



Parliamentary Joint Committee
on Human Rights

Annual report 2018

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Committee information

Current members (February, 2019)

Mr Ian Goodenough MP, Chair (14.09.16-present, Chair from 14.09.16-present)	Moore, Western Australia, LP
Mr Graham Perrett MP, Deputy Chair (06.02.13-05.08.13 and 15.09.16-present)	Moreton, Queensland, ALP
Mr Russell Broadbent MP (14.09.16-present)	McMillan, Victoria, LP
Senator Carol Brown (01.07.14-present)	Tasmania, ALP
Senator Lucy Gichuhi (05.02.2018-present)	South Australia, LP
Ms Madeleine King MP (15.09.16-present)	Brand, Western Australia, ALP
Mr Julian Leeser MP (14.09.16-present)	Berowra, New South Wales, LP
Senator Nick McKim (12.09.16-present)	Tasmania, AG
Senator Claire Moore (01.07.14 to 09.05.16 and from 15.09.16-present)	Queensland, ALP
Senator James Paterson (12.09.16-present)	Victoria, LP

Former members 2018

Senator Linda Reynolds CSC (12.09.16-05.02.18)	Western Australia, LP
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Secretariat 2018¹

Ms Toni Dawes, Committee Secretary
Ms Zoe Hutchinson, Principal Research Officer/ Committee Secretary (A/g)
Dr Kate Mitchell, Principal Research Officer
Ms Shennia Spillane, Principal Research Officer
Mr Andrew McIntyre, Senior Research Officer
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Ms Kristen Zornada, Senior Research Officer
Mr David Hopkins, Legislative Research Officer
Ms Ingrid Zappe, Legislative Research Officer
Ms Stephanie Lum, Legislative Research Officer

Secretariat for the preparation of the annual report

Ms Toni Dawes, Committee Secretary
Ms Zoe Hutchinson, Principal Research Officer/ Committee Secretary (A/g)
Dr Kate Mitchell, Principal Research Officer
Ms Stephanie Lum, Legislative Research Officer

1 The human rights committee secretariat is staffed by parliamentary officers drawn from the Department of the Senate Legislative Scrutiny Unit (LSU), which usually includes two Principal Research Officers with specialised expertise in international human rights law. LSU officers regularly work across multiple scrutiny committee secretariats. The officers who are listed completed, at least, some work for the human rights committee secretariat during 2018.

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Chapter 1

Introduction

Establishment of the committee

1.1 The committee was established under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act) in March 2012. The establishment of the committee was a key element of Australia's Human Rights Framework, which was launched on 21 April 2010, and which was intended to enhance the understanding of, and respect for, human rights in Australia.¹

Role of the committee

1.2 The establishment of the committee builds on the Parliament's established traditions of legislative scrutiny. Accordingly, the committee undertakes its scrutiny function as a technical inquiry relating to Australia's international human rights obligations. The committee does not consider the broader policy merits of legislation when performing its technical scrutiny function.

1.3 The committee's purpose is to enhance understanding of, and respect for, human rights in Australia; and to ensure appropriate recognition of human rights issues in legislative and policy development.

Functions and powers of the committee

1.4 The committee has the following functions under the Act:

- to examine bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue; and
- to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

1.5 The powers and proceedings of the committee are set out in the committee's resolution of appointment and the Act.²

1 See, Attorney-General's second reading speech: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2010-09-30%2F0033%22>.

2 The committee's resolution of appointment is available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/.

Definition of human rights and the Act

1.6 Human rights are defined in the Act as those contained in the following seven human rights treaties to which Australia is a party:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- Convention on the Elimination of Discrimination against Women (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CRC); and
- Convention on the Rights of Persons with Disabilities (CRPD).

1.7 The committee's analysis of legislation is against the standards set out in these seven human rights treaties. The ICCPR and the ICESCR cover all the key civil and political and economic, social and cultural rights. For the most part, the five other treaties expand or elaborate on these rights in a more detailed way. This understanding is consistent with the approach the Attorney-General's Department has adopted in providing support to executive departments and agencies.

Committee membership

1.8 The resolution of appointment governing the committee's operation provides that the committee consists of 10 members: three members of the House of Representatives drawn from the government party; two members of the House of Representatives drawn from the opposition or any other non-aligned member; two Senators drawn from the government party; two Senators drawn from the opposition; and one Senator from a minority party or an independent Senator.

1.9 The committee elects as its Chair a government member from either the House of Representatives or the Senate. The Deputy Chair is elected from one of the non-government members of the committee.

Acknowledgements

1.10 The committee wishes to acknowledge the work and assistance of its external legal adviser during the reporting period, Dr Jacqueline Mowbray and the committee secretariat.

1.11 The committee also wishes to acknowledge the assistance of ministers and associated departments and agencies during the reporting period. The responsiveness of ministers, departments and agencies to the committee's inquiries is critical to ensuring that the committee can perform its scrutiny function effectively.

Structure of the report

1.12 This report covers the period 1 January 2018 to 31 December 2018 (the reporting period). Mr Ian Goodenough MP has been Chair of the committee during the reporting period, a position he has held since 14 September 2016.

1.13 Chapter 2 sets out the committee's mode of operation, its analytical framework and the scrutiny dialogue model. Chapter 3 reports on the work of the committee during the reporting period.

Chapter 2

The committee's mode of operation

Overview

2.1 The committee examines and reports on the human rights compatibility of all bills and legislative instruments that come before the Parliament. Since its inception, and in keeping with the longstanding conventions of the Senate scrutiny committees,¹ the committee has sought to adopt a non-partisan, technical approach to its scrutiny of legislation.

2.2 The committee generally meets when both the House of Representatives and the Senate are sitting, and has a regular reporting cycle around these meetings. The committee's reports are tabled after each meeting, and deal with the bills and instruments of delegated legislation introduced or tabled in the preceding period.

2.3 The committee seeks to conclude and report on its examination of bills while they are still before the Parliament, so that its findings may inform the legislative deliberations of the Parliament. The committee's ability to do so is, however, dependent on the legislative program of the government of the day and the timeliness of ministers' responses to the committee's inquiries. Where a bill is passed before the committee has been able to conclude its examination, the committee nevertheless completes its examination of the legislation and reports its findings to the Parliament.

2.4 The committee examines all legislative instruments tabled in the Parliament, including legislative instruments that are exempt from the disallowance process under the *Legislation Act 2003* (LA).² The committee seeks to conclude and report on its examination of legislative instruments within the timeframe for disallowance prescribed by the LA (15 sitting days). In the event that the committee's concerns cannot be resolved before the expiry of this period, the committee may give a 'protective' notice of motion to disallow the instrument to ensure that the ability of the Parliament to disallow the instrument is not lost pending the conclusion of the committee's examination.

1 The three scrutiny committees in the Legislative Scrutiny Unit are the Senate Standing Committee for the Scrutiny of Bills; the Senate Standing Committee on Regulations and Ordinances; and the Parliamentary Joint Committee on Human Rights.

2 The LA provides that certain instruments are exempt from disallowance by providing either that a type of instrument is not a legislative instrument for the purposes of the LA (section 9) or is otherwise not subject to disallowance (section 42).

The committee's analytical framework

2.5 Australia has voluntarily accepted obligations under the seven core United Nations (UN) human rights treaties. It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and any limitations on human rights are to be interpreted narrowly. Accordingly, the primary focus of the committee's reports is determining whether any identified limitation of a human right is justifiable.

2.6 International human rights law recognises that permissible limits may be placed on most rights and freedoms—there are few absolute rights (that is, rights which cannot be limited in any circumstances).³ All other rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.

2.7 Where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against these limitation criteria.

2.8 Where relevant, the committee takes into account the views of human rights treaty bodies, as well as international and comparative human rights jurisprudence. These sources are relevant to the interpretation of the human rights against which the committee is required to assess legislation.

Statements of compatibility

2.9 The Act requires that each bill and disallowable legislative instrument be accompanied by a statement of compatibility.⁴ The statement of compatibility serves as the starting point for the application of the committee's analytical framework, and sets out the legislation proponent's assessment of the extent to which the legislation engages human rights.

3 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law; and the right to non-refoulement.

4 See Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2.10 The committee sets out its expectations in relation to statements of compatibility in its *Guidance Note 1*.⁵

The scrutiny dialogue model

2.11 The committee's main function of scrutinising legislation is pursued through dialogue with legislation proponents (usually ministers). Accordingly, where legislation raises a human rights concern which has not been adequately justified in the relevant statement of compatibility, the committee's usual approach is to publish an initial report setting out its concerns, and seek further information from the legislation proponent. Any response from the legislation proponent is subsequently considered and published alongside the committee's concluding report on the matter. As well as making findings on the human rights compatibility of the relevant legislation, the committee may make specific recommendations to ensure the compatibility of the legislation with Australia's human rights obligations.

