

Chapter 3

Work of the committee in 2016-17

3.1 This chapter provides information about the work of the committee during 2016-17,¹ including the major themes and scrutiny issues arising from the legislation examined by the committee.

Legislation considered

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

3.3 Table 3.1 shows the total number of bills, Acts and legislative instruments assessed. It also shows how many in each category were found to raise no human rights concerns. Where a bill, Act or legislative instrument raised human rights concerns, Table 3.1 shows whether the committee provided an advice-only comment to, or required a response from, the legislation proponent in relation to the human rights issues identified.

Table 3.1: Legislation considered during the reporting period

	Total considered	No human rights concerns	Advice-only comment	Response required
Bills and Acts	405	309	42	54
Legislative instruments	2,942	2,875	32	35

Reports tabled during the period

3.4 The committee tabled 17 scrutiny reports during the reporting period, from *Report 7 of 2016* to *Report 13 of 2017*.²

1 The reporting period covers from the opening of the 45th Parliament on 30 August 2016 to 31 December 2017. The committee's first scrutiny report of the 45th Parliament, *Report 7 of 2016*, was tabled on 11 October 2016 and its final scrutiny report of 2017, *Report 13 of 2017*, was tabled on 5 December 2017.

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.

3.5 The committee also tabled its *Freedom of Speech in Australia* inquiry report as well as two annual reports, *Annual Report 2014-15* and *Annual Report 2015-16*.³

Commonly engaged rights

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

- right to privacy;⁴
- right to equality and non-discrimination;⁵
- right to a fair trial;⁶
- right to a fair hearing;⁷
- right to an adequate standard of living;⁸
- protection of the family/respect for family life;⁹
- right to social security;¹⁰
- right to be presumed innocent;¹¹
- right to freedom of expression or opinion;¹²
- best interests of the child/rights of children;¹³

3 The committee's annual reports are available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Annual_Reports. The committee's inquiry report, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)*, is available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries.

4 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

5 Articles 2 and 26 of the ICCPR; Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

6 Article 14 of the ICCPR.

7 Article 14 of the ICCPR.

8 Article 11(1) of the ICESCR.

9 Articles 17 and 23 of the ICCPR; article 10 of the ICESCR.

10 Article 9 of the ICESCR.

11 Article 14(2) of the ICCPR.

12 Article 19 of the ICCPR; article 21 of the Convention on the Rights of Persons with Disabilities (CRPD).

13 Article 3 of the Convention on the Rights of the Child (CRC).

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- non-refoulement obligations;¹⁴
 - right to freedom of movement;¹⁵ and
 - right not to incriminate oneself.¹⁶

3.7 During the reporting period, the rights listed above accounted for 71 percent of rights which the committee reported on substantively within both primary and delegated legislation. This figure does not include rights engaged in legislation which the committee initially examined and reported on as not raising human rights concerns (this may be because the bill or instrument promoted human rights and/or permissibly limited human rights).¹⁷

3.8 Figure 3.1 shows the breakdown of human rights engaged by the legislation examined and substantively commented on by the committee in the reporting period. These statistics show similar trends to the previous reporting period with a balance between civil and political rights and economic, social and cultural rights engaged.

