

Chapter 3

Work of the committee in 2020

3.1 This chapter provides information about the work of the committee during 2020,¹ including statistics, major themes arising from the legislation examined, and information as to the committee's impact during the reporting period.

Legislation considered

3.2 During the reporting period, the committee assessed a large number of bills and legislative instruments for their compatibility with Australia's international human rights obligations.

3.3 Table 3.1 indicates the committee's consideration of the bills and legislative instruments considered during this reporting period.

Table 3.1: Legislation considered during the reporting period

	Total considered	No comment	Advice-only comment	Response required
Bills	252	206	15	31
Legislative instruments	1776	1741	3	32

Reports tabled during the period

3.4 The committee tabled fifteen scrutiny reports during the reporting period, from *Report 1 of 2020* to *Report 15 of 2020*.²

3.5 The committee also tabled its *Annual Report 2019* on 26 August 2020.³

1 The reporting period covers 1 January 2020 to 31 December 2020. The committee's first scrutiny report of the reporting period, *Report 1 of 2020*, was tabled on 5 February 2020 and its final scrutiny report of 2020, *Report 15 of 2020*, was tabled on 9 December 2020.

2 The committee's scrutiny reports are available on its website at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

3 The committee's annual reports are available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Annual_Reports.

Impact of COVID-19 during 2020

3.6 Due to interruptions to the parliamentary sittings as a result of the COVID-19 pandemic, on 9 April 2020 the committee resolved that it would continue to meet and report to the Parliament regularly during 2020, so that it could fulfil its important role in scrutinising legislation, and in particular, legislation in relation to the COVID-19 response. On numerous occasions during the year, the committee met via teleconference and reported out of session in both Houses to ensure the timeliness of its scrutiny reports.

3.7 As part of the approach to the scrutiny of COVID-19 related legislation, the committee took the following actions:

- published a specific report focusing on COVID-19 related bills and legislative instruments,⁴ which included an overview regarding the laws applicable to the protection of human rights in times of emergency;
- issued a media release on 15 April 2020,⁵ which set out the committee's proposed course of action regarding COVID-19 bills and legislative instruments, which was distributed via the Parliament's twitter accounts and to subscribers to the PJCHR mailing list;
- updated the committee's website, devoting a special page to outlining the committee's scrutiny of COVID-19 related bills and legislative instruments;
- wrote to civil society organisations advising them that the committee would accept submissions about a bill or legislative instrument at any time, and drew their attention to the committee's COVID-19 webpage;
- wrote to all ministers and heads of departments explaining the committee's proposed course of action regarding COVID-19 related bills and instruments, and communicated the committee's scrutiny approach, and emphasised the importance of having a detailed statement of compatibility with human rights for all COVID-19 related legislation; and
- wrote to the United Kingdom Joint Committee on Human Rights explaining the committee's approach to the scrutiny of COVID-19 related legislation.

3.8 The committee tabled a number of reports during 2020 which scrutinised COVID-19 related legislation, in particular *Report 5 of 2020*, and dedicated chapters in *Reports 6, 7 and 8 of 2020* to COVID-19 related legislation.

3.9 The committee published on its COVID-19 webpage lists of federal legislation made in response (or partly in response) to the pandemic and introduced or registered

4 Parliamentary Joint Committee on Human Rights, *Report 5 of 2020*, (29 April 2020).

5 The committee media release dated 15 April 2020, is available on its website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/COVID19_Legislative_Scrutiny

since 21 January 2020 (being a complete list of such legislation, irrespective of whether the legislation engaged human rights). The committee also published on its website correspondence received that was particularly relevant to its work in examining COVID-19 related legislation.

Commonly engaged rights

3.10 The most commonly engaged human rights identified in legislation substantively commented on during the reporting period included both civil and political rights and economic, social and cultural rights. These were, in order of most commonly engaged:

- right to privacy;⁶
- right to equality and non-discrimination;⁷
- right to health;⁸
- right to life;⁹
- right to freedom of movement;¹⁰
- right to work;¹¹
- right to freedom of expression or opinion;¹²
- criminal process rights;¹³
- right to liberty;¹⁴
- rights of persons with disabilities;¹⁵
- right to education;¹⁶

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

7 International Covenant on Civil and Political Rights, articles 2 and 26; International Covenant on Economic, Social and Cultural Rights, article 2(2).

8 International Covenant on Economic, Social and Cultural Rights, article 12.

9 International Covenant on Civil and Political Rights, article 6.

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

11 International Covenant on Economic, Social and Cultural Rights; articles 6.

12 International Covenant on Civil and Political Rights, articles 19 and 20; Convention on the Rights of Persons with Disabilities, article 21.

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

14 International Covenant on Civil and Political Rights, article 9.

15 Convention on the Rights of Persons with Disabilities.

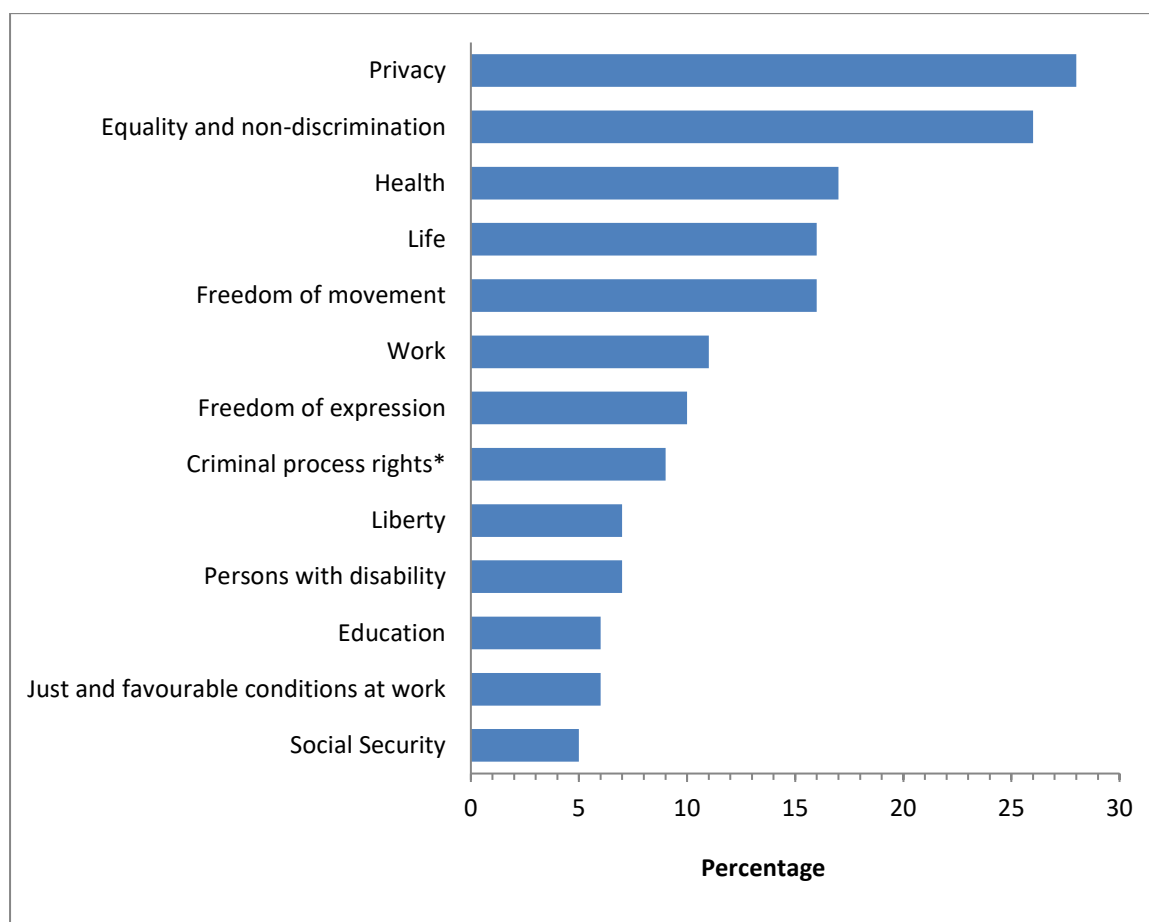
16 International Covenant on Economic, Social and Cultural Rights, articles 13 and 14; article 28 of the Convention on the Rights of the Child.