2.12 In some cases, legislation proponents may provide an undertaking to address the committee's concerns in the future (for example, by amending legislation or undertaking to conduct a review of the legislation in due course).⁶

2.13 The committee does not generally call for public submissions in relation to its technical scrutiny of legislation. However, the committee welcomes correspondence and submissions from parliamentarians, interested groups and other stakeholders who wish to bring matters to the committee's attention that are relevant to its functions under the Act. The committee will take these into account where relevant to the examination of a particular item of legislation.

Structure of the committee's scrutiny reports

2.14 The structure of the committee's scrutiny reports reflects the progress of the dialogue model described above, with matters proceeding from an initial report describing the human rights issues and concerns to a concluding report that takes

5 See Guidance Note 1 at Appendix 2.

6 See, for example, Parliamentary Joint Committee on Human Rights, Commonwealth Redress Scheme Bill 2018, *Report 2 of 2018* (13 February 2018) pp. 73-96: the minister noted that in response to the committee's concerns he would consider including a positive requirement that the scheme operator must have regard to the impact disclosure might have on a person when determining whether to make a public interest disclosure. This requirement was included in Rule 42 of the National Redress Scheme Rules 2018. See Parliamentary Joint Committee on Human Rights, National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, *Report 9 of 2018* (11 September 2018) pp. 52-54. See, also, Parliamentary Joint Committee on Human Rights, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, *Report 3 of 2018* (27 March 2018) pp. 224-236; 242-244; 250-253: the Attorney-General introduced amendments to the bill in response to concerns the committee raised, for example amendments to the proposed secrecy offences and the removal of the strict liability element of offences in proposed sections 91.3 and 122.1. The introduced amendments partially addressed committee concerns.

into account any information received by the legislation proponent in response to the committee's initial report.

2.15 Chapter 1 of the committee's reports includes new and continuing matters. This generally includes all bills introduced during the preceding period, with bills not raising human rights concerns being listed as such.⁷ Where bills raise human rights concerns, these are the subject of substantive report entries setting out the nature of the committee's concerns and any information being sought from the legislation proponent. That is, the committee generally takes an exceptions-based approach to substantive report entries and focuses its attention on whether potential limitations are permissible as a matter of international human rights law. However, on occasion, the committee has also substantively reported on legislation which is likely to promote rights.⁸

2.16 Chapter 1 also includes the committee's reporting on any instruments of delegated legislation registered on the Federal Register of Legislation (FRL) in the reporting period that raise human rights concerns. The committee's reports cross-reference to the FRL for the full list of instruments considered during the reporting period. Due to the very high volume of delegated legislation examined by the committee, such instruments are substantively reported on as per an exceptions-based approach.

2.17 Chapter 1 also considers continuing matters (or further response required matters), which are matters in relation to which the committee has received a response from the legislation proponent, but requires further information in order to conclude its examination of the matter.

2.18 Chapter 2 of the committee's reports examine responses received in relation to the committee's requests for information and on the basis of which the committee will conclude its examination of the legislation in question. As noted above at [2.11], the committee's concluding remarks on legislation may include findings or recommendations as to the human rights compatibility of the legislation and/or specific recommendations to address any human rights concerns.

2.19 While correspondence received by the committee was previously included in full in an appendix to each report, from *Report 11 of 2018* onwards, responses from legislation proponents to requests for information moved to being published in full

7 This may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights.

8 See, for example, Parliamentary Joint Committee on Human Rights, *Modern Slavery Bill 2018, Report 8 of 2018* (21 August 2018) pp. 17-22, although the committee also commented on the compatibility of the bill with the right to privacy in its analysis.

online alongside the report on the committee's website.⁹ These responses continue to be summarised and analysed in Chapter 2 of the report, and a hyperlink to the committee's website is included in the concluding report entry.

Legal advice

2.20 The committee is assisted by an external legal adviser on a part-time basis, who is appointed by the Presiding Officers of the Parliament. The committee's legal adviser during the reporting period was Dr Jacqueline Mowbray. Dr Mowbray has extensive research and teaching experience in international law and human rights. Dr Mowbray has also published widely on related matters, including, as co-author, a leading work on the International Covenant on Economic, Social and Cultural Rights. Dr Mowbray previously served as co-director of the Sydney Centre for International Law, as editor of the *Australian International Law Journal* and has worked as a solicitor in London and Melbourne. During her time as legal adviser to the committee she continued researching and teaching on international law at the University of Sydney. In addition to the external legal adviser, the human rights committee secretariat also usually includes two full-time Principal Research Officers with specialised expertise in international human rights law.

Committee publications and resources

2.21 In addition to its regular reports on the human rights compatibility of legislation, the committee has produced a number of publications and resources to assist ministers, departments and interested parties more generally in engaging with the committee and its work.

Committee guidance notes

2.22 The committee has produced two guidance notes, which are available on the committee's website and are included in **Appendix 2** to this report.

Guidance Note 1—Drafting statements of compatibility

2.23 This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is primarily designed to assist legislation proponents in the preparation of statements of compatibility.

Guidance Note 2—Offence provisions, civil penalties and human rights

2.24 This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

9 Legislation proponent responses are available at:
https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Guide to human rights

2.25 The committee's *Guide to human rights* (the guide) provides an introduction to the key human rights protected by the human rights treaties relevant to the committee's assessments of legislation.¹⁰

2.26 The guide is intended to provide a brief and accessible overview of Australia's human rights obligations, the key human rights considered by the committee, and the manner in which human rights may be justifiably limited. Case studies are provided to illustrate how human rights may be engaged and limited in practice. The guide also includes a references section for those seeking more comprehensive information about the rights listed in the guide.

2.27 The guide is available on the committee's website.¹¹

Index of bills and legislative instruments

2.28 The *Index of bills and legislative instruments* lists all the bills examined by the committee, and those legislative instruments in relation to which the committee has identified human rights concerns (as noted above at paragraph [2.16], the committee takes an exceptions-based approach to substantive reporting on legislative instruments).¹²

2.29 The *Index* contains a shorthand description of any rights engaged by the legislation; the key issues arising in the legislation; the action taken by the committee (that is, whether the committee considered that the legislation did not raise human rights concerns, made an advice-only comment or made a comment requiring a response from the legislation proponent); and the relevant report(s) in which the committee's full comments may be found.¹³

Scrutiny reports and databases

2.30 The committee's scrutiny reports themselves are also a key resource. These are available on the committee's website. They can be downloaded as single PDF

10 The committee's first *Guide to Human Rights* was published in March 2014. This guide was updated in June 2015.

11 The committee's *Guide to Human Rights* is available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

12 The instruments received and considered by the committee in the reporting period are listed on the Federal Register of Legislation: <https://www.legislation.gov.au/>.

13 The Index of bills is available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments.

documents or separate chapters.¹⁴ Since 16 August 2018, the scrutiny reports are also available on the Australasian Legal Information Institute (AustLII) website where each report entry for legislation is available separately and is individually searchable.¹⁵

14 The committee's scrutiny reports are available at:
https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

15 The Australasian Legal Information Institute PJCHR database is available at:
<http://www.austlii.edu.au/cgi-bin/viewdb/au/other/AUPJCHR/>.

Chapter 3

Work of the committee in 2018

3.1 This chapter provides information about the work of the committee during 2018,¹ 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 or responses 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	Further response required ²
Bills and Acts	238	181	19	38	4
Legislative instruments	1,850	1,802	10	38	11

Reports tabled during the period

3.4 The committee tabled 13 scrutiny reports during the reporting period, from *Report 1 of 2018* to *Report 13 of 2018*.³

1 The reporting period covers 1 January 2018 to 31 December 2018. The committee's first scrutiny report of the reporting period, *Report 1 of 2018*, was tabled on 6 February 2018 and its final scrutiny report of 2018, *Report 13 of 2018*, was tabled on 4 December 2018.

2 A 'further response required' request is where the committee has requested further additional information from a legislation proponent after receiving the legislation proponent's initial response. Therefore more than one response can be required in relation to one bill or instrument.