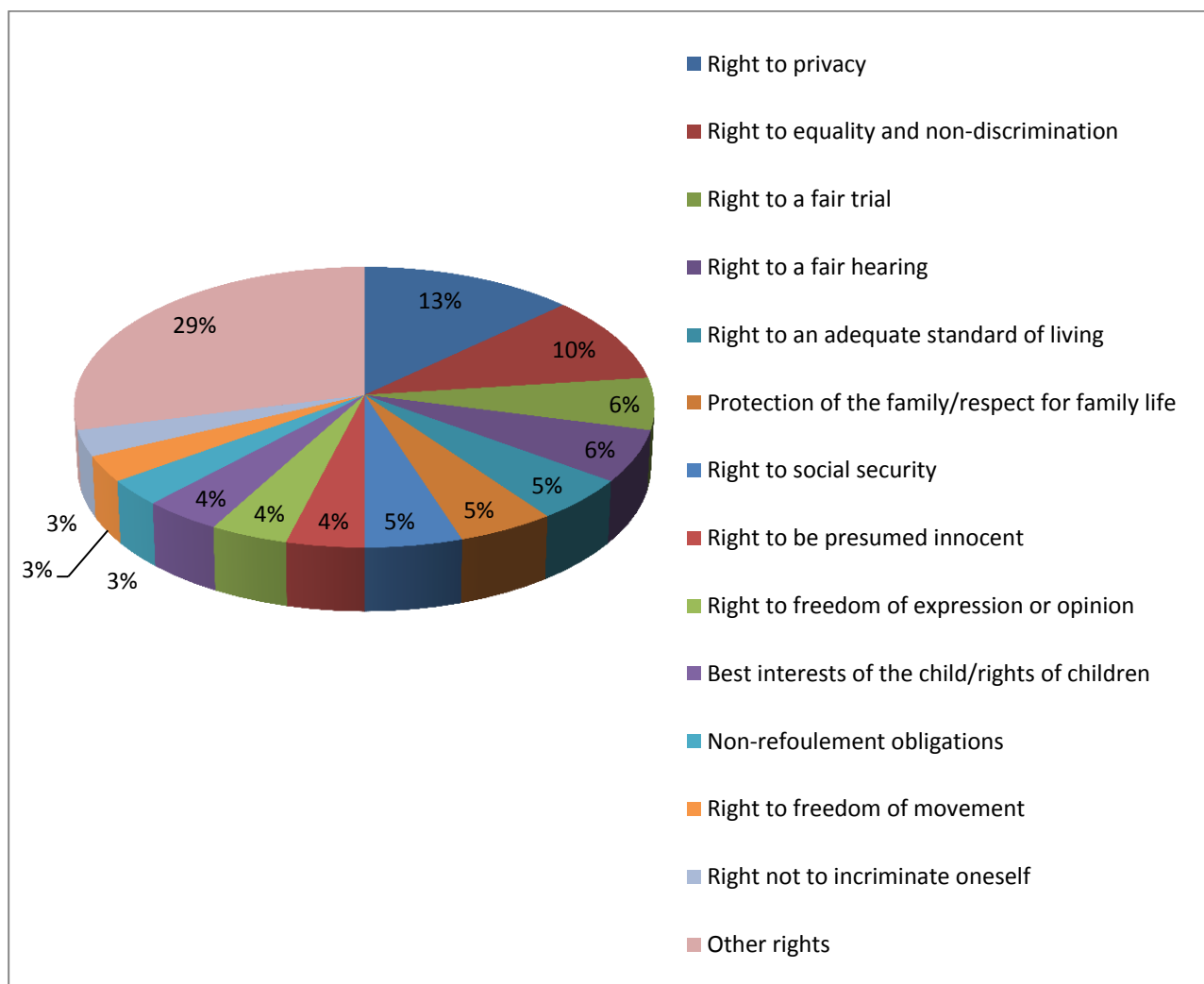
14 Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; articles 6(1) and 7 of the ICCPR; see also Article 33 of the Refugee Convention.

15 Article 12 of the ICCPR.

16 Article 14(3)(g) of the ICCPR.

17 The committee examines all bills and instruments that come before the parliament for compatibility with human rights. However, it focuses its substantive analysis or comments in reports on measures that raise human rights concerns in such legislation. Accordingly, the rights that are identified as engaged in the above statistics relate to legislation raising human rights concerns. During the reporting period, bills not raising human rights concerns were listed in the committee's reports. For legislative instruments not raising human rights concerns, a cross reference was made in the committee's reports to the list contained in the *Journals of the Senate*. Legislative instruments raising human rights concerns were identified on an exceptions basis in the committee's reports.

Figure 3.1: Human rights engaged by legislation in 2016-17



Major themes

3.9 Three significant policy areas that attracted substantive comment from the committee in the reporting period related to social security, workplace relations and migration legislation. Additionally, the committee commented on various pieces of legislation that engaged the right to a fair trial and fair hearing.

Social security legislation

3.10 The committee examined a number of bills and legislative instruments in the reporting period relating to social security. Measures examined included amended waiting periods, residency requirements and other qualification criteria for certain payments;¹⁸ measures which sought to restrict how certain payments are used;¹⁹ the

18 For example, Parliamentary Joint Committee on Human Rights, *Social Services Legislation Amendment Bill 2017, Report 5 of 2017* (14 June 2017) pp. 67-72; *Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016 [F2016L01858], Report 4 of 2017* (9 May 2017) pp. 149-154; *Social Services Legislation Amendment (Payment Integrity) Bill 2017, Report 10 of 2017* (12 September 2017) pp. 75-81.

creation of a new jobseeker payment and the cessation of certain social security types;²⁰ and proposed penalties for non-compliance with certain conditions.²¹

3.11 Human rights engaged by this legislation included the right to social security; the right to an adequate standard of living; the right to privacy; the right to equality and non-discrimination; the rights of the child; the right to protection of the family; the right to health; the right to maternity leave; and obligations not to unjustifiably take retrogressive or backward steps in the progressive realisation of economic, social and cultural rights.

Changes to waiting periods

3.12 In the reporting period, several pieces of legislation sought to implement or adjust waiting periods for persons accessing certain social security payments.²² The imposition of waiting periods before access to social security entitlements engages and limits the right to social security and an adequate standard of living because it reduces access to such entitlements and may impact on an individual's ability to afford the necessities to maintain an adequate standard of living.

3.13 In several cases, the committee was able to conclude that such measures were likely to constitute permissible limitations on human rights following further information from the relevant minister.

3.14 This was the case, for example, with the Social Services Legislation Amendment Bill 2017 (now Act), which sought to extend the Ordinary Waiting Period²³ to persons claiming youth allowance (other) or parenting payments. The committee's initial analysis outlined several human rights concerns, including the availability of adequate safeguards where a person may be unable to meet basic necessities during the waiting period.²⁴ The initial analysis also identified that, as

19 For example, Parliamentary Joint Committee on Human Rights, Social Services Amendment (Housing Affordability) Bill 2017, *Report 12 of 2017* (28 November 2017) pp. 43-52; Social Services Legislation Amendment (Cashless Debit Card) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 126-138.

