rights concerns were endorsed by numerous submissions to the LCA inquiry and reflected in the LCA report → the LCA report stated that a number of submissions referred to and endorsed the concerns raised by the PJCHR.[122] For example, the Kaldor Centre for International Refugee Law and the Gilbert + Tobin Centre of Public Law's submission referred extensively to the PJCHR's report and, when setting out the human rights impact of the bill, referred the LCA Committee to the analysis by the PJCHR for a more detailed analysis of the rights implications of the bill.[123] The Law Council of Australia noted and commended the consideration of the bill by the PJCHR and noted that its constituent bodies that considered the bill, the Law Institute of Victoria and the Law Society of NSW, agreed with the PJCHR's conclusions. Its submission quoted extensively from the research presented in the PJCHR's reports, and its recommendations reflected the issues raised by the PJCHR.[124] Further, the Australian Lawyers for Human Rights submission made extensive reference to the PJCHR's report and agreed with the concerns expressed.[125]

The committee's concerns were referenced in debate on the bill →The PJCHR's report, and the submissions to the LCA inquiry, were quoted in Parliament during debates on the bill in both the House and the Senate.[126]

The following five case studies illustrate that the committee's influence on the development of legislation may not always be readily apparent. In some cases, the committee's concerns have been addressed (in whole or part) by amendments or future legislation or policy without explicit reference to the committee's consideration of the legislation. In such cases, discerning the committee's influence may require very close monitoring of the progress of legislation over time, or an intimate knowledge of its passage through both chambers of Parliament.

In the following example, the influence of the committee's recommendations on the drafting and re-drafting of legislation and explanatory materials (including statements of compatibility with human rights) only becomes clear with careful review:

[122] Legal and Constitutional Affairs Legislation Committee, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 [Provisions], June 2015, p. 8.

[123] Andrew & Renata Kaldor Centre for International Refugee Law and Gilbert + Tobin Centre of Public Law, UNSW, Submission 8, p. 5.

[124] Law Council of Australia, Submission 30.

[125] Australian Lawyers for Human Rights, Submission 15. See also, for example, the Asylum Seeker Resource Centre, Submission 26, p. 6; Refugee Council of Australia, Submission 27; Public Law and Policy Research Unit, University of Adelaide, Submission 37; Civil Liberties Australia, Submission 121, p. 9

[126] See, Mr Graham Perrett MP; Ms Melissa Parke MP, Mr Frank Zappia MP, second reading debate, *House of Representatives Hansard* (13 May 2015) p. 3838; Senator Sue Lines, second reading debate, *Senate Hansard* (19 August 2015) p. 5829; Senator Richard Di Natale, second reading debate, *Senate Hansard* (20 August 2015) p. 5915.

Australian Security Intelligence Organisation Amendment Bill 2020[127]

The bill

On 13 May 2020, this bill was introduced into the House of Representatives. It sought to repeal and replace the Australian Security Intelligence Organisation's (ASIO) compulsory questioning framework, including amending the provisions related to questioning warrants. This framework: provided for the apprehension of subjects; would require a subject to attend questioning and provide information, and/or produce records or things; and provided for the search of a person and entry to premises. The proposed measures engaged a significant number of human rights, including the rights to: liberty; freedom of movement; humane treatment in detention; privacy; fair trial; freedom of expression; as well as the rights of the child and the rights of persons with disability.

The process

The day this bill was introduced into the House of Representatives, the provisions of the bill were referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) for report (meaning that the bill would not proceed to debate prior to that report being tabled, which ultimately occurred in December 2020). On 17 June, the PJCHR reported its initial consideration of this bill, noting the many human rights questions that the proposed measures raised, and seeking responses to 51 specific questions. The minister's 38-page response was received on 9 July, in which the minister advised that a number of safeguards would be set out in a statement of procedures to be made by legislative instrument. The committee then reported its extensive concluded findings on the bill on 18 August. In some respects, it considered that the additional information provided by the Minister satisfied its human rights concerns. In other instances, it offered specific recommendations to improve the human rights compatibility of the bill (and further recommendations were set out in a dissenting report).

