

Chapter 3

Work of the committee in 2018

3.1 This chapter provides information about the work of the committee during 2018,¹ including the major themes and scrutiny issues arising from the legislation examined by the committee.

Legislation considered

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

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

Table 3.1: Legislation considered during the reporting period

	Total considered	No human rights concerns	Advice-only comment	Response required	Further response required ²
Bills and Acts	238	181	19	38	4
Legislative instruments	1,850	1,802	10	38	11

Reports tabled during the period

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

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

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

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

Commonly engaged rights

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

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

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

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

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

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

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

8 Article 14 of the ICCPR.

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

10 Article 2(3) of the ICCPR.

11 Article 9 of the ICCPR.

12 Article 9 of the ICESCR.

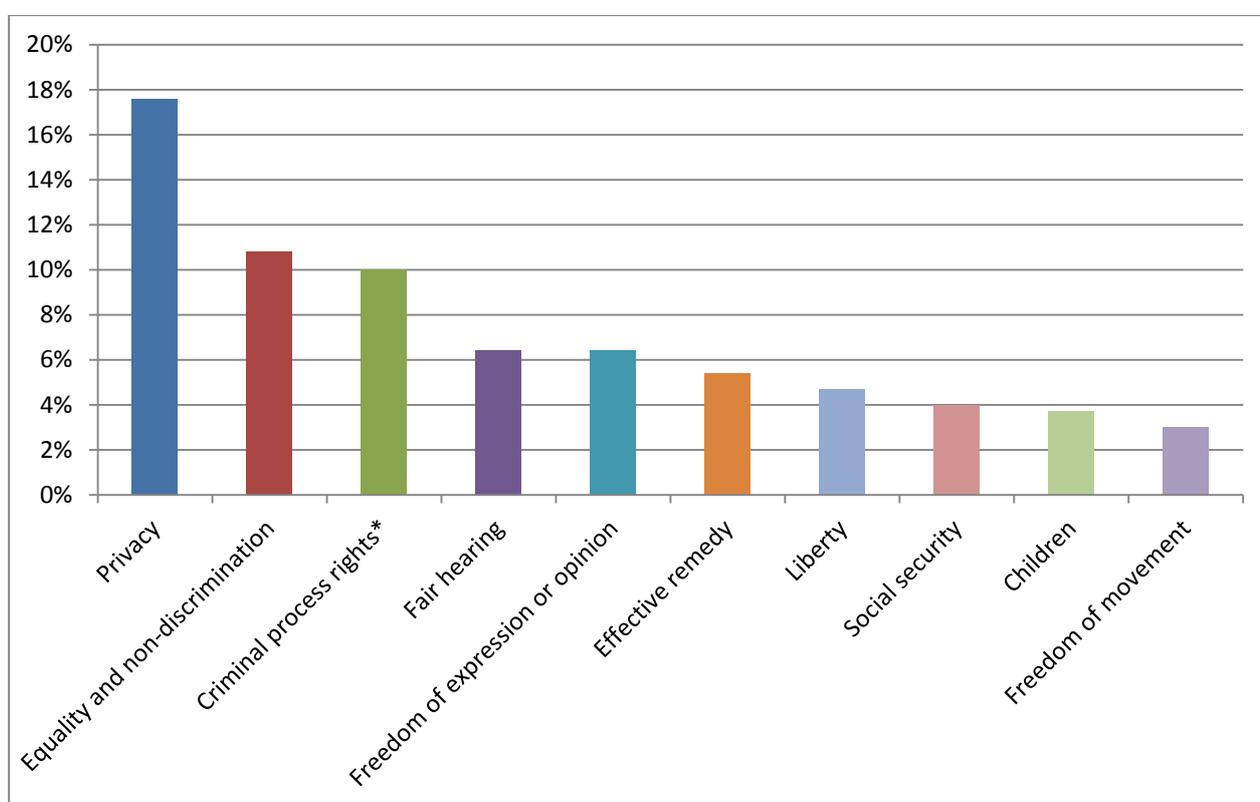
13 Article 3 of the Convention on the Rights of the Child (CRC).