20 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Welfare Reform) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 138-203.

21 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Welfare Reform) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 138-203.

22 Some of these measures were reintroduced measures. For example, the Social Services Legislation Amendment (Youth Employment) Bill 2016 sought to introduce a four-week waiting period for individuals under the age of 25 applying for Youth Allowance (Other) or Special Benefit. This measure was previously contained in the Social Services Legislation Amendment (Youth Employment) Bill 2015. The committee reported on the 2016 bill, which did not proceed, in its *Report 7 of 2016* (11 October 2016) pp. 97-99.

23 The ordinary waiting period is a one week period that new claimants must serve before they are able to start accessing payments, including Newstart Allowance and sickness allowance.

24 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) pp. 67-72.

women are the primary recipients of parenting payments, and social security payments more broadly, reductions to access to such payments under the bill would disproportionately impact upon this group and the right to equality and non-discrimination was therefore also engaged.

3.15 In response to the committee's inquiries, the minister explained that there was an exception to the Ordinary Waiting Period for persons unable to accommodate their own living costs due to severe financial hardship. Further, the minister noted that there was also specific support for those who had experienced domestic violence (most of whom are women) to ensure they will have immediate support.²⁵

3.16 Each of these exceptions appeared to provide a safeguard such that eligible individuals could afford the basic necessities to maintain an adequate standard of living in circumstances of severe financial hardship, including leaving situations of domestic violence. In light of the additional information provided, the committee assessed that the measure appeared likely to be compatible with the right to social security, the right to an adequate standard of living and the right to equality and non-discrimination.

Income management arrangements

3.17 The committee commented on a number of bills and instruments seeking to implement, extend or amend income management arrangements.²⁶

3.18 The income management regime was examined by the committee in its 2013 and 2016 Reviews of the Stronger Futures measures, focusing on its operation in the Northern Territory.²⁷ Assessments of related legislation in the reporting period drew the findings of the 2016 review to the attention of legislation proponents. Along with the right to social security, this legislation engaged the right to privacy and family and the right to equality and non-discrimination.

3.19 Income management arrangements generally involve a portion of a person's social security payment being 'quarantined', with restrictions imposed on how these

25 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) p. 71.

26 Including, Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill, Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) pp. 45-48; Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Amendment Determination (No. 2) 2016 [F2016L01424], *Report 8 of 2016* (9 November 2016) pp. 53-54; Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210], *Report 8 of 2017* (15 August 2017) pp. 122-126; and Social Services Legislation Amendment (Cashless Debit Card) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 126-137.

27 See, Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) and *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (27 June 2013).

'quarantined' funds can be spent. In particular, the committee noted that such arrangements may not be a proportionate limitation on human rights where the blanket imposition of the scheme occurs without an assessment of an individual's suitability and consent to participate.²⁸ The committee raised these concerns in relation to legislation that sought to extend the cashless debit card trial, implemented under the *Social Security Legislation Amendment (Debit Card Trial) Act 2015*. The committee noted that, as the scheme applies to anyone residing in locations where the trial operates who is receiving a social security payment specified under the scheme, there were serious doubts as to whether the measures were the least rights restrictive way to achieve the stated objectives.²⁹

3.20 By comparison, it was noted that the income management regime in Queensland's Cape York allows for individual assessment of the particular circumstances of affected individuals and the management of their welfare payments.³⁰ Accordingly, the committee stated that this regime may be less rights restrictive than the blanket location-based scheme applied under other income management measures.³¹

Welfare reform bill

3.21 Various changes to the administration, qualification and receipt of social security were proposed under the Social Services Legislation Amendment (Welfare Reform) Bill 2017. These included measures to:

- create a new jobseeker payment as the main working age social security payment and provide that a number of other social security payments will cease;
- establish a two year trial of mandatory drug testing for recipients of Newstart Allowance and Youth Allowance in three regions;
- remove exemptions from mutual obligation participation requirements in relation to certain social security payments where the reason is attributable to drug or alcohol dependency; and
- suspend income support payments for failure to meet mutual obligation participation requirements without a reasonable excuse, which may lead to cancellation in certain circumstances.

28 See, Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Cashless Debit Card) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 126-137.

29 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Cashless Debit Card) Bill 2017, *Report 11 of 2017* (17 October 2017) p. 131.

30 See, Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill 2017, *Report 5 of 2017* (14 June 2017) pp. 45-48.

31 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) p. 47.

