

Chapter 3

Work of the committee in 2021

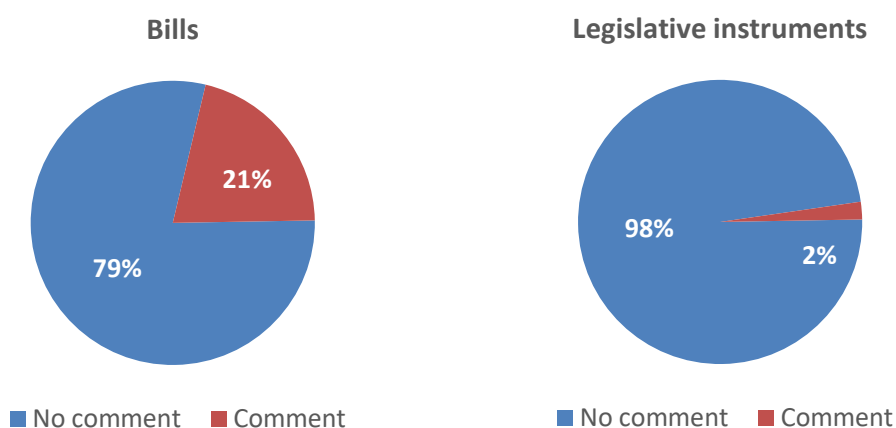
3.1 This chapter provides information about the work of the committee during 2021,¹ including statistics, major themes arising from the legislation examined, and information as to the committee's impact during the reporting period.

Legislation considered

3.2 During the reporting period, the committee assessed legislation for its compatibility with Australia's international human rights obligations including:

- a total of 223 bills.² Of these bills, the committee did not comment on 76 per cent (176); commented on 10 per cent (23) to draw Parliament's attention to the bill but did not require a response; and sought ministerial advice on 11 per cent (24) of the bills; and
- a total of 1769 legislative instruments. Of these legislative instruments, the committee did not comment on 98 per cent (1732); commented on 0.5 per cent (9) to draw Parliament's attention to the legislative instruments but did not require a response; and sought ministerial advice on 1.5 per cent (28) of the legislative instruments.

Table 3.1: Legislation considered during the reporting period



1 The reporting period covers 1 January 2021 to 31 December 2021. The committee's first scrutiny report of the reporting period, *Report 1 of 2020*, was tabled on 3 February 2021 and its final scrutiny report of 2021, *Report 15 of 2021*, was tabled on 8 December 2021.

2 The committee determined that the Religious Discrimination Bill 2021, Religious Discrimination (Consequential Amendments) Bill 2021 and Human Rights Legislation Amendment Bill 2021 referred by the Attorney-General would be considered as part of its inquiry into the Religious Discrimination Bill 2021 and related bills to report by 4 March 2022.

Reports tabled during the period

3.3 The committee tabled fifteen scrutiny reports during the reporting period, from *Report 1 of 2021* to *Report 15 of 2021*.³

3.4 The committee also tabled its [Annual Report 2020](#) on 13 May 2021, and its inquiry report [ParentsNext: examination of Social Security \(Parenting payment participation requirements—class of persons\) Instrument 2021](#) on 4 August 2021.

Impact of COVID-19 during 2021

3.5 During 2021 the committee met via teleconference on several occasions, partly as a result of disruptions caused by lockdowns as a result of the COVID-19 pandemic, and reported out of session in both Houses to ensure the timeliness of its scrutiny reports.

3.6 The committee continued during 2021 to publish on its COVID-19 webpage lists of federal legislation made in response (or partly in response) to the pandemic and introduced or registered from 21 January 2020 (being a complete list of such legislation, irrespective of whether the legislation engaged human rights).

3.7 The rights implications of the COVID-19 pandemic continued to be a major theme that attracted substantive comment from the committee during this reporting period (see further below at paragraph [3.25] onwards).

Commonly engaged rights

3.8 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, the:

- right to privacy;⁴
- right to equality and non-discrimination;⁵
- rights of the child;⁶
- right to freedom of movement;⁷
- criminal process rights;⁸

3 The committee's scrutiny reports are available on its [webpage](#).

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

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

6 Convention on the Rights of the Child.

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

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

- right to health;⁹
- right to social security;¹⁰
- right to life;¹¹
- right to liberty;¹²
- right to freedom of expression or opinion;¹³
- rights of persons with disabilities;¹⁴
- right to adequate standard of living;¹⁵ and
- right to work.¹⁶

3.9 During the reporting period, the rights listed above accounted for 83 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. As in the previous reporting year, the rights to health, life and freedom of movement were most commonly engaged by legislation made in response to the COVID-19 pandemic.

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

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

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

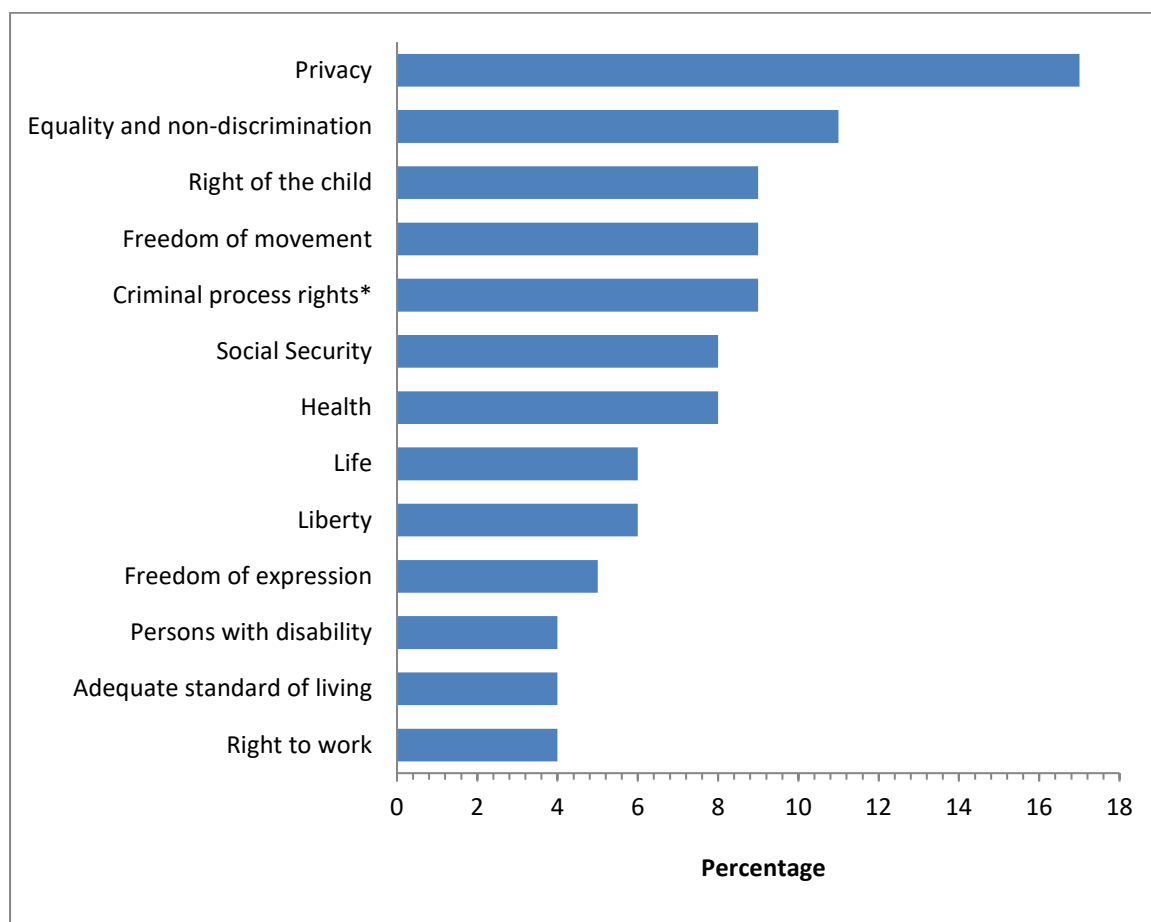
12 International Covenant on Civil and Political Rights, article 9.

