



Parliamentary Joint Committee
on Human Rights

Annual report 2019

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Membership of the committee

Current members 2019

Senator the Hon Sarah Henderson, Chair (15.10.19 - present, Chair from 16.10.19 - present)	Victoria, LP
Mr Ian Goodenough MP, Former Chair (14.09.16 - present, Chair from 24.09.16 - 16.10.19)	Moore, Western Australia, LP
Mr Graham Perrett MP, Deputy Chair (06.02.13 - 05.08.13 and 15.09.16 - present)	Moreton, Queensland, ALP
Senator Patrick Dodson (04.07.19 - present)	Western Australia, ALP
Mr Steven Georganas MP (29.07.19 - present)	Adelaide, South Australia, ALP
Senator Nita Green (04.07.19 - present)	Queensland, ALP
Ms Celia Hammond MP (04.07.19 - present)	Curtin, Western Australia, LP
Senator Nick McKim (12.09.16 - present)	Tasmania, AG
Senator Andrew McLachlan CSC (11.02.20 - present)	South Australia, LP
Dr Anne Webster MP (04.07.19 - present)	Mallee, Victoria, Nats

Former members 2019

Mr Russell Broadbent MP (14.09.16 - 01.07.19)	McMillan, Victoria, LP
Senator Claire Chandler (02.07.2019 - 11.02.20)	Tasmania, LP
Senator Carol Brown (01.07.14 - 01.07.19)	Tasmania, ALP
Senator Lucy Gichuhi (05.02.2018 – 30.06.19)	South Australia, MP
Ms Madeleine King MP (15.09.16 - 01.07.19)	Brand, Western Australia, ALP
Mr Julian Leeser MP (14.09.16 – 01.07.19)	Berowra, New South Wales, LP

Senator Claire Moore (01.07.14 - 09.05.16 and 15.09.16 - 30.06.19)	Queensland, ALP
Senator James Paterson (12.09.16 – 01.07.19)	Victoria, LP
Senator David Van (02.07.19 – 15.10.19)	Victoria, LP

Secretariat 2019

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 Zoe Hutchinson, Principal Research Officer/Acting Committee Secretary
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Secretariat for the preparation of the annual report

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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, the then Attorney-General's second reading speech on the Human Rights (Parliamentary Scrutiny) Bill 2010: The Hon. Robert McClelland MP, Attorney-General, *House of Representatives Hansard*, 30 September 2010, p. 271:
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%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, Associate Professor Jacqueline Mowbray.

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 annual report

1.12 This report covers the period 1 January 2019 to 31 December 2019 (the reporting period). Mr Ian Goodenough MP was Chair of the committee during the reporting period until 16 October 2019, when Senator the Hon Sarah Henderson was elected as Chair.

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. In keeping with the longstanding conventions of the Senate scrutiny committees,¹ the committee adopts a technical approach to its scrutiny of legislation, and does not consider the policy merits of the legislation.

2.2 During the reporting period, the committee generally met when both the House of Representatives and the Senate sat, and had a regular reporting cycle around these meetings. The committee's reports were generally tabled after these meetings, and generally dealt with the bills and legislative instruments 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 Parliament's legislative program and the timeliness of 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 also examines all legislative instruments tabled in the Parliament, including legislative instruments that are exempt from the disallowance process.² The committee seeks to conclude and report on its examination of legislative instruments within the timeframe for disallowance prescribed by the *Legislation Act 2003* (generally 15 sitting days after tabling).³

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- 1 The three scrutiny committees in the Parliament are the Senate Standing Committee for the Scrutiny of Bills; the Senate Standing Committee for the Scrutiny of Delegated Legislation (formerly the Senate Standing Committee on Regulations and Ordinances); and the Parliamentary Joint Committee on Human Rights.
 - 2 Legislative instruments may be exempt from disallowance as a result of exemptions in its enabling legislation, and the *Legislation Act 2003* also provides that certain legislative instruments are exempt from disallowance (see section 44).
 - 3 In the event that the committee's concerns cannot be resolved before the expiry of this period, the committee retains the option to give a 'protective' notice of motion to disallow the instrument, extending the disallowance period by a further 15 sitting days, to ensure that the ability of the Parliament to disallow the instrument is not lost pending the conclusion of the committee's examination.

The committee's analytical framework

2.5 Australia has voluntarily accepted obligations under the seven core United Nations 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 permissible under international human rights law.

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).⁴ 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 (that is, effective to achieve) its stated objective; and
- be a proportionate way to achieve that objective.

2.7 Where a bill or instrument limits a human right, the statement of compatibility should 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 *Human Rights (Parliamentary Scrutiny) Act 2011* requires that each bill and disallowable legislative instrument be accompanied by a statement of compatibility.⁵ 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.

4 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment (including the prohibition on non-refoulement); 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.

5 See *Human Rights (Parliamentary Scrutiny) Act 2011*, Part 3.

2.10 The committee sets out its guidance in relation to statements of compatibility in its *Guidance Note 1*.⁶

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 explained in the relevant statement of compatibility, the committee's usual approach is to publish an initial report setting out the questions it has in relation to the legislation and advising that it intends to 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 concluding remarks on the human rights compatibility of the relevant legislation, the committee may recommend that consideration be given to implementing recommendations to strengthen the compatibility of the legislation with Australia's human rights obligations.

2.12 In some cases, legislation proponents may undertake 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), or may advise that amendments have been made to address the committee's earlier concerns when introducing a future iteration of a bill.⁷

2.13 The committee does not generally call for public submissions in relation to its technical scrutiny of legislation.⁸ 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 engaged by the bill, to a concluding report that analyses

6 See *Guidance Note 1, Drafting statements of compatibility*, available on the committee's webpage at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

7 See, for example, the Hon Peter Dutton MP, Crimes Legislation Amendment (Police Powers at Airports) Bill 2019, second reading speech, 4 July 2019.

8 During the reporting period, the committee undertook an inquiry into the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019, where it called for public submissions. See further information in relation to this in Chapter 3.

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

2.15 Chapter 1 of the committee's reports include new and continuing matters. This generally includes all bills introduced during the preceding sitting week and legislative instruments tabled in the preceding period. Where the committee considers that a bill or instrument engages human rights and further information is required in order for the committee to complete its examination, these bills and instruments are the subject of substantive report entries describing the relevant measures, the human rights that appear to be engaged by the measure, and the information that is required in order for the committee to complete its assessment.