3.22 The committee sought the advice of the minister as to whether various identified measures in the bill were compatible with human rights. The further information provided by the minister enabled the committee to conclude that several measures may be compatible.³²

3.23 For example, in relation to the creation of a new jobseeker payment and the cessation of certain social security types,³³ the committee sought the advice of the minister as to whether this may result in reductions in the amount payable, or the qualifications for, certain social security recipients and the availability of safeguards. The minister's response indicated that in the majority of cases, the cessation of certain categories of social security payments would not result in a reduction in the level of payments. The response also explained a range of safeguards in place to help ensure that individuals were able to access social security to meet basic necessities. On the basis of this further information, the committee concluded that the measures were likely to be compatible with the right to social security.³⁴

3.24 However, in relation to various other measures, including the proposed drug testing trial and the removal of certain exemptions from mutual obligation requirements, evidence was not provided to demonstrate the proportionality of these changes. Based on the information provided, the committee concluded a number of these other measures were likely to be incompatible with various human rights.³⁵

Workplace relations legislation

3.25 In the reporting period, the committee considered a number of bills and instruments relating to workplace relations, including amendments to the *Fair Work Act 2009* and the *Fair Work (Registered Organisations) Act 2009*, as well as legislative instruments made under the *Building and Construction (Improving Productivity) Act 2016*.³⁶

3.26 Measures examined by the committee included proposals to:

32 Including measures in schedules 1 -7; schedule 10; and schedule 17.

33 Schedules 1-7 of the Social Services Legislation Amendment (Welfare Reform) Bill 2017.

34 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) p. 146.

35 After the reporting period, the mandatory drug testing trial provisions in Schedule 12 were removed from the Welfare Reform Bill. However, on 28 February 2018 the Social Services Legislation Amendment (Drug Testing Trial) Bill 2018 was introduced in the House of Representatives. The 2018 Bill is substantively the same as Schedule 12 of the Welfare Reform Bill. The committee reported on the 2018 Bill in its *Report 3 of 2018* (27 March 2018) p. 124.

36 These included: Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132]; Code for the Tendering and Performance of Building Work 2016 [F2016L01859]; Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017; Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017; and Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017.

- expand the circumstances in which a person may be disqualified from holding office in a registered organisation (such as a trade union or employers association);³⁷
- expand the grounds for the cancellation of the registration of registered organisations;³⁸
- provide that Commonwealth funded building industry participants must not be covered by an enterprise agreement that includes specific clauses;³⁹
- prohibit the display of particular signs and union logos, mottos or indicia;⁴⁰
- prohibit any term of a modern award, enterprise agreement or contract of employment permitting or requiring employee contributions to an election fund;⁴¹
- prohibit any action with the intent to coerce an employer to pay amounts to a particular worker entitlement fund, superannuation fund, training fund, welfare fund or employee insurance scheme;⁴² and
- increase the maximum civil penalties for failure to comply with certain provisions of the *Fair Work Act 2009*.⁴³

3.27 Human rights engaged by these and related amendments included the right to freedom of association; the right to collectively bargain; the right to just and favourable conditions of work; and the right to freedom of expression. In its assessments of the compatibility of legislation against these rights, the committee's

37 Parliamentary Joint Committee on Human Rights, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, *Report 12 of 2017* (28 November 2017) p. 113.

38 Parliamentary Joint Committee on Human Rights, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, *Report 12 of 2017* (28 November 2017) p. 113.

39 See, Code for the Tendering and Performance of Building Work 2016 [F2016L01859] and Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132], assessed in 2017 in the committee's *Report 5 of 2017* (14 June 2017) pp. 2-13; *Report of 9 of 2017* (5 September 2017) pp. 45-63; and *Report 12 of 2017* (28 November 2017) pp. 58-79.

40 See, Code for the Tendering and Performance of Building Work 2016 [F2016L01859] and Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132], assessed in 2017 in the committee's *Report 5 of 2017* (14 June 2017) pp. 2-13; *Report of 9 of 2017* (5 September 2017) pp. 45-63; and *Report 12 of 2017* (28 November 2017) pp. 58-79.

41 Parliamentary Joint Committee on Human Rights, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, *Report 12 of 2017* (28 November 2017) p. 16.

42 Parliamentary Joint Committee on Human Rights, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, *Report 12 of 2017* (28 November 2017).

43 Parliamentary Joint Committee on Human Rights, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Report 8 of 2017* (15 August 2017) pp. 104-121.

analysis was informed, in part, by International Labour Organization (ILO) treaties, including the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).⁴⁴

3.28 In particular, concerns arose about measures that created an additional sanction or disincentive for taking industrial action and it was noted that existing restrictions on taking industrial action under Australian domestic law had been consistently criticised by international supervisory mechanisms as going beyond what is permissible under international human rights law.⁴⁵

3.29 Concerns also arose over the prohibition of particular terms in industrial agreements, which limited the right to just and favourable conditions of work and the right to collectively bargain as an aspect of the right to freedom of association.⁴⁶ In relation to the circumstances in which it might be legitimate for a government to limit the outcomes of a bargaining process, the committee drew to the attention of legislation proponents comments by the ILO's Committee on Freedom of Association, that 'any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement.'⁴⁷

3.30 The committee also made some recommendations in order to assist to improve the human rights compatibility of certain measures.

