Human Rights Law Centre

RMIT UNIVERSITY

# Human Rights Scrutiny in the Australian Parliament

## Are new Commonwealth laws meeting Australia's international human rights obligations?

**Report commissioned by the Human Rights Law Centre, prepared by Dr Adam Fletcher (RMIT) with research assistance from Stephanie Kerr, Jessie-Grace Stephenson and Michelle Hannon (Gilbert + Tobin)**

## Executive Summary

Australia does not have a Constitutional Bill of Rights, nor does it have a Charter of Human Rights or Human Rights Act at the national level. Due in large part to a strong attachment to the doctrine of Parliamentary sovereignty, Australia has decided that Parliament should be the body to assess whether new federal laws are compatible with Australia's human rights obligations generally, rather than have the courts decide in individual cases.[1] Other Western, liberal jurisdictions employ a combination of legal and political mechanisms to ensure that their people's human rights are protected.

This report assesses Australia's uncommon approach 10 years after the establishment of the relevant Parliamentary mechanism – a legislative scrutiny regime led by the Parliamentary Joint Committee on Human Rights. In particular, it addresses institutional obstacles to its effectiveness, and what these obstacles mean for the human rights compatibility of Australian federal laws passed in recent years.

The report concludes that there are indeed several significant obstacles to the scrutiny regime's effectiveness – foremost among them the lack of a prominent human rights culture within the Australian Government. As such, despite an excellent catalogue of human rights analysis in the Joint Committee's reports, there is still insufficient institutional impetus to make new federal laws more compliant with Australia's human rights obligations.

## Methodology

This report has been prepared based on an analysis of data on the operation of the scrutiny regime from 2019-2021, collected with the invaluable assistance of the Pro Bono team at Gilbert + Tobin.

With a view to assessing the impact of the scrutiny regime in recent years, the reports of the Parliamentary Joint Committee on Human Rights (PJCHR) from 2019-2021, as well as related parliamentary materials, were examined to determine:

- Whether the PJCHR had sufficient time to scrutinise important new laws with human rights implications;
- To what extent, when the PJCHR expressed concerns in its initial assessments of such laws, these concerns were taken up by the Parliament;
- How the scrutiny regime deals with Legislative Instruments (see Chapter 3) such as Regulations and Ministerial Directions, some of which have had significant rights impacts over the last few years, and
- Whether there were any other relevant trends or issue raised by the Scrutiny Reports which should be highlighted.

[1] See for example the Second Reading Speech by Attorney-General Robert McClelland on the *Human Rights (Parliamentary Scrutiny) Bill 2010*, 30 September 2010 House of Representatives Hansard, page 271.

This report builds on the earlier PhD research of its lead author into the impact of the scrutiny regime from 2012-2016, which was published in 2018.[2] It also draws on other related academic work engaging with the scrutiny regime since 2016.[3]

## Recommendations

1. Enact a Federal Charter of Human Rights to strengthen and complement the scrutiny regime
2. Give the PJCHR guaranteed time for scrutiny for Bills and Legislative Instruments if they propose to limit human rights
3. Give the PJCHR the power to conduct 'own-motion' investigations to address systemic issues which come to its notice, rather than only those into which the Government wishes to inquire
4. Prescribe that Legislative Instruments with implications for human rights be disallowable by default
5. Make internal Government advice on Australia's international human rights obligations a routine part of legislative development work

[2] Adam Fletcher, *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?* (Melbourne University Press, 2018).

[3] See eg Daniel Reynolds and George Williams, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469; Gabrielle Appleby, 'Challenging the Orthodoxy: Giving the Court a Role in Scrutiny of Delegated Legislation' (2016) 69 *Parliamentary Affairs* 269; Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) Australasian Parliamentary Review 72; Lisa Burton Crawford, 'The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth): A Failed Human Rights Experiment?' in Matthew Groves, Janina Boughey and Dan Meagher (eds), The Legal Protection of Rights in Australia (Hart Publishing, 2019) 143; Sarah Moulds 'Scrutinising COVID-19 laws: An early glimpse into the scrutiny work of federal parliamentary committees' (2020) 45(3) *Alternative Law Journal* 180; Julie Debeljak and Laura Grenfell (Eds), *Law Making and Human* Rights (Thomson Reuters, 2020) – see in particular Part I, with contributions from Julie Debeljak, Laura Grenfell, Adam Fletcher, Daniel Reynolds, George Williams, Simon Rice and Andrew Byrnes; also Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime' (2021) 46(1) *Monash University Law Review* 256.