2.16 Where the committee considers that legislation does not engage, or only marginally engages, human rights; promotes human rights; and/or permissibly limits human rights, it lists these bills in a 'no comment' section of the report, or in relation to instruments, states it has no comment in relation to the remaining instruments registered in the relevant period.⁹ From September 2019,¹⁰ the committee introduced a new approach to the consideration of bills introduced by private members and senators, listing any such bills which appear to engage and potentially limit human rights in Chapter 1, and noting that should they proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill. This assists in enabling the committee to manage its high workload and prioritise those bills which are more likely to move to further stages of debate.

2.17 Chapter 1 also considers continuing matters (or further response required matters), where 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, on the basis of which the committee has concluded its examination of the legislation in question. Ministerial responses

9 Each report states that the committee examines the legislative instruments registered on the Federal Register of Legislation during a specified period. Due to the very high volume of legislative instruments examined by the committee, instruments on which no substantive comment is made are not listed in the report itself. All legislative instruments scrutinised by the committee during the stated period can be viewed on the Federal Register of Legislation using its advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.

10 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2019* (10 September 2019), p. 10.

are published in full alongside the report on the committee's website.¹¹ These responses are also extracted and analysed in Chapter 2 of the report. As noted above at paragraph [2.11], the committee's concluding remarks on legislation may include findings as to the human rights compatibility of the legislation, and recommendations to address any human rights concerns.

2.19 During 2019, the committee adopted a new report entry structure. From *Report 6 of 2019*, report entries clearly distinguish between the international human rights legal advice which has been provided to the committee, and the committee's subsequent consideration of that advice in relation to the legislation under review. Assessing legislation for compatibility with international human rights law often requires an assessment of whether a human right is limited and whether this can be appropriately justified by way of a permissible limitation. The new structure of the committee reports provides appropriate transparency as to the legal advice received by the committee as distinct from the independent analysis of that legal advice, and other relevant materials as the case may be, by committee members. This is an important distinction to make as only committee members, as democratically elected parliamentarians, are empowered to report to the Parliament as to the human rights implications of any bill or instrument.

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 Associate Professor Jacqueline Mowbray. Associate Professor Mowbray has extensive research and teaching experience in international law and human rights. Associate Professor 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. Associate Professor Mowbray previously served as co-director of the Sydney Centre for International Law and as editor of the *Australian International Law Journal*. During her time as legal adviser to the committee she remained employed by the University of Sydney.

2.21 In addition to the external legal adviser, the human rights committee secretariat also includes staff with expertise in international human rights law.

Committee publications and resources

2.22 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.

11 Ministerial responses are available at:
https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Committee guidance notes

2.23 The committee has produced two guidance notes, which are available on the committee's website.¹²

Guidance Note 1—Drafting statements of compatibility

2.24 This note sets out the committee's approach to human rights assessments and provides guidance as to 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

2.25 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 approach in relation to assessing the human rights compatibility of such provisions.

Guide to human rights

2.26 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.¹³

2.27 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 permissibly 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. The guide is available on the committee's website.¹⁴

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 substantively commented on. The index contains a shorthand description of any rights engaged by the legislation and the action taken by the committee (that is, whether the committee made no comment, an advice-only comment, or a comment

12 Available at:
https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

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

14 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.

requiring a response from the legislation proponent); and the relevant report(s) in which the committee's full comments may be found.¹⁵

Scrutiny reports and databases

2.29 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 documents or separate chapters.¹⁶ 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.¹⁷

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

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

17 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 2019

3.1 This chapter provides information about the work of the committee during 2019,¹ including statistics, major themes arising from the legislation examined, and information as to the committee's impact during the reporting period.

Legislation considered

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

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

Table 3.1: Legislation considered during the reporting period

	Total considered	No comment	Advice-only comment	Response required
Bills	213	146	43	26
Legislative instruments	1385	1368	8	9

Reports tabled during the period

3.4 The committee tabled six scrutiny reports during the reporting period, from *Report 1 of 2019* to *Report 6 of 2019*.² This number was lower than usual for a twelve month period, noting that no scrutiny reports were tabled following the dissolution of Parliament on 11 April 2019 for the federal election, until after the commencement of the 46th Parliament on 2 July 2019.

1 The reporting period covers 1 January 2019 to 31 December 2019. The committee's first scrutiny report of the reporting period, *Report 1 of 2019*, was tabled on 12 February 2019 and its final scrutiny report of 2019, *Report 6 of 2019*, was tabled on 5 December 2019.

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

3.5 The committee also tabled its *Annual Report 2018* on 12 February 2019.³

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;⁴
- right to freedom of expression or opinion;⁵
- right to equality and non-discrimination;⁶
- right to freedom of movement.⁷
- criminal process rights, including the right not to incriminate oneself, the right to be presumed innocent and the right to a fair trial;⁸
- right to a fair hearing;⁹
- right to freedom of association;¹⁰
- right to an effective remedy;¹¹
- right to social security;¹²
- right to protection of the family;¹³
- right to liberty;¹⁴ and
- rights of children/obligation to consider the best interests of the child.¹⁵