14 Article 12 of the ICCPR.

3.7 During the reporting period, the rights listed above accounted for 73% of rights which the committee reported on substantively within both primary and delegated legislation. This figure does not include rights engaged in legislation which the committee initially examined and reported on as not raising human rights concerns (this may be because the bill or instrument promoted human rights and/or permissibly limited human rights).¹⁵

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

Figure 3.1: Human rights engaged by legislation in 2018



15 As discussed in Chapter 2, the committee examines all bills and instruments that come before the parliament for compatibility with human rights. However, it focuses its substantive analysis or comments in reports on measures that raise human rights concerns in such legislation. Accordingly, the rights that are identified as engaged in the above statistics relate to legislation raising human rights concerns. During the reporting period, bills not raising human rights concerns were listed in the committee's reports. For legislative instruments not raising human rights concerns, a cross reference was made in the committee's reports to the Federal Register of Legislation. Legislative instruments raising human rights concerns were identified on an exceptions basis in the committee's reports.

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

Major themes

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

Human rights and technology

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

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

3.11 Measures examined by the committee included proposals to:

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

17 The Bill is currently before the House of Representatives.

18 The Bill received Royal Assent on 8 December 2018.

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

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

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

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

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

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

National security and foreign interference

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

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

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

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

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

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

27 The Bill received Royal Assent on 29 June 2018.

28 The Bill received Royal Assent on 29 June 2018.

29 The Bill received Royal Assent on 10 December 2018.

30 The Bill received Royal Assent on 24 August 2018.

31 The Bill is currently before the House of Representatives.

32 These Bills received Royal Assent on 10 December 2018.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Equality and non-discrimination and vulnerable groups

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

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

Right to equality and non-discrimination

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

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

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

49 The Bill received Royal Assent on 24 August 2018.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The rights of persons with disabilities

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

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

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

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

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

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

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

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

Information sharing, assistance and extradition to foreign countries

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

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

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

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

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

66 The Bill received Royal Assent on 11 April 2018.

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

3.34 Measures examined in these bills and instruments include:

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

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

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

67 The Bill received Royal Assent on 8 December 2018.

68 The Bill received Royal Assent on 10 December 2018.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Children's rights

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

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

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

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

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

80 The Bill received Royal Assent on 21 June 2018.

81 The Bill is currently before the Senate.

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

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

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

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

Committee impact

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

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

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

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

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

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

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

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

Scrutiny issues

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

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

Timeliness

Timeliness of committee reports

3.48 The committee seeks to conclude its assessment of bills while they are still before the Parliament, and its assessment of legislative instruments within the timeframe for disallowance (usually 15 sitting days). In both cases, the committee's approach seeks to ensure that reports on the human rights compatibility of legislation are available to inform parliamentary deliberations. The committee's ability to do so is, however, dependent on the legislative program of the government of the day and the timeliness of ministers' responses to the committee's inquiries.

3.49 During the reporting period, the committee concluded it's reporting on most legislation prior to passage or, in the case of legislative instruments, during the period for disallowance. However, there were some occasions where the committee did not table its final report on legislation prior to its passage or until after the period for disallowance. During the reporting period, 17 out of the 238 new bills examined by the committee passed prior to (or on the same day as) the committee tabling its final report (7.1%). For six of the 17 bills that passed before the committee had published a final report, the committee had published an initial comment in advance of passage. As the committee's initial reports generally contain a detailed human rights analysis, this means that a human rights analysis of 95% of new bills was available to inform members of parliament prior to passage of the legislation.⁹²

Timeliness of responses

3.50 The responsiveness of legislation proponents to the committee's requests for information regarding human rights concerns is critical to the effectiveness of the scrutiny process.⁹³ While the committee stipulates a deadline by which it expects a response be provided, there is no legal or procedural requirement to ensure that a legislation proponent provides the response within this time period. There is also no procedural requirement for the committee to have finally reported on a particular bill prior to its passage by the Parliament, even where this is due to the failure of a minister to respond to the committee's requests for information.