- right to just and favourable conditions at work;¹⁷
- right to social security.¹⁸

3.11 During the reporting period, the rights listed above accounted for 75 per cent of rights which the committee reported on substantively within both primary and delegated legislation. The right to privacy continued to be the most frequently considered issue on which the committee comments.

3.12 Figure 3.1 shows the breakdown of human rights engaged by the legislation which the committee examined and substantively commented on in the reporting period. These statistics show a mix between civil and political rights and economic, social and cultural rights. The rights to health, life and freedom of movement were most commonly engaged by legislation made in response to the COVID-19 pandemic.

Figure 3.1: Human rights engaged by legislation in 2020



*Criminal process rights include the right not to incriminate oneself, the right to be presumed innocent, the right to a fair trial, the prohibition against retrospective criminal laws, and the prohibition against double punishment.

17 International Covenant on Economic, Social and Cultural Rights, article 7.

18 International Covenant on Economic, Social and Cultural Rights, article 9.

Timeliness

Timeliness of committee reports

3.13 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 after tabling). In both cases, the committee's approach seeks to ensure that reports on the human rights compatibility of legislation are available to inform parliamentary deliberations.

Bills

3.14 During the reporting period, the committee concluded its consideration on the majority of bills prior to their passage. However, on some occasions, bills were passed by the Parliament before the committee could finalise its deliberations. During the reporting period, 24 out of the 252 new bills examined by the committee passed prior to (or on the same day as) the committee tabling its final report (9 per cent). This was particularly the case in relation to bills responding to the COVID-19 pandemic which often passed within a day or two of the bill being introduced.¹⁹ For three of the 24 bills that passed before the committee had published a final report, the committee had published an initial comment in advance of its passage. As the committee's initial reports generally contain a detailed human rights analysis, this means that a human rights analysis of 92 per cent of new bills was available to inform members of parliament prior to the passage of legislation.²⁰

Legislative instruments

3.15 Of the 1776 legislative instruments registered between 1 January to 31 December 2020, the committee substantively reported on two per cent of those instruments. Of those legislative instruments subject to disallowance, the committee concluded its examination of 100 per cent of these within the disallowance timeframe.²¹ The committee also examined and requested additional information

19 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. These bills were introduced into the House of Representatives on 23 March 2020 and received Royal Assent on 24 March 2020. The Privacy Amendment (Public Health Contact Information) Bill 2020 was introduced into the House of Representatives and passed both House, meaning that the committee had no time to consider these bills or comment on them before they passed.

20 For further information on the committee's scrutiny process see Chapter 2, 'The scrutiny dialogue model'.

21 The 'disallowance timeframe' is based on disallowance being available in either House of the Parliament when the committee has concluded its deliberation on the legislative instrument. Note, that legislative instruments registered between 2–31 December 2020 were considered by the committee in its first two reports of 2021.

from the minister in relation to 16 legislative instruments which were exempt from disallowance.

Timeliness of responses

3.16 The responsiveness of ministers to the committee's requests for information regarding human rights concerns is critical to the effectiveness of the scrutiny process.²² Although the committee requests a response within a specified timeframe (generally within two weeks), this request does not affect the passage of the legislation.²³

3.17 During 2020, the committee made 63 requests for additional information from ministers.²⁴ Of the requests for information, 57 responses were received during the 2020 reporting period. The remaining six responses were not received in the 2020 reporting period as the due date for these responses fell in 2021.

3.18 Of the 57 responses received by the committee in 2020, 44 responses (77 per cent) were received within the requested timeframe.²⁵

Major themes

3.19 There were four significant areas that attracted substantive comment from the committee in the reporting period, notably: the rights implications of the COVID-19 pandemic; national security measures; information sharing arrangements, particularly with foreign countries; and equality and non-discrimination, particularly as it relates to Aboriginal and Torres Strait Islander peoples.

Rights implications of the COVID-19 pandemic

3.20 The COVID-19 pandemic has required governments across the globe to introduce legislative measures seeking to contain the outbreak and respond to its multifaceted impacts. At the Commonwealth level, 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* (Biosecurity Act) to manage and respond to risks to human health caused by the

22 For further information on the committee's scrutiny process see above at Chapter 2, 'The Scrutiny Dialogue Model'.

23 In contrast, if bills are referred to a standing or select committee they cannot be considered in a committee of the whole until that committee reports, see Senate standing order 115. This does not apply to the consideration of bills by the scrutiny committees, such as the Parliamentary Joint Committee on Human Rights or the Senate Standing Committee for the Scrutiny of Bills.