3 The committee's annual reports are available at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Annual_Reports.

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

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

6 ICCPR, articles 2 and 26; International Covenant on Economic, Social and Cultural Rights (ICESCR), article 2(2).

7 ICCPR, article 12.

8 ICCPR, articles 14(1), 14(2) and 14(3)(g).

9 ICCPR, article 14.

10 ICCPR, article 22.

11 ICCPR, article 2(3).

12 ICESCR, article 9.

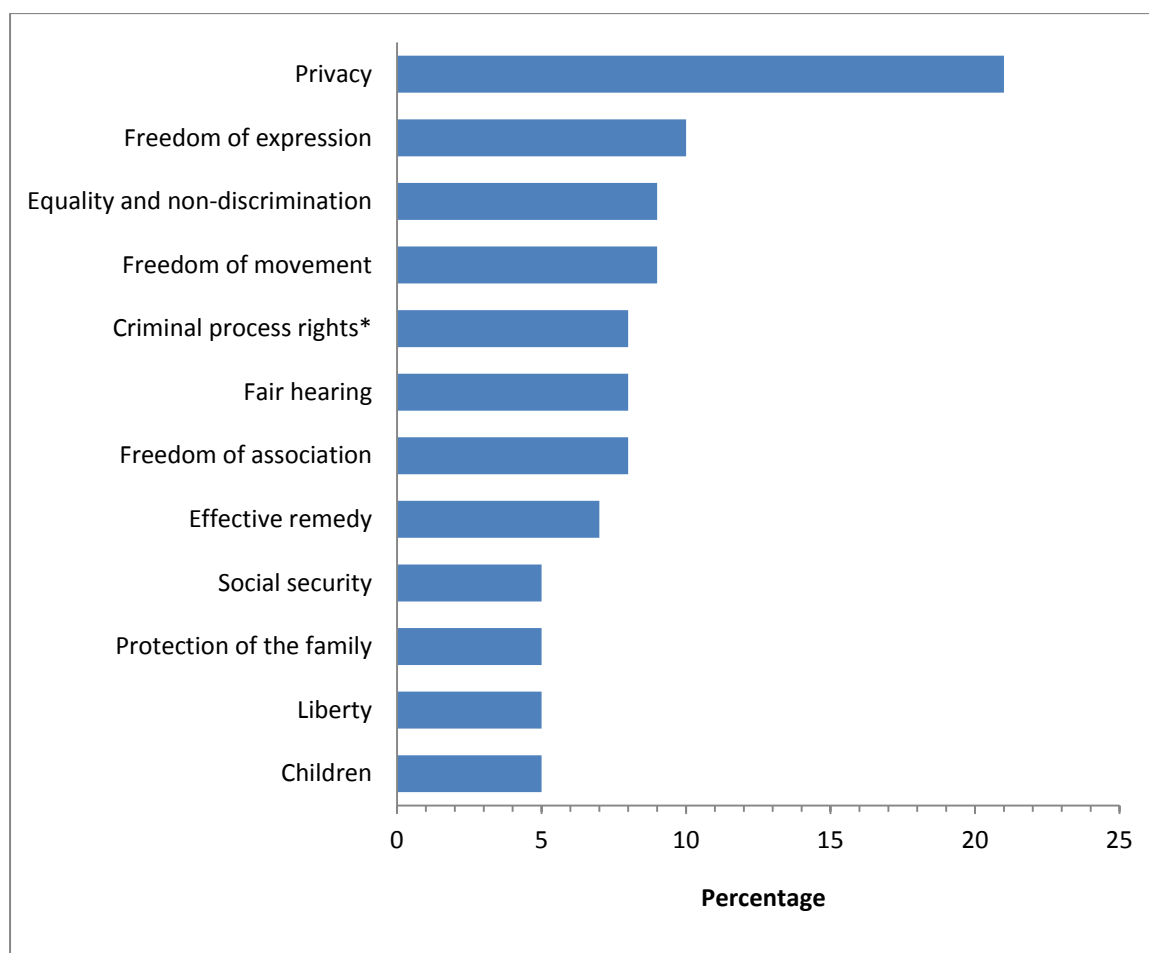
13 ICCPR, articles 17 and 23; and ICESCR, article 10(1).

14 ICCPR, article 9.

3.7 During the reporting period, the rights listed above accounted for 71 per cent of rights which the committee reported on substantively within both primary and delegated legislation. The right to privacy continued to be the most frequently considered issue on which the committee comments.

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

Figure 3.1: Human rights engaged by legislation in 2019



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

Timeliness

Timeliness of committee reports

3.9 The committee seeks to conclude its assessment of bills while they are still before the Parliament, and its assessment of legislative instruments within the timeframe for disallowance (usually 15 sitting days after tabling). In both cases, the committee's approach seeks to ensure that reports on the human rights compatibility of legislation are available to inform parliamentary deliberations.

3.10 During the reporting period, the committee concluded its consideration on most legislation prior to the passage of bills or, in the case of legislative instruments, during the period for disallowance. However, on some occasions bills were passed by the Parliament before the committee could finalise its deliberations. During the reporting period, 15 out of the 213 new bills examined by the committee passed prior to (or on the same day as) the committee tabling its final report (7 per cent).¹⁶ For six of the 15 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 96 per cent of new bills was available to inform members of parliament prior to the passage of legislation.¹⁷

Timeliness of responses

3.11 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.¹⁸ Although the committee requests a response within a specified timeframe (generally within two weeks), this request does not affect the passage of the legislation.

3.12 During 2019, the committee made 32 requests for additional information from ministers.¹⁹ Six of those requests were made in the final report of 2019,²⁰ therefore no response was able to be received during 2019. Of the 26 other requests

16 For example, the Treasury Laws Amendment (Tax Relief So Working Australians Keep More of Their Money) Bill 2019 was introduced into the House of Representatives on 2 July 2019 and received Royal Assent on 5 July 2019, meaning that the committee had very limited time during which to consider the bill, and did not have the opportunity to comment on the bill before it passed.

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

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

19 Given the dissolution of the Parliament in 2019, the number of requests for additional information in 2019 was considerably lower than in 2018 (91 responses were requested in 2018, see Parliamentary Joint Committee on Human Rights, *Annual Report 2018*, p. 32).

20 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019).

for information, 14 responses were received. The remaining 12 responses which were not received were due at the point at which Parliament was dissolved for the federal election. No responses were therefore provided, as the House of Representatives, and this committee, were dissolved.

3.13 Of the 14 responses received by the committee in 2019, 11 responses (79 per cent) were received within the requested timeframe.²¹

Major themes

3.14 Four significant areas that attracted substantive comment from the committee in the reporting period related to: national security and foreign interference; immigration and citizenship; equality and non-discrimination among groups in society, including Indigenous Australians; and privacy and information sharing.

National security and foreign interference

3.15 The committee continued to consider a number of bills in relation to national security and foreign interference, including the:

- Intelligence Services Amendment Bill 2018;²²
- Foreign Influence Transparency Scheme Legislation Amendment Bill 2018;²³
- Counter-Terrorism (Temporary Exclusion Orders) Bill 2019;²⁴ and
- Crimes Legislation Amendment (Police Powers at Airports) Bill 2019.²⁵

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

22 Parliamentary Joint Committee on Human Rights, Intelligence Services Amendment Bill 2018, *Report 1 of 2019* (12 February 2019), p. 29; and *Report 2 of 2019* (2 April 2019), p. 101. The bill received royal assent on 10 December 2018. The bill was introduced into the House of Representatives on 29 November 2018 and into the Senate on 5 December 2018, and was passed by both houses on 5 December 2018. The committee twice sought a response from the minister but no response was provided.