3.5 The committee also tabled its *Annual Report 2016-17* on 19 June 2018.⁴

Commonly engaged rights

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

- right to privacy;⁵
- right to equality and non-discrimination;⁶
- criminal process rights, including the right not to incriminate oneself, the right to be presumed innocent and the right to a fair trial;⁷
- right to a fair hearing;⁸
- right to freedom of expression or opinion;⁹
- right to an effective remedy;¹⁰
- right to liberty;¹¹
- right to social security;¹²
- rights of children/obligation to consider the best interests of the child;¹³ and
- right to freedom of movement.¹⁴

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

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

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

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

7 Articles 14(1), 14(2) and 14(3)(g) of the ICCPR.

8 Article 14 of the ICCPR.

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

10 Article 2(3) of the ICCPR.

11 Article 9 of the ICCPR.

12 Article 9 of the ICESCR.

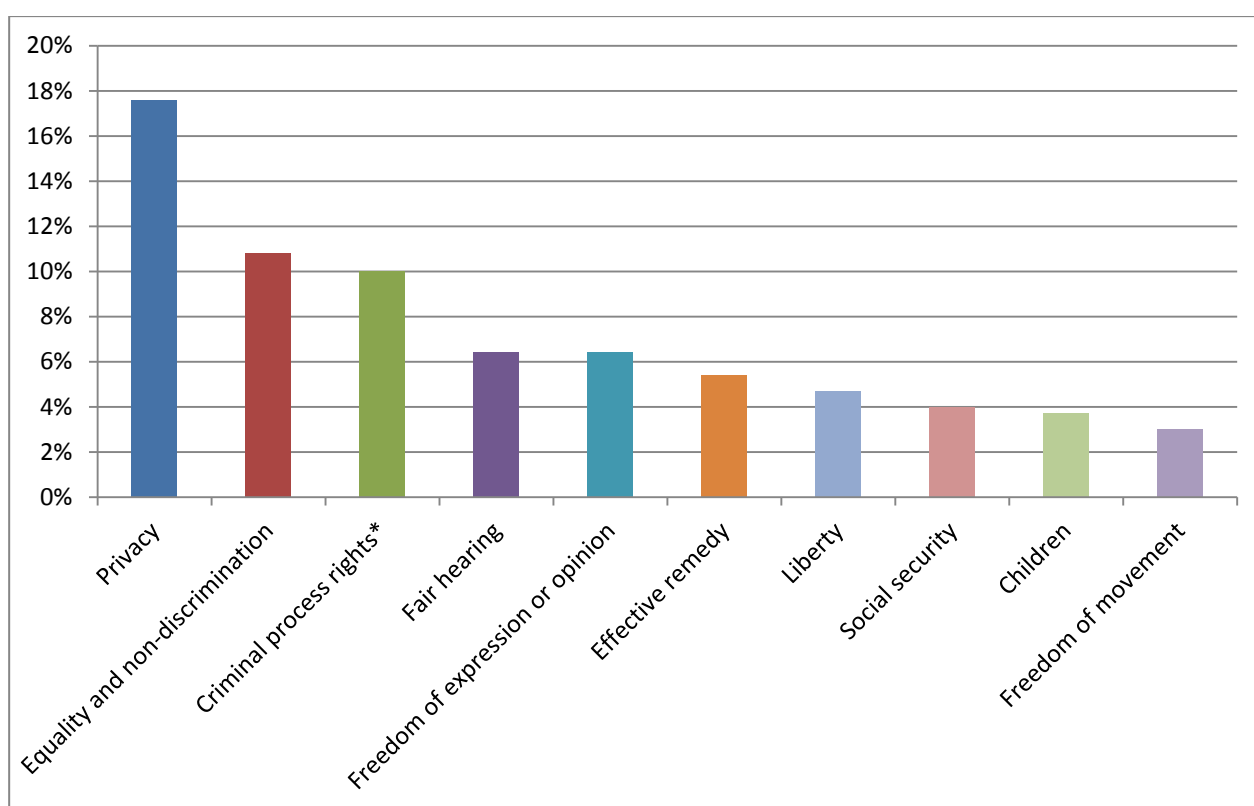
13 Article 3 of the Convention on the Rights of the Child (CRC).

14 Article 12 of the ICCPR.

3.7 During the reporting period, the rights listed above accounted for 73% 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).¹⁵

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 a mix between civil and political rights and economic, social and cultural rights.

Figure 3.1: Human rights engaged by legislation in 2018



15 As discussed in Chapter 2, 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 Federal Register of Legislation. Legislative instruments raising human rights concerns were identified on an exceptions basis in the committee's reports.

* 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.

Major themes

3.9 Five significant areas that attracted substantive comment from the committee in the reporting period related to: human rights and technology; national security and foreign interference; equality and non-discrimination and vulnerable groups; information sharing, assistance and extradition to foreign countries; and children's rights.

Human rights and technology

3.10 The growing capacities for technology to be used to collect, store, access, match and share information has a range of potential human rights implications. The committee examined a number of bills and delegated legislation that relate to the intersection of human rights and technology, including the:

- Identity-matching Services Bill 2018;¹⁷
- amendments to the *Telecommunications Act 1997* in the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018;¹⁸ and
- My Health Records (National Application) Rules 2017 [F2017L01558].

3.11 Measures examined by the committee included proposals to:

- allow for the matching and sharing of facial images and biometric data across government agencies, and between particular government and non-government agencies through a centralised Hub;¹⁹
- require 'designated communications providers' to assist law enforcement agencies in a number of ways, including by covertly removing electronic protection from a device such as a mobile telephone (that is, decryption), installing software on devices, and facilitating access to customer equipment, software or devices;²⁰
- establish a computer access warrant scheme in the *Surveillance Devices Act 2004*, in which officers would be enabled to search a computer remotely or physically and access content on that computer;²¹

17 The Bill is currently before the House of Representatives.

18 The Bill received Royal Assent on 8 December 2018.

19 Parliamentary Joint Committee on Human Rights, Identity-matching Services Bill 2018, *Report 3 of 2018* (27 March 2018) p. 42 and *Report 5 of 2018* (19 June 2018) p. 110.

20 Parliamentary Joint Committee on Human Rights, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, *Report 11 of 2018* (16 October 2018) p. 24 and *Report 13 of 2018* (4 December 2018) p. 51.

21 Parliamentary Joint Committee on Human Rights, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, *Report 11 of 2018* (16 October 2018) p. 40 and *Report 13 of 2018* (4 December 2018), p. 71.

- conceal that information on computers has been accessed or that assistance has been given;²² and
- automatically include health information in the My Health Record system, an online electronic system of an individual's health records.²³

3.12 These introduced measures raise a number of human rights concerns primarily regarding respect for informational privacy. The committee was particularly concerned about the proportionality of the measures and the lack of, or inadequacy of, safeguards where the legislation allowed for increased access to information but limited ability for individuals to control information disclosure. For a number of these measures, the committee concluded that there may be a risk of incompatibility with the right to privacy or they are likely to be incompatible with the right to privacy.²⁴ Some of the measures introduced have also raised further human rights concerns around the right to an effective remedy and right to a fair trial and fair hearing.²⁵

3.13 The committee was also unable to conclude some of the measures were compatible with human rights, particularly in relation to the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, as the minister had not fully addressed some of the committee's concerns and this served to limit the committee's final assessment of the legislation.²⁶

National security and foreign interference

3.14 The committee continues to receive a number of bills in relation to national security and foreign interference, including the:

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- 22 Parliamentary Joint Committee on Human Rights, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, *Report 11 of 2018* (16 October 2018), p. 51 and *Report 13 of 2018* (4 December 2018) p. 89.
 - 23 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018), My Health Records (National Application) Rules 2017 [F2017L01558], p. 135.
 - 24 Parliamentary Joint Committee on Human Rights, Identity-matching Services Bill 2018, *Report 5 of 2018* (19 June 2018) p. 133; Parliamentary Joint Committee on Human Rights, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, *Report 13 of 2018* (4 December 2018), p. 92; and Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018), My Health Records (National Application) Rules 2017 [F2017L01558], p. 143.
 - 25 Parliamentary Joint Committee on Human Rights, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, *Report 13 of 2018* (4 December 2018) pp. 69-71 and 81-84.
 - 26 Parliamentary Joint Committee on Human Rights, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, *Report 13 of 2018* (4 December 2018). See pp. 69-71 on the compatibility of technical assistance notices, technical capability notices and technical assistance requests with the right to an effective remedy; pp. 87-89 on the compatibility of computer access warrants with multiple rights; and pp. 92-96 on assistance order provisions and the right to privacy.

- National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017;²⁷
- Foreign Influence Transparency Scheme Bill 2017;²⁸
- Defence Amendment (Call Out of the Australian Defence Force) Bill 2018;²⁹
- Counter-Terrorism Legislation Amendment Bill (No. 1) 2018;³⁰
- Crimes Legislation Amendment (Police Powers at Airports) Bill 2018;³¹ and
- Office of National Intelligence Bill 2018 and the Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018.³²

3.15 National security and foreign interference bills collectively engaged a large number of human rights including freedom of expression, right to an effective remedy, right to be presumed innocent, right to privacy, freedom of association, right to take part in public affairs, right to equality and non-discrimination, right to life, right to liberty, prohibition on torture and cruel, inhuman and degrading treatment or punishment, right to social security, and the right to an adequate standard of living.