The PJCIS tabled its report on the bill on 3 December 2020.[128] The bill subsequently passed both Houses of Parliament in a single day, on 10 December 2020 (the final sitting day of the year). Fourteen days later, on 24 December 2020, the Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020 (made under s 34AF of the *Australian Security Intelligence Organisation Act 1979*) was registered.[129]

The impact

At first glance, the PJCHR's comprehensive consideration of the human rights implications of this bill (and its many recommendations) appeared to have little tangible impact. The PJCIS did not acknowledge the committee's comments in its own report despite raising similar concerns,[130] and the committee's concerns received minimal coverage in the media. Further, when multiple amendments were made to the bill to address the PJCIS's recommendations one week after its report had been tabled,[131] and when the bill was then introduced into the Senate, the PJCIS's recommendations were noted but the PJCHR's consideration of the bill was not.[132]

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[127] See, *Reports 7* and *9 of 2020*.

[128] Parliamentary joint Committee on Intelligence and Security (PJCIS), *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020* (December 2020).

[129] Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020 [F2020L01714].

[130] PJCIS, *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020* (December 2020).

[131] A summary of the passage of the bill (including amendments and amended explanatory materials) is available on the bill homepage.

[132] Senator the Hon Richard Colbeck, second reading speech, *Senate Hansard* (10 December 2020) pp. 7441–7456.

On closer inspection, however, the PJCHR's recommendations would appear to have been considered and, in numerous respects, given effect:

Numerous recommendations made by the PJCIS, which directly addressed some of the PJCHR's concerns, were implemented → These included providing that the best interests of the child would be a primary consideration in decisions involving minors and strengthening oversight by the Inspector-General of Intelligence Services.[133] Then PJCHR Chair, Senator the Hon Sarah Henderson, drew the committee's recommendations and these amendments to the attention of the Senate.[134]

The statement of compatibility with human rights to the bill was expanded as the PJCHR recommended → If the original statement of compatibility to the bill is compared with the revised statement of compatibility[135] following amendments made to the bill on 10 December, it can be seen that the statement has been expanded to include an analysis of specific human rights issues as flagged by the PJCHR, including reflecting that: the best interests of the child are to be a primary consideration; both body searches and forced entry to private premises engage and limit the right to privacy; and limitations on leaving Australia engage and limit the rights to freedom of movement and protection of the family.

The Statement of Procedures to be followed in the exercise of questioning powers (a legislative instrument) incorporated many of the PJCHR's recommendations → The bill empowered the Minister for Home Affairs to make a statement of procedures in the form of a legislative instrument. The PJCHR was advised that this was intended to include more detailed guidance as to how questioning could be conducted, and many safeguards to protect human rights. As the document did not exist at the time of the PJCHR's report, the committee could not assess the potential safeguard value of such a document. As such, the PJCHR made numerous recommendations for what additional safeguards should be included in such a document. When the legislative instrument was registered on 24 December 2020,[136] it included many of the safeguards that the PJCHR had recommended, including specific protections where the subject of a warrant has a known vulnerability such as a disability, and requirements for the conditions of the questioning environment itself.

In some cases, the committee's influence on the development of legislation has taken place over a lengthy period. In the following case study, the committee's previous comments had not been explicitly acknowledged in the explanatory materials accompanying the most recent instrument. As such, it would be challenging to have identified the committee's impact on its development over that lengthy period without an understanding of the historical involvement:

[133] See, Australian Security Intelligence Organisation Amendment Bill, supplementary explanatory memorandum.
[134] Senator the Hon Sarah Henderson, tabling speech, *Senate Hansard*, 3 February 2021, p. 290.
[135] Both of these documents can be found on the bill homepage, and the amendments to the original document can be observed by using the 'compare document' function in Microsoft Word.
[136] Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020 [F2020L01714].

Australian Public Service Commissioner's Directions[137]

The legislative instruments

These Directions prescribe the minimum standards with which agency heads and Australian Public Service employees must comply to meet their obligations under the *Public Service Act 1999*, and support agency heads to fulfil their responsibilities in respect of their employer powers. The Directions require agency heads to notify certain employment decisions in the Public Service Gazette. Historically they required the publication of decisions to terminate a public servant's employment and the grounds for termination on a public website.