23 Parliamentary Joint Committee on Human Rights, Foreign Influence Transparency Scheme Legislation Amendment Bill 2018, *Report 1 of 2019* (12 February 2019), p. 52. The bill was introduced into the House of Representatives on 28 November 2018 and into the Senate on 5 December 2018, and was passed by the House on 4 December 2018 and by the Senate on 5 December 2018. The speed with which this legislation passed meant that the committee was unable to report on it until after it had received royal assent.

24 Parliamentary Joint Committee on Human Rights, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, *Report 2 of 2019* (2 April 2019), p. 38.

25 Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Police Powers at Airports) Bill 2019, *Report 4 of 2019* (10 September 2019), p. 18. The committee initially reported on the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018 in its *Report 11 of 2018* and concluded its examination of the bill in its *Report 12 of 2018*. This 2019 bill reintroduced the 2018 bill with amendments.

3.16 National security and foreign interference bills often collectively engage a large number of human rights including the rights to life, liberty, to take part in public affairs, privacy, equality and non-discrimination, fair trial and fair hearing, the protection of the family, rights of children, the prohibitions on torture and cruel, inhuman and degrading treatment or punishment and on retrospective criminal laws, and the rights to freedom of expression, association, and movement (including the right to enter one's own country).

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

- enable the Minister for Foreign Affairs to specify additional persons outside Australia who may be protected by an Australian Secret Intelligence Service (ASIS) staff member or agent, and to provide that an ASIS staff member or agent will be able to use force in the performance of an ASIS function;²⁶
- allow information published on the online register of persons who undertook certain activities 'on behalf of' a 'foreign principal' including activities 'for the purpose of political or government influence' to remain publicly available after a person ceases to be registered;²⁷
- allowing the Minister for Home Affairs to prevent a person from entering Australia for a specified period up to two years and to impose conditions on their return to Australia and subsequent residence;²⁸ and
- increasing police powers at airports, including directions to provide identity information and move-on directions at airports.²⁹

3.18 The committee noted that, in general, providing necessary powers to security and law enforcement would likely constitute a legitimate objective for the purposes of human rights law. However, in many cases, the committee was concerned as to whether the measures were proportionate to this objective, given the apparent breadth of some of the measures.

3.19 For example, the committee raised concerns as to whether the measures contained in the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 were sufficiently circumscribed, subject to adequate safeguards and were the least rights

26 Parliamentary Joint Committee on Human Rights, Intelligence Services Amendment Bill 2018, *Report 1 of 2019* (12 February 2019) p. 29 and *Report 2 of 2019* (2 April 2019) p. 101.

27 Parliamentary Joint Committee on Human Rights, Foreign Influence Transparency Scheme Legislation Amendment Bill 2018, *Report 1 of 2019* (12 February 2019) p. 52.

28 Parliamentary Joint Committee on Human Rights, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, *Report 2 of 2019* (2 April 2019), p. 38.

29 Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Police Powers at Airports) Bill 2019, *Report 4 of 2019* (10 September 2019), p. 18.

restrictive approach reasonably available.³⁰ The committee noted that the bill empowered the minister to impose a Temporary Exclusion Order on a person, which would prevent them from entering Australia during a specified timeframe. Among a range of concerns, the committee noted that the thresholds for granting such an order, namely that the minister 'suspects on reasonable grounds' that the order 'would substantially assist in preventing' certain types of activities, where those activities are themselves framed in very broad terms, granted the minister a wide discretion to make an exclusion order.

3.20 Further, the committee examined the Foreign Influence Transparency Scheme Legislation Amendment Bill 2018, which would allow information published on the online register where those persons had undertaken certain activities 'on behalf of' a 'foreign principal', including activities 'for the purpose of political or governmental influence', to remain publicly available after a person ceased to be registered. The committee expressed concern that these terms appeared to be broadly defined, and did not appear to be sufficiently circumscribed so as to constitute a proportionate limitation on the right to privacy, freedom of expression, freedom of association, and the right to take part in the conduct of public affairs.³¹

3.21 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.³² In other cases, the committee concluded that the measures may be, or risk being, incompatible with human rights.³³

Immigration and citizenship

3.22 In a related and often overlapping theme, the committee continued to consider a number of bills which relate to immigration and citizenship, including the:

30 Parliamentary Joint Committee on Human Rights, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, *Report 2 of 2019* (2 April 2019), p. 43.

31 Parliamentary Joint Committee on Human Rights, Foreign Influence Transparency Scheme Legislation Amendment Bill 2018, *Report 1 of 2019* (12 February 2019) p. 52

32 For example, Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Police Powers at Airports) Bill 2019, *Report 4 of 2019* (10 September 2019), p. 20.

33 For example, Parliamentary Joint Committee on Human Rights, Foreign Influence Transparency Scheme Legislation Amendment Bill 2018, *Report 1 of 2019* (12 February 2019) p. 55.

- Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018;³⁴
- Australian Citizenship Amendment (Citizenship Cessation) Bill 2019.³⁵
- Migration Amendment (Streamlining Visa Processing) Bill 2018;³⁶
- Migration Amendment (Strengthening the Character Test) Bill 2018;³⁷
- Migration Amendment (Repairing Medical Transfers) Bill 2019;³⁸ and

3.23 Immigration and citizenship bills collectively engage a large number of human rights including the right to a fair hearing, a fair trial, privacy, family, to take part in public affairs, liberty, equality and non-discrimination, freedom of movement, work, social security, adequate standard of living, health, and education, the rights of children, and the prohibition against non-refoulement, retrospective criminal laws, and double punishment.

3.24 These bills introduced, extended or amended a number of measures relating to immigration and citizenship, including measures to:

- amend the *Migration Act 1958* to provide additional grounds for visa cancellation or refusal where a non-citizen commits a 'designated offence';³⁹
- remove provisions which created a framework for the transfer of transitory persons (and their family members, and other persons recommended to accompany the transitory person) from regional processing countries to

34 Parliamentary Joint Committee on Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, *Report 1 of 2019* (12 February 2019), p. 2; *Report 2 of 2019* (2 April 2019), p.171 . The Bill lapsed at the end of Parliament on 1 July 2019.

35 Parliamentary Joint Committee on Human Rights, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019, *Report 6 of 2019* (5 December 2019), p. 2.