3.16 The bills introduced, extended or amended a number of measures relating to national security and foreign interference. These included measures to:

- establish a Foreign Influence Transparency Scheme, which requires registration and disclosure for persons or entities who undertake certain activities, such as political lobbying, on behalf of a foreign principal;³³
- introduce new secrecy provisions which criminalise the disclosure or use of government information;³⁴

27 The Bill received Royal Assent on 29 June 2018.

28 The Bill received Royal Assent on 29 June 2018.

29 The Bill received Royal Assent on 10 December 2018.

30 The Bill received Royal Assent on 24 August 2018.

31 The Bill is currently before the House of Representatives.

32 These Bills received Royal Assent on 10 December 2018.

33 Parliamentary Joint Committee on Human Rights, Foreign Influence Transparency Scheme Bill 2017, *Report 1 of 2018* (6 February 2018) p. 34 and *Report 3 of 2018* (27 March 2018) p. 189. The Bill provided that these activities include Parliamentary lobbying, general political lobbying, communications activity or donor activity, where the activity is in Australia for the purpose of political or governmental influence.

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- introduce new offences relating to foreign interference and create a broader range of espionage offences;³⁵
 - provide for a presumption against bail in relation to certain offences;³⁶
 - provide certain agencies with information gathering powers;³⁷
 - call out the Australian Defence Force (ADF) domestically and provide the ADF with a range of powers including the use of lethal force in certain circumstances;³⁸
 - extend the operation of control orders and preventative detention orders;³⁹
 - extend the operation of Australian Federal Police (AFP) stop, search and seize powers;⁴⁰
 - extend the operation of Australian Security Intelligence Organisation (ASIO)'s questioning and detention powers;⁴¹ and
 - increase police powers at airports, including directions to provide identity information and move-on directions at airports.⁴²
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34 Parliamentary Joint Committee on Human Rights, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, *Report 2 of 2018* (13 February 2018) p. 2 and *Report 3 of 2018* (27 March 2018) p. 213; and Parliamentary Joint Committee on Human Rights, Office of National Intelligence Bill 2018 and Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018, *Report 7 of 2018* (14 August 2018) p. 48 and *Report 10 of 2018* (18 September 2018) p. 54.

35 Parliamentary Joint Committee on Human Rights, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, *Report 2 of 2018* (13 February 2018) pp. 17 and 23 and *Report 3 of 2018* (27 March 2018) pp. 244 and 255.

36 Parliamentary Joint Committee on Human Rights, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, *Report 2 of 2018* (13 February 2018) and *Report 3 of 2018* (27 March 2018) pp. 260-64.

37 Parliamentary Joint Committee on Human Rights, Office of National Intelligence Bill 2018 and Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018, *Report 7 of 2018* (14 August 2018) p. 56 and *Report 10 of 2018* (18 September 2018) p. 68.

38 Parliamentary Joint Committee on Human Rights, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018, *Report 8 of 2018* (21 August 2018) p. 2 and *Report 12 of 2018* (27 November 2018) p. 77.

39 Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment Bill (No. 1) 2018, *Report 6 of 2018* (26 June 2018) pp. 3 and 12 and *Report 10 of 2018* (26 June 2018) pp. 22 and 36.

40 Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment Bill (No. 1) 2018, *Report 6 of 2018* (26 June 2018) p. 21 and *Report 10 of 2018* (26 June 2018) p. 45.

41 Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment Bill (No. 1) 2018, *Report 6 of 2018* (26 June 2018) p. 24.

3.17 The committee noted that, in general, providing necessary powers to security and law enforcement may constitute a legitimate objective for the purposes of human rights law. However, in many cases, the committee was concerned at the breadth of some of the measures, and whether they were necessary to achieve the legitimate objectives.

3.18 For example, the committee was concerned about the lack of precision of terms triggering powers such as 'good order' in the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018 and 'domestic violence' in the Defence Amendment (Call Out of the Australian Defence Force) Bill 2018. In these cases their lack of definition could mean that they may capture a broader range of conduct than necessary to be compatible with particular human rights.⁴³

3.19 In some cases the committee concluded that the measures introduced in these bills were likely to be compatible with human rights but recommended that the measures be monitored to ensure that, in practice, the exercise of the powers are compatible with human rights.⁴⁴ In other cases, the committee concluded that the measures may be or risk being incompatible with human rights.⁴⁵

3.20 The committee also made some recommendations to assist in determining whether certain measures are compatible with human rights on an ongoing basis. For example, in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, the committee recommended that the secrecy provisions introduced should be subject to review after five years in operation.⁴⁶ During the

42 Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Police Powers at Airports) Bill 2018, *Report 11 of 2018* (16 October 2018) p. 9 and *Report 12 of 2018* (27 November 2018) p. 55.

43 Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Police Powers at Airports) Bill 2018, *Report 12 of 2018* (27 November 2018) p. 63 and Parliamentary Joint Committee on Human Rights, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018, *Report 12 of 2018* (27 November 2018) p. 99.

44 See, for example, Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Police Powers at Airports) Bill 2018, *Report 12 of 2018* (27 November 2018) p. 72.

45 See, for example, Parliamentary Joint Committee on Human Rights, Foreign Influence Transparency Scheme Bill 2017, *Report 3 of 2018* (27 March 2018) p. 203; Parliamentary Joint Committee on Human Rights, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, *Report 3 of 2018* (27 March 2018) p. 279; Parliamentary Joint Committee on Human Rights, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018, *Report 12 of 2018* (27 November 2018) p. 95..

46 Parliamentary Joint Committee on Human Rights, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, *Report 3 of 2018* (27 March 2018) pp. 236, 244 and 259.

second reading debate on the bill, the Attorney-General cited the committee's concerns for moving amendments to the bill.⁴⁷

Equality and non-discrimination and vulnerable groups

3.21 The committee received a number of bills and delegated legislation that engaged the right to equality and non-discrimination or impacted upon certain vulnerable groups, for example:

- legislation relating to the National Redress Scheme for Institutional Child Sexual Abuse Bill;⁴⁸
- the Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018;⁴⁹
- the National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 [F2018L00632]; and
- various Social Security Determinations and bills relating to cashless welfare and welfare quarantining.⁵⁰

Right to equality and non-discrimination

3.22 The right to equality and non-discrimination in the International Covenant on Civil and Political Rights (ICCPR) provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law. 'Discrimination' encompasses a distinction based on a personal attribute (for example, race, sex, or on the basis of disability), which has either the purpose (called 'direct' discrimination) or the effect (called 'indirect' discrimination),

47 House of Representatives Hansard, No. 9 2018 (26 June 2018) p. 6352.

48 National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 and the National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018, along with accompanying delegated legislation, the National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 [F2018L00969], the National Redress Scheme for Institutional Child Sexual Abuse Direct Personal Response Framework 2018 [F2018L00970], and the National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 [F2018L00975]). These Bills received assent on 21 June 2018.

49 The Bill received Royal Assent on 24 August 2018.

50 Parliamentary Joint Committee on Human Rights, Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245]; Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018 [F2018L00251], Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018, *Report 6 of 2018* (26 June 2018) p. 30 and *Report 8 of 2018* (21 August 2018) p. 37. The Bill received assent on 21 September 2018. See also Parliamentary Joint Committee on Human Rights, Social Security Legislation Amendment (Community Development Program) Bill 2018, *Report 10 of 2018* (18 September 2018) p. 10 and *Report 12 of 2018* (27 November 2018) p. 25. The Bill is currently before the Senate.

of adversely affecting human rights. The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular protected attribute.⁵¹ Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination.

3.23 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

3.24 The bills and instruments listed above implement a number of measures which engaged the right to equality and non-discrimination including:

- introducing a National Redress Scheme for survivors of institutional child sexual abuse, which includes special rules for eligibility for persons with serious criminal convictions and which restricts the eligibility of non-citizens and non-permanent residents;⁵²
- lowering the repayment threshold for Higher Education Loan Program (HELP) debts;⁵³
- the expansion of the cashless debit card trial to Bundaberg and Hervey Bay, and amendments to the cashless welfare arrangements in other trial areas;⁵⁴ and
- amendments to apply the targeted compliance framework (TCF) to the Community Development Program (CDP) social security recipients.⁵⁵

51 *Althammer v Austria*, HRC 998/01 [10.2].

52 Parliamentary Joint Committee on Human Rights, National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 and the National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018, *Report 5 of 2018* (19 June 2018) p. 14 and p.24 and *Report 9 of 2018* (11 September 2018) p.48 and p. 56.

53 Parliamentary Joint Committee on Human Rights, Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018, *Report 3 of 2018* (27 March 2018) p. 30 and *Report 4 of 2018* (8 May 2018) p. 107.