The process

The committee engaged in an ongoing dialogue with the executive regarding the compatibility of various iterations of these Directions. The committee first sought clarification in 2013 as to why it was necessary to publish employment decisions in the Gazette, including publication of decisions to terminate a public servant's employment and the grounds for termination on a public website (this could include setting out that employment was terminated on mental health grounds, which the committee noted engaged the right to privacy and to equality and non-discrimination). In response, the APS Commissioner stated that they would review these powers.[138]

Following that review, the 2013 Directions were amended in 2014. The explanatory materials to the amending legislative instrument acknowledged the committee's concerns about the power to publish decisions, stating that in response to the committee's concerns the Directions were being amended to remove most of the requirements to publish termination decisions.[139] However, the requirement to publicly publish a termination on the grounds of a breach of the Code of Conduct was retained.

The committee further considered this requirement in subsequent reports in 2015, concluding that publishing this information on a publicly accessible website was not a proportionate limit on the right to privacy, as there were other less rights restrictive methods available (such as internal record-keeping).[140] The committee raised similar concerns in 2016, in response to which the APS Commissioner again undertook to review the necessity of publicly notifying termination information.[141] Following that review, the legislative instrument was re-made, ultimately addressing the committee's privacy concern.[142]

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[137] Australian Public Service Commissioner's Directions 2013 [F2013L00448]; Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426]; Australian Public Service Commissioner's Directions 2016 [F2016L01430]; and Australian Public Service Commissioner's Directions 2022 [F2022L00088]. See *Report 6 of 2013*, *Eighteenth* and *Twenty-first Reports of the 44th Parliament*, and *Reports 8* and *10 of 2016*. Note that very similar directives were made in relation to the parliamentary service, with amendments made to those in response to the committee's concerns: see *Report 1/44* and *Report 3/44* regarding the Parliamentary Service Determination 2013; *Report 1 of 2017* and *Report 2 of 2017* regarding the Parliamentary Service Amendment (Notification of Decisions and Other Measures) Determination 2016; and *Report 1 of 2018* and *Report 3 of 2018* regarding the Parliamentary Service Amendment (Managing Recruitment Activity and Other Measures) Determination 2017.

[138] Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426], statement of compatibility with human rights.

[139] Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426], statement of compatibility with human rights.

[140] *Twenty-First Report of the 44th Parliament*, p. 27.

[141] *Report 10 of 2016*, p. 16.

[142] Australian Public Service Commissioner's Directions 2022 [F2022L00088].

The impact

The Directions were amended several times over 8 years in response to the committee's concerns → They were initially amended in a way that much better protected privacy and rights of persons with disabilities. They were then later improved more broadly.

The most recent Directions addressed the committee's long-held privacy concerns → The Australian Public Service Commissioner's Directions 2022 included a new exception so that an employee's name may not be included in a notification for an employment termination for breach of the Code of Conduct if including the name is not necessary to ensure public confidence in the integrity of the APS.[143] This amendment addressed the privacy concerns the committee had been raising since 2014 and thus the committee did not comment on these Directions.

In the following case study, the committee's consideration of legislative instruments to provide for the imposition of sanctions on individuals received media coverage and arguably led to improvements to statements of compatibility with human rights:

Autonomous Sanctions and Charter of the United Nations designations or listings[144]

The legislation

Under the Autonomous Sanctions Regulations 2011 and the *Charter of the United Nations Act 1945* the Minister for Foreign Affairs may designate or list a person (in a legislative instrument) as subject to sanctions. Such a listing or designation results in an individual's assets being frozen and the cancellation of any visa, and a ban on travel. Since 2013, the committee has drawn attention to the human rights implications of such executive decisions, which can operate variously to both promote and limit rights. If sanctions are placed on persons to whom Australia owes human rights obligations (usually those located in Australia), this could operate to limit human rights, particularly the rights to freedom of movement; private life; family life; and a fair hearing. The statements of compatibility accompanying sanctions legislation initially did not recognise that placing sanctions limited any human rights.

The process

In 2013 the committee sought further information as to the human rights implications of the imposition of sanctions. It asked that the Department of Foreign Affairs conduct a comprehensive review of the sanctions regime in light of Australia's international human rights obligations and report back. In 2013 the then Minister stated that he had instructed the Department to carefully consider the committee's recommendation. However, the Foreign Minister in 2015 advised the committee she considered there was no need to review the sanctions regime. The committee subsequently undertook its own review,[145] identified the relevant rights that appeared to be impermissibly limited and made a number of recommendations for safeguards to be included in the legislation to better protect rights.[146] The committee continued to raise its concerns and, in 2018,

[143] This was registered on the Federal Register of Legislation on 31 January 2022, meaning that it was considered by the PJCHR in its *Report 2 of 2022* (which considered instruments registered between 20 December 2021 and 15 March 2022).