36 Parliamentary Joint Committee on Human Rights, Migration Amendment (Streamlining Visa Processing) Bill 2018The Bill lapsed at the dissolution of Parliament on 11 April 2019.

37 Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2018, *Report 1 of 2019* (12 February 2019), p. 69. The bill lapsed at the dissolution of Parliament on 11 April 2019.

38 Parliamentary Joint Committee on Human Rights, Migration Amendment (Repairing Medical Transfers) Bill 2019, *Report 4 of 2019* (10 September 2019), p. 2; and *Report 6 of 2019* (5 December 2019), p. 83. A dissenting report was issued with respect to this bill in *Report 6 of 2019*, p. 117.

39 Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2018, *Report 12 of 2018* (27 November 2018) and *Report 1 of 2019* (12 February 2019) p. 69.

Australia for medical or psychiatric assessment or treatment; and provide for their subsequent removal from Australia;⁴⁰

- amend the threshold for the Minister for Home Affairs to determine that a person has ceased to be an Australian citizen following conviction of a criminal offence;⁴¹ and
- provide that, at the discretion of the Minister for Home Affairs, a person who is a national or citizen of a country other than Australia ceases to be an Australian citizen if the person acts inconsistently with their allegiance to Australia by engaging in terrorist offences.⁴²

3.25 The committee noted that in general terms, national security, public order and the rights and freedoms of others are capable of constituting a legitimate objective for the purposes of international human rights law.⁴³ However, in several cases the committee was concerned at the breadth of the proposed measures. For example, the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 and the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019, which would enable the minister to cease a person's citizenship where they had repudiated their 'allegiance' to Australia, raised concerns as to whether the powers were sufficiently in certain scope.⁴⁴

3.26 In some cases the committee concluded that the proposed measures did not appear to be compatible with human rights. For example, in its concluding observations with respect to the Migration Amendment (Strengthening the Character Test) Bill 2018 (which provided additional grounds for visa cancellation or refusal where a non-citizen commits a 'designated offence'), the committee concluded that the provisions of the bill may not be compatible with the right to privacy, freedom of movement, best interests of the child, protection of the family,

40 Parliamentary Joint Committee on Human Rights, Migration Amendment (Repairing Medical Transfers) Bill 2019, *Report 4 of 2019* (10 September 2019), p. 2; and *Report 6 of 2019* (5 December 2019), p. 83.

41 Parliamentary Joint Committee on Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, *Report 1 of 2019* (12 February 2019) p. 2 and *Report 2 of 2019* (2 April 2019) p. 171.

42 Parliamentary Joint Committee on Human Rights, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019, *Report 6 of 2019* (5 December 2019), p. 2.

43 For example, Parliamentary Joint Committee on Human Rights, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019, *Report 6 of 2019* (5 December 2019), p. 9; and Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, *Report 2 of 2019* (2 April 2019) p. 177.

44 Parliamentary Joint Committee on Human Rights, Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, *Report 1 of 2019* (12 February 2019) p. 2 and *Report 2 of 2019* (2 April 2019) p. 171; and Australian Citizenship Amendment (Citizenship Cessation) Bill 2019, *Report 6 of 2019* (5 December 2019), p. 17.

expulsion without due process, liberty, effective remedy, and the prohibition against non-refoulement.⁴⁵ However, in other cases the committee concluded that, having considered additional information from the minister, the measures appeared likely to be compatible with the human rights raised.⁴⁶

3.27 In relation to the Migration Amendment (Repairing Medical Transfers) Bill 2019, which sought to repeal provisions which expanded the grounds on which persons in offshore processing countries could be transferred to Australia on medical grounds, the committee concluded that it did not consider the provisions to be repealed provided a higher degree of access to healthcare. As such, and given existing safeguards in place, the committee considered that repealing these provisions did not represent an unjustified or retrogressive step in relation to the realisation of the right to health for refugees and asylum seekers in regional processing countries. Based on the minister's advice that an individual assessment is made as to whether transferring a person to a regional processing country would contravene Australia's non-refoulement obligations, the committee was also of the view that the return of such persons to a regional processing country did not engage Australia's non-refoulement obligations.⁴⁷ Five members of the committee issued a dissenting report in relation to this matter, as they noted concerns as to whether the healthcare available to refugees and asylum seekers in regional processing countries was sufficient, and whether the discretionary transfer system adequately protected the right to health for those needing urgent medical care. Additionally, the dissenting members considered that the medical transfer provisions sought to be repealed appeared to provide a higher degree of access to healthcare, and repealing this may represent an unjustified retrogressive step in relation to the realisation of the right to health. The dissenting members also considered that was a risk that repealing the current medical transfer provisions could lead to the return of persons to regional processing countries in circumstances that may not be consistent with Australia's non-refoulement obligations and the right to an effective remedy.⁴⁸

45 Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2018, *Report 1 of 2019* (12 February 2019) pp.69-97.

46 See, for example, Parliamentary Joint Committee on Human Rights, Migration Amendment (Seamless Traveller) Regulations 2018 [F2018L01538], *Report 2 of 2019* (2 April 2019), p. 202.

47 Parliamentary Joint Committee on Human Rights, Migration Amendment (Repairing Medical Transfers) Bill 2019, and *Report 6 of 2019* (5 December 2019), pp. 91-92 and 97-98.

48 Parliamentary Joint Committee on Human Rights, Migration Amendment (Repairing Medical Transfers) Bill 2019, *Report 4 of 2019* (10 September 2019), p. 2; and *Report 6 of 2019* (5 December 2019), pp. 124 and 128.

Right to equality and non-discrimination

3.28 The committee considered a number of bills and delegated legislation involving measures which appeared to have a particular impact on certain groups in society.

3.29 Bills and legislative instruments which have a particular impact on certain groups in society may engage the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind. 'Discrimination' encompasses a distinction based on a personal attribute (for example, race, sex, or on the basis of disability), which has either the purpose (called 'direct' discrimination) or the effect (called 'indirect' discrimination), of adversely affecting human rights. However, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that objective and is a proportionate means of achieving that objective.

The rights of Indigenous Australians

3.30 The committee considered several bills and instruments which appeared to have a particular impact on Indigenous Australians, including:

- Social Services Legislation Amendment (Drug Testing Trial) Bill 2019;⁴⁹
- Native Title Legislation Amendment Bill 2019;⁵⁰ and
- several social security determinations and bills relating to cashless welfare and welfare quarantining.⁵¹

3.31 These included measures to:

- provide for a two year trial of mandatory drug testing for new recipients of Newstart Allowance and Youth Allowance in certain geographical locations;⁵²

49 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Drug Testing Trial) Bill 2019, *Report 6 of 2019* (5 December 2019) p. 54.