3.31 For example, under proposed section 28 of the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, the Fair Work Commissioner, the minister or another person with sufficient interest can apply to the Federal Court for an order cancelling registration of an organisation, if the person considers there are grounds for such cancellation. Under proposed section 28K, if the court finds that a ground is established it must cancel the organisation's registration unless the organisation can satisfy the court that it would be unjust to do so, having

44 ILO treaties and jurisprudence are relevant to the interpretation of rights, such as the right to collective bargaining and the right to freedom of association, contained in the human rights treaties which fall directly under the committee's mandate. Further, the Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

45 See, Parliamentary Joint Committee on Human Rights, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, *Report 12 of 2017* (28 November 2017) p. 119.

46 Parliamentary Joint Committee on Human Rights, Code for the Tendering and Performance of Building Work 2016 [F2016L01859] and Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132], *Report 12 of 2017* (28 November 2017) p. 60.

47 Parliamentary Joint Committee on Human Rights, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, *Report 12 of 2017* (28 November 2017) p. 18.

regard to certain matters.⁴⁸ The committee recommended that the court's proposed powers of cancellation be amended so as only to be available to be exercised as a matter of last resort where it is in the best interests of the members of the organisation in question.⁴⁹

Migration legislation

3.32 As with previous reporting periods, the committee considered a number of bills and legislative instruments relating to migration; citizenship; asylum seekers and refugees, and substantively commented on measures including in relation to visa cancellation and revalidation powers; review processes; measures made under, or amending, the *Australian Citizenship Act 2007* including relating to loss of citizenship and citizenship eligibility; and the management of immigration detention facilities.⁵⁰

3.33 This legislation engaged a number of human rights, including the right to equality and non-discrimination; right to freedom of movement; right to privacy; right to protection of the family; right to take part in public affairs; right to liberty; obligations of non-refoulement; the prohibition on torture, cruel, inhuman and degrading treatment or punishment; right to a fair hearing and criminal process rights; the prohibition against retrospective criminal laws; the prohibition against double punishment; the rights of children; right to an effective remedy; and the right to freedom of expression.

48 These include, the nature of the matters constituting that ground; the action (if any) that has been taken by or against the organisation; the best interests of the members of the organisation as a whole and any other matters the court considers relevant. See, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, explanatory memorandum, pp. 19-20.

49 Parliamentary Joint Committee on Human Rights, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, *Report 12 of 2017* (28 November 2017) p. 127.

50 See, Parliamentary Joint Committee on Human Rights, Australian Citizenship (Declared Terrorist Organisation—Islamic State) Declaration 2016 [F2016L00665] and Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016, *Report 7 of 2016* (11 October 2016); Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 and Migration Legislation Amendment (Regional Processing Cohort) Bill 2016, *Report 2 of 2017* (21 March 2017); Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017, *Report 13 of 2017* (5 December 2017); Migration Amendment (Validation of Decisions) Bill 2017 and Australian Citizenship (IMMI 17/073: Declared Terrorist Organisation—Jabhat Al-Nusra) Declaration 2017 [F2017L01031], *Report 11 of 2017* (17 October 2017); Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016, *Report 4 of 2017* (9 May 2017); and Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, *Report 10 of 2017* (12 September 2017).

Non-refoulement

3.34 A number of the committee's assessments of legislation in this policy area focused on non-refoulement obligations, which are absolute and therefore may not be subject to any limitation.

3.35 Non-refoulement obligations require that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; and cruel, inhuman or degrading treatment or punishment.

3.36 In its consideration of legislation that engaged Australia's non-refoulement obligations, such as visa cancellation powers, the committee reiterated that effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to giving effect to non-refoulement obligations.⁵¹ The committee further noted that ministerial discretion not to remove a person is not a sufficient safeguard under international human rights law.⁵²

3.37 For example, in its consideration of the Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016, the committee assessed that the power to remove a non-citizen following the cancellation of their visa contained no safeguards to ensure that a person was not removed from Australia in circumstances where Australia owes non-refoulement obligations. The committee drew its previous comments in this context to the attention of the parliament, namely, that 'independent, effective and impartial' review of decisions to remove or deport an individual are required to comply with Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵³

Asylum seekers and immigration detention

3.38 The committee also commented on proposed amendments to the *Migration Act 1958* that affected the rights of people in immigration detention facilities and the rights of people seeking asylum.

3.39 This included measures that prohibited certain items in immigration detention facilities and expanded search and seizure powers to allow searches for a 'prohibited thing'.⁵⁴ The prohibiting of certain items in immigration detention

51 Parliamentary Joint Committee on Human Rights, Migration Amendment (Validation of Decisions) Bill 2017, *Report 11 of 2017* (17 October 2017) p. 109.

52 Parliamentary Joint Committee on Human Rights, Migration Amendment (Validation of Decisions) Bill 2017, *Report 11 of 2017* (17 October 2017) p. 111.

53 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 92.