13 International Covenant on Civil and Political Rights, articles 19 and 20.

14 Convention on the Rights of Persons with Disabilities.

15 International Covenant on Economic, Social and Cultural Rights, article 11.

16 International Covenant on Economic, Social and Cultural Rights, article 6.

Figure 3.1: Human rights engaged by legislation in 2021

*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.

Timeliness

Timeliness of committee reports

3.10 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

During this reporting period, the committee concluded its consideration on the vast majority of bills prior to their passage. However, on some occasions, bills were passed

by the Parliament before the committee could finalise its deliberations.¹⁷ During the reporting period, 9 per cent of bills passed prior to (or on the same day) the committee tabled its final report (20 out of 223). However, for twelve of the 20 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 96 per cent of new bills was available to inform members of parliament prior to the passage of legislation.¹⁸

Legislative instruments

3.11 Of the 1769 legislative instruments assessed by the committee during this reporting period, the committee substantively reported on two per cent of those instruments.¹⁹ Of those instruments subject to disallowance, the committee concluded its examination of 100 per cent of these legislative instruments within the disallowance timeframe.

Timeliness of responses

3.12 The responsiveness of ministers to the committee's requests for information regarding human rights concerns is critical to the effectiveness of the scrutiny process.²⁰ Although the committee requests a response within a specified timeframe (generally within two weeks), this request does not affect the passage of the legislation.²¹

17 In some instances where this occurred, the committee noted with concern that the short timeframe within which a bill was passed did not provide the committee with adequate time to scrutinise the legislation and seek further information in order to provide appropriate advice to Parliament as to the human rights compatibility of the bill. For example, the Electoral Legislation Amendment (Party Registration Integrity Bill) 2021 passed both Houses of Parliament four sitting days after its introduction, and one day after the committee reported that it required further information to complete its human rights scrutiny of the legislation. See *Report 12 of 2021*, pp. 59–59. See also *Report 11 of 2021*, Foreign Intelligence Legislation Amendment Bill 2021, pp. 37–38, which passed both Houses of Parliament one sitting day after its introduction before the committee had an opportunity to scrutinise the legislation.

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

19 *Report 1 to 15 of 2021* reported on legislative instruments registered between 7 December 2020 to 13 November 2021.

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

21 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.

3.13 During 2021, the committee made 52 requests for additional information from ministers.²² Of the requests for information, 49 responses were received during the 2021 reporting period. The remaining three responses were not received in the 2021 reporting period as the due date for these responses fell in 2022.

3.14 Of the 49 responses received by the committee in 2021, 37 responses (76 per cent) were received within the requested timeframe.

Inquiries

Inquiry into ParentsNext Program

3.15 The Social Security (Parenting payment participation requirements – class of persons) Instrument 2021 (the instrument) came into force on 1 July 2021. This instrument specifies the class of persons subject to compulsory participation in the ParentsNext program and merges two existing streams as to how the program is delivered to people into one stream. Participation in the program is mandatory and a failure to meet the obligations under the program can result in the suspension or cancellation of Parenting Payments (thereby engaging the rights to social security, an adequate standard of living, equality and non-discrimination, private life, and the rights of the child).

3.16 The committee tabled its initial consideration of this instrument in its *Report 2 of 2021* on 24 February 2021, seeking a response from the minister.²³ The minister provided the committee with further information on 11 March 2021. Following receipt of this information the committee resolved to undertake a short, targeted inquiry into the instrument as part of its function of examining legislative instruments for compatibility with human rights.²⁴

3.17 The committee held a one-day public hearing, taking evidence from a range of community organisations, peak bodies, academics and the Department of Education, Skills and Employment. In addition, the committee received 38 public submissions, and considered a number of pieces of additional information.

3.18 On 11 May 2021, Senator Dodson placed a protective notice of motion to disallow the instrument on behalf of the committee. This extended the period by which the instrument was subject to disallowance by a further 15 sitting days (to 11 August 2021).

3.19 The committee tabled its inquiry report on 4 August 2021, recommending that the ParentsNext program be made voluntary and stating:

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

23 Parliamentary Joint Committee on Human Rights, *Report 2 of 2021* (24 February 2021) pp. 58–66.

24 All documents and information associated with this inquiry are available on the committee's inquiry [webpage](#).

The committee considers that there is a risk that, for a cohort of ParentsNext participants, compulsory participation in ParentsNext as a condition for qualifying for parenting payment, and consequent financial sanctions, may mean they are unable to meet their basic needs in practice. The committee considers that...there is considerable risk that this would constitute an impermissible limitation on the rights to social security and an adequate standard of living.²⁵

3.20 In addition, members of the committee from the Australian Labor Party tabled additional comments recommending that participation in ParentsNext be voluntary, and that sections 4 and 6 of the instrument be disallowed (with the effect that ParentsNext would no longer be compulsory to receive parenting payment).²⁶

3.21 On completion of the inquiry the committee resolved to withdraw the notice of disallowance. Senator Dodson gave notice of his intention to withdraw the notice (on the committee's behalf), and then requested the disallowance notice stand in his name (in his personal capacity) (see paragraph [3.59] to [3.64] below for further detail).

Inquiry into the Religious Discrimination Bill 2021 and related bills

3.22 On 26 November 2021, pursuant to section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2001*, the Attorney-General referred to the committee the Religious Discrimination Bill 2021; the Religious Discrimination (Consequential Amendments) Bill 2021 and the Human Rights Legislation Amendment Bill 2021 for inquiry and report by 4 February 2022.