24 Note some of the responses received dealt with multiple bills and legislative instruments.

25 This includes responses provided on the initial due date or where an extension had been granted.

virus.²⁶ Since then, numerous legislative instruments and bills were introduced throughout 2020 to respond to the impacts of the COVID-19 pandemic, including on 18 March 2020 a declaration from the Governor-General that a human biosecurity emergency existed.²⁷ As part of its legislative scrutiny functions, the committee resolved to report on legislation that was made in response to, or because of, the COVID-19 pandemic.²⁸ These included measures to:

- prevent cruise ships from entering Australian territory or Australian ports, unless an exemption applied to the ship;²⁹
- ban Australian citizens or permanent residents from leaving Australia, unless otherwise exempted;³⁰
- control or prevent the entry or spread of COVID-19 in designated remote communities in Australia;³¹
- specify human health response zones for the purposes of the Biosecurity Act;³² and

26 See Biosecurity (Listed Human Diseases) Amendment Determination 2020.

27 See Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020.

28 On a number of occasions, the committee provided a dedicated assessment of the human rights compatibility of legislation made in response to the COVID-19 pandemic: see e.g. Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020); *Report 6 of 2020* (20 May 2020) pp. 1–20; *Report 7 of 2020* (17 June 2020) pp. 1–30; *Report 8* (1 July 2020) pp. 2–25; *Report 9 of 2020* (1 July 2020) pp. 1–26; *Report 12 of 2020* (15 October 2020) pp. 6–13; *Report 14 of 2020* (26 November 2020) pp. 18–25, 71–81.

29 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Determination 2020; Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020 and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020. See Parliamentary Joint Committee on Human Rights, *Report 12 of 2020* (15 October 2020), pp. 6–13; *Report 14 of 2020* (26 November 2020) pp. 71–81.

30 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020. See Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020) pp. 19–21; *Report 12 of 2020* (15 October 2020), pp. 6–13; *Report 14 of 2020* (26 November 2020) pp. 71–81.

31 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020. See Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020) pp. 6–9.

32 Biosecurity (Human Health Response Zone) (Howard Springs Accommodation Village) Determination 2020 and Biosecurity (Human Health Response Zone) (Swissotel Sydney) Determination 2020. See Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020) pp. 13–18.

- introduce, extend and amend the Jobkeeper payment scheme and the COVID-19 supplement.³³

3.21 These various legislative instruments and bills engaged multiple human rights, including the rights to health, life, social security, freedom of movement, privacy and equality and non-discrimination. In many cases, these measures promoted several rights. The committee considered that measures introduced to control the entry, establishment or spread of COVID-19 and alleviate the adverse financial, social and health impacts of the pandemic would often promote the rights to health and life.³⁴ The right to life requires States parties to take positive measures to protect life.³⁵ The United Nations (UN) Human Rights Committee has stated that the duty to protect life implies that States parties should take appropriate measures to address the conditions in society that may give rise to direct threats to life, including life threatening diseases.³⁶ The right to health requires States parties to take steps to prevent, treat and control epidemic diseases.³⁷ With respect to the COVID-19 pandemic specifically, the UN Human Rights Committee has called on States to 'take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction'.³⁸

3.22 In addition, the committee considered that legislative responses to help manage the impact of the COVID-19 pandemic on jobs and the economy engaged and promoted a number of human rights, including the rights to work, an adequate standard of living and social security.³⁹ For example, the committee considered that the establishment of the JobKeeper payment (which subsidised the wages of employees of eligible businesses) and the provision of a fortnightly supplement to

33 Coronavirus Economic Response Package (Payments and Benefits) Rules 2020; Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 5) 2020; Coronavirus Economic Response Package Omnibus Bill 2020. See Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020) pp. 32–37; *Report 8 of 2020* (1 July 2020) 2–9; *Report 9 of 2020* (18 August 2020) pp. 129–140; *Report 10 of 2020* (26 August 2020) pp. 2–6; *Report 12 of 2020* (15 October 2020) pp. 27–37.

34 Right to life: International Covenant on Civil and Political Rights, article 6. Right to health: International Covenant on Economic, Social and Cultural Rights, article 12.

35 International Covenant on Civil and Political Rights, article 6.

36 See United Nations Human Rights Committee, *General Comment No. 36, Article 6 (Right to Life)* (2019) [26].

37 International Covenant on Economic, Social and Cultural Rights, article 12(2)(c).

38 UN Human Rights Committee, *Statement on derogations from the Covenant in connection with the COVID-19 pandemic* (2020) [2]. Regarding States obligations with respect to the rights to health and life generally, see UN Human Rights Committee, *General Comment No. 36, Article 6 (Right to Life)* (2019) [26].

39 See International Covenant on Economic, Social and Cultural Rights, articles 6 and 7 (work); article 11 (adequate standard of living) and article 9 (social security).

recipients of certain social security payments promoted the rights to work, social security and an adequate standard of living.⁴⁰

3.23 However, the committee acknowledged that in light of the unprecedented nature of the COVID-19 pandemic and the necessity for States to confront the threat of widespread contagion with emergency and temporary measures, such measures may also limit other human rights, such as the rights to freedom of movement, freedom of assembly, privacy and equality and non-discrimination. International human rights law recognises that reasonable limits may be placed on most rights and freedoms where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. This assessment applies even in times of emergency, noting that Australia has not officially proclaimed an intention to derogate from its human rights obligations during the pandemic.

3.24 Throughout the reporting period the committee continued to apply the usual scrutiny process in its assessment of COVID-19 related legislation, including considering any statement of compatibility and applying the usual limitation criteria. During this time, a number of the legislative instruments made in response to the COVID-19 pandemic were exempt from the parliamentary disallowance process. Exempt legislative instruments are not required to provide statements of compatibility.⁴¹ However, the committee noted on a number of occasions during the reporting period that given the human rights implications of legislative instruments dealing with the COVID-19 pandemic, it considered it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility.⁴² The committee also wrote to ministers and heads of departments to this effect.⁴³

3.25 In relation to legislation which appeared to limit human rights, the committee noted, in general, preventing the spread of COVID-19 and addressing the social, economic and health impacts of the pandemic, would be legitimate objectives for the purposes of international human rights law, and many of the measures appeared to be rationally connected to these objectives. However, in some cases, the committee raised questions as to whether the measures were proportionate. For example, in its initial analysis of the Privacy Amendment (Public Health Contact Information) Bill 2020, which introduced a number of measures designed to provide privacy protections relating to the COVIDSafe app and COVIDSafe app data, the committee raised

40 *Report 5 of 2020* (29 April 2020) pp. 32–37; *Report 8 of 2020* *Report 9 of 2020* (1 July 2020) pp. 2–9; 18 August 2020) pp. 129–140

41 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

42 See Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020) pp. 3–4; *Report 12 of 2020* (15 October 2020) p. 13; *Report 14 of 2020* (26 November 2020) p. 81.