50 Parliamentary Joint Committee on Human Rights, Native Title Legislation Amendment Bill 2019, *Report 2 of 2019* (2 April 2019) p. 68.

51 Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Income Management and Cashless Welfare) Bill 2019, *Report 2 of 2019* (2 April 2019) p. 146; Social Security (Administration) (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2019 [F2019L00911], *Report 4 of 2019* (10 September 2019) p. 21; Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019, *Report 6 of 2019* (5 December 2019) p. 39.

52 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Drug Testing Trial) Bill 2019, *Report 6 of 2019* (5 December 2019) p. 54.

- amend the process of applicant decision-making under the *Native Title Act 1993* so that the applicant may act by majority as the default position for all things that the applicant is required or permitted to do under the Act;⁵³ and
- extend the operation of the cashless debit card trial in trial locations, and the Cape York Welfare Reform income management program,⁵⁴ and establish the Northern Territory and Cape York areas as cashless debit card trial areas.⁵⁵

3.32 The committee noted that income management and cashless welfare measures engage the rights to equality and non-discrimination, social security, and the rights to privacy and family. These measures have been considered by the committee for many years, and in its reports 2 and 4 of 2019 the committee took the opportunity to reiterate its earlier human rights concerns.⁵⁶ The committee noted that, while these measures are not applied based on a person's race, they apply overwhelmingly to Indigenous people (in some locations 90 per cent of participants were Indigenous)⁵⁷ and the measures therefore limit the right to equality and non-discrimination.⁵⁸ In some reports the committee raised concerns that evaluations of the trials indicated a lack of evidence that compulsory income management is

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- 53 Parliamentary Joint Committee on Human Rights, *Native Title Legislation Amendment Bill 2019, Report 2 of 2019* (2 April 2019) p. 68.
- 54 Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Income Management and Cashless Welfare) Bill 2019, Report 2 of 2019* (2 April 2019) p. 146.
- 55 Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019, Report 6 of 2019* (5 December 2019) p. 39.
- 56 See, Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Income Management and Cashless Welfare) Bill 2019, Report 2 of 2019* (2 April 2019) p. 146 which refers to the *2016 Review of Stronger Futures measures* (16 March 2016) pp. 43-63. See also, *Social Security (Administration) (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2019 [F2019L00911], Report 4 of 2019* (10 September 2019) p. 24.
- 57 Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019, Report 6 of 2019* (5 December 2019) p. 43 in reference to Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) p. 40.
- 58 Parliamentary Joint Committee on Human Rights, *Social Security (Administration) Amendment (Income Management and Cashless Welfare) Bill 2019, Report 2 of 2019* (2 April 2019) p. 152 in reference to Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016), see p. 60.

effective to achieve its stated objectives.⁵⁹ Further, in some reports the committee considered that the blanket application of the regime raised concerns with respect to proportionality.⁶⁰ In *Report 6 of 2019* the committee also emphasised that measures relating to income management and cashless welfare are intended to promote a range of human rights, including the rights of the child, the right to protection of the family, and the right to health;⁶¹ and that income management is intended to reduce immediate hardship and deprivation, violence and harm, and the likelihood that welfare recipients will remain on welfare.⁶²

The rights of persons with disabilities

3.33 The committee also considered bills and instruments which engaged the rights of persons with disabilities, including:

- Civil Aviation Safety Amendment (Part 91) Regulations 2018 [F2018L01783];⁶³
- Disability Discrimination Regulations 2019 [F2019L01186];⁶⁴ and
- Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 [F2019L00511].⁶⁵

3.34 These measures engaged a number of human rights, including the rights of persons with disabilities, related to accessibility and personal mobility; the right to education and to work; and the right to equality and non-discrimination, which

59 Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Income Management and Cashless Welfare) Bill 2019, *Report 2 of 2019* (2 April 2019) p. 152 in reference to Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016), see pp. 52 and 61.

60 Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Income Management and Cashless Welfare) Bill 2019, *Report 2 of 2019* (2 April 2019) p. 152, which refers to Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016), see p. 56.

61 Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019, *Report 6 of 2019* (5 December 2019) pp. 50-51.

62 Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019, *Report 6 of 2019* (5 December 2019) p. 51.

63 Parliamentary Joint Committee on Human Rights, Civil Aviation Safety Amendment (Part 91) Regulations 2018 [F2018L01783] *Report 2 of 2019* (2 April 2019) p. 22; and *Report 5 of 2019* (17 September 2019) p 37.

64 Parliamentary Joint Committee on Human Rights, Disability Discrimination Regulations 2019 [F2019L01186], *Report 6 of 2019* (5 December 2019) p. 24.

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

includes a requirement that special affirmative measures must not result in the perpetuation of isolation or segregation of persons with disabilities.

3.35 For example, the Civil Aviation Safety Amendment (Part 91) Regulations 2018 provided that despite any requirements in the *Disability Discrimination Act 1992*, an operator or pilot in command of an aircraft could refuse to carry an assistance animal on board. The committee was concerned that the regulations may not adequately protect the rights of persons with disabilities, including the right to be able to access transportation.⁶⁶ The committee considered that it may be appropriate if the regulations were amended to include a requirement that airlines have guidelines in place, to assist pilots, regarding management of any risks posed by the carriage of assistance animals.⁶⁷

3.36 Further, the Disability Discrimination Regulations 2019 exempted a number of Commonwealth and State laws, and activities considered to be combat-related, from compliance with the *Disability Discrimination Act 1992*. The committee noted that this had the effect that a number of measures were exempt from the prohibition against discrimination on the basis of disability. For example, it prescribed certain sections of the *Education Act 1972* (South Australia) as being exempt from this prohibition, meaning that the Director-General could direct that a child be enrolled in a special school, and enable a school to refuse to enrol a student on the basis of disability. The committee noted the advice that this appeared to engage the right to equality and non-discrimination and to education, and sought further information from the Attorney-General with respect to the measure.⁶⁸

Privacy and information-sharing

3.37 The committee examined a number of bills and instruments which raised privacy concerns, including the:

- Civil Aviation Order 48.1 Instrument 2019 [F2019L01070];⁶⁹
- National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019;⁷⁰ and

66 Parliamentary Joint Committee on Human Rights, Civil Aviation Safety Amendment (Part 91) Regulations 2018 [F2018L01783] *Report 5 of 2019* (17 September 2019) p 38.