54 Parliamentary Joint Committee on Human Rights, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017, *Report 13 of 2017* (5 December 2017) p. 62-89.

engaged various human rights, including the right to privacy, right to respect for the family, and the right to freedom of expression. The committee noted that, in light of the broad wording of the power to prohibit items, including mobile phones and other electronic devices, the measure risked being incompatible with human rights. In relation to the measure's compatibility with the right to respect for the family, the committee recommended that its implementation in each detention centre be monitored by government to ensure that individuals are able to maintain an adequate and sufficiently private level of communication with families that is consistent with the right not to be subjected to arbitrary or unlawful interference with family.⁵⁵

3.40 Other proposed amendments examined in the reporting period included a measure that would prevent asylum seekers who were at least 18 years of age, and were taken to a regional processing country after 19 July 2013, from making a valid application for an Australian visa.⁵⁶

3.41 Analysis in the committee's report identified that this measure engaged the right to equality and non-discrimination by its differential treatment of 'cohorts' or groups of people in materially similar situations, and that the proposed ban may also have a disproportionate negative effect on individuals from particular national origins, nationalities, or on the basis of race, giving rise to concerns regarding indirect discrimination. The analysis also identified that the measure engaged and limited the right to protection of the family and rights of the child.⁵⁷

3.42 The engagement of some of these rights was acknowledged in the statement of compatibility accompanying the bill.⁵⁸ However, the committee's concluding assessment stated that to penalise people who seek to enter Australia illegally in order to seek asylum was not a legitimate objective for the purposes of international human rights law.⁵⁹

Fair trial and fair hearing

3.43 The rights to a fair trial and fair hearing were engaged by a significant number of bills and legislative instruments examined by the committee in the reporting period.

55 Parliamentary Joint Committee on Human Rights, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017, *Report 13 of 2017* (5 December 2017) p. 73.

56 Parliamentary Joint Committee on Human Rights, Migration Legislation Amendment (Regional Processing Cohort) Bill 2016, *Report 2 of 2017* (21 March 2017) pp. 85-89.

57 Parliamentary Joint Committee on Human Rights, Migration Legislation Amendment (Regional Processing Cohort) Bill 2016, *Report 2 of 2017* (21 March 2017) p. 87.

58 See, statement of compatibility for the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016.

59 Parliamentary Joint Committee on Human Rights, Migration Legislation Amendment (Regional Processing Cohort) Bill 2016, *Report 2 of 2017* (21 March 2017) p. 89.

3.44 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR and applies to both criminal and civil proceedings. There are also specific guarantees of the right to a fair trial in the determination of a criminal charge under articles 14 and 15 of the ICCPR, including the right to be presumed innocent, the right not to incriminate oneself, the right not to be tried and punished twice for an offence, and a guarantee against retrospective criminal laws.

3.45 A significant issue that arose in this context was the proposed introduction or strengthening of coercive information gathering powers, including for bodies such as the Fair Work Ombudsman (FWO)⁶⁰ and the Australian Prudential Regulation Authority (APRA).⁶¹

3.46 These measures abrogated the privilege against self-incrimination by providing that a person was not excused from giving information or appearing before an agency or commission on the grounds that to do so might tend to incriminate that person. The right not to incriminate oneself may be permissibly limited, provided the measure supports a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

3.47 In assessing these measures, the availability of 'use' and 'derivative use' immunities can be one important factor in determining whether a limitation on the right not to incriminate oneself is proportionate. For example, in relation to the proposed evidence gathering powers of the FWO, the committee noted that partial 'use' immunity would be provided for criminal offences, meaning no information or documents obtained under a FWO notice would be admissible in evidence in proceedings, subject to certain exceptions.⁶² However, no 'derivative use' immunity was provided (which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person). The lack of a derivative use immunity in the context of the proposed evidence gathering powers raised questions about whether the measure was the least rights restrictive way of achieving its

60 Parliamentary Joint Committee on Human Rights, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Report 8 of 2017* (15 August 2017) pp. 104-121.

61 Parliamentary Joint Committee on Human Rights, Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017, *Report 12 of 2017* (28 November 2017) pp. 53-57. Other legislation examined by the committee in this area included measures to increase penalties for non-compliance with coercive evidence gathering powers. This included failing to attend a Royal Commission as a witness and refusing or failing to comply with a notice to furnish or produce information or appearing before the Australian Competition and Consumer Commission. See, Parliamentary Joint Committee on Human Rights, Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017, *Report 6 of 2017* (20 June 2017) pp. 35-48 and Competition and Consumer Amendment (Competition Policy Review) Bill 2017, *Report 9 of 2017* (5 September 2017) pp. 64-77.

62 Parliamentary Joint Committee on Human Rights, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Report 6 of 2017* (20 June 2017) p. 22.

objective. There were also questions about whether the scope of the measure was overly broad with respect to its stated objective.

Scrutiny issues

3.48 During the reporting period, the timeliness of responses to the committee's requests for further information and the quality of statements of compatibility continued to pose challenges in the context of the scrutiny process.

Timeliness

3.49 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). 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. During the reporting period, the committee completed its reporting on most legislation prior to passage or, in the case of legislative instruments, during the period for disallowance. However, there were some occasions where the committee did not table its final report on legislation prior to its passage or until after the period for disallowance.⁶³

3.50 In this respect, the responsiveness of legislation proponents to the committee's requests for information regarding human rights concerns is critical to the effectiveness of the scrutiny process.⁶⁴ While the committee stipulates a deadline by which it expects a response be provided, there is no legal or procedural requirement to ensure that a legislation proponent provides the response within this time period. There is also no procedural requirement for the committee to have finally reported on a particular bill prior to its passage by the Parliament, even where this is due to the failure of a minister to respond to the committee's requests for information.