43 See paragraph [3.7] above and the committee' media statement of 15 April 2020.

questions as to the proportionality of the measure in relation to the right to privacy. Following the provision of further information by the Attorney-General in relation to safeguards which limited access to COVIDSafe app data, and required its deletion where it was no longer required for a legally permissible purpose, the committee considered that the measure constituted a permissible limitation on the right to privacy. However, the committee recommended that three amendments be made to the Act in order to further strengthen the privacy protections.⁴⁴

3.26 Further, the committee examined legislative instruments that extended the human biosecurity emergency period and prevented cruise ships from entering Australia.⁴⁵ The committee noted that the instruments, which were designed to prevent the spread of COVID-19, promoted the rights to life and health, but may also limit the rights to a private life, freedom of movement and equality and non-discrimination. The minister advised that the instruments were developed pursuant to the advice of the Commonwealth Chief Medical Officer and/or the Australian Health Principal Protection Committee, and were no more restrictive or intrusive than is required in the circumstances. The committee also considered a directive issued by the Australian Border Force which clarified when individual exemptions from the overseas travel ban may be granted. Noting this flexibility (but also noting that much will depend on how this is applied in practice), the committee considered that while the risk of the spread of COVID-19 from travellers returning from overseas remained high, the restrictions imposed by the measures constituted a permissible limitation on the right to freedom of movement, and other rights such as the rights to a private life and family reunification.⁴⁶

3.27 In other cases, where rights-promoting measures were revoked or not extended, the committee raised questions as to whether the removal of such measures was retrogressive – a type of limitation on human rights. For example, the committee assessed instruments that removed the requirement that doctors undertaking telehealth and phone appointments bulk-bill certain patients and removed the temporary increase to the schedule fees for bulk-billing incentive items.⁴⁷

44 Parliamentary Joint Committee on Human Rights, *Report 8 of 2020* (1 July 2020) pp. 24–25.

45 Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020 and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020, *Report 14 of 2020* (26 November 2020) pp. 71–81.

46 Parliamentary Joint Committee on Human Rights, *Report 14 of 2020* (26 November 2020) pp. 80–81.

47 Parliamentary Joint Committee on Human Rights, Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2020 and Health Insurance Legislation Amendment (Bulk-billing Incentive (No. 2)) Regulations 2020, *Report 14 of 2020* (26 November 2020) pp. 18–25.

The committee noted that as the initial measures promoted the right to health, it was not clear if removing these temporary measures may be seen under international human rights law to constitute a backwards step in the realisation of the rights to health and social security and may have a disproportionate impact on certain persons.⁴⁸ During the reporting period the committee sought further information regarding these matters to assess the human rights implications of the instruments.⁴⁹

National security

3.28 The committee continued to consider a number of bills and legislative instruments in relation to national security, including the:

- Australian Security Intelligence Organisation Amendment Bill 2020;⁵⁰
- Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019;⁵¹
- Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020;⁵²
- Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020;⁵³

48 Parliamentary Joint Committee on Human Rights, *Report 14 of 2020* (26 November 2020) pp.24–25.

49 The committee concluded its examination of these instruments in Parliamentary Joint Committee on Human Rights, *Report 1 of 2021* (3 February 2021) pp. 112–122. The committee noted the legal advice that as the initial temporary measures promoted the right to health, the removal of these rights-enhancing measures may, as a technical matter, constitute a retrogressive step under international human rights law, if the effect was to reduce access to affordable health-care services for certain patients. Notwithstanding, the committee noted that these measures aligned tele-health appointments with the same bulk-billing arrangements as face-to-face appointments, and the return of the scheduled fees continue to retain the incentive for medical practitioners to provide bulk-billed services to financially disadvantaged patient groups.

50 Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020) pp. 32–68; *Report 9 of 2020* (18 August 2020) pp. 1–114.

51 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020) pp. 2–6; *Report 4 of 2020* (9 April 2020) pp. 31–39.

52 Parliamentary Joint Committee on Human Rights, *Report 11 of 2020* (24 September 2020) pp. 2–29; *Report 13 of 2020* (13 November 2020) pp. 19–62.

53 Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020) pp. 69–86; *Report 9 of 2020* (18 August 2020) pp. 147–176.

- Coronavirus Economic Response Package (Deferral of Sunsetting – ASIO Special Powers Relating to Terrorism Offences) Determination 2020;⁵⁴
- Crimes Legislation Amendment (Economic Disruption) Bill 2020;⁵⁵ and
- Australian Citizenship Amendment (Citizenship Cessation) Bill 2019.⁵⁶

3.29 Legislation relating to national security often collectively engages a large number of human rights, including the rights to life, liberty, privacy, equality and non-discrimination, fair trial and fair hearing, the protection of the family, rights of children, the prohibitions on torture and cruel, inhuman and degrading treatment or punishment and on retrospective criminal laws, and the rights to freedom of expression, association, and movement.

3.30 The bills introduced, extended or amended a number of measures relating to national security, including measures to:

- repeal and replace the Australian Security Intelligence Organisation's (ASIO) compulsory questioning framework, including:
 - amending provisions relating to questioning warrants, and abolishing question and detention warrants;⁵⁷
 - allowing for the physical apprehension of an individual in relation to a questioning warrant and allowing a subject of a questioning warrant to be questioned for a 'permitted questioning time' of up to 24 hours, or 40 hours where an interpreted is being used;⁵⁸
 - extending the compulsory questioning warrant regime to children aged between 14 and 18 years in relation to 'minor questioning matters',⁵⁹ and

54 Parliamentary Joint Committee on Human Rights, *Report 12 of 2020* (15 October 2020), pp.14–19; *Report 14 of 2020* (26 November 2020) pp. 82–91.

55 Parliamentary Joint Committee on Human Rights, *Report 11 of 2020* (14 September 2020) pp. 30–47; *Report 13 of 2020* (13 November 2020) pp. 63–90.

56 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019) pp. 2–19; *Report 1 of 2020* (5 February 2020) pp. 99–126.

57 Parliamentary Joint Committee on Human Rights, Australian Security Intelligence Organisation Amendment Bill 2020, *Report 7 of 2020* (17 June 2020) pp. 32–68; *Report 9 of 2020* (18 August 2020) pp. 1–114.

58 Parliamentary Joint Committee on Human Rights, Australian Security Intelligence Organisation Amendment Bill 2020, *Report 7 of 2020* (17 June 2020) pp. 32–68; *Report 9 of 2020* (18 August 2020) pp. 1–114.

59 Parliamentary Joint Committee on Human Rights, Australian Security Intelligence Organisation Amendment Bill 2020, *Report 7 of 2020* (17 June 2020) pp. 32–68; *Report 9 of 2020* (18 August 2020) pp. 1–114.

