

## Chapter 3

### Work of the committee in 2019

3.1 This chapter provides information about the work of the committee during 2019,<sup>1</sup> 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*.<sup>2</sup> 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 46<sup>th</sup> 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](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.<sup>3</sup>

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

---

3 The committee's annual reports are available at:

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Annual\\_Reports](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.

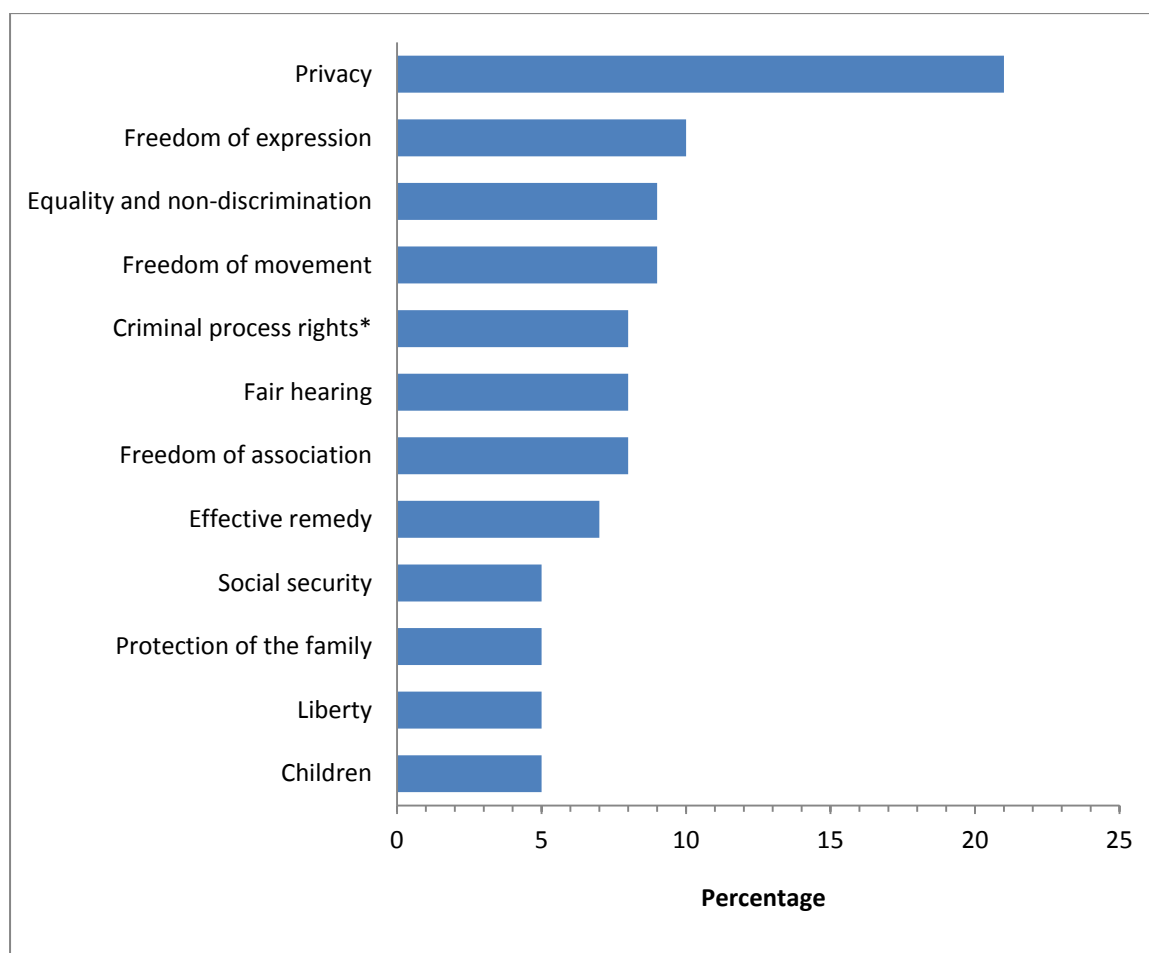
13 ICCPR, articles 17 and 23; and ICESCR, article 10(1).

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).<sup>16</sup> 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.<sup>17</sup>

### *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.<sup>18</sup> 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.<sup>19</sup> Six of those requests were made in the final report of 2019,<sup>20</sup> 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.<sup>21</sup>

### 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;<sup>22</sup>
- Foreign Influence Transparency Scheme Legislation Amendment Bill 2018;<sup>23</sup>
- Counter-Terrorism (Temporary Exclusion Orders) Bill 2019;<sup>24</sup> and
- Crimes Legislation Amendment (Police Powers at Airports) Bill 2019.<sup>25</sup>

---

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;<sup>26</sup>
- 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;<sup>27</sup>
- 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;<sup>28</sup> and
- increasing police powers at airports, including directions to provide identity information and move-on directions at airports.<sup>29</sup>

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.<sup>30</sup> 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.<sup>31</sup>

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

### ***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;<sup>34</sup>
- Australian Citizenship Amendment (Citizenship Cessation) Bill 2019.<sup>35</sup>
- Migration Amendment (Streamlining Visa Processing) Bill 2018;<sup>36</sup>
- Migration Amendment (Strengthening the Character Test) Bill 2018;<sup>37</sup>
- Migration Amendment (Repairing Medical Transfers) Bill 2019;<sup>38</sup> 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';<sup>39</sup>
- 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;<sup>40</sup>

- 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;<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup> 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.<sup>46</sup>

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.<sup>47</sup> 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.<sup>48</sup>

---

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;<sup>49</sup>
- Native Title Legislation Amendment Bill 2019;<sup>50</sup> and
- several social security determinations and bills relating to cashless welfare and welfare quarantining.<sup>51</sup>

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;<sup>52</sup>

---

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;<sup>53</sup> and
- extend the operation of the cashless debit card trial in trial locations, and the Cape York Welfare Reform income management program,<sup>54</sup> and establish the Northern Territory and Cape York areas as cashless debit card trial areas.<sup>55</sup>

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.<sup>56</sup> 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)<sup>57</sup> and the measures therefore limit the right to equality and non-discrimination.<sup>58</sup> In some reports the committee raised concerns that evaluations of the trials indicated a lack of evidence that compulsory income management is

- 
- 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.<sup>59</sup> Further, in some reports the committee considered that the blanket application of the regime raised concerns with respect to proportionality.<sup>60</sup> 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;<sup>61</sup> 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.<sup>62</sup>

### *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];<sup>63</sup>
- Disability Discrimination Regulations 2019 [F2019L01186];<sup>64</sup> and
- Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 [F2019L00511].<sup>65</sup>

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.<sup>66</sup> 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.<sup>67</sup>

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.<sup>68</sup>

### ***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];<sup>69</sup>
- National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019;<sup>70</sup> 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.<sup>71</sup>

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;<sup>72</sup>
- establish a national database of information relating to worker screening for the purposes of the National Disability Insurance Scheme;<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup> However, it had concerns with respect to the proportionality of the measures.<sup>76</sup> 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.<sup>77</sup>

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.<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup>

### **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,<sup>81</sup> other committee reports and parliamentary publications,<sup>82</sup> and more broadly.<sup>83</sup>

### **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.<sup>84</sup>

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*.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup>

### **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.<sup>89</sup> 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](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.<sup>90</sup>

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.<sup>91</sup> 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.<sup>92</sup>

## **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.