3.23 During this reporting period, the committee wrote to stakeholders inviting them to make submissions and developed an online survey to allow members of the public to fully express their views on the religious discrimination legislative package. Submissions for this inquiry and the survey closed on 21 December 2021. The committee held the first of three public hearings in Canberra on 21 December 2021. The inquiry continued in 2022.²⁷

Major themes

3.24 There were four significant areas that attracted substantive comment from the committee in the reporting period, notably: the rights implications of the

25 Parliamentary Joint Committee on Human Rights, *Inquiry report ParentsNext: examination of Social Security (Parenting payment participation requirements—class of persons) Instrument 2021*, (4 August 2021) p. 111.

26 The Australian Greens member also tabled additional comments which included additional recommendations to the committee's recommendations.

27 All documents and information associated with this inquiry are available on the inquiry [webpage](#).

COVID-19 pandemic; migration; social security measures; and national security measures.

Rights implications of the COVID-19 pandemic

3.25 During the reporting period, the government continued to introduce legislative measures that sought to contain the outbreak and spread of COVID-19 and respond to its multifaceted impacts. As part of its legislative scrutiny functions, the committee reported on legislation that was made in response to, or because of, the COVID-19 pandemic.

3.26 Since the Director of Human Biosecurity added COVID-19 to the list of human diseases in 2020, numerous measures have been taken under the *Biosecurity Act 2015* (Biosecurity Act) to manage and respond to the risks caused by COVID-19 to human health.²⁸ In this reporting period, these included measures to:

- extend the human biosecurity emergency period for three months at a time, the effect being the extension of any emergency requirements or directions determined under the Biosecurity Act, such as restrictions on cruise ships entering Australian territory or ports, a ban on Australian citizens or permanent residents leaving Australia (unless otherwise exempted), and mandatory pre-departure COVID-19 testing and mask wearing for passengers and aircrew travelling on an international flight to Australia;²⁹
- remove the automatic exemption from the overseas travel ban for Australian citizens and permanent residents ordinarily resident in a country other than Australia;³⁰

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

29 Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 [F2021L00727] and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 3) Instrument 2021 [F2021L01232], *Report 8 of 2021* (23 June 2021) pp 2–12; *Report 9 of 2021* (4 August 2021) pp. 2–10; *Report 12 of 2021* (20 October 2021), pp. 79–96.

30 This had the effect that Australian citizens or permanent residents who ordinarily resided overseas and returned to Australia to visit were unable to rely on an automatic exemption to leave Australia again and instead had to apply for an exemption, demonstrating a compelling reason to leave Australia. See Parliamentary Joint Committee on Human Rights, Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021 [F2021L01068], *Report 10 of 2021* (25 August 2021), pp. 36–41; *Report 12 of 2021* (20 October 2021), pp. 97–104.

- temporarily require a person who was an international air passenger not to enter Australia if they had been in India within 14 days before the day the flight was scheduled to commence;³¹
- require certain individuals who are entering Australia to provide a written statement declaring their COVID-19 vaccination status;³² and
- provide an exemption from the overseas travel ban for persons who have completed a course of a COVID-19 vaccination at least seven days prior to travelling and can show evidence of this vaccination status.³³

3.27 The committee also considered proposed amendments to the Biosecurity Act itself, including amendments to allow a chief human biosecurity officer or a human biosecurity officer to make a human biosecurity group direction.³⁴

3.28 In addition to the above biosecurity-related measures, the committee considered numerous other legislative measures that were made in response to the COVID-19 pandemic, including measures to:

- require the mandatory reporting of COVID-19 vaccinations on the Australian Immunisations Register;³⁵
- extend two temporary JobKeeper flexibilities to businesses significantly impacted by the COVID-19 pandemic;³⁶ and

31 Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 [F2021L00533], *Report 6 of 2021* (13 May 2021) pp. 2–7; *Report 8 of 2021* (23 June 2021) pp. 39–47.

32 Parliamentary Joint Committee on Human Rights, Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2021 [F2021L01484], *Report 14 of 2021* (24 November 2021), pp. 9–13.

33 Parliamentary Joint Committee on Human Rights, Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 2) Determination 2021 [F2021L01463], *Report 13 of 2021* (10 November 2021), pp. 22–26; *Report 15 of 2021* (8 December 2021), pp. 37–47.

34 Parliamentary Joint Committee on Human Rights, Biosecurity Amendment (Enhanced Risk Management) Bill 2021, *Report 11 of 2021* (16 September 2021), pp. 7–17; *Report 12 of 2020* (20 October 2021) pp. 9–27.

35 Parliamentary Joint Committee on Human Rights, Australian Immunisation Register Amendment (Reporting) Bill 2020 and Australian Immunisation Register Amendment (Reporting) Rules 2021 [F2021L00133], *Report 1 of 2021* (3 February 2021) pp. 2–6; *Report 4 of 2021* (31 March 2021) pp. 7–14.

36 Parliamentary Joint Committee on Human Rights, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, *Report 2 of 2021* (24 February 2021) pp. 19–50; *Report 4 of 2021* (31 March 2021) pp. 47–88.

- provide for the payment of the COVID-19 supplement for recipients of certain social security payments.³⁷

3.29 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.³⁸ The right to life requires States parties to take positive measures to protect life.³⁹ 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.⁴⁰ The right to health requires States parties to take steps to prevent, treat and control epidemic diseases.⁴¹ 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'.⁴²

3.30 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.⁴³ For example, the committee considered that, taken alone, making available a COVID-19 supplement to recipients of certain social

37 Parliamentary Joint Committee on Human Rights, Social Security (Coronavirus Economic Response—2020 Measures No. 16 Determination 2020 [F2020L01671], *Report 2 of 2021* (24 February 2021) pp. 54–57.

38 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.

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

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

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

42 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].

43 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).

security payments for a period of three months, promoted the rights to social security and an adequate standard of living.⁴⁴

3.31 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.

3.32 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.⁴⁵ However, the committee noted on a number of occasions during this 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.⁴⁶

3.33 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

44 Parliamentary Joint Committee on Human Rights, Social Security (Coronavirus Economic Response—2020 Measures No. 16) Determination 2020 [F2020L01671], *Report 2 of 2021* (24 February 2021) pp. 54–57.