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

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

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

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

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

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

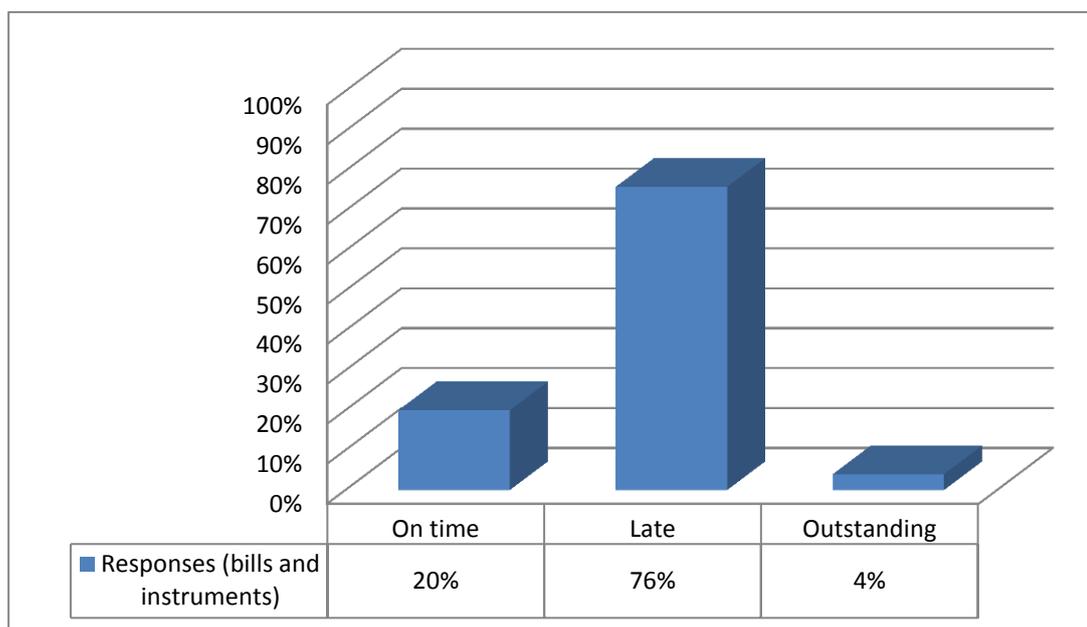
3.55 Ninety-one responses were requested in relation to 76 bills and legislative instruments in the reporting period.⁹⁷ Of these, 18 responses (20%) were provided to the committee by the initial request date.

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

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

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

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

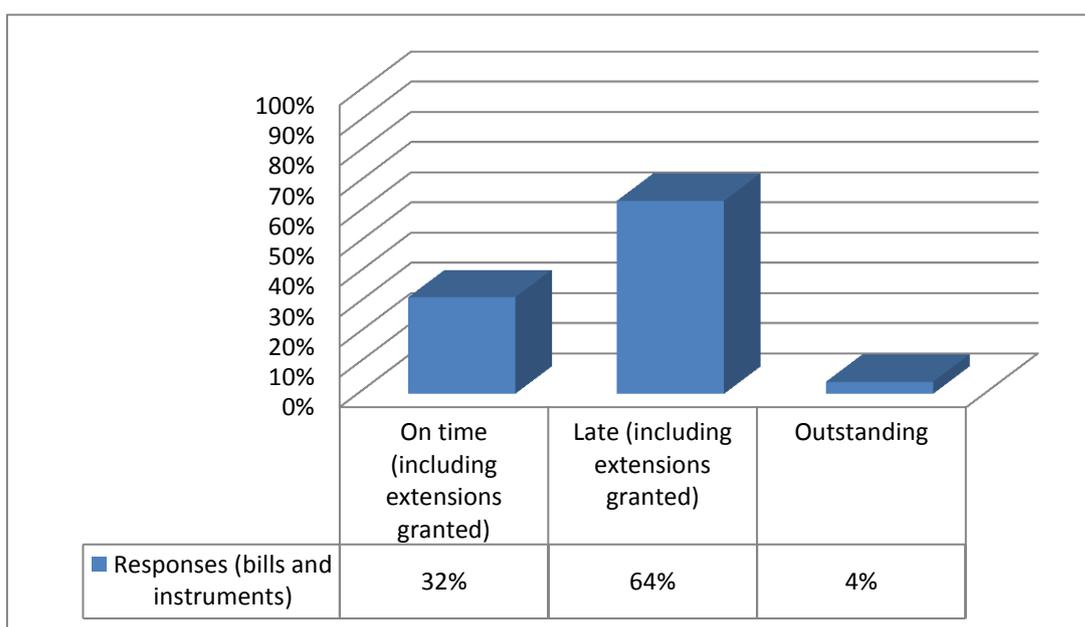
Figure 3.2 Percentage of responses received by initial due date

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

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

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

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



Statements of compatibility

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

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

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

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

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

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

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

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

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

Additional work of the committee

Statement of Compatibility project

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

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

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

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

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

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

Site visit to the Australian Human Rights Commission

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

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

AustLII launch

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

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

101 For example, with the Department of Health.

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

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

Liaison with external groups and delegations

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

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

Mr Ian Goodenough MP

Chair