67 Parliamentary Joint Committee on Human Rights, Civil Aviation Safety Amendment (Part 91) Regulations 2018 [F2018L01783] *Report 5 of 2019* (17 September 2019) p 43.

68 Parliamentary Joint Committee on Human Rights, Disability Discrimination Regulations 2019 [F2019L01186], *Report 6 of 2019* (5 December 2019) pp. 25-29.

69 Parliamentary Joint Committee on Human Rights, Civil Aviation Order 48.1 Instrument 2019 [F2019L01070], *Report 6 of 2019* (5 December 2019) p. 20.

70 Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019, *Report 2 of 2019* (2 April 2019) p 61; and *Report 5 of 2019* (17 September 2019), p. 70.

- Crimes Legislation Amendment (Police Powers at Airports) Bill 2019.⁷¹
- 3.38 The right to privacy is multi-faceted, and includes respect for informational privacy; protection against arbitrary and unlawful interferences with a person's private life, family, correspondence or home; and includes a right to personal autonomy and physical and psychological integrity.
- 3.39 The bills and instruments introduced, extended or amended a number of measures which had privacy implications, including to:
- establish a regulatory framework for the management of risk fatigue in aviation operations, enabling the collection and use of a person's psychological information;⁷²
 - establish a national database of information relating to worker screening for the purposes of the National Disability Insurance Scheme;⁷³ and
 - introduce new powers at major airports, including the power for constables and protective service officers to give directions to persons to provide identification, move-on, or stop.⁷⁴
- 3.40 The committee noted that in general terms, these measures appeared to be directed towards achieving a legitimate objective for the purposes of human rights law. For example, the committee considered that measures to maintain air safety by addressing the safety implications of fatigue by flight crew members, constituted a legitimate objective.⁷⁵ However, it had concerns with respect to the proportionality of the measures.⁷⁶ In some cases, having received additional information from the responsible minister, the committee concluded that legislative limitations around the

71 Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Police Powers at Airports) Bill 2019, *Report 4 of 2019* (10 September 2019), p. 18.

72 Parliamentary Joint Committee on Human Rights, Civil Aviation Order 48.1 Instrument 2019 [F2019L01070], *Report 6 of 2019* (5 December 2019) p. 20.

73 Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019, *Report 2 of 2019* (2 April 2019) p 61; and *Report 5 of 2019* (17 September 2019), p. 70.

74 Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (Police Powers at Airports) Bill 2019, *Report 4 of 2019* (10 September 2019), p. 18.

75 For example, Parliamentary Joint Committee on Human Rights, Civil Aviation Order 48.1 Instrument 2019 [F2019L01070], *Report 6 of 2019* (5 December 2019) p. 21.

76 Parliamentary Joint Committee on Human Rights, Civil Aviation Order 48.1 Instrument 2019 [F2019L01070], *Report 6 of 2019* (5 December 2019) p. 22.

type and extent of information appeared to serve as important safeguards against any disproportionate limit on the right to privacy.⁷⁷

3.41 In addition, the committee examined legislation which provided for the sharing of information outside Australia. For example, the Fisheries Management Regulations 2019 provided for the collection and sharing of personal information about illegal foreign fishers (including fingerprints, photographs and iris scans) to certain entities, including foreign government agencies.⁷⁸ The committee noted that this measure may engage a number of human rights, including the right to privacy, life, and the absolute prohibition against torture and other cruel, inhuman or degrading treatment or punishment. In particular, the committee expressed concern as to the gathering and sharing of information which may expose a person to the risk of the death penalty or to other cruel treatment in a foreign country.⁷⁹ The committee noted that the scheme did have some administrative safeguards, and recommended that consideration be given to developing guidelines to help ensure that information would not be shared overseas in such circumstances.⁸⁰

Committee impact

3.42 During the reporting period, there was evidence that the committee continues to have an impact in relation to the consideration of the human rights implications of legislation. One measure of the committee's impact relates to the use of its reports. In this respect, during the reporting period, there was evidence of the committee's reports being drawn on in Parliament and beyond. For example, this

77 For example, Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019, *Report 5 of 2019* (17 September 2019), p. 75.

78 Parliamentary Joint Committee on Human Rights, Fisheries Management Regulations 2019 [F2019L00383], *Report 3 of 2019* (30 July 2019), p. 10; and *Report 5 of 2019* (17 September 2019), p. 59.

79 Parliamentary Joint Committee on Human Rights, Fisheries Management Regulations 2019 [F2019L00383], *Report 5 of 2019* (17 September 2019), p. 68.

80 Parliamentary Joint Committee on Human Rights, Fisheries Management Regulations 2019 [F2019L00383], *Report 5 of 2019* (17 September 2019), p. 69.

includes the committee's reports being cited in parliamentary debates,⁸¹ other committee reports and parliamentary publications,⁸² and more broadly.⁸³

Crimes Legislation Amendment (Police Powers at Airports) Bill 2019

3.43 The committee's consideration of the Crimes Legislation Amendment (Police Powers at Airports) Bill 2019 is an example of the committee's dialogue model in action, and demonstrative of the committee's continued impact.⁸⁴

3.44 The committee first reported on the initial iteration of this bill—the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018—in its *Report 11 of 2018* and *Report 12 of 2018*.⁸⁵ In those reports, the committee noted that the bill sought to introduce new powers at major airports, including the power for constables and protective service officers to give directions to persons to provide identification, move-on, or stop. The committee noted that these proposed measures engaged the right to privacy, liberty, and freedom of movement and expression. In particular, the committee expressed concern that the breadth of the term 'good order', with respect to maintaining 'aviation security', created a significant risk that directions to move on could be given to persons exercising their right to freedom of expression

81 See, for example, by Senator Whish-Wilson in relation to the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019 during the second reading debate on 4 December 2019; by Senator Faruqi in relation to the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 during 'in-committee' debate on 28 November 2019; and by Senator Dodson with respect to the same bill during the second reading debate on 27 November 2019; and by Mr Chris Hayes MP with respect to the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 during the second reading debate on 15 October 2019.