## Chapter 1 – What is the Commonwealth Scrutiny Regime?

The scrutiny regime assessed in this report dates back to 2012. It was created by the Rudd/Gillard Government in response to the National Human Rights Consultation of 2008/2009. The Consultation Committee, led by lawyer and priest Father Frank Brennan, recommended a national Human Rights Act be adopted, the better to protect Australians' rights and implement our international obligations.[4] However, the Act was eventually rejected, and the scrutiny regime was one of the 'planks' of the 2010 National Human Rights Framework that the Government introduced instead (along with some associated human rights education measures, and a promise to review existing Commonwealth laws for human rights compliance).[5] A Parliament-led rights protection regime was seen to be more in keeping with fundamental notions of Australian constitutional arrangements, such as Parliamentary sovereignty and a strictly delineated role for the courts.

The scrutiny regime involves two main processes. First, public servants working on new legislation must draft a Statement of Compatibility (SoC) with Human Rights, outlining the Government's official view on the compatibility of measures in the law with Australia's international human rights obligations – for example, to protect freedom of speech under article 19 of the International Covenant on Civil and Political Rights (ICCPR).

The second process is where Members of Parliament come in. The Parliamentary Joint Committee on Human Rights (PJCHR) was established in 2012 to assess the compatibility claims in these SoCs independently, and report to Parliament on any human rights risks presented by newly-tabled legislation. For example, if legislation giving Government agencies new surveillance powers potentially infringes Australians' right to privacy under the ICCPR, the PJCHR's role is to alert MPs and Senators voting on the relevant Bill to the risks involved (a Committee has no power of its own to amend or reject a Bill, although the situation is a little more complicated with Legislative Instruments – see Chapter 3).

Both of these aspects of the scrutiny regime are underpinned by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which sets out the requirement to table SoCs with most new legislation, and the mandate of the PJHCR. There are some important limitations on both of these aspects of the regime which will be discussed in Chapters 3 and 4 of this report.

Commonwealth legislation tends to be complex and multifaceted, and many Bills present the PJCHR with some difficulty in assessing their human rights implications. In fact, in many cases, it is impossible to draw any firm conclusions about such implications, because much will depend on how the law is implemented (for example by public servants at Centrelink or AFP officers).

Despite the evident difficulty of this task, the PJCHR has built up an immense body of analysis of thousands of new laws in its scrutiny reports over the past decade. If a Bill is determined to raise potential human rights concerns in an initial triage process, a detailed analysis is performed, with the assistance of an expert external legal adviser. If the analysis raises questions that are not satisfactorily answered in the SoC for the relevant Bill, the PJCHR Chair writes to the responsible Minister to request clarification and/or to point out potential human rights pitfalls which may or may

[4] See *National Human Rights Consultation Report*, Commonwealth of Australia, 2009, Recommendation 18 (page xxxiv).

[5] See Adam Fletcher and Philip Lynch, 'Australia's Human Rights Framework: Has It Improved Accountability?' in Gerber and Castan, *Critical Perspectives on Human Rights Law in Australia* (Thomson Reuters 2021, Vol 1), 17.

not have been apparent to Government at the time of drafting. The Minister replies to the PJCHR in time for it to produce a follow-up scrutiny report for parliamentarians before they vote on the legislation.

The Government, in introducing this regime in 2010, stated that:

> The measures in this bill will deliver improved policies and laws in the future by encouraging early and ongoing consideration of human rights issues in the policy and law-making process and informing parliamentary debate on human rights issues.[6]

So, armed with this wealth of human rights information about legislation before it, how has the Australian Parliament actually responded? Research into the effectiveness of this scrutiny process from 2012-2016 determined that its impact on the actual content of legislation has been limited.[7] In fact, some academic commentators went so far as to conclude that there was no evidence it had led to better laws.[8]

Research since 2016 indicates that, despite some tweaks to processes aimed at improving the scheme's effectiveness, there has been little progress in terms of actual human rights compatibility of new laws.[9] Some exceptions to this general rule will be discussed in Chapters 2 and 3.