- expanding ASIO's surveillance powers by allowing internal ASIO authorisation to use a tracking device (or enhancement equipment) to track a person or object;⁶⁰
- extend ASIO's powers with respect to compulsory questioning warrants (without detention) and compulsory questioning warrants (which authorise detention for up to seven days);⁶¹
- prohibit the possession of certain things by detainees in immigration detention facilities and other places of detention, such as mobile phones and computers;⁶²
- establish an extended supervision order scheme for 'high-risk terrorist offenders' and restrict the subject of an application for an extended or interim supervision order from accessing evidence which may nevertheless be used against them, or from being able to appear at a hearing regarding the admissibility of such evidence;⁶³ and
- provide the minister with the discretionary power to determine that a person ceases to be an Australian citizen in certain circumstances, including where the minister is satisfied that a person has demonstrated that they have 'repudiated their allegiance to Australia' and it is contrary to the 'public interest' for the person to remain an Australian citizen.⁶⁴

3.31 These measures engaged and limited a wide range of human rights and, in some cases, had implications on the prohibitions on torture and cruel, inhuman and degrading treatment or punishment, and on retrospective criminal laws. In relation to rights that may be subject to permissible limitations, the committee noted that, in general, providing necessary powers to security and law enforcement agencies would likely constitute a legitimate objective for the purposes of human rights law. However,

60 Parliamentary Joint Committee on Human Rights, Australian Security Intelligence Organisation Amendment Bill 2020, *Report 7 of 2020* (17 June 2020) pp. 32–68; *Report 9 of 2020* (18 August 2020) pp. 1–114.

61 Parliamentary Joint Committee on Human Rights, Coronavirus Economic Response Package (Deferral of Sunsetting – ASIO Special Powers Relating to Terrorism Offences) Determination 2020, *Report 12 of 2020* (15 October 2020), pp.14–19; *Report 14 of 2020* (26 November 2020) pp. 82–91.

62 Parliamentary Joint Committee on Human Rights, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, *Report 7 of 2020* (17 June 2020) pp. 69–86; *Report 9 of 2020* (18 August 2020) pp. 147–176.

63 Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, *Report 11 of 2020* (24 September 2020) pp. 2–29; *Report 13 of 2020* (13 November 2020) pp. 19–62.

64 Parliamentary Joint Committee on Human Rights, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019, *Report 1 of 2020* (5 February 2020), pp. 99–126.

in many cases, the committee raised concerns as to whether the measures were proportionate to this objective, given the apparent breadth of some of the measures.

3.32 For example, the Australian Security Intelligence Organisation Amendment Bill 2020 sought to introduce a number of measures to amend ASIO's compulsory questioning and surveillance device powers. In general, the committee considered that the bill pursued the legitimate objectives of protecting national security interests, protecting the Australian community from national security threats, and ensuring the effectiveness of information gathering operations in relation to national security and intelligence. However, the committee expressed concern that the safeguards accompanying some of the measures may not have been sufficient in all instances and there appeared to be a risk that some measures may have impermissibly limited rights, such as the right to privacy with respect to ASIO's compulsory questioning framework, the rights of people with disability with respect to the permitted questioning time of subjects of a questioning warrant, and the privilege against self-incrimination with respect to provisions permitting the use of material from, or derived from, a questioning warrant.⁶⁵ In relation to other measures introduced in the bill, the committee concluded that, having considered additional information from the minister, these measures were likely to be compatible with the human rights raised.⁶⁶ The committee considered that the proportionality of specific measures would have been assisted if some suggested amendments were made to the bill.⁶⁷

3.33 The Australian Labor Party and Australian Greens members of the committee issued a dissenting report with respect to this bill.⁶⁸ The dissenting members disagreed with the committee's conclusion in relation to certain measures regarding their compatibility with human rights. For instance, the dissenting members considered that the provisions relating to minor questioning warrants may have engaged and impermissibly limited the rights of the child, noting the absence of sufficient safeguards and that questions remained as to whether the measure addressed a pressing and substantial concern.⁶⁹ Similar concerns were raised by the dissenting members in relation to the measures that would restrict legal representatives, introduce secrecy and disclosure provisions, and provide for internal ASIO

65 Parliamentary Joint Committee on Human Rights, *Report 9 of 2020* (18 August 2020) pp. 22–23; pp. 46–47; pp. 76–78.

66 Parliamentary Joint Committee on Human Rights, *Report 9 of 2020* (18 August 2020) pp. 26–27; pp. 53–54; pp. 69–70

67 Parliamentary Joint Committee on Human Rights, *Report 9 of 2020* (18 August 2020) pp. 22–23; pp. 46–47; pp. 53–54; pp. 69–70; pp. 89–90; pp. 99–100, p. 114.

68 Parliamentary Joint Committee on Human Rights, *Report 9 of 2020* (18 August 2020) pp. 189–200.

69 Parliamentary Joint Committee on Human Rights, *Report 9 of 2020* (18 August 2020) pp. 194–195.

authorisation for the use of tracking devices.⁷⁰ The dissenting members also proposed additional amendments to assist with the proportionality of specific measures.

3.34 In another example, the committee raised concerns that the legislative instrument that extended the operation of ASIO's existing detention warrant powers for a further six months (pending the passage of the above-mentioned bill), thereby enabling ASIO to detain a person for up to seven days for questioning, did not appear to be compatible with multiple human rights, including the right to liberty. The committee noted that there appeared to be less rights restrictive mechanisms available rather than extending the detention powers.⁷¹ While acknowledging these human rights concerns, the committee also noted that the extension of ASIO's powers was intended to be temporary until such time as the Australian Security Intelligence Organisation Amendment Bill 2020 was passed.

Information sharing

3.35 In a related and often overlapping theme, the committee considered bills which related to information sharing, including the:

- Telecommunications Legislation Amendment (International Production Orders) Bill 2020;⁷² and
- Foreign Investment Reform (Protecting Australia's National Security) Bill 2020.⁷³

3.36 These bills introduced or amended a number of measures relating to information sharing, including measures to:

- broaden the scope of materials which the Attorney-General may authorise to be provided to a foreign country, including sharing information derived from protected International Production Orders with a foreign country to investigate or prosecute an offence against the laws of that country, including those that may be punishable by the death penalty;⁷⁴ and

70 Parliamentary Joint Committee on Human Rights, *Report 9 of 2020* (18 August 2020) pp. 196–200.

71 Parliamentary Joint Committee on Human Rights, Coronavirus Economic Response Package (Deferral of Sunsetting – ASIO Special Powers Relating to Terrorism Offences) Determination 2020, *Report 14 of 2020* (26 November 2020) pp. 90–91.

72 Parliamentary Joint Committee on Human Rights, *Report 4 of 2020* (9 April 2020) pp. 9–26; *Report 7 of 2020* (17 June 2020) pp. 87–130.

73 Parliamentary Joint Committee on Human Rights, *Report 14 of 2020* (26 November 2020) pp. 2–17; *Report 1 of 2021* (3 February 2021) pp. 49–74.

74 Parliamentary Joint Committee on Human Rights, Telecommunications Legislation Amendment (International Production Orders) Bill 2020, *Report 4 of 2020* (9 April 2020) pp. 9–26; *Report 7 of 2020* (17 June 2020) pp. 87–130.