[144] See, *Twenty-Eighth* and *Thirty-Third Reports of the 44th Parliament*, *Report 9 of 2016*, *Reports 3, 4 and 6 of 2018*, and *Report 8 of 2021*.

[145] *Twenty-Eighth Report of the 44th Parliament*, pp. 15–38; *Thirty-third Report of the 44th Parliament* pp. 17–25.

[146] *Report 9 of 2016* pp. 41–55.

the Minister agreed to ask the Department to consider whether additional detail regarding the human rights impacts of sanctions could be provided in future statements of compatibility.[147]

In 2021, numerous legislative instruments made between 2001–2020 imposing sanctions on almost 300 individuals, were tabled. They were classified as exempt from the disallowance process (by which Parliament can veto the instrument), and therefore were not accompanied by statements of compatibility. The committee noted that it appeared this was an incorrect classification, and also questioned the validity of the previous listings.[148]

The impact

The human rights implications of autonomous sanctions are now better acknowledged in statements of compatibility accompanying legislative instruments imposing sanctions → Prior to the committee's work, statements of compatibility with human rights did not reflect a consideration as to the human rights implications of the imposition of sanctions on individuals. While the legislation has not yet been amended to contain the safeguards recommended by the committee, the quality of statements of compatibility accompanying such legislative instruments have improved, with such statements now regularly acknowledging that rights may be limited.[149]

The committee's concerns received media coverage → In addition, flowing on from the committee's consideration of those instruments which were not registered over a period of 20 years, the committee's concerns were quoted in a media report.[150] On 2 August 2021 the instruments were updated to reflect that they were subject to disallowance, and statements of compatibility were prepared for all instruments. On 11 August 2021, a bill was introduced to validate any actions taken under the earlier listings.[151]

The committee continues to note its concerns about the sanctions regime by listing any such legislative instruments that have been registered within the reporting period, but where it does not appear the individuals subject to designation or listing are in Australia it makes no further comment on individual listings.[152]

In addition to the committee's consideration of bills and legislative instruments through its scrutiny and inquiry reports, the committee has also influenced the development of legislation behind the scenes.

As noted earlier, the committee Chair initially took the lead on liaising with departments and ministers to provide feedback on the drafting of statements of compatibility with human rights. In 2013 and 2014, where inadequacies in statements of compatibility were identified, the Chair sent advisory letters to legislation proponents to provide guidance on the preparation of, and requirements for, statements of compatibility.[153] From June 2018, the committee undertook a project to improve

[147] *Report 3 of 2018* pp. 82–96; *Report 4 of 2018* and *Report 6 of 2018* pp. 104–131.
[148] *Report 8 of 2021* pp. 27–28.
[149] Compare, for example the statements of compatibility for legislative instruments from 2013 to 2022: for 2013 example see: Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013 [F2013L00477]. For 2022 example see: Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 16) Instrument 2022 [F2022L00707].
[150] See Karen Middleton, Rush to fix 'unlawful' list, *The Saturday Paper*, 10 July 2021.
[151] Charter of the United Nations Amendment Bill 2021 (passed both chambers on 2 September 2021).
[152] See, for example, *Report 2 of 2022*, (24 February 2022) p. 68 (footnotes 4 and 5, which list the five autonomous sanctions instruments registered in the reporting period—between 22 December 2020 and 27 January 2021—and list the committee's earlier substantive reports which consider the compatibility of autonomous sanctions with human rights).
[153] *Annual Report 2013-14*, p. 18.

statements of compatibility by further explaining the committee's expectations, underpinned by the legal requirements, as to their content and information as to how they could be improved. This included liaising with legislation proponents and government departments about areas of concern, supplementing and developing further guidance materials and resources to assist in the preparation of statements of compatibility and providing targeted training to departmental officials regarding the committee's expectations. It also involved preliminary discussions to explore options for collaboration with the Attorney-General's Department, in relation to guidance materials, as well as the Australian Human Rights Commission.[154] This process lapsed at the end of the 45th Parliament in mid-2019. In the 46th Parliament, in September 2021, the committee resolved that its secretariat should, where it considered it appropriate, engage directly with relevant departments immediately after the legal adviser and secretariat have identified minor, technical human rights concerns with legislative instruments, in an attempt to resolve the matter *before* involving the minister or committee by reporting on the legislation publicly. This was intended to help departmental officials understand the type of information that should be included in a statement of compatibility. Further, where a statement of compatibility was considered to be inadequate (but where it nonetheless did not appear that the legislation raises human rights concerns), the committee authorised the Committee Secretary to write to departmental officials setting out the committee's expectations for future reference. The committee in the 47th Parliament has also endorsed the committee's secretariat undertaking this informal engagement.