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

46 See e.g. Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 [F2021L00533], *Report 6 of 2021* (13 May 2021) pp. 2–7; *Report 8 of 2021* (23 June 2021) pp. 39–47. The committee first stated this in Parliamentary Joint Committee on Human Rights, *Report 5 of 2020: Human rights scrutiny of COVID-19 legislation*, 29 April 2020. Additionally, early in the COVID-19 pandemic, the committee wrote to all ministers advising them of the importance of having a detailed statement of compatibility with human rights for all COVID-19 related legislation (see media statement of 15 April 2020, available on the committee's [webpage](#)).

raised questions as to whether the measures were proportionate. For example, the committee raised questions regarding proportionality in relation to the determination that made it a temporary requirement for international air passengers not to enter Australia if they had been in India within 14 days before the day the flight was scheduled to commence. The committee considered that while the time limited nature of the measure assisted with its proportionality (noting it was repealed 12 days after its entry into force), questions remained as to whether the measure was proportionate to the objective sought to be achieved. The committee noted there were extremely limited exceptions to the application of the direction, no procedure whereby an individual could apply for an exemption, and no information provided as to whether persons of Indian descent were disproportionately affected.⁴⁷

3.34 Further, the committee examined legislative instruments that extended the human biosecurity emergency period and consequently extended any emergency requirements or directions made under the Biosecurity Act, such as the ban on Australian citizens and permanent residents travelling overseas unless otherwise exempted.⁴⁸ 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 have limited the rights to a private life, freedom of movement and equality and non-discrimination. The committee considered that questions remained as to whether all aspects of the measures were proportionate. The committee noted that the time limited nature of each extension and the existence of some important safeguards assisted with proportionality. However, the committee also noted the risk that the longer the emergency period and the consequent emergency powers were extended (noting that by October 2021 it had been extended six times throughout 2020 and 2021), the less likely it was to be considered a temporary measure and the more likely it was to constitute a significant interference with rights. This was particularly so in relation to the overseas travel ban, as this measure considerably interfered with human rights. Regarding the last extension assessed by the committee during the reporting period (which extended the biosecurity period and consequently the travel ban until 17 December 2021), the committee considered that in the absence of sufficient safeguards, there was a risk that the measure may have disproportionately limited the rights to freedom of movement and a private life for those denied the right

47 Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 [F2021L00533], *Report 6 of 2021* (13 May 2021) pp. 2–7; *Report 8 of 2021* (23 June 2021) pp. 39–47.

48 Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 [F2021L00727] and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 3) Instrument 2021 [F2021L01232], *Report 8 of 2021* (23 June 2021) pp 2–12; *Report 9 of 2021* (4 August 2021) pp. 2–10; *Report 12 of 2021* (20 October 2021), pp. 79–96.

to leave Australia. The committee further noted that if the measure were to disproportionately affect certain nationalities, it may have impermissibly limited the right to equality and non-discrimination.⁴⁹

3.35 In other cases, where rights-promoting measures were revoked or not extended in full, 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 considered an instrument that made available a temporary monetary supplement to recipients of certain social security payments.⁵⁰ Insofar as this instrument provided for the continued payment of a COVID-19 supplement that otherwise would have ceased to operate, taken alone, the committee considered it promoted the rights to social security and an adequate standard of living. However, noting the supplement was \$100 less than the previous COVID-19 supplement, the effect being that recipients of the supplement received a reduced rate of social security, the committee raised questions as to whether this may constitute a retrogressive measure (namely, a backwards step in the realisation of the rights to social security and an adequate standard of living). As it was not entirely clear as a matter of international human rights law if the continued operation of the COVID-19 supplement, albeit at a reduced rate, was a retrogressive measure, the committee made no conclusion on this matter but drew the advice to the attention of the minister and the Parliament.

Migration

3.36 During this reporting period the committee considered numerous bills and legislative instruments that introduced, extended or amended various measures relating to migration, including measures to:

- clarify that the power to remove an unlawful non-citizen does not require or authorise an officer to remove a person where there has been a protection finding in relation to that person – the effect of which would be to subject some detainees to indefinite immigration detention; and introduce provisions to ensure that protection obligations are always assessed, including before the

49 See Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021 [F2021L00727] and Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 3) Instrument 2021 [F2021L01232], *Report 12 of 2021* (20 October 2021), pp. 79–96.

50 Parliamentary Joint Committee on Human Rights, Social Security (Coronavirus Economic Response–2020 Measures No. 16) Determination 2020 [F2020L01671], *Report 2 of 2021* (24 February 2021) pp. 54–57.

- minister considers whether the person meets other criteria for the grant of a protection visa;⁵¹
- give the minister a discretionary power to cancel or refuse a visa where the non-citizen has been convicted of a 'designated offence' (regardless of the sentence imposed);⁵²
 - introduce a protected information framework that would prohibit the disclosure of confidential information provided by intelligence and law enforcement agencies where the information is used for certain character-based migration or citizenship decisions;⁵³
 - approve the Australian Values Statement for specified subclasses of visas, and require that for specified permanent visa subclasses, applicants must sign a values statement, which includes an undertaking to make reasonable efforts to learn English if it is not the applicant's native language;⁵⁴
 - set a maximum number of contributory parent visas, parent visas and other family visas that can be granted in the 2020–2021 financial year;⁵⁵
 - permit the minister to impose a range of additional discretionary conditions on certain bridging visas and require certain visa holders to sign a code of behaviour and not breach the code of behaviour;⁵⁶

51 Parliamentary Joint Committee on Human Rights, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, *Report 7 of 2021* (2021) pp. 100–124.

52 Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2021, *Report 15 of 2021* (8 December 2021) pp. 17–34.

53 Parliamentary Joint Committee on Human Rights, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, *Report 1 of 2021* (3 February 2021) pp. 7–19; *Report 3 of 2021* (17 March 2021) pp. 37–62.

54 Parliamentary Joint Committee on Human Rights, Migration (LIN 20/166: Australian Values Statement for Public Interest Criterion 4019) Instrument 2020 [F2020L01305], *Report 14 of 2020* (26 November 2020) pp. 34–37; *Report 1 of 2021* (3 February 2021) pp. 123–130.

55 Parliamentary Joint Committee on Human Rights, Migration (Granting of contributory parent visas, parent visas and other family visas in the 2020/2021 financial year) Instrument (LIN 21/025) 2021 [F2021L00511], *Report 6 of 2021* (13 May 2021) pp. 8–10; *Report 7 of 2021* (16 June 2021) pp. 125–134.

56 Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444], *Report 7 of 2021* (16 June 2021) pp. 50–74; *Report 9 of 2021* (4 August 2021) pp. 66–108.

- prescribe a time period of 120 days for the Administrative Appeals Tribunal to make its decision in relation to review of a ministerial decision that a person is not owed protection;⁵⁷
- increase the Administrative Appeals Tribunal application fee for review of decisions relating to visas (other than protection visas) by 64 per cent;⁵⁸ and
- exclude work carried out by specified employers from counting towards eligibility for a second or third working holiday maker visa and enable the minister to publicly list such employers if they pose a risk to safety or welfare.⁵⁹

3.37 These various measures engaged and limited a number of human rights, including the rights to liberty, privacy, fair hearing, work and protection of the family, freedom of movement, association and expression, the rights of the child and the prohibition on expulsion of aliens without due process. In some cases, Australia's obligations not to return a person to a country where they may be subject to ill-treatment (non-refoulement) were also engaged. In general, the committee considered objectives such as protecting national security, the safety of the Australian community and the integrity of the migration system were capable of constituting legitimate objectives of the purposes of international human rights law.⁶⁰ However, for these objectives to be legitimate in the context of specific measures, they must also be necessary and address a pressing and substantial need or concern. In many cases, the committee raised questions as to the necessity of the measures and whether the stated objectives did in fact address a pressing and substantial concern. The committee also raised significant concerns regarding the proportionality of a number of measures, particularly those relating to mandatory immigration detention.