3.51 While timeliness continued to be an issue during the reporting period, the percentage of responses received on or before the requested date increased by comparison with previous reporting periods. This coincided with the establishment of a Correspondence Register on the committee's webpage at the beginning of the

63 This was the case, for example, in relation to the Australian Border Force Amendment (Protected Information) Bill 2017; the Migration Amendment (Validation of Decisions) Bill 2017; the Privacy Amendment (Notifiable Data Breaches) Bill 2016; and the Treasury Laws Amendment (Housing Tax Integrity) Bill 2017. However, in several cases – including in relation to the four bills listed here – the committee tabled an initial report on the legislation prior to its passage.

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

45th Parliament, tracking outstanding correspondence, correspondence recently received and any correspondence received after the requested date.⁶⁵

3.52 The committee may also choose to conclude its consideration of legislation without a response from the relevant legislation proponent, which may act as an incentive for the timely receipt of responses in relation to the committee's scrutiny inquiries.⁶⁶

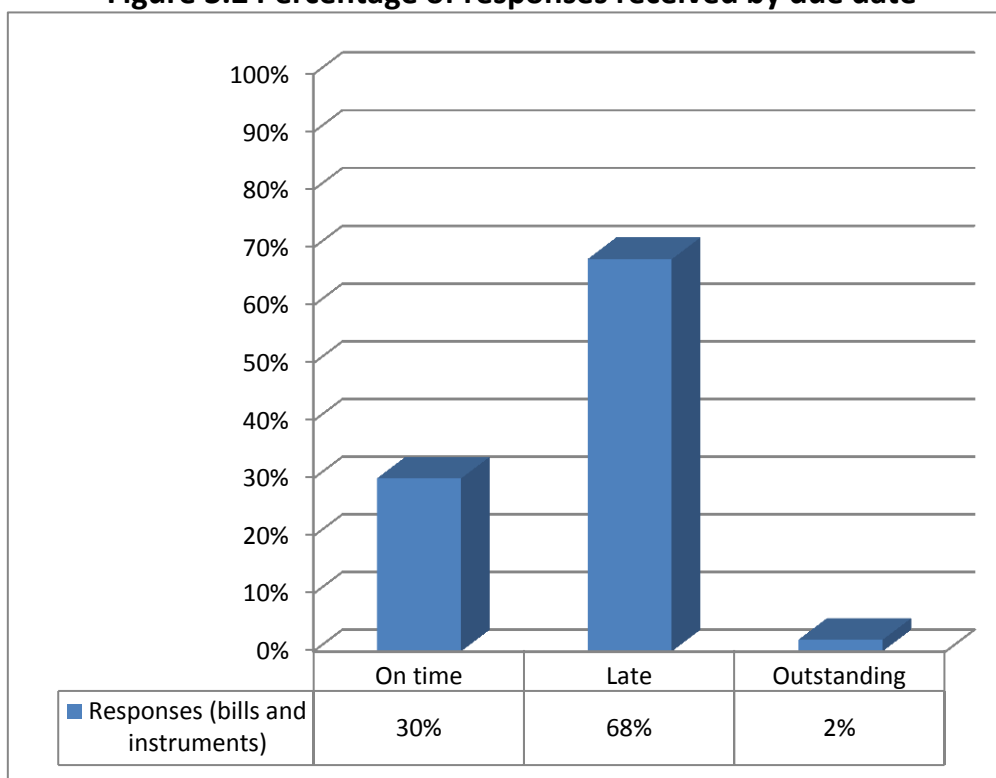
3.53 Responses were requested in relation to 89 bills and legislative instruments in the reporting period.⁶⁷ Of these, responses in relation to 27 bills and instruments (30%) were provided to the committee by the requested date. Responses in relation to 60 bills and instruments (68%) were provided to the committee after the requested date and two bills and instruments (2%) still had a response outstanding as of 19 June 2018 (see figure 3.2).

3.54 By comparison, responses in relation to only 11% of bills and instruments were received by the requested date in the 2015-16 reporting period.

65 See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

66 The committee concluded its consideration of several bills and instruments in the reporting period without a response from the legislation proponent. See, for example, Parliamentary Joint Committee on Human Rights, Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016, *Report 4 of 2017* (9 May 2017) pp. 99-111; and Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210], *Report 8 of 2017* (15 August 2017) pp. 122-125.

67 Responses were requested in relation to 54 bills and 35 legislative instruments in the reporting period.

Figure 3.2 Percentage of responses received by due date

Statements of compatibility

3.55 During the reporting period, a number of statements of compatibility provided sufficient assessments of limitations on human rights, which enabled the committee to conclude its scrutiny of specific legislation without needing to request further information from the legislation proponent.