Providing feedback in this manner in relation to bills facilitates the committee's educative function, providing departments with information to inform future such drafting. In relation to legislative instruments (and their explanatory materials), this feedback can be incorporated directly by departmental officers, because legislative instruments can often be amended and updated by departmental officers or other delegates directly.

Between September and December 2021, the secretariat liaised directly with departments in relation to a number of bills and legislative instruments. In one case, this resulted in a large department updating its internal guidance for preparing statements of compatibility, and inviting the Committee Secretary to present on the subject at a training session attended by over 70 departmental officers. The approach has also resulted in significant improvements to the explanatory materials accompanying legislative instruments, as well as fostering the committee's positive educative relationship with departments:

Instruments amending the Pharmaceutical Benefits Scheme

Background

Each year, numerous legislative instruments are registered to add, remove or otherwise alter the listing of medications on the Pharmaceutical Benefits Scheme (PBS), which provides for medication subsidies. For some time, the statements of compatibility with human rights accompanying these instruments were largely standard wording noting that the PBS itself promotes the right to health by providing for access to subsidised medication,[155] but not addressing whether the amendments being made by a specific legislative instrument were taking subsidised medications or medical services away from patients (and so potentially limiting the right to health). As such, it could be difficult to determine the effect of the instrument on its face given the complexity of the PBS and the potential availability of other medications or medical procedures.

[154] *Annual Report 2018*, p. 36.

[155] See, for example, National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2021 (No. 10) [F2021L01485], statement of compatibility with human rights (registered on the FRL on 31 October 2021).

Liaison with department

Following the committee's resolution that the secretariat may liaise directly with departmental officers to discuss minor technical human rights concerns, the secretariat contacted the Department of Health seeking advice about the operation of several PBS instruments. The secretariat advised that it was unclear from the statements of compatibility what the effect of deleting relevant drugs from the PBS would be and asked whether there would be any detriment to patients.

Result

The Department swiftly responded, explaining the effect of the relevant instruments and advising that they would amend their statements of compatibility in future to explain how most amendments to the PBS do not affect human rights, but where any drug is to be de-listed entirely, to provide more specific information as to the effect of this on patients. This revised approach has since been observed.[156]

Human rights scrutiny of COVID-19 related legislation

The COVID-19 pandemic, and the associated legislative response by the federal Parliament, impacted on the committee's work, both in terms of its influence on committee processes and the types and extent of human rights scrutiny concerns it considered.

Changes to committee processes

In early 2020, as COVID-19 cases continued to emerge in Australia, states and territories progressively introduced lockdown and quarantine measures, which limited the capacity of parliamentarians to physically attend Parliament in Canberra. To keep operating effectively while unable to continue its usual practice of meeting in person, the committee resolved to hold its meetings remotely, via teleconference. Further, the committee resolved to:

- publish a special scrutiny report focusing on COVID-19 related bills and legislative instruments, with an overview regarding the laws applicable to the protection of human rights in times of emergencies; and
- maintain a list of all bills and legislative instruments made in response to the pandemic (not merely those that raised human rights concerns).[157]

To communicate this approach, the committee issued a media release setting out the committee's proposed course of action regarding COVID-19 bills and instruments.[158] It also wrote to civil society stakeholders advising that the committee could accept submissions about a bill or instrument at any time, and drawing their attention to the COVID-19 sub-page on the committee's web pages.[159] Further, the committee wrote to all ministers and heads of departments explaining the committee's scrutiny approach regarding COVID-19 related bills and instruments. The committee also continued to publish

[156] See, for example, National Health (Pharmaceutical benefits – early supply) Amendment Instrument 2022 (No. 5) [F2022L00725], statement of compatibility with human rights (registered on the FRL on 27 May 2022).
[157] These lists, dating from the beginning of the pandemic to December 2021, are available on the committee website. The Senate Standing Committee for the Scrutiny of Delegated Legislation published a similar list of legislative instruments only.
[158] This media release is available on the committee website.
[159] The committee published six pieces of correspondence received.