3.38 For example, the committee considered there to be a risk that the Migration Amendment (Strengthening the Character Test) Bill 2021, which sought to give the minister a discretionary power to cancel or refuse a visa where the non-citizen has

57 Parliamentary Joint Committee on Human Rights, Migration Amendment (Clarifying International Obligations for Removal) Regulations 2021 [F2021L01078], *Report 11 of 2021* (16 September 2021) pp. 54–59.

58 Parliamentary Joint Committee on Human Rights, Migration Amendment (Merits Review) Regulations 2021 [F2021L00845], *Report 10 of 2021* (25 August 2021) pp. 42–50; *Report 12 of 2021* (20 October 2021) pp. 105–118.

59 Parliamentary Joint Committee on Human Rights, Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 [F2021L01030], *Report 10 of 2021* (25 August 2021) pp. 51–55; *Report 12 of 2021* (20 October 2021) pp. 119–130.

60 See e.g. Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2021, *Report 15 of 2021* (8 December 2021) pp. 17–34; Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2021, *Report 1 of 2021* (3 February 2021) pp. 7–19; *Report 3 of 2021* (17 March 2021) pp. 37–62.

been convicted of a 'designated offence' (regardless of the sentence imposed), was incompatible with multiple rights.⁶¹ Noting the result of visa cancellation is mandatory immigration detention prior to removal from Australia, by amending the grounds on which visas may be cancelled or refused, the measure engaged and limited the right to liberty and, where children to be detained, the rights of a child. A person's consequent expulsion from Australia may also limit other rights, including the prohibition on expulsion of aliens without due process, freedom of movement and protection of the family. As the minister already had the power to cancel or refuse a person's visa on the grounds set out in the bill, the committee considered that it had not been established that the measure was necessary and addressed a pressing and substantial concern. The committee further considered that the measure may not be proportionate in all circumstances, particularly given the lack of any opportunity to effectively challenge a deportation decision and the mandatory detention prior to deportation.

3.39 In addition, the committee noted that measures that resulted in the indefinite detention of certain persons may have implications on Australia's obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment. This obligation is absolute and may never be permissibly limited. In cases considering individuals detained under Australia's mandatory immigration detention scheme, the UN Human Rights Committee has found that the combination of subjecting individuals to arbitrary and protracted and/or indefinite detention, the absence of procedural safeguards to challenge that detention, and the difficult detention conditions, cumulatively inflicts serious psychological harm on such individuals that amounts to cruel, inhuman or degrading treatment.⁶² Measures that have the effect of subjecting certain persons to ongoing immigration detention in similarly difficult conditions would therefore appear to have implications for Australia's obligation not to subject any person to ill-treatment.

3.40 For example, the committee found that to the extent that the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 resulted in the prolonged or indefinite detention of persons who were deemed to be unlawful non-citizens but could not be removed because a protection finding had been made in relation to them, it engaged and limited the right to liberty and the rights of the child as well as potentially having implications on the prohibition against torture or

61 Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2021, *Report 15 of 2021* (8 December 2021) pp. 17–34.

62 *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.8]. See also *F.J. et al. v. Australia*, UN Human Rights Committee Communication No. 2233/2013 (2016) [10.6].

ill-treatment.⁶³ In the absence of effective safeguards and in light of evidence that the persons to whom this bill applied were frequently detained for significant periods of time, the committee considered there to be a significant risk that the measure may be incompatible with the right to liberty and the prohibition on torture or ill-treatment, and were children to be detained, the rights of the child.

Social security measures

3.41 The committee considered several bills and legislative instruments which sought to introduce, amend, extend or revoke a number of social security measures, including measures to:

- specify additional businesses in relation to which transactions involving money in a welfare restricted bank account may be declined by a financial institution, meaning that a cashless debit card cannot be used to purchase goods at those specified businesses;⁶⁴
- standardise the newly arrived resident's waiting period for social security payments by applying a consistent four-year waiting period across all relevant payments and concession cards (including low income health care card and commonwealth seniors health card);⁶⁵
- establish a new supplementary payment under the remote engagement program for people in remote areas receiving a qualifying remote income support payment;⁶⁶
- set out the requirements for 'employment pathway plans', which some social welfare recipients must comply with to qualify for a social welfare payment. For these recipients, failure to comply with a plan may result in suspension or cancellation of their payment;⁶⁷

63 Parliamentary Joint Committee on Human Rights, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, *Report 5 of 2021* (29 April 2021) pp. 13–28; *Report 7 of 2021* (16 June 2021) pp. 100–124.

64 Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2021 [F2021L01473], *Report 14 of 2021* (24 November 2021) pp. 14–18.

65 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021, *Report 10 of 2021* (25 August 2021) pp. 18–30; *Report 12 of 2021* (20 October 2021) pp. 60–78.

66 Parliamentary Joint Committee on Human Rights, Social Security Legislation Amendment (Remote Engagement Program) Bill 2021, *Report 11 of 2021* (16 September 2021) pp. 42–53.

67 Parliamentary Joint Committee on Human Rights, Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021, *Report 7 of 2021* (16 June 2021) pp.27–49; *Report 9 of 2021* (4 August 2021) pp. 34–65.

- increase the maximum basic rates of working age social security payments by \$50 per fortnight from 1 April 2021 (when the COVID-19 social security supplement ceased);⁶⁸ and
- extend by three years an existing determination which specifies requirements to be met for assurances of support.⁶⁹

3.42 In addition to these measures, as discussed elsewhere in this chapter (at paragraphs [3.15] and [3.59]), the committee also undertook an inquiry into the Social Security (Parenting payment participation requirements – class of persons) Instrument 2021.⁷⁰

3.43 The above measures generally engaged the right to social security as well as a number of other related rights, such as the right to an adequate standard of living. The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.⁷¹ The UN Committee on Economic, Social and Cultural Rights has noted that social security benefits must be adequate in amount and duration having regard to the principle of human dignity, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.⁷² The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.⁷³

68 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Strengthening Income Support) Bill 2021, *Report 3 of 2021* (17 March 2021) pp.30–34.

69 Parliamentary Joint Committee on Human Rights, Social Security (Assurances of Support Amendment Determination 2021 [F2021L00198], *Report 5 of 2021* (29 April 2021) pp.29–33; *Report 7 of 2021* (16 June 2021) pp. 135–144.