- authorise the disclosure of protected information obtained under, in accordance with or for the purposes of the *Foreign Acquisitions and Takeovers Act 1975*, including personal information, to a foreign government or entity for the purpose of assisting them to perform a function or duty, or exercise a power.⁷⁵

3.37 Legislation that provides for information sharing arrangements often engages and limits the right to privacy.⁷⁶ The right to privacy includes respect for informational privacy, including the right to respect private and confidential information, particularly the storing, use and sharing of such information.⁷⁷ It also includes the right to control the dissemination of information about one's private life. The committee noted, in general, addressing national security risks appeared to be a legitimate objective for the purposes of international human rights law. However, the committee raised questions as to whether the proposed limitation on the right to privacy was proportionate. For example, in relation to the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020, the committee raised questions as to whether the limit on the right to privacy was proportionate, noting the breadth of protected information that could be disclosed to a foreign government.⁷⁸

3.38 In addition, to the extent that there may be a risk that disclosure of protected information to a foreign government or entity could expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment, the committee raised concerns that information sharing arrangements may also engage and limit the right to life and may engage the prohibition against torture or cruel, inhuman or degrading treatment or punishment. While the committee noted the

75 Parliamentary Joint Committee on Human Rights, Foreign Investment Reform (Protecting Australia's National Security) Bill 2020, *Report 14 of 2020* (26 November 2020) pp. 2–17; *Report 1 of 2021* (3 February 2021) pp. 49–74.

76 The committee also scrutinised a number of other bills and legislative instruments that engaged and limited the right to privacy. See, eg, Parliamentary Joint Committee on Human Rights, Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019, *Report 1 of 2020* (5 February 2020); *Report 4 of 2020* (9 April 2020); Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019, *Report 1 of 2020* (5 February 2020); *Report 4 of 2020* (9 April 2020); National Commissioner for Defence and Veteran Suicide Prevention Bill 2020, *Report 11 of 2020* (24 September 2020); *Report 13 of 2020* (13 November 2020).

77 International Covenant on Civil and Political Rights, article 17. Every person should be able to ascertain which public authorities or private individuals or bodies control or may control their files and, if such files contain incorrect personal data or have been collected or processed contrary to legal provisions, every person should be able to request rectification or elimination: UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]. See also, *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

78 Parliamentary Joint Committee on Human Rights, *Report 14 of 2020* (26 November 2020) pp. 2–17; *Report 1 of 2021* (3 February 2021) pp. 49–74.

government's stated intention to act consistently with its opposition to the death penalty in relation to information sharing arrangements with foreign countries, it remained concerned that, in the absence of a legislative requirement to prohibit the sharing of personal information in circumstances that may expose a person to a real risk of the death penalty being applied, or to ill treatment, there was a risk that information sharing arrangements may not be compatible with human rights as discretionary considerations and assurances may be insufficient to meet Australia's obligations with respect to these rights. In such cases, the committee recommended that protected information must not be shared with foreign countries where there are substantial grounds for believing that there is a real risk that disclosure of information may expose a person to the death penalty or to ill-treatment.⁷⁹

Right to equality and non-discrimination

3.39 The committee considered several bills and legislative instruments involving measures which appeared to have a particular impact on certain groups in society, and so engaged the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind. 'Discrimination' encompasses a distinction based on a personal attribute (for example, race, sex, or on the basis of disability), which has either the purpose (called 'direct' discrimination) or the effect (called 'indirect' discrimination), of adversely affecting human rights.

The rights of Aboriginal and Torres Strait Islander peoples

3.40 The committee considered several bills and legislative instruments which had a particular impact on Aboriginal and Torres Strait Islander peoples, including:

- Native Title Legislation Amendment Bill 2019;⁸⁰
- National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020;⁸¹
- Native Title Amendment (Infrastructure and Public Facilities) Bill 2020;⁸²
- Social Services Legislation Amendment (Drug Testing Trial) Bill 2019;⁸³

79 Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020) p. 123; *Report 1 of 2021* (3 February 2021) p. 61.

80 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020) pp. 47–55; *Report 4 of 2020* (9 April 2020) pp. 139–148.

81 Parliamentary Joint Committee on Human Rights, *Report 3 of 2020* (26 February 2020) pp. 2–10; *Report 4 of 2020* (9 April 2020) pp. 103–121.

82 Parliamentary Joint Committee on Human Rights, *Report 13 of 2020* (13 November 2020) pp. 2–11; *Report 15 of 2020* (9 December 2020) pp. 9–26.

83 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019) pp. 54–63; *Report 1 of 2020* (5 February 2020) pp. 143–156.

- Social Security (Administration) Amendment (Income Management to Cashless Debt Card Transition) Bill 2019;⁸⁴ and
- Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020.⁸⁵

3.41 These bills and legislative instruments introduced, amended or extended measures to:

- provide for a two-year trial of mandatory drug testing for new recipients of Newstart Allowance and Youth Allowance in certain geographical locations;⁸⁶
- specify the site of Napandee, South Australia, as the site on which nuclear waste would be stored, and in so doing, extinguished native title rights at this specified site, and allowed additional land to be compulsorily acquired, which could lead to all rights and interests in that land, including native title, being extinguished;⁸⁷
- extend the operation of the future acts regime in the *Native Title Act 1993* for a further 10 years;⁸⁸
- extend the cashless welfare trials in Ceduna, East Kimberly, the Goldfields and the Bundaberg and Hervey Bay region and establish the Northern Territory and Cape York areas as cashless debit card trial areas and establish the Cashless Debit Card scheme as a permanent measure.⁸⁹

3.42 The committee noted that these bills and legislative instruments often engaged and limited the right to equality and non-discrimination. Some of the measures had a disproportionate impact on Aboriginal and Torres Strait Islander peoples, for example, measures relating to the cashless welfare scheme had a

84 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019) pp. 39–53; *Report 1 of 2020* (5 February 2020) pp. 132–142.

85 Parliamentary Joint Committee on Human Rights, *Report 14 of 2020* (26 November 2020) pp. 38–54; *Report 1 of 2021* (3 February 2021) pp. 83–102.

86 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Drug Testing Trial) Bill 2019, *Report 6 of 2019* (5 December 2019) pp. 54–63; *Report 1 of 2020* (5 February 2020) pp. 143–156.

87 Parliamentary Joint Committee on Human Rights, National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020, *Report 3 of 2020* (26 February 2020) pp. 2–10; *Report 4 of 2020* (9 April 2020) pp. 103–121.

88 Parliamentary Joint Committee on Human Rights, Native Title Amendment (Infrastructure and Public Facilities) Bill 2020, *Report 13 of 2020* (13 November 2020) pp. 2–11; *Report 15 of 2020* (9 December 2020) pp. 9–26.