its regular scrutiny reports in a timely way, ultimately tabling 15 scrutiny reports in 2020 including one report dedicated to the scrutiny of COVID-19 legislation.[160]

Scrutiny of COVID-19 related legislation

The COVID-19 pandemic required governments globally to introduce legislative measures seeking to contain the outbreak and respond to its impacts. In Australia, the *Biosecurity Act 2015* is the primary legislative basis for the Australian government to manage the risk of diseases entering Australian territory and causing harm to human health. It sets out a number of measures that can be taken to prevent a listed human disease from entering, or establishing itself or spreading in, an Australian territory. On 21 January 2020, the Director of Human Biosecurity first added 'human coronavirus with pandemic potential' to the list of human diseases, to allow measures to be taken under the *Biosecurity Act 2015* to manage and respond to risks to human health caused by the virus.[161] Since that time, numerous legislative instruments made under the *Biosecurity Act 2015* and other Acts, and numerous Acts were made to respond to the economic, health, social and other impacts of COVID-19.

The committee considered that legislation taken to control the entry, establishment or spread of COVID-19 in Australia was likely to promote and protect the rights to life and health of Australians; and that legislative responses to help manage the impact of the COVID-19 pandemic on jobs and the economy were likely to engage and promote a number of human rights, including rights to work, an adequate standard of living and social security.[162] Equally, it recognised that such legislation could also limit other human rights (in particular, the rights to freedom of movement and liberty, privacy, equality and non-discrimination, and freedom of assembly). This necessitated careful consideration of whether such limitations were permissible under international human rights law.[163]

One notable aspect of the legislative response to COVID-19 was that many significant responses to the pandemic (including establishing travel bans, entry and exit requirements, and quarantine zones) were dealt with via legislative instruments made under the *Biosecurity Act 2015* and were exempt from disallowance. This meant that the Parliament's primary method of exerting control over delegated legislation was not available. It also meant that the measures were not required to include a statement of compatibility with human rights as part of their explanatory materials.[164] Further, until 16 June 2021, the committee was the *sole* parliamentary committee able to scrutinise this exempt delegated legislation.[165] As such, the committee scrutinised many legislative instruments with significant impacts, which did not include a statement of compatibility (and were not required to include one), and so sought further information (largely from the Minister for Health) to establish whether the measures were compatible with human rights law. The ministerial responses and the committee's assessment of these legislative instruments provided greater information about the rationale for, and impact of, each instrument than was otherwise available. This was significant noting that many of these legislative instruments appeared to raise significant human rights questions.

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[160] *Report 5 of 2020 (Human rights scrutiny report of COVID-19 legislation)*.

[161] See, Biosecurity (Listed Human Diseases) Amendment Determination 2020 [F2020L00037].

[162] *Report 5 of 2020 (Human rights scrutiny report of COVID-19 legislation)*, pp. 1–4.

[163] *Report 5 of 2020 (Human rights scrutiny report of COVID-19 legislation)*, pp. 1–4.

[164] The requirement to prepare a statement of compatibility with human rights in relation only to legislative instruments subject to disallowance is found in subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

[165] As of 16 June 2021, the Senate Standing Committee for the Scrutiny of Delegated Legislation can now routinely scrutinise all legislative instruments.

For example, the committee examined numerous legislation instruments were made under the authority of the *Biosecurity Act 2015* to regulate movement into and out of remote communities:

Legislative instruments restricting movement into (and later, out of) remote communities[166]

The legislative instruments

Between 2020 and 2021, 21 legislative instruments were registered, which established or altered emergency requirements for remote communities.[167] These instruments were made under the authority of the *Biosecurity Act 2015,* designating several geographical areas in Western Australia, Queensland, South Australia and the Northern Territory, and establishing that persons could not enter (and later, could not leave) these areas except in specified circumstances, in an effort to control the entry or spread of COVID-19. Failure to comply with this requirement constituted a criminal offence punishable by five years' imprisonment, or a penalty of up to $63,000. Some of the 21 instruments amended those requirements over time, including revoking the requirements in some locations. These legislative instruments were exempt from the disallowance process.[168]