The impact of the scrutiny regime has been limited for various reasons. Among the most important of these are:

- By the time a Bill arrives in Parliament, it has been subject to sign-off by multiple APS executives and one or more Ministers, which means that changes are difficult to make without the support of the relevant Minister(s).
- The Government has a tightly-controlled legislative programme for each of Parliament's sittings, and is usually unwilling to, for example, delay the passage of a Bill due to the concerns of a Committee (unless it is a very influential and high profile committee such as the Joint Committee on Intelligence and Security).
- The packed legislative agenda also often allows little time for debate and scrutiny in general – particularly when it comes to Bills seen as urgent (known as 'Category T' Bills).
- The PJCHR is a creation of Parliament, and has its own political struggles internally, which have arguably resulted in scrutiny findings being less robust than they otherwise might be.
- There are no legal consequences, and precious few political consequences, for a Minister who proposes new rights-limiting legislation without respecting the scrutiny process.[10]

The last of these reasons is perhaps the hardest to address. Human rights experts talk about a 'culture of accountability' or 'human rights culture' which grows up around rights instruments like a Charter. This is an atmosphere in which Ministers and other public officials feel compelled to respect people's human rights, because there will be political or even legal consequences for failing to do so. There is some evidence of such a culture having begun to develop in the ACT and Victoria, after those

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[6] Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 272 (Robert McClelland).
[7] Adam Fletcher, *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?* (Melbourne University Press, 2018), Ch 5.
[8] Reynolds and Williams, above n 3, 506.
[9] See Reynolds, Hall and Williams, above n 3.
[10] Burton-Crawford, above n 3, 159.

jurisdictions introduced Acts protecting rights in 2004 and 2006 respectively.[11] The absence of a Charter at the federal level means that it is largely up to the PJCHR to encourage the development of such a culture – a Sisyphean task without support from the courts or leaders of the Executive.

With this in mind, our strongest recommendation for improving the effectiveness of the scrutiny regime is to adopt a federal Charter. However, as demonstrated in the following Chapters, there is room for further improvement in the way the wider Parliament approaches the scrutiny regime as well – not least in terms of respect for the PJCHR's processes and adequate time to do its job.

[11] See eg Victorian Equal Opportunity and Human Rights Commission, *Human rights culture:* https://www.humanrights.vic.gov.au/for-public-sector/human-rights-culture*;* ACT Human Rights Act Research Project (ANU), *The* Human Rights Act 2004 *(ACT) – The First Five Years of Operation,* May 2009: https://regnet.anu.edu.au/sites/default/files/uploads/2016-03/ACTHRA_project_final_report-2.pdf.

## Chapter 2 – Bills of Concern

More than 400 Bills passed through both Houses of Parliament between 2019 and 2021, of which at least 72 were found by the PJCHR to raise human rights concerns. With respect to such Bills, the human rights scrutiny regime is intended to function according to the following steps:

1. A Bill is introduced into Parliament, and is automatically referred to the PJCHR (also to the Senate Scrutiny of Bills Committee, but we are focussing on human rights scrutiny).
2. An initial assessment is performed by PJCHR to determine whether the Bill engages human rights – this is where the majority of Bills gets screened out.
3. Bills which are found to raise some human rights issues or concerns are subject to an initial assessment and report, giving an overview of potential concerns and often requesting more information from the Minister who introduced the Bill.
4. Taking into account further information provided by the Minister, the PJCHR proceeds to a full analysis and conclusions as to the compatibility of the Bill in a final report, for the information of parliamentarians who will vote on its passage.

At this point, the PJCHR has played its role in the scrutiny regime, and Members of Parliament may draw on the available human rights analysis as they wish before voting, along with information from other sources such as explanatory material or other committee reports. Unfortunately, the evidence shows that the scrutiny regime hardly features in parliamentary debates on Bills – even in the Senate, which is traditionally the House of review.

Occasionally, parliamentary amendments are made to a Bill to address concerns raised by the PJCHR. Between 2012 and 2016, this occurred a handful of times, mostly in relation to privacy concerns. According to information published to date, between 2019 and 2021 only the Crimes Legislation Amendment (Police Powers at Airports) Bill 2019 and the National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020 appear to have been amended as a direct result of PJCHR concerns.[12] However, as mentioned in the previous chapter, this low 'hit rate' reflects the difficulty of amending Bills once they enter Parliament, and the political reality of the kinds of concerns that tend to lead to such amendments (for example, if the support of non-Government MPs or Senators is required and amendments are demanded as a condition of that support).