54 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018, *Report 6 of 2018* (26 June 2018) p. 32 and *Report 8 of 2018* (21 August 2018) p. 39. The cashless debit card trial permits welfare payments to be divided into 'restricted' and 'unrestricted' positions. The restricted position cannot be spent on particular items.

55 Parliamentary Joint Committee on Human Rights, Social Security Legislation Amendment (Community Development Program) Bill 2018, *Report 10 of 2018* (18 September 2018) p. 10 and *Report 12 of 2018* (27 November 2018) p. 25.

3.25 These measures may have a disproportionate effect on certain groups.

3.26 For example, Aboriginal and Torres Strait Islander people are likely to be disproportionately negatively affected under special rules applying to individuals with serious criminal convictions, restricting their ability to access the National Redress Scheme. This is because of a context where Aboriginal and Torres Strait Islander peoples are over-represented in the criminal justice system and are sentenced to custody at a higher rate than non-Indigenous defendants.⁵⁶ The committee concluded that the measure may be for a legitimate objective, but questioned whether the measure was the least rights restrictive way to achieve it and ultimately concluded that it may be incompatible with the right to equality and non-discrimination. The committee recommended that the special assessment process for people with serious criminal convictions be monitored by government to ensure it operates in a manner compatible with the right to equality and non-discrimination.⁵⁷

3.27 Similarly, in the Social Security Legislation Amendment (Community Development Program) Bill 2018, applying the targeted compliance framework (a framework which subjects social security income support recipients to financial and non-payment sanctions for a failure to meet participation requirements) to CDP participants, may have a disproportionate negative impact on Aboriginal and Torres Strait Islander people. This is because 80% of CDP participants are Aboriginal and Torres Strait Islander. The committee was unable to conclude whether the measure is compatible with the right to equality and determination as the minister's response did not address this issue. The committee has sought a further response.⁵⁸

3.28 Another example concerns the Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018. The committee's report stated that reducing the minimum repayment income threshold for HELP debts to \$44,999 may have a disproportionate impact on women and other vulnerable groups. In relation to women, this is because, on average, women are more likely to earn less than men, and therefore are more likely to be affected by the reduction in the repayment threshold to cover those earning between \$44,999 and \$55,000. Following correspondence with the minister, the committee stated that it was not possible to conclude that the measure is compatible with the right to equality and non-discrimination (indirect discrimination).⁵⁹

56 Parliamentary Joint Committee on Human Rights, *Report 9 of 2018* (11 September 2018), p. 58.

57 Parliamentary Joint Committee on Human Rights, *Report 9 of 2018* (11 September 2018), p. 63.

58 Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018), pp. 35-36.

59 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018), pp. 113-118.

3.29 Some statements of compatibility identified and addressed whether measures could engage the right to equality and non-discrimination (either directly or indirectly). However, the committee was concerned that in a number of cases legislation proponents failed to recognise the indirect impact measures may have on particular groups, and which may constitute indirect discrimination if they do not meet specified criteria. The committee was further concerned that once these concerns were brought to the attention of the legislation proponent, sometimes legislation proponents failed to address the effect of these measures in their responses, instead focusing on the direct impact of the measures on particular groups and dismissing relevant human rights concerns. As such, in a number of cases, the potential of measures to exacerbate existing inequalities was not addressed by the legislation proponent.

The rights of persons with disabilities

3.30 During the reporting period the committee also examined legislation that impacted upon particular vulnerable groups. This included examining legislation that engaged the rights of persons with disabilities. For example, it considered:

- requirements for National Disability Insurance Scheme (NDIS) providers to implement and maintain incident management systems to report incidents;⁶⁰
- requirements for the resolution of complaints relating to NDIS providers, as well as complaints to and inquiries by the NDIS Quality and Safeguards Commissioner;⁶¹ and
- conditions relating to the use of regulated restrictive practices by NDIS providers.⁶²

3.31 In relation to the National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018 [F2018L00633], the committee was concerned that the statement of compatibility did not acknowledge that the rules may engage and limit the right to privacy or acknowledge that the inquiry powers, incident management processes and complaints management processes

60 Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018 [F2018L00633], *Report 7 of 2018* (14 August 2018) p. 23, and *Report 9 of 2018* (11 September 2018) p. 23.

61 Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018 [F2018L00633], *Report 7 of 2018* (14 August 2018) p. 23, and *Report 9 of 2018* (11 September 2018) p. 23.

62 Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 [F2018L00632], *Report 7 of 2018* (14 August 2018) p. 39, *Report 9 of 2018* (11 September 2018) p. 7, and *Report 13 of 2018* (4 December 2018) p. 39.

may engage and limit the right to a fair hearing.⁶³ Following the minister's response however, which provided information as to the penalties for disclosure in breach of the NDIS Code of Conduct and guidelines outlining procedural fairness requirements, the committee concluded that both measures were likely to be compatible with the right to privacy and the right to a fair hearing.⁶⁴

3.32 The committee also initially raised concerns that the National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 [F2018L00632] may not include adequate safeguards to ensure that regulated restrictive practices would not amount to torture, cruel, inhuman or degrading treatment or punishment. The committee was also concerned about the instrument's compatibility with a number of rights under the Convention on the Rights of Persons with Disabilities. The committee therefore sought the advice of the minister as to the proportionality of the conditions relating to the use of regulated restricted practices: following an initial response from the minister, the committee maintained its concerns regarding the adequacy of the safeguards in place. However, after seeking a further response, the committee concluded that the safeguards in the rules relating to the use of restrictive practices pursuant to behaviour support plans may be capable, in practice, of being compatible with Australia's obligations relating to the prohibition on torture, cruel, inhuman and degrading treatment or punishment, and rights of persons with disabilities. The committee recommended the use of restrictive practices pursuant to behaviour support plans be monitored. The committee also concluded, however, that there was a risk that the conditions relating to the 'first use' and 'single emergency use' of regulated restrictive practices by NDIS providers may be incompatible with the prohibition on torture, cruel, inhuman and degrading treatment or punishment, and rights of persons with disabilities. However, the committee considered that policy guidance referred to in the minister's response may be capable, in practice, of addressing these concerns.⁶⁵

Information sharing, assistance and extradition to foreign countries

3.33 In the reporting period the committee examined a number of bills and delegated legislation concerning information sharing, assistance and extradition to foreign countries, which may put individuals at risk of human rights violations, for example:

- the Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018;⁶⁶

63 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018* (14 August 2018) pp. 27 and 29.

64 Parliamentary Joint Committee on Human Rights, *Report 9 of 2018* (11 September 2018) pp. 32 and 36.

65 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) p. 50.

66 The Bill received Royal Assent on 11 April 2018.

- the Extradition (El Salvador) Regulations 2017 [F2017L01581];
- the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018;⁶⁷ and
- the Office of National Intelligence Bill 2018.⁶⁸

3.34 Measures examined in these bills and instruments include:

- sharing information overseas including with foreign entities and foreign intelligence agencies;⁶⁹
- amending the *Mutual Assistance in Criminal Matters Act 1987* to provide assistance to foreign countries in relation to data held in computers; and⁷⁰
- extending the definition of 'extradition country' to include El Salvador and removing India from the list of extradition countries in the Extradition (Commonwealth countries) Regulations,⁷¹ as it was now governed by the Extradition (India) Regulations 2010.⁷²

3.35 Human rights engaged by these measures include the right to privacy, the prohibition on torture, cruel, inhuman or degrading treatment or punishment, the presumption of innocence, the right to life, the right to a fair hearing and fair trial, and the right to equality and non-discrimination.

3.36 The committee raised concerns that some of the information sharing and extradition measures may mean that Australian agencies cooperate with foreign countries in which the death penalty applies. While the ICCPR does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty, like Australia, from exposing a person to the death penalty in another state. As clarified by the United Nations Human Rights

67 The Bill received Royal Assent on 8 December 2018.

68 The Bill received Royal Assent on 10 December 2018.

69 See, Parliamentary Joint Committee on Human Rights, Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018, *Report 3 of 2018* (27 March 2018) p. 52; *Report 4 of 2018* (8 May 2018) p. 47 and *Report 7 of 2018* (14 August 2018) p. 112. See, also, Parliamentary Joint Committee on Human Rights, Office of National Intelligence Bill 2018, *Report 7 of 2018* (14 August 2018) p. 62 and *Report 10 of 2018* (18 September 2018) p. 76.

70 Parliamentary Joint Committee on Human Rights, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, *Report 11 of 2018* (16 October 2018) p. 61 and *Report 13 of 2018* (4 December 2018) p. 101.

71 Extradition (Commonwealth countries) Regulations 2010 [F2017C01207].

72 Parliamentary Joint Committee on Human Rights, Extradition (El Salvador) Regulations 2017 [F2017L01581] and Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017[F2017L01575], *Report 3 of 2018* (27 March 2018) pp. 17 and 26, and *Report 5 of 2018* (19 June 2018) pp. 78 and 103.