The process

In its first scrutiny report dedicated to the examination of COVID-19 related legislation, the committee noted that these measures were intended to prevent the spread of COVID-19 and so would appear to promote the rights to life and health, but in doing so they may also have limited the right to freedom of movement and the right to equality and non-discrimination (noting that these remote geographical areas appeared to have a high proportion of Indigenous people living there, although this was not specifically addressed in the explanatory materials).[169] The committee therefore asked the Minister for Health for further information as to the compatibility of the measures with human rights, particularly the rights to freedom of movement, and equality and non-discrimination. The Minister responded on 29 May but failed to provide any information with respect to the limitation on these rights.[170]

A further such legislative instrument was registered on 23 April 2020,[171] and the committee again wrote to the Minister requesting information as to the compatibility of the measure with human rights, particularly the rights to freedom of movement, and equality and non-discrimination.[172] The minister responded on 9 July, explaining that the measure to control the spread of COVID-19 was necessary owing to the greater health risks to Indigenous Australians should these communities be exposed to the infection. The minister noted that the measure was in place for a specific period. While the committee did note that information about any consultation with affected communities

[166] See, *Report 5 of 2020*; *Report 6 of 2020*; and *Report 7 of 2020*.
[167] See, COVID-19 bills and instruments indexes, 2020–2021.
[168] In 2020 and 2021, the Senate Standing Committee for the Scrutiny of Delegated Legislation inquired into the exemption of delegated legislation from parliamentary oversight. This inquiry raised significant concerns about the large volume of legislative instruments which were exempt from parliamentary oversight, see *Exemption of delegated legislation from parliamentary oversight*, final report (16 March 2021) recommendation 9. The Senate adopted that recommendation as a resolution of the Chamber on 16 June 2021.
[169] Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 [F2020L00324] and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020 [F2020L00415], explanatory statements.
[170] *Report 7 of 2020* (17 June 2020), pp. 13–19.
[171] Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment Determination (No. 2) 2020 [F2020L00466].
[172] *Report 6 of 2020* (20 May 2020), pp. 2–4.

would have been useful, it found that the measures did appear to constitute a permissible limitation on the right to freedom movement and a permissible limit on the right to equality and non-discrimination.

The impact

Human rights scrutiny available to the Parliament → The committee's consideration of the human rights implications of these determinations was the only parliamentary consideration of these instruments, and brought this issue to the attention of the Parliament. [173]

Influence on civil society → The committee's consideration of this legislation also assisted civil society in their understanding of the human rights implications of these measures when making submissions to the COVID-19 Select Committee.[174]

Conclusion

In the first 10 years of its operation, the Parliamentary Joint Committee on Human Rights has conducted a significant volume of legislative scrutiny, publishing a substantial number of scrutiny reports and eight inquiry reports. The committee's operating practices have continued to evolve as the committee has established itself as a fixture of the Parliament. As the case studies in this paper have demonstrated, the committee continues to have an impact on the development of legislation, both directly and indirectly, and in educating parliamentarians, the executive, civil society and the public as to the human rights implications of Commonwealth legislation. The committee's role, questions, and advice to Parliament appear to have gradually gained acceptance by parliamentarians and the executive, and engagement with its processes appears to have progressively become an expected norm. Parliamentary committees continually evolve as their membership changes and their working practices become more established, and the next decade of the committee will no doubt bring new perspectives, influence and impact.

[173] It is noted that in 2021 and 2022, the Senate Standing Committee for the Scrutiny of Bills reviewed the appropriateness of provisions in the *Biosecurity Act 2015* allowing delegated legislation to be exempt from parliamentary disallowance. The committee identified 30 provisions—including those pursuant to which COVID-19 was first designated a 'listed human disease'—which it considered may inappropriately exempted from disallowance. It recommended that the Biosecurity Act be amended to provide that instruments made under the Act be subject to disallowance, see Senate Standing Committee for the Scrutiny of Bills, *Review of exemption from disallowance provisions in the Biosecurity Act 2015* (May 2021 to February 2022). Were this to take place, it would also have the effect that any such instruments would, in future, require the inclusion of a statement of compatibility with human rights as per *Human Rights (Parliamentary Scrutiny) Act 2011*, subsection 9(1).

[174] See, for example, Law Council of Australia, Submission to the Select Committee on COVID-19, *Inquiry into the Australian Government's response to the COVID-19 pandemic* (June 2020) p. 41.