3.56 For example, in his tabling statement in the House of Representatives on 14 June 2017, the committee's Chair referred to the example of the Education Legislation Amendment (Provider Integrity and Other Measures) Bill 2017, which increased compliance requirements in the vocational education and training sector. The Chair noted that the statement of compatibility for the bill clearly acknowledged potential limitations on the rights to education, work and privacy, but provided enough information to justify these limitations under human rights law.⁶⁸ The committee was therefore able to classify the bill as not raising human rights concerns.⁶⁹

3.57 However, in general, there remained considerable room for improvement in terms of the quality of statements of compatibility during the reporting period. A

68 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Wednesday 14 June 2017. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements.

69 As noted earlier, a bill may be listed as not raising human rights concerns because the bill does not engage or promotes human rights, and/or permissibly limits human rights.

number of statements of compatibility asserted that measures did not engage any 'applicable rights or freedoms', in cases where human rights were engaged and potentially limited.⁷⁰ A number of statements failed to acknowledge that measures engaged specific rights, including the right not to incriminate oneself⁷¹ and the right to equality and non-discrimination (indirect discrimination).⁷²

3.58 In his tabling statement on 9 May 2017, the committee's Chair emphasised that a limitation on human rights is acceptable in many circumstances, but requires explanation as to whether it is permissible; namely, how the measure pursues a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.⁷³ This includes setting out in the statement of compatibility any safeguards that will be available to ensure that any limitations on human rights are the least rights restrictive alternative.

Additional work of the committee

Freedom of speech in Australia inquiry

3.59 On 8 November 2016, the Attorney-General referred to the committee the following matters for inquiry: firstly, whether the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) (including sections 18C and 18D) impose unreasonable restrictions on freedom of speech and, secondly, whether the complaints-handling procedures of the Australian Human Rights Commission should be reformed.⁷⁴

3.60 As part of the inquiry, the committee held nine public hearings between 12 December 2016 and 20 February 2017 in each state and territory and received a

70 See, for example, Parliamentary Joint Committee on Human Rights, Treasury Laws Amendment (2016 Measures No. 1) Bill 2016 *Report 1 of 2017* (16 February 2017) pp. 2-4; Vaporised Nicotine Products Bill 2017, *Report 7 of 2017* (8 August 2017) pp. 34-35; Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2017 [F2017L00822], *Report 9 of 2017* (5 September 2017) pp. 25-27.

71 See, for example, Parliamentary Joint Committee on Human Rights, Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 28-34 and Banking and Financial Services Commission of Inquiry Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 42-44.

72 See, for example, Parliamentary Joint Committee on Human Rights, Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 46-49; Social Services Legislation Amendment (Payment Integrity) Bill 2017, *Report 10 of 2017* (12 September 2017) pp. 75-82; Social Services Legislation Amendment (Housing Affordability) Bill 2017, *Report 12 of 2017* (28 November 2017) pp. 43-52.

73 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 9 May 2017. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements.

74 The full terms of reference are available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Terms_of_Reference.

high volume of written submissions.⁷⁵ The committee tabled its final inquiry report on 28 February 2017, comprised of four substantive chapters addressing the four terms of reference for the inquiry.

3.61 The final report contained 22 recommendations aimed at improving the legislation and the complaints-handling process.

3.62 The committee is yet to receive a formal government response to this report. However, some of the measures in the Human Rights Legislation Amendment Bill 2017, which passed both Houses of Parliament in amended form on 31 March 2017, related to issues raised in the course of the committee's inquiry and the committee's final report, including its recommendations.⁷⁶

Liaison with external groups and delegations

3.63 During the reporting period, committee members met with a range of individuals and delegations, including:

- Mr Michael Forst, UN Special Rapporteur on the situation of human rights defenders (11 October 2016);
- Dr Mutuma Ruteere, UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (28 November 2016);
- a parliamentary delegation from the United Kingdom (21 March 2017);
- Ms Victoria Tauli-Corpuz, UN Special Rapporteur on the rights of indigenous peoples (27 March 2017);
- representatives of the Refugee Council of Australia (23 May 2017);
- Dr Al-Saraj, Iraqi MP (20 June 2017);
- Professor Rosalind Croucher, President of the Australian Human Rights Commission (7 September 2017);
- DFAT representatives for a briefing on business and human rights (16 October 2017);
- Ms Jessie Majome, member of the National Assembly of Zimbabwe (5 December 2017); and
- representatives of the ASEAN Intergovernmental Commission on Human Rights (6 December 2017).

75 The committee received approximately 11,460 items relating to the inquiry, 418 of which were accepted as submissions and published on the committee's website.

76 See, Parliamentary Joint Committee on Human Rights, Human Rights Legislation Amendment Bill 2017, *Report 4 of 2018* (9 May 2017) pp. 50-65.

3.64 Additionally, two committee members, Mr Graham Perrett (Deputy Chair) and Senator Linda Reynolds, attended the Commonwealth Parliamentary Conference on the Rule of Law and Human Rights in London on 24-26 January 2017. During the conference, topics discussed included best practices for parliamentary human rights committees and opportunities for such committees to work productively with national human rights institutions, civil society and executive government.

Mr Ian Goodenough MP
Chair