Committee, this prohibits the provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies.⁷³ The committee also raised concerns that information sharing overseas in some circumstances could result in a person being subject to torture, cruel, inhuman or degrading treatment or punishment. The committee noted that these issues were not addressed in the statement of compatibility for a number of these measures, which is of particular concern as there is no specific requirement under Australian law to decline to disclose information where it may result in a person being tortured or prosecuted for an offence carrying the death penalty.⁷⁴

3.37 The committee emphasised the need for adequate and effective safeguards to ensure that cooperation or information sharing does not occur where it may lead to the imposition of the death penalty or a person being subject to torture, cruel, inhuman or degrading treatment or punishment, and raised concerns that the safeguards that do exist may be insufficient. However, in some cases, like the amendments to the *Mutual Assistance in Criminal Matters Act 1987*, the committee noted that the human rights compatibility of the measure may depend on how the safeguards operate in practice.⁷⁵ The committee made some recommendations including that the committee be provided with guidelines developed from the Office of National Intelligence in relation to the disclosure of information to foreign partners.⁷⁶

3.38 Ministerial responses to some of these concerns were lacking relevant information, and sometimes resulted in the committee being unable to conclude that a measure was compatible with human rights. For example, the committee was unable to conclude in relation to information sharing to foreign intelligence agencies under the Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018 whether the measure was compatible with the right to life and the prohibition on torture, or cruel, inhuman or degrading treatment or punishment.⁷⁷ Further, the committee remained concerned that some of the measures, for example the general discretion under the *Extradition Act 1988* for the

73 Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5, 7 May 2009, [20].

74 See, for example, Parliamentary Joint Committee on Human Rights, Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018, *Report 10 of 2018* (18 September 2018), p. 80; and Parliamentary Joint Committee on Human Rights, Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018, *Report 3 of 2018* (27 March 2018) p. 54.

75 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018), p. 109.

76 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018), p. 80.

77 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018* (14 August 2018) p. 119.

minister to determine whether to surrender a person, were not likely to be sufficient to ensure compatibility with Australia's obligations in article 7 of the ICCPR not to extradite persons who may be subject to cruel, inhuman or degrading treatment or punishment if extradited. This was because unconstrained discretion is generally insufficient for human rights purposes to ensure that powers are exercised in a manner that is compatible with human rights. That is, it is possible that the Attorney-General may decline to exercise his or her discretion not to surrender someone even though there is a real risk of the person being subject to cruel, inhuman and degrading treatment and punishment.⁷⁸

3.39 The committee continues to draw to ministers' attention that some Acts would benefit from a full foundational review of the human rights compatibility where their enactment predated the establishment of the committee, for example the *Mutual Assistance in Criminal Matters Act 1987* and the *Extradition Act 1988*.⁷⁹

Children's rights

3.40 The committee considered a number of bills that engaged children's rights. Some bills introduced measures that promote children's rights like the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018.⁸⁰ For others, the committee found they are likely to be incompatible with human rights, for example, in respect of measures in the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018.⁸¹

3.41 These bills collectively engaged the right to respect for the family, the obligation to consider the best interests of the child, the right to equality and non-discrimination, and the right to an effective remedy.

3.42 The committee found that children's rights were promoted with the passing of the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018. The national redress scheme provides that child applicants undertake a special application process to access the scheme. The committee sought further information as to whether a different process was compatible with the right to equality and non-discrimination and the right to an effective remedy, given concern that without sufficient safeguards, the broad scope of the power to determine a person's entitlement to eligibility could be exercised in such a way as to be incompatible with human rights.⁸² The committee was satisfied with the minister's response that

78 Parliamentary Joint Committee on Human Rights, *Report 5 of 2018* (19 June 2018) pp. 82-83.

79 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018), p. 109; and Parliamentary Joint Committee on Human Rights, *Report 5 of 2018* (19 June 2018) p. 94.

80 The Bill received Royal Assent on 21 June 2018.

81 The Bill is currently before the Senate.

82 Parliamentary Joint Committee on Human Rights, National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, *Report 5 of 2018* (19 June 2018) p. 40.

clarified that the rules did not preclude entitlement or eligibility for redress, and therefore found that the measure is likely to be compatible with those human rights.⁸³

3.43 Measures that put at risk children's rights included the expansion of the visa bar under the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018.⁸⁴ Noting the legislative context, applying the visa bar to children engages and may limit the obligation to consider the best interests of the child. The statement of compatibility accompanying the bill commented that these measures were compatible with the obligation to consider the best interests of the child, given that, although they may not be in the child's best interests, they are balanced against other considerations like maintaining the integrity of Australia's migration system.⁸⁵ However, the committee noted that the UN Committee on the Rights of the Child has made clear that the child's best interests may not be considered on the same level as all other considerations.⁸⁶

3.44 The committee raised further concerns about the lack of substantive safeguards requiring the best interests of the child to be considered as a primary consideration. The committee found that the further bar on visa claims was likely to be incompatible with obligations to consider the best interests of the child.⁸⁷

Committee impact

3.45 During the reporting period, there was evidence that the committee is continuing to have an impact in relation to the consideration of the human rights implications of legislation. There were some examples of the committee's reports resulting in amendments to legislation, for example the Attorney-General stated the amendments to the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 were, in part, in response to concerns the committee

83 Parliamentary Joint Committee on Human Rights, National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, *Report 9 of 2018* (11 September 2018) pp 75-79.

84 Parliamentary Joint Committee on Human Rights, Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018, *Report 4 of 2018* (8 May 2018) p. 4 and *Report 6 of 2018* (26 June 2018) p. 49. The issue also arose in the Migration Amendment (Strengthening the Character Test) Bill 2018, currently before the House of Representatives. It provides for the power to cancel or refuse a visa when a non-citizen commits a 'designated offence'. The committee provided its initial report in Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2018, *Report 12 of 2018* (27 November 2018) p. 3, but is yet to conclude on the compatibility of the measures under the bill.

85 Statement of compatibility to the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018, p. 26.

86 Parliamentary Joint Committee on Human Rights, Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018, *Report 6 of 2018* (26 June 2018) p. 61.

87 Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018), p. 61.

raised. These included amendments to the proposed secrecy offences and the removal of the strict liability element of offences in proposed sections 91.3 and 122.1. The introduced amendments partially addressed committee concerns.⁸⁸

3.46 A further measure of the committee's impact relates to the use of its reports. In this respect, during the reporting period, there was evidence of the committee's reports being drawn upon in parliament and beyond. For example, this includes the committee's reports being cited in parliamentary debates,⁸⁹ other committee reports and parliamentary publications⁹⁰ and more broadly.⁹¹

Scrutiny issues

3.47 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.

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- 88 Another example is the minister's response to the committee's comments on the Commonwealth Redress Scheme Bill 2018 in *Report 2 of 2018* (13 February 2018) pp. 73-96: the minister noted that in response to the committee's concerns he would consider including a positive requirement that the scheme operator must have regard to the impact disclosure might have on a person when determining whether to make a public interest disclosure. This requirement was included in Rule 42 of the National Redress Scheme Rules 2018. See Parliamentary Joint Committee on Human Rights, National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, *Report 9 of 2018* (11 September 2018) pp. 52-54.
- 89 See, for example, by Ms O'Toole in relation to the cashless debit card trial during the second reading debate on 21 June 2018 on the Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018; Senator McKim in relation to the Counter-Terrorism Legislation Amendment Bill (No. 1) 2018 during the second reading debate on 16 August 2018; and Mr Perrett in relation to the Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 during the second reading debate on 18 October 2018.
- 90 See, for example, Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (February 2018) pp. 9-10, 41-42, 85; Legal and Constitutional Affairs Legislation Committee, *Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017 report* (February 2018) pp. 5-6.; Scrutiny of Acts and Regulations Committee (Victoria) referenced the committee's reporting on the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 in Alert Digest No. 7 of 2018, p. 18.
- 91 See, for example, the UN Special Rapporteur on the situation of human rights defenders' report on 28 February 2018 referenced the committee's reporting on the National Security Legislation Amendment Bill (No 1) 2014: UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders on his mission to Australia*, A/HRC/37/51/Add.3 (28 February 2018) [31]. For a further discussion of the committee see, also, Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years', *Australasian Parliamentary Review* (vol.33, no.1) pp. 72-107.

Timeliness

Timeliness of committee reports

3.48 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. The committee's ability to do so is, however, dependent on the legislative program of the government of the day and the timeliness of ministers' responses to the committee's inquiries.