89 Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020, *Report 14 of 2020* (26 November 2020) pp. 38–54; *Report 1 of 2021* (3 February 2021) pp. 83–102.

disproportionate impact on Aboriginal and Torres Strait Islander peoples notwithstanding that the scheme is not applied on the basis of race or cultural factors.⁹⁰ For the purposes of international human rights law, where a measure has a disproportionate impact on a particular group, this may constitute indirect discrimination.⁹¹ In other cases, measures explicitly treated Aboriginal and Torres Strait Islander peoples differently from other people or groups in society, for example, amendments to native title legislation and measures affecting native title rights and interests. Differential treatment on the grounds of a protected attribute, such as race, may not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

3.43 These bills and legislative instruments also often engaged and limited the rights to self-determination and culture. The right to self-determination includes 'the rights of all peoples to pursue freely their economic, social and cultural development without outside interference'.⁹² As part of its obligations in relation to respecting the right to self-determination, Australia has an obligation under customary international law to consult with indigenous peoples in relation to actions which may affect them.⁹³ A related requirement is that of indigenous peoples' 'free, prior and informed consent' in relation to decisions that may affect them.⁹⁴ The right to culture provides that all

90 See, eg, Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020, *Report 14 of 2020* (26 November 2020) pp. 38–54; *Report 1 of 2021* (3 February 2021) pp. 83–102.

91 *D.H. and Others v the Czech Republic*, European Court of Human Rights (Grand Chamber), Application no. 57325/00 (2007) [49]; *Hoogendijk v the Netherlands*, European Court of Human Rights, Application no. 58641/00 (2005).

92 International Covenant on Civil and Political Rights, article 1; and the International Covenant on Economic, Social and Cultural Rights, article 1. See United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation 21 on the right to self-determination* (1996).

93 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp.122–123. The United Nations Human Rights Council has recently provided guidance on the right to be consulted, as part of its Expert Mechanism on the Rights of Indigenous Peoples, stating that 'states' obligations to consult with indigenous peoples should consist of a qualitative process of dialogue and negotiation, with consent as the objective' and that consultation does not entail 'a single moment or action but a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up': United Nations Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [15]–[16].

94 See United Nations Declaration on the Rights of Indigenous Peoples, article 19.

people have the right to benefit from and take part in cultural life.⁹⁵ In the context of indigenous peoples, the right to culture includes the right for Indigenous people to use land resources, including through traditional activities such as hunting and fishing, and to live on their traditional lands.⁹⁶ In applying these rights and the related principle of free, prior and informed consent, the committee has considered the United Nations Declaration on the Rights of Indigenous Peoples. While this Declaration is not included in the definition of 'human rights' that this committee is specifically required to consider under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Declaration provides clarification as to how human rights standards under international law, including under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights apply to the particular situation of indigenous peoples.⁹⁷

3.44 For example, the committee considered that the Native Title Amendment (Infrastructure and Public Facilities) Bill 2020, which extended the operation of the future acts regime, thereby permitting the construction of public housing and other infrastructure on Indigenous held land, promoted the rights to an adequate standard of living, education and health by facilitating the timely provision of public housing and other public infrastructure on Indigenous held land. However, the committee also noted that by permitting the development of such infrastructure on native title land without requiring the consent of native title holders and registered claimants, the rights to equality and non-discrimination, self-determination and culture appeared to be limited. In assessing these limitations, the committee considered that the bill pursued a legitimate objective but remained concerned that the consultation process contained in the bill may not be effective and meaningful in practice, noting that the consultation process appeared to lack several constituent elements of free, prior and informed consent for the purposes of international human rights law. The committee considered that the proportionality of the measure would be assisted if certain amendments were made to the *Native Title Act 1993*, or alternatively, the period of

95 International Covenant on Economic, Social and Cultural Rights, article 15; and International Covenant on Civil and Political Rights, article 27. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 21: article 15 (right of everyone to take part in cultural life)* (2009). The committee explains, at [6], that the right requires from a State party both abstention (including non-interference with the exercise of cultural practices) and positive action (including ensuring preconditions for participation, facilitation and promotion of cultural life).

96 See, *Käkkäläjärvi et al. v Finland*, UN Human Rights Committee Communication No.2950/2017 (2 November 2018) [9.8]–[9.10].

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

time during which the future acts regime is to operate was reduced and the use and effectiveness of the regime reviewed.⁹⁸

3.45 The committee also raised concerns regarding limits on the rights to culture and self-determination with respect to the National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020.⁹⁹ The committee noted that in assessing these limits, it is necessary to consider the extent to which relevant groups have been consulted, which should consist of a qualitative process of dialogue and negotiation, with consent as the objective. The committee considered that in light of the stated opposition of the Barnjarla peoples to the specification of Napandee as the site for the establishment of a radioactive waste facility, and the potential impact on Indigenous cultural heritage, there was a significant risk that the measures did not fully protect the rights to culture and self-determination.

Other groups with protected attributes

3.46 The committee also considered legislative instruments which engaged the rights of other people with protected attributes, including:

- Disability Discrimination Regulations 2019 with respect to people with disability;¹⁰⁰ and
- Age Discrimination Regulations 2020 with respect to older persons.¹⁰¹

3.47 These legislative instruments prescribed exemptions from the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*, and in doing so, had the effect of permitting differential treatment of persons on the grounds of age or disability. The committee noted that these instruments engaged and limited the right to equality and non-discrimination as well as other human rights, including the right to work and the rights of people with disability. In general, the committee noted that the instruments appeared to pursue a legitimate objective but was concerned that the measures were not a proportionate means of achieving the stated objective. For example, in relation to the Age Discrimination Regulations 2020, which exempted provisions of the Defence Regulations 2016, thereby permitting a mandatory retirement age for members of the Australian Defence Force, the committee noted that there appeared to be a less rights restrictive way to achieve the objective of

98 Parliamentary Joint Committee on Human Rights, *Report 13 of 2020* (13 November 2020) pp. 2–11; *Report 15 of 2020* (9 December 2020) pp. 9–26.

99 Parliamentary Joint Committee on Human Rights, *Report 3 of 2020* (26 February 2020) pp. 2–10; *Report 4 of 2020* (9 April 2020) pp. 103–121.

100 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019) pp. 24–38; *Report 2 of 2020* (12 February 2020) pp. 11–26.