70 Parliamentary Joint Committee on Human Rights, *Inquiry report ParentsNext: examination of Social Security (Parenting payment participation requirements–class of persons) Instrument 2021* (4 August 2021) p. 111. This instrument specifies the class of persons subject to compulsory participation in the ParentsNext program and merges two existing streams as to how the program is delivered to people into one stream. The committee concluded that there was a considerable risk that the measure impermissibly limits the rights to social security and an adequate standard of living and recommended that the ParentsNext program be made voluntary.

71 International Covenant on Economic, Social and Cultural Rights, article 9. See also, UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008).

72 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [22].

73 International Covenant on Economic, Social and Cultural Rights, article 11.

3.44 The committee considered that where a measure introduced a new social security payment or increased the amount of an existing social security payment, it generally promoted the rights to social security and an adequate standard of living. For example, the Social Security Legislation Amendment (Remote Engagement Program) Bill 2021 (now Act) introduced a new supplementary payment under the remote engagement program for people in remote areas receiving a qualifying remote income support payment, including JobSeeker Payment, Youth Allowance, Parenting Payment and Disability Support Pension.⁷⁴ Insofar as the measure introduced a supplementary payment and increased the amount of social security benefits payable to certain recipients, the committee considered that it likely promoted the rights to social security and an adequate standard of living (although, other aspects of the measure limited rights). Similarly, as noted above (at paragraph [3.30]), the committee noted that the introduction of a supplementary COVID-19 payment was, taken alone, a rights-promoting measure.⁷⁵

3.45 However, where the effect of the measure was to suspend, cancel or reduce a social security benefit, the committee noted that there was a risk that it may be a retrogressive measure (a type of limitation) on the right to social security as well as other related rights, such as the right to an adequate standard of living, and may limit the right to equality and non-discrimination (were the measure to have a disproportionate effect on certain groups in society). On a number of occasions, the committee raised concerns about the human rights compatibility of social security measures that involved mutual obligations and the suspension or cancellation of payments for failure to meet these obligations.⁷⁶

3.46 For example, the committee commented on the Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021, which set out the requirements for 'employment pathway plans'.⁷⁷ Some social welfare recipients must comply with an employment pathway plan to qualify for a social welfare payment. These plans are subject to the Targeted Compliance

74 Parliamentary Joint Committee on Human Rights, Social Security Legislation Amendment (Remote Engagement Program) Bill 2021, *Report 11 of 2021* (16 September 2021) pp. 42–53.

75 Parliamentary Joint Committee on Human Rights, Social Security (Coronavirus Economic Response–2020 Measures No. 16) Determination 2020 [F2020L01671], *Report 2 of 2021* (24 February 2021) pp. 54–57.

76 See e.g. Parliamentary Joint Committee on Human Rights, Social Security Legislation Amendment (Remote Engagement Program) Bill 2021, *Report 11 of 2021* (16 September 2021) pp. 42–53; Parliamentary Joint Committee on Human Rights, *Inquiry report ParentsNext: examination of Social Security (Parenting payment participation requirements–class of persons) Instrument 2021* (4 August 2021).

77 Parliamentary Joint Committee on Human Rights, Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021, *Report 7 of 2021* (16 June 2021) pp.27–49; *Report 9 of 2021* (4 August 2021) pp. 34–65.

Framework, meaning that failure to comply with a plan may result in the suspension or cancellation of a recipient's payment. The committee noted that while engagement in an employment pathway plan may, in and of itself, promote the rights to work and education, because the bill links the engagement in such a plan with eligibility for social welfare payments, the bill may also limit the rights to social security, an adequate standard of living, equality and non-discrimination and privacy. The committee considered that the bill pursued a legitimate objective but raised questions as to the effectiveness of mutual obligations in causing a person to secure sustainable and ongoing employment. The committee also raised questions about the adequacy of the proposed exemptions from the employment pathway plan requirements, noting that there was some risk that, in certain circumstances, the requirement for welfare recipients to enter into, and comply with, employment pathway plans in order to receive social security may not adequately protect the aforementioned rights. The committee suggested some amendments to the bill to assist with its proportionality.

3.47 In some cases, the committee noted that while a measure increasing social security payments may appear to be rights promoting, considered in a broader context, it may have a retrogressive effect.⁷⁸ For example, the Social Services Legislation Amendment (Strengthening Income Support) Bill 2021 increased the maximum basic rates of working age social security payments by \$50 per fortnight from 1 April 2021, when the COVID-19 social security supplement ceased.⁷⁹ The committee noted that while the increase to the maximum basic rate is, taken alone, a rights-enhancing measure, considering the effect of this measure in context, notably its commencement when the temporary COVID-19 supplement ceased, there was some risk that this measure may be retrogressive in relation to the realisation of the rights to social security and an adequate standard of living. While the committee did not conclude on this matter, it drew its advice to the attention of the minister and the Parliament.

National security measures

3.48 The committee continued to consider several bills and legislative instruments that introduced, extended or amended measures relating to national security, including measures to:

- authorise the disclosure of protected information relating to national security, including personal information, to a foreign government or entity for the

78 See e.g. Parliamentary Joint Committee on Human Rights, Social Security (Coronavirus Economic Response–2020 Measures No. 16) Determination 2020 [F2020L01671], *Report 2 of 2021* (24 February 2021) pp. 54–57.

79 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Strengthening Income Support) Bill 2021, *Report 3 of 2021* (17 March 2021) pp.30–34.

- purpose of assisting the foreign government or entity to perform a function or duty, or exercise a power;⁸⁰
- allow the Treasurer to make a direction if they had reason to believe that a person has engaged, is engaging or will engage in conduct which would contravene the *Foreign Acquisitions and Takeovers Act 1975*, including directing that specified persons (such as non-Australian citizens) not be senior officers of specified corporations;⁸¹
 - introduce and significantly increase the penalties for contraventions of civil penalty provisions under the *Foreign Acquisitions and Takeovers Act 1975*, including up to 2,500,000 penalty units (\$555 million) for individuals;⁸²
 - set out the procedures to be followed in the exercise of authority under an Australian Security Intelligence Organisation (ASIO) compulsory questioning warrant;⁸³
 - extend the operation of a number of counter-terrorism related provisions (which were otherwise due to sunset), including the declared area provisions, the control order regime, the preventative detention order regime and police stop, search and seizure powers;⁸⁴
 - expand the application of Australia's foreign intelligence warrant framework to domestic communications and Australian citizens and permanent residents;⁸⁵ and

80 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.

81 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.

82 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.

83 Parliamentary Joint Committee on Human Rights, Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020, *Report 2 of 2021* (24 February 2021) pp. 51–53. See also Parliamentary Joint Committee on Human Rights, *Annual Report 2020* (13 May 2020) p. 36.

84 Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021, *Report 10 of 2021* (25 August 2021) pp. 2–7.