3.49 During the reporting period, the committee concluded it's 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. During the reporting period, 17 out of the 238 new bills examined by the committee passed prior to (or on the same day as) the committee tabling its final report (7.1%). For six of the 17 bills that passed before the committee had published a final report, the committee had published an initial comment in advance of passage. As the committee's initial reports generally contain a detailed human rights analysis, this means that a human rights analysis of 95% of new bills was available to inform members of parliament prior to passage of the legislation.⁹²

Timeliness of responses

3.50 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.⁹³ 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 Timeliness of responses from legislation proponents continued to be an issue during the reporting period.

92 By comparison, in 2017, 18 of the 270 new bills considered by PJCHR passed before the PJCHR published its concluding report (6.7%). An human rights analysis in the form of an initial report, an advice only comment or concluding report was available for 96% of bills prior to passage: Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years', *Australasian Parliamentary Review* (vol.33, no.1) pp. 88.

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

3.52 At the start of the current 45th parliament, the committee introduced some approaches to attempt to improve the timeliness of responses from legislation proponents. The committee established a Correspondence Register, which tracks outstanding correspondence, correspondence recently received and any correspondence received after the requested date.⁹⁴ The committee also indicated to legislation proponents that it may conclude its consideration of legislation without a response from the relevant legislation proponent where the response was not received by the requested date. Since that time, there have been a number of occasions where the committee has concluded its examination without a response from legislation proponents.⁹⁵ These approaches were intended to act as an incentive for the timely receipt of responses in relation to the committee's scrutiny inquiries.

3.53 Following the introduction of these approaches, the 30 August 2016 – 31 December 2017 reporting period indicated an improvement in the timeliness of responses. However, the percentage of responses received on or before the initial requested date decreased in the current reporting period.

3.54 The statistics relating to the timeliness of responses in the current reporting period may be affected by two matters. First, the current reporting period includes timeliness statistics in relation to the 15 'further response required' requests. Secondly, one report entry that covers multiple bills or instruments, if late, will be counted as late for each bill or instrument it reports on. In the current reporting period there were two notable examples of this which increased the late response rate.⁹⁶

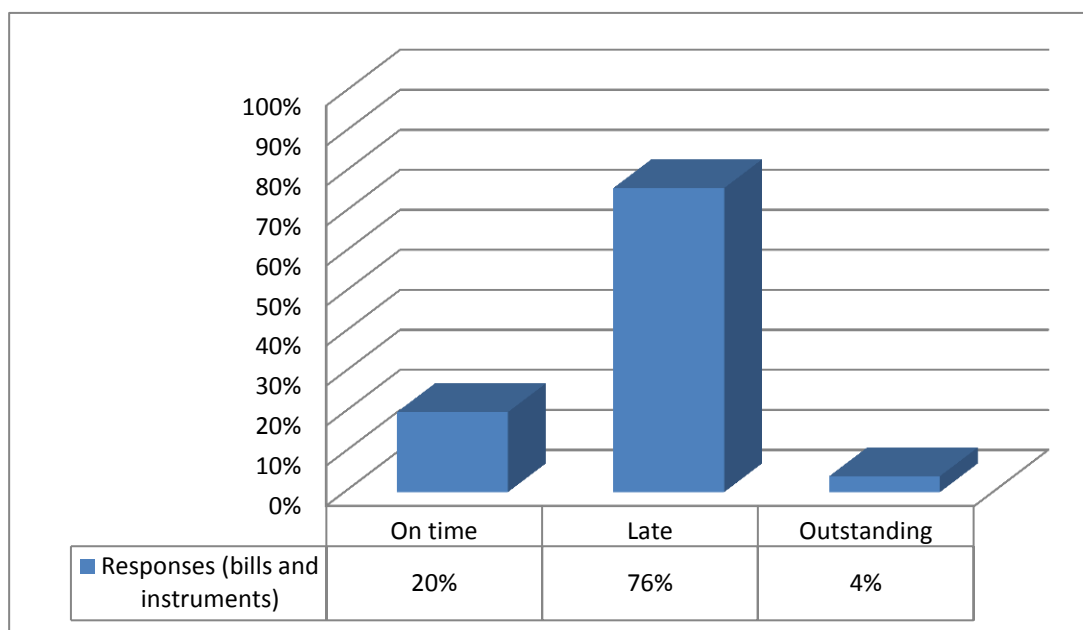
3.55 Ninety-one responses were requested in relation to 76 bills and legislative instruments in the reporting period.⁹⁷ Of these, 18 responses (20%) were provided to the committee by the initial request date.

94 The Correspondence Register is available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

95 In this reporting period, for example, the committee concluded its consideration of the Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018, *Report 7 of 2018* (14 August 2018) pp. 111-119.

96 The response to nine instruments made under the *Autonomous Sanctions Act 2011*, while it related to only one report entry, was late and therefore counted as late nine times. As it also required a further response which was also late, it was counted again as late an additional nine times. Similarly, the five various park management plans made under the *Environment Protection and Biodiversity Conservation Act 1999* were counted as 5 late responses although they refer to only one report entry.

97 Responses were requested in relation to 38 bills and 38 legislative instruments in the reporting period.

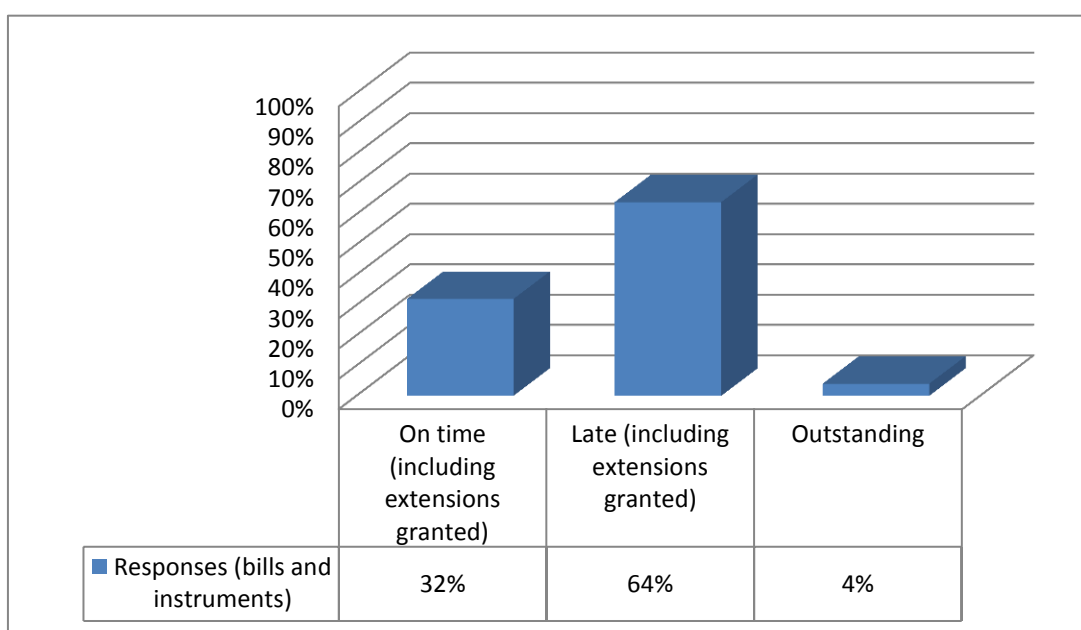
Figure 3.2 Percentage of responses received by initial due date

3.56 By comparison, responses in relation to 11% of bills and instruments in the 2015-16 reporting period, and 30% in the 2016-17 reporting period, were received by the initial requested date, although noting that the current reporting also includes 'further response required' requests which were not included in previous years' data.

3.57 Further, previous reporting periods determined whether a response was on time or late depending on the initial requested date and did not include data on whether responses were received on time where response extensions were granted. Previously, responses received after the initial requested date, even where an extension was granted, were considered late. For this reporting period, data has been disaggregated to determine the number of extensions granted and the timeliness of responses which were granted extensions.

3.58 Thirty-five response extensions were granted (38%) and, of these, 11 responses (31% of extensions granted; 12% of all responses requested) were provided to the committee by the extended date. Twenty-nine responses were received on time (32%), by either the initial requested date or the extended date. Fifty-eight responses (64%) were provided to the committee after the initial or extended requested date. For the 35 responses where extensions were granted, 24 responses (69% of extensions granted; 26% of all responses received) were received after the extended date. Further, four responses (4%) were outstanding as of 3 January 2019 (see figure 3.3).

Figure 3.3 Percentage of responses received by due date (including extensions granted)



Statements of compatibility

3.59 Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), all bills and disallowable legislative instruments must be accompanied by a statement of compatibility which provides an *assessment* of whether the bill or instrument is compatible with human rights.

3.60 Statements of compatibility are the primary document that sets out the legislation proponent's assessment of the human rights compatibility of the legislation, and are a key starting point for the committee's examination of the human rights compatibility of legislation.