82 See, for example, Community Affairs Legislation Committee, *Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 [Provisions]* (October 2019); Legal and Constitutional Affairs Legislation Committee, *Criminal Code Amendment (Agricultural Protection) Bill 2019 [Provisions]* (September 2019); and Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 [Provisions]* (November 2019).

83 For example, the committee's public hearing for its inquiry into the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 on 20 August 2019 attracted media attention, including on SBS World News, *The Canberra Times*, 9 News, *The West Australian* and various media alerts from organisations such as Human Rights Watch, Open Access Government, Aged Care Institute, Dementia Australia, Australian Ageing Agenda and the Royal Australian College of General Practitioners. In addition, the role of the committee was highlighted in the Australian Public Law Book Forum on Adam Fletcher's monograph, *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?*.

84 Parliamentary Joint Committee on Human Rights, Crimes Legislation (Police Powers at Airports) Bill 2018, *Report 4 of 2019* (10 September 2019) p. 18.

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

and assembly, and may be overly broad.⁸⁶ This bill lapsed with the dissolution of Parliament on 11 April 2019.

3.45 When the bill was re-introduced later in 2019, the Minister for Home Affairs noted in his second reading speech that the amendments which had been incorporated into the bill were consistent with the concerns which this committee had expressed.⁸⁷ Specifically, the bill was amended such that safeguarding the 'public order and safe operation' of a major airport does not apply, by itself, to persons exercising their right to lawfully engage in advocacy, protest, dissent or industrial action. The committee considered that these changes adequately addressed the scope of concerns which it had raised, while recommending that the government continue to monitor the use of these powers.⁸⁸

Quality of Care inquiry report

3.46 As part of its function of examining legislative instruments for compatibility with human rights, the committee resolved to inquire into the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 on 29 July 2019.⁸⁹ This instrument came into force on 1 July 2019, and regulated the use of physical restraints and chemical restraints by approved providers of residential aged care and short-term restorative care in a residential setting.

3.47 The committee's decision to hold an inquiry was informed by correspondence it had received from Human Rights Watch and the Office of the Public Advocate (Victoria) asking it to consider a number of human rights concerns in relation to the instrument, including the prohibition against cruel, inhuman, or degrading treatment, the right to health, and the rights of persons with disabilities.

3.48 The committee held a one day public hearing, taking evidence from 29 witnesses, including departmental officials, state and territory public guardians, and medical experts. Following this hearing, the committee sought further information from the Department of Health. In addition, the committee received 17 written submissions, and considered a number of pieces of additional information.

86 See, Parliamentary Joint Committee on Human Rights, Crimes Legislation (Police Powers at Airports) Bill 2018, *Report 12 of 2018* (27 November 2018), p. 55.

87 The Hon Peter Dutton MP, Crimes Legislation Amendment (Police Powers at Airports) Bill 2019, second reading speech, 4 July 2019.

88 Parliamentary Joint Committee on Human Rights, Crimes Legislation (Police Powers at Airports) Bill 2018, *Report 4 of 2019* (10 September 2019) p. 19.

89 All correspondence and other records associated with this inquiry are available on the inquiry webpage at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/QualityCareAmendment

3.49 On behalf of the committee, Senator McKim placed a protective notice of motion to disallow the instrument in the Senate on 16 September 2019. This extended the period by which the instrument was subject to disallowance by a further 15 sitting days. The disallowance procedure is the primary mechanism by which the Parliament may exercise control over delegated legislation. The placing of the protective notice of motion to disallow ensured continued parliamentary control over the instrument pending completion of the committee's inquiry.

3.50 The committee tabled its inquiry report on 13 November 2019, and made the following recommendations:

Recommendation 1

In light of the above concerns, the committee recommends, at a minimum, that:

- the instrument be amended to include a note to clarify that other laws prohibit the use of both physical and chemical restraint without prior informed consent; and
- detailed amendments are made to the explanatory materials accompanying the instrument, to clarify how the instrument interacts with state and territory laws, in particular regarding the authorisation of substitute decision-making and the continued obligations for prescribers to exhaust alternative options and obtain informed consent prior to the use of chemical restraint.

Recommendation 2

The committee also recommends that the minister undertakes extensive consultation with relevant stakeholders to work towards better regulating the use of restraints in residential aged care facilities, in particular including:

- an explicit requirement to exhaust alternatives to the use of restraint, including preventative measures and that restraint be used as a last resort (noting the approach taken by the National Disability Insurance Scheme rules);
- obligations to obtain or confirm informed consent prior to the administration of chemical restraint;
- improved oversight of the use of restraints in aged care facilities; and
- mandatory reporting requirements for the use of all types of restraint.⁹⁰

3.51 In addition, members of the committee from the Australian Labor Party and the Australian Greens Party tabled a dissenting report recommending that the instrument be disallowed, that a new instrument be introduced, and that widespread

90 Parliamentary Joint Committee on Human Rights, *Inquiry into the Quality of Care (Minimising the Use of Restraints) Principles 2019* (13 November 2019), pp. 54-55.

consultation be implemented urgently to protect residents of aged care facilities in the use of restraints.

3.52 On 25 November 2019, the Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019 (Amending Principles) were registered on the Federal Register of Legislation.⁹¹ These clarified that the use of restraint must be a measure of last resort, and provided that the Minister for Health must ensure that there is a review of the operation of the Quality of Care Principles 2014, relating to physical and chemical restraint. The review must consider the effectiveness of Part 4A of the Quality of Care Principles in minimising the use of physical restraints and chemical restraint by approved providers in relation to consumers in the period 1 July 2019 to 30 June 2020. The Amending Principles also provided that the relevant Part of the Quality of Care Principles would be repealed by 1 July 2021.

3.53 The committee withdrew its protective Notice of Motion to disallow the original instrument on 29 November 2019, a day prior to the commencement of the Amending Principles, on 30 November 2019.

3.54 The committee received a government response to this inquiry in March 2020. In this response, the Minister for Health thanked the committee for its work. The response indicated in-principle support of both recommendations made by the committee, and noted that the concerns which the committee had raised had been a consideration in the decision to further strengthen the regulation of restraint in residential aged care.⁹²

Senator the Hon Sarah Henderson

Chair

91 The Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019 (Amending Principles) [F2019L01505] were registered on the Federal Register of Legislation on 25 November 2019, and can be accessed at: <https://www.legislation.gov.au/Details/F2019L01505>.

92 The government response also indicated in-principle response with respect to recommendations two and three made in the dissenting report to this inquiry.