101 Parliamentary Joint Committee on Human Rights, *Report 12 of 2020* (15 October 2020) pp. 2–5; *Report 14 of 2020* (26 November 2020) pp. 59–70.

ensuring all members are fit for duty. As such, the committee considered that questions remained as to whether the measure constituted a proportionate limit on the right to equality and non-discrimination.¹⁰² Similarly, in relation to the Disability Discrimination Regulations 2019, the committee was concerned that it had not been demonstrated that each of the prescribed exemptions to the *Disability Discrimination Act 1992* were proportionate. In particular, the committee considered that it was not clear that providing a blanket exemption to the prescribed acts was the least rights restrictive way of achieving the stated objectives, or that there were sufficient safeguards in place.¹⁰³

Committee impact

3.48 The full impact of the committee's work can be difficult to quantify, as it is likely that the committee has an unseen influence in relation to the development of legislation before its introduction into the Parliament and on consideration of future legislation. During the reporting period, there was specific evidence that the committee continues to have an impact in relation to the consideration of human rights in the legislation making process. One measure of the committee's impact relates to the use of its reports. In this respect, during the reporting period, there was evidence of the committee's reports being considered and drawn on in Parliament and beyond. For example, on a number of occasions, an addendum to the explanatory memorandum was tabled in Parliament to address specific concerns raised by the committee in its reports.¹⁰⁴

3.49 A clear example of the committee's dialogue model in action is the committee's consideration of the National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020.¹⁰⁵ In its initial assessment, the committee noted that the bill would enable additional land to be acquired to allow for the expansion of the proposed radioactive waste management site or to provide all-weather access to the site. The committee raised concerns that as the site may have cultural significance for Aboriginal or Torres Strait

102 Parliamentary Joint Committee on Human Rights, *Report 14 of 2020* (26 November 2020) pp. 69–70.

103 Parliamentary Joint Committee on Human Rights, *Report 2 of 2020* (12 February 2020) pp. 25–26.

104 See, e.g., National Vocational Education and Training Regulator Amendment (Governance and Other Matters) Bill 2020, Addendum to explanatory memorandum (which addressed comments in Parliamentary Joint Committee on Human Rights, *Report 4 of 2020* (6 October 2020); Tertiary Education Quality and Standards Agency Amendment (Prohibiting Academic Cheating Services) Bill 2019, Addendum to explanatory memorandum (which addressed comments in Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (6 October 2020)).

105 Parliamentary Joint Committee on Human Rights, *Report 3 of 2020* (26 February 2020) pp. 2–10; *Report 4 of 2020* (9 April 2020) pp. 103–121.

Islander peoples and as native title rights or interests may be extinguished by these provisions, the bill appeared to engage and may limit the rights to culture, self-determination and equality and non-discrimination. In its concluding assessment, the committee welcomed the minister's assurance that the government did not intend to extinguish native title rights or interests in the process of developing the radioactive waste facility. Accordingly, the committee considered that it would be appropriate for the bill to be amended to make clear that native title cannot be extinguished by the provisions. The committee's comments on this bill attracted some media attention.¹⁰⁶

3.50 In subsequent parliamentary debates on 11 June 2020, the Minister for Resources, Water and Northern Australia cited the committee's comments in relation to this bill and progressed amendments to the bill in accordance with the committee's recommendation. The minister stated:

Following feedback from the Parliamentary Joint Committee on Human Rights, it is acknowledged it could be clearer on the face of the legislation that these rights would not be compulsorily acquired. As a result, I am progressing amendments [to section 19B of the bill] which put beyond doubt that native title rights or interests cannot be acquired or extinguished if additional land is required for the purpose of providing all-weather road access to the facility. It will remain possible for the minister's instrument to specify other rights or interests that are not required to be acquired or extinguished.¹⁰⁷

3.51 Further, the committee's consideration of the Australian Security Intelligence Organisation Amendment Bill 2020 is another example of the committee's impact on legislative development. This bill proposed various amendments to ASIO's compulsory questioning and surveillance device powers. The committee undertook a comprehensive analysis of the various measures in the bill in its scrutiny *Reports 7 and 9 of 2021*.¹⁰⁸ The committee considered that amendments to the bill would assist with the proportionality of specific measures, and made recommendations to that effect.¹⁰⁹

106 See, eg, Gabriella Marchant, 'Nuclear waste law could extinguish native title without owners' consent, Senate committee says', *ABC*, 27 February 2020, <https://www.abc.net.au/news/2020-02-27/kimba-nuclear-facility-threat-to-native-title-committee-says/12007246>; Gabriella Marchant, 'Kimba nuclear waste dump law risks breaching Indigenous human rights, committee finds', *ABC*, 16 April 2020, <https://www.abc.net.au/news/2020-04-16/risk-kimba-nuclear-dump-may-breach-human-rights-committee-says/12154474>.

107 The Hon. Keith Pitt MP, Minister for Resources, Water and Northern Australia, *House of Representatives Hansard*, 11 June 2020, p. 3901. Three government amendments were agreed to on 11 June 2020 in the House of Representatives: see Government Sheet SV107.

108 Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020) pp. 32–68; *Report 9 of 2020* (18 August 2020) pp. 1–114.

109 Parliamentary Joint Committee on Human Rights, *Report 9 of 2020* (18 August 2020) pp. 22–23; pp. 46–47; pp. 53–54; pp. 69–70; pp. 89–90; pp. 99–100, p. 114.

Some of these recommendations were reflected in the Parliamentary Joint Committee on Intelligence and Security's report on this bill¹¹⁰ and amendments were subsequently made to the bill and the statement of compatibility was revised. For example, the bill sought to extend the compulsory questioning regime to children aged 14 years and over. The Parliamentary Joint Committee on Human Rights recommended that safeguards with respect to the conduct of any such questioning be strengthened, noting the special rights which apply to children under international human rights law. In particular, the committee recommended that in deciding whether to issue a questioning warrant in relation to a child, the Attorney-General must consider their best interests as a primary consideration. This recommendation is now reflected in the Act, which requires the Attorney-General to consider the best interests of the person as a primary consideration when deciding whether to issue a warrant in relation to a person who is at least 14 years old.¹¹¹ In addition, some of the committee's other concerns in relation to ASIO's compulsory questioning scheme were addressed in the subsequent Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020.¹¹² This instrument sets out the procedures to be followed in the exercise of authority under an ASIO compulsory questioning warrant, including allowing for adjustments for questioning for persons with known vulnerabilities.¹¹³ In its assessment of this instrument, the committee noted that the instrument addressed specific concerns raised by the committee in its earlier consideration of the bill, including in relation to questioning conditions, and additional safeguards for warrant subjects with disability.¹¹⁴

Dr Anne Webster MP

Chair

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- 110 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020*, December 2020, see list of recommendations pp. xiii–xiv, particularly recommendations 1 and 2.
- 111 *Australian Security Intelligence Organisation Act 1979*, subsections 34BB(2)–(4). See also Revised statement of compatibility, pp. 24–25.
- 112 Registered on the Federal Register of Legislation on 24 December 2020 as F2020L01714.
- 113 The instrument is made pursuant to section 34AF of the *Australian Security Intelligence Organisation Act 1979*.
- 114 Parliamentary Joint Committee on Human Rights, *Report 2 of 2021* (24 February 2021) pp. 51–53.