3.61 In several cases during the reporting period, where the human rights issues were fully addressed in the statement of compatibility, the committee was able to conclude its analysis without needing to seek further information from legislation proponents. For example, in his tabling statement accompanying *Report 12 of 2018*, the Chair highlighted the statement of compatibility for the Agricultural and Veterinary Chemicals Legislation Amendment (Streamlining Regulation) Bill 2018. This bill amended a number of acts relating to the regulation of agricultural and veterinary chemical products in a manner that engaged and limited a number of human rights, including the right to privacy, freedom of expression and criminal process rights. The statement of compatibility comprehensively set out each of the rights that were engaged and limited by the measures in the bill, which allowed for

an assessment that the measures, in context, were permissible limitations on human rights.⁹⁸

3.62 However, where statements of compatibility are not comprehensive this creates further work for the committee and ministers and their departments, and makes it more difficult to assess whether legislation raises human rights concerns. The committee was concerned that a number of statements of compatibility during the reporting period fell into this category. The committee identified a number of common issues in the drafting of statements of compatibility which made the committee's task of analysing human rights compatibility more difficult:

- although a number of human rights appear to be engaged by the legislation, no rights or not all relevant rights are identified as engaged in the statement of compatibility;
- where a proposed piece of legislation contains several measures, only some of those measures are addressed in the statement of compatibility, whereas other measures within the legislation that engage human rights are not addressed;
- the statement of compatibility provides insufficient information about the operation of the legislation and the objectives supporting the legislation to enable the committee to determine whether measures in the legislation engage and limit or promote human rights;
- the statement of compatibility identifies that a right is engaged, but does not provide a sufficient explanation of how the right is engaged;
- the statement of compatibility does not provide any assessment on whether any limitations on the human rights identified in the statement of compatibility are permissible;
- while it appears that the measures in the legislation only marginally engage human rights or contain permissible limits on human rights (and so may be included in the 'no concerns' category of bills and instruments), the statement of compatibility does not provide a sufficient assessment of whether each of these limitations are permissible; and
- where a measure substantially engages human rights, the statement of compatibility's assessment of whether any limitations on the right are permissible is insufficient to allow the committee to conclude its analysis and requires the committee to seek further advice. This includes where the statement of compatibility addresses the limitation criteria inadequately

98 Parliamentary Joint Committee on Human rights, Chair's tabling statement for *Report 12 of 2018*, 27 November 2018, at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements.

(e.g. failing to identify a legitimate objective, or failing to provide information as to the proportionality of the measure such as the presence of safeguards).

3.63 Noting these concerns, in 2018 the committee commenced a project to improve statements of compatibility (see [3.64] below).

Additional work of the committee

Statement of Compatibility project

3.64 Since June 2018, the committee has been undertaking a project to improve statements of compatibility. The aim of the project is to improve the quality of statements of compatibility by further explaining the committee's expectations, underpinned by the legal requirements, as to their content and information as to how they could be improved. That is, while the committee's scrutiny reports are a key mechanism for improving statements of compatibility, this project has sought to augment this reporting with additional approaches and mechanisms for improving statements of compatibility. These include liaising with legislation proponents and government departments about areas of concern, supplementing and developing further guidance materials and resources to assist in the preparation of statements of compatibility and providing targeted training to departmental officials regarding the committee's expectations.⁹⁹ It has also involved preliminary discussions to explore options for collaboration with the Attorney-General's Department (AGD), in relation to guidance materials, as well as the Australian Human Rights Commission.

3.65 Generally, where a bill or instrument was assessed as having 'no concerns' and is listed as such, this could include a bill or instrument that is substantively considered to have no concerns but where the statement of compatibility itself was inadequate. In these circumstances, it was not the committee's practice to canvass these matters in detail in the report or to engage with the legislation proponent to suggest improvements to the drafting of the statement of compatibility.¹⁰⁰

3.66 However, one aspect of this project has been, where the legislation did not substantively raise concerns but the statement of compatibility was inadequate, or where statements of compatibility accompanying a number of pieces of legislation were or continued to be deficient, letters were sent to legislation proponents explaining the committee's expectations as to the content of statements of compatibility, setting out how the statement of compatibility could be improved, and including references to the committee's guidance notes and the Attorney-General's Department's resources, as well as information about potential training.

99 For example, with the Department of Finance regarding Appropriations Bills.

100 This is because, as noted earlier, the committee adopts an exceptions-based approach to its analysis such that it does not generally report on matters where human rights are promoted, not engaged, marginally engaged, or permissibly engaged.

3.67 Following this correspondence, the secretariat has also provided training to several government departments on the committee's expectations as to statements of compatibility, as well as providing training and resources relating to human rights commonly engaged in the relevant legislation portfolio.¹⁰¹

Site visit to the Australian Human Rights Commission

3.68 On 29 June 2018 members of the committee visited the Australian Human Rights Commission in Sydney accompanied by acting committee secretary, Ms Zoe Hutchinson, and the committee's external legal adviser, Dr Jacqueline Mowbray. As part of this visit, the committee was briefed on different areas of the Commission's work. This included an overview of the Commission's complaint functions, trends in complaints, and legislative changes to the Commission's complaint function following the committee's Freedom of Speech in Australia inquiry report.¹⁰² The Commission's involvement in parliamentary scrutiny and potential briefings were also discussed. Specialist briefings in relation to age discrimination, children's rights and multiculturalism and discrimination in Australia were also provided to committee members.

3.69 This is the first site visit the committee has attended at the Commission. It arose from the suggestion by Professor Rosalind Croucher, the President of the Commission, with the aim of building a productive working relationship between the committee and the Commission as well as increasing the committee's knowledge of the Commission's work.

AustLII launch

3.70 On 16 August 2018 the Australasian Legal Information Institute (AustLII) launched a database of the committee's reports. The launch was held at Parliament House and was attended by a number of committee members including the Chair and Deputy Chair. The database was formally launched by the Chair, as Guest of Honour at the event, and Professor Andrew Byrnes, the committee's former external legal advisor between 2012 and 2014.

3.71 The purpose of the database is to make the committee's reports more broadly accessible by being available on a platform for legal research along with the benefit of globally searchable entries. Following a proposal in 2014 by Professor Byrnes, the committee agreed to a request by AustLII to build a searchable database of PJCHR reports and other documents. The proposal for it was also supported by the University of New South Wales Faculty of Law. The database contains the full text of

101 For example, with the Department of Health.

102 Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia* (28 February 2017) available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia.

all the committee's scrutiny reports up until August 2018, as well as the committee's annual reports and inquiry reports. Each bill and legislative instrument report entry is available separately and is individually searchable on the AustLII website.

Liaison with external groups and delegations

3.72 During the reporting period, committee members also met with:

- AGD, the Department of Foreign Affairs and Trade, and Office for Women representatives for a briefing on engagement with reporting processes to UN human rights supervisory mechanisms (16 October 2018); and
- Commissioner Chin Tan, Race Discrimination Commissioner of the Australian Human Rights Commission (28 November 2018).

Mr Ian Goodenough MP

Chair

Appendix 1

Outstanding correspondence

As at February 2019, the following responses to committee comments in its regular scrutiny reports in the 44th and 45th Parliament remained outstanding.

Outstanding correspondence

Government bills and legislative instruments

Legislation	Portfolio	Report(s)	Response requested by
Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014	Attorney-General	30/44	27 Nov 2015
Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018	Defence	3/2018 4/2018	23 May 2018
Omnibus Repeal Day (Autumn 2014) Bill 2014	Prime Minister and Cabinet	5/44	11 Apr 2014
Plebiscite (Same-Sex Marriage) Bill 2016	Attorney-General	7/2016	26 Oct 2016
Road Safety Remuneration Repeal Bill 2016	Employment	38/44	20 May 2016
Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210]	Social Services	5/2017	30 June 2017

Committee inquiries

The committee is still awaiting formal responses to its following inquiries:

Inquiry	Report tabled
Examination of the <i>Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012</i> and related legislation	19 June 2013
2016 Review of Stronger Futures measures	16 Mar 2016
Freedom of speech in Australia	28 Feb 2017

Appendix 2

Guidance Note 1 and Guidance Note 2

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.¹ For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.²

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

¹ Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

² For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>.

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*, may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department.³

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

³ The Attorney-General's Department guidance may be found at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx>.

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on a human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).¹

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.²

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.³ However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

¹ For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>.

² The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

³ See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition, available at <http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>.

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).⁴ Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

⁴ See, for example, *A v Australia* (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.⁵

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.⁶ This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if:

- a) the purpose of the penalty is to punish or deter; **and**
- b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if the civil penalty provision carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

⁵ This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

⁶ The UN Human Rights Committee, while not providing further guidance, has determined that 'civil' penalties may be 'criminal' for the purpose of human rights law, see, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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