85 Parliamentary Joint Committee on Human Rights, Foreign Intelligence Legislation Amendment Bill 2021, *Report 11 of 2021* (16 September 2021) pp. 22–41.

- authorise the sharing of protected foreign intelligence information to such persons, and in such a manner, as approved by the Attorney-General as well as authorise the use and recording of that information.⁸⁶

3.49 Legislation relating to national security often collectively engages multiple human rights. To the extent that some of the above measures were capable of assisting to protect Australia's national security interests and protect against the possibility of terrorist acts in Australia, the committee considered that they would promote the rights to life and security of the person.⁸⁷ The right to life⁸⁸ includes an obligation on the state to protect people from being killed by others or identified risks.⁸⁹ The right imposes a duty on states to take positive measures to protect the right to life, including an obligation to take adequate preventative measures in order to protect persons from reasonably foreseen threats, such as terrorist attacks or organised crime, as well as an obligation to take appropriate measures to address the general conditions in society that may threaten the right to life, such as high levels of crime and gun violence.⁹⁰ The right to security of the person requires the state to take steps to protect people against interference with personal integrity by others.⁹¹

3.50 However, the committee also acknowledged that the above national security measures limited a number of other human rights, including the rights liberty, privacy, equality and non-discrimination, fair trial and fair hearing, the protection of the family, rights of children, and the rights to freedom of expression, association, and movement. As discussed below (at paragraph [3.54]), some measures also had implications on the prohibitions on torture and cruel, inhuman and degrading treatment or punishment and on retrospective criminal laws.

3.51 In relation to rights that may be subject to permissible limitations, the committee noted that, in general, providing necessary powers to security and law

86 Parliamentary Joint Committee on Human Rights, Foreign Intelligence Legislation Amendment Bill 2021, *Report 11 of 2021* (16 September 2021) pp. 22–41.

87 See e.g. Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021, *Report 10 of 2021* (25 August 2021) pp. 2–7; Foreign Intelligence Legislation Amendment Bill 2021, *Report 11 of 2021* (16 September 2021) pp. 22–41.

88 International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1.

89 UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [3]: the right should not be interpreted narrowly and it 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

90 UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [21], [26]. See also UN Human Rights Committee, *General Comment No. 6: article 6 (right to life)* (1982) [5].

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

enforcement agencies, protecting national security interests and protecting the Australian community from national security threats, would likely constitute legitimate objectives for the purposes of human rights law. However, 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, the lack of adequate safeguards, and, in some cases, the absence of evidence justifying their necessity.

3.52 For example, the Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021⁹² (now Act) extended the operation of a number of counter-terrorism provisions that were due to sunset, including the operation of the control order regime, the preventative detention order regime and the stop, search and seizure powers. The committee had previously considered the human rights compatibility of the provisions extended by this Act. It had found that while all of the measures likely sought to achieve a legitimate objective (namely, that of seeking to prevent terrorist acts), there were questions whether the measures would be effective to achieve this and were necessary, and, in particular, the measures did not appear to be proportionate. As a result, the committee previously found the measures were likely to be incompatible with a range of human rights.⁹³ In light of these findings, the committee considered that the extension of these counter-terrorism provisions raised similar human rights concerns. In addition, the committee noted that there was limited evidence presented demonstrating the necessity of continuing these coercive powers beyond their sunset date. Considering this, and the committee's previous conclusions, the committee stated it had not been demonstrated that the extension of these provisions was compatible with human rights.

3.53 In another example, the committee raised questions regarding proportionality in relation to the Foreign Intelligence Legislation Amendment Bill 2021 (now Act), which, among other things, expanded the application of Australia's foreign intelligence framework to domestic communications and Australian citizens and permanent residents, meaning that foreign intelligence could be collected on certain Australian

92 Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021, *Report 10 of 2021* (25 August 2021) pp. 2–7.

93 In relation to the declared area provisions, see Parliamentary Joint Committee on Human Rights, Fourteenth Report of the 44th Parliament (October 2014) pp. 34-44; *Nineteenth Report of the 44th Parliament* (3 March 2015) pp. 75-82; and most recently, *Report 6 of 2018*, (26 June 2018), pp. 17-21. In relation to control orders, preventative detention orders, and stop, search and seizure powers, see most recently *Report 10 of 2018* (18 September 2018) p. 25-53. Note in relation to the stop, search and seizure powers the committee concluded that in circumstances where a police officer believes on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act, these powers might be a proportionate limit on human rights, however, the scope of the other powers are likely to be incompatible with human rights, see *Report 10 of 2018* (18 September 2018) p. 45-53.

persons under a warrant.⁹⁴ While the measures were accompanied by some important safeguards, questions remained as to whether these safeguards were sufficient in all circumstances, and, noting the broad category of people to whom these measures applied, whether the measures were sufficiently circumscribed. The committee also noted that judicial authorisation of surveillance and interception warrants is considered best practice in international human rights law, yet the issuing authority under the Act sits with the executive. The committee considered there to be a risk that the measures arbitrarily limited the right to privacy, to which persons may not have access to an effective remedy.

3.54 In some cases, national security measures had implications for the right to life and prohibition on torture and cruel, inhuman and degrading treatment or punishment.⁹⁵ For example, the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 (now Act) introduced a measure authorising the disclosure of protected information relating to national security, including personal information, to a foreign government or entity for the purpose of assisting the foreign government or entity to perform a function or duty, or exercise a power.⁹⁶ By authorising the disclosure of personal information to a foreign government, the measure engaged and limited the right to privacy. In addition, to the extent that the disclosure of such information to a foreign government exposed a person to a real risk of the death penalty or ill-treatment, it may have implications for the right to life and prohibition on torture and cruel, inhuman and degrading treatment or punishment. While the committee noted the government's official policy opposing the death penalty and its intention to seek assurances, it considered that discretionary considerations and assurances may be insufficient for the purpose of meeting Australia's obligations with respect to the right to life and the prohibition on torture and ill-treatment. To assist with the compatibility of the measure, the committee recommended that the Act be amended to provide that where there are substantial grounds for believing there is a real risk that disclosure of information to a foreign government may expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment, protected information must not be shared with that government.

94 Parliamentary Joint Committee on Human Rights, Foreign Intelligence Legislation Amendment Bill 2021, *Report 11 of 2021* (16 September 2021) pp. 22–41.

95 See e.g. Parliamentary Joint Committee on Human Rights, Foreign Intelligence Legislation Amendment Bill 2021, *Report 11 of 2021* (16 September 2021) pp. 22–41; 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.

96 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.

Committee impact

3.55 The full extent of the committee's impact can often 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. In addition, it can routinely be challenging to track the influence of the committee on legislative amendments without very close consideration of the committee's recommendations and consequent changes (particularly where amendments are made that reflect the committee's suggestions but the committee's role is not noted). Nevertheless, 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.

Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 and related legislation

3.56 In 2019, the committee undertook an inquiry into the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019.⁹⁷ This legislative instrument regulated the use of physical and chemical restraints in aged care. Among other things, 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.⁹⁸

3.57 In response to the committee's inquiry 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.⁹⁹ 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.¹⁰⁰

97 Parliamentary Joint Committee on Human Rights, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (13 November 2019).

98 Parliamentary Joint Committee on Human Rights, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (13 November 2019), recommendation 2, pp. 54–55.

99 See *Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019*. See also Australian Government [response](#) to the Parliamentary Joint Committee on Human Rights report on the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019*, 18 March 2020 (accessed 9 June 2021).

100 See Australian Healthcare Associates, [Independent review of legislative provisions governing the use of restraint in residential aged care: Final report](#), December 2020 (accessed 9 June 2021).

3.58 In addition, the Royal Commission into Aged Care Quality and Safety 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. Following the Royal Commission's recommendations,¹⁰¹ legislation was introduced during this reporting period 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; after informed consent is given; and that the use of a restrictive practice is monitored and reviewed.¹⁰²

Contribution to the ParentsNext Program disallowance debate

3.59 As set out above at paragraphs [3.15] to [3.21], the committee undertook an inquiry into a legislative instrument specifying the class of persons subject to compulsory participation in the ParentsNext. Following the tabling of the inquiry report, Senator Dodson withdrew the disallowance notice on behalf of the committee on 5 August 2021 and requested that the disallowance notice stand in his name.

3.60 On 11 August 2021, Senator Dodson moved that sections 4 and 6 of the instrument be disallowed (with the effect that ParentsNext would no longer be compulsory to receive parenting payment) and the Senate debated this disallowance motion. Several speakers participated in the debate, drawing on the committee's report to inform their views.

3.61 Senator Dodson, for example, stated that:

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.¹⁰³

101 See 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, (accessed 9 June 2021).

102 Parliamentary Joint Committee on Human Rights, Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 (now Act), *Report 7 of 2021* (16 June 2021) pp. 2–10; *Report 10 of 2021* (25 August 2021) pp. 63–90. See also Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021, *Report 10 of 2021* (25 August 2021) pp. 63–90.

103 Senator Patrick Dodson, Senate Hansard, 11 August 2021, p. 4734.

3.62 In his concluding remarks Senator Dodson stressed that if the disallowance motion was agreed to and the ParentsNext program was made voluntary, this 'could promote a range of human rights and no human rights would be limited'.¹⁰⁴

3.63 Senator Siewert also emphasised the committee's finding that 'compulsory participation in ParentsNext does limit human rights'. Senator Siewert stated that:

The evidence presented to the latest inquiry, and throughout other inquiries that have been done into this program, is clear: the benefits do not outweigh the immediate and long-term harms caused by the ParentsNext program.¹⁰⁵

3.64 Senator Dodson's motion was voted on, and the result was tied.¹⁰⁶ Because the Senate was equally divided on the question, the disallowance notice was negated. However, without the committee's inquiry into this legislative instrument (and the placing of the original notice of motion to disallow the instrument, to give the committee time to undertake its inquiry) there would have been no debate on this issue in the chamber.

Data Availability and Transparency Bill 2022

3.65 This bill (now Act) established a legislative framework to facilitate the sharing of, and controlled access to, public sector data held by Commonwealth bodies and accredited entities. The committee commented on this bill (as introduced in December 2020) in two reports in 2021.¹⁰⁷ The committee raised concerns that the measures in the bill may not be a proportionate limitation on the right to privacy and suggested a number of amendments to the bill to assist with proportionality.

3.66 The bill, as passed by both Houses in March 2022, 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.¹⁰⁸ Most relevantly to this committee, the amendments introduced a general complaints division, to allow members of the general public to make complaints to the

104 Senator Patrick Dodson, Senate Hansard, 11 August 2021, pp. 4735-4736.

105 Senator Rachel Siewert, Senate Hansard, 11 August 2021, p. 4736.

106 16 Ayes and 16 Noes. This vote reflects the lower than usual number of Senators in the chamber at the time, due to the vote taking place during lockdowns caused by the Covid-19 pandemic with numerous Senators attending Parliament remotely and unable to vote.

107 Parliamentary Joint Committee on Human Rights, *Data Availability and Transparency Bill 2020, Report 2 of 2021* (24 February 2021), pp. 5–18; *Report 4 of 2021* (31 March 2021), pp. 26–46.

108 Supplementary explanatory memorandum to the Data Availability and Transparency Bill 2020, p. 1.

Commissioner about the operation and administration of the scheme.¹⁰⁹ 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.¹¹⁰

Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 [F2021L01030]

3.67 This legislative instrument excluded work for specified employers from being counting towards eligibility for a second or third working holiday working visa, and enabled the minister to publicly list such employers in a legislative instrument if the minister was satisfied the employer, or work, poses a risk to safety or welfare.

3.68 The committee initially reported on this legislative instrument in its *Report 10 of 2021*,¹¹¹ and stated that the listing of 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 as to whether the measure was sufficiently circumscribed and contained sufficient safeguards to constitute a proportionate limit on rights.

3.69 On receiving the minister's response, the committee concluded its consideration of the legislative instrument in *Report 12 of 2021*.¹¹² 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 be made 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 has 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.

3.70 On 4 March 2022, the minister registered a new legislative instrument in response to the concerns raised by both the Senate Standing Committee for the

109 Supplementary explanatory memorandum to the Data Availability and Transparency Bill 2020, p. 70; Data Availability and Transparency Bill 2022, clause 94.

110 Parliamentary Joint Committee on Human Rights, Data Availability and Transparency Bill 2020, *Report 4 of 2021* (31 March 2021), p. 46.

111 Parliamentary Joint Committee on Human Rights, Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 [F2021L01030], *Report 10 of 2021* (25 August 2021), pp. 51-55.

112 Parliamentary Joint Committee on Human Rights, Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 [F2021L01030], *Report 12 of 2021* (20 October 2021), p. 119.

Scrutiny of Delegated Legislation and this committee.¹¹³ Of relevance to this committee, the Migration Regulations were amended to include a procedural fairness mechanism. The statement of compatibility explained the amendments as follows:

Before specifying a person, partnership or unincorporated association [as an 'excluded' employer], the Minister will be required to advise that employer in writing of his/her intention to do so, and the reasons. The Minister must also allow that employer at least 28 days to make a written submission to the Minister about the proposed specification.¹¹⁴

3.71 This amendment reflects the committee's suggestion that employers be informed of the decision to list them and be provided with a right of reply. The committee's consideration of this legislative instrument is an example of the committee's dialogue model in action, and demonstrative of the committee's impact.

Mr Josh Burns MP
Chair

113 Migration Amendment (Subclass 417 and 462 Visas) Regulations 2022 [F2022L00244].

114 Statement of compatibility p. 6.