The PJCHR's work also has impact in less direct ways, such as being cited in parliamentary debates or being taken into account by the public servants who prepare draft Bills for Ministers. Opinions vary as to the extent of this impact,[13] which is of course difficult to assess meaningfully. The PJCHR has had some additional influence in the realm of delegated legislation, which is discussed in the following chapter.[14]

However, the aspect of the scrutiny regime's functioning which is of greatest concern from a human rights perspective is where its reports are ignored by Parliament, even where they identify significant and unjustified limits on fundamental rights – something which occurs all too

[12] See PJCHR, *Annual Report 2019,* 29-30 and *Annual Report 2020*, 34-35.
[13] See eg Reynolds, Hall and Williams, above n 3, 269-272. Contrast Hutchinson, above n 3.
[14] See PJCHR, *Annual Report 2019,* 28-32 and *Annual Report 2020*, 34-36.

frequently.[15] Even the conservative thinktank The Institute for Public Affairs has noticed and decried this trend.[16]

The Bills highlighted in this chapter fall into one of three categories:

I. Bills raising potential human rights issues which passed before any scrutiny could be conducted (4 during study period)

II. Bills raising potential human rights issues which passed before the PJCHR could produce a final report on compatibility (39 during study period), or

III. Bills subject to adverse final PJHCR reports (ie raising significant concerns) which nevertheless passed without amendment (29 during study period).

Below are case studies and snapshots of a selection of these Bills, which passed despite unaddressed human rights issues. They demonstrate the breadth of human rights issues which the scrutiny regime is attempting to address.

**Category I**

> **Case Study – Bill passed before any scrutiny could be conducted:** The Privacy Amendment (Public Health Contact Information) Bill 2020
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> The Privacy Amendment (Public Health Contact Information) Bill 2020 was introduced into the House of Representatives on 12 May 2020, and just three days later it had passed both Houses and received Royal Assent. This was an extremely rapid process, and obviously did not leave adequate time for a debate about the Bill's implications, let alone proper Committee scrutiny.
>
> Nevertheless, the PJCHR reviewed the Bill (now Act). It delivered its preliminary report on 20 May 2020, and final report on 1 July 2020. Perhaps the greatest flaw in this legislation from a human rights perspective was that it failed to define the scope of information to be collected by the Government's COVIDSafe contact-tracing app. It also failed to define what the app would consider a 'close contact' for data collection purposes, and to set a limit on the retention by Government of data generated by the app.
>
> The Bill itself had been introduced to address concerns about the app's privacy impacts, but had evidently been prepared in haste. The PJCHR requested further information from the Attorney-General regarding its concerns with the Bill, but was unable to do so before it became law due to its rapid passage through both Houses of Parliament. In its final report in July, the PJCHR concluded that the Act was well-intentioned (ie it was designed to reassure Australians that the Government was taking privacy concerns seriously to encourage faster adoption of the contact-tracing app, and did contain some worthy privacy protections), but that Government ought to have anticipated and addressed the flaws identified above.[17]

[15] See Reynolds, Hall and Williams, above n 3, 273.
[16] See Morgan Begg and Anis Rezae, Institute of Public Affairs, *Legal Rights Audit 2018* (Report, December 2018) https://ipa.org.au/wp-content/uploads/2019/01/IPA-Report-Legal-Rights-Audit-2018.pdf.
[17] See PJCHR, *Report 8 of 2020*, 25.

**Other Bills which passed before scrutiny could be applied:**

**Intelligence Services Amendment Bill 2018**

*Passed:* December 2018
*Initial PJCHR Report:* February 2019
*Final PJCHR Report:* April 2019
*How it changed the law:* Empowered Foreign Affairs Minister to authorise the use of force (including the use of weapons) by ASIS officers overseas
*Human rights analysis:* PJCHR was unable to conclude its compatibility analysis because the Minister did not respond to its request for information. Scope of authorisations and Guidelines for implementation remained unknown.

PJCHR – *Report 2 of 2019* (April 2019)

**Treasury Laws Amendment (International Tax Agreements) Bill 2019**

*Passed:* November 2019
*Initial PJCHR Report:* December 2019
*Final PJCHR Report:* February 2020
*How it changed the law:* Enabled exchange of taxpayer information between Israel and Australia to 'improve administrative cooperation in tax matters to help reduce tax evasion and avoidance'.
*Human rights concerns:* PJCHR requested information on safeguards in both Israeli and Australian law, as well as remedies available for taxpayers whose information is not kept private.
In this case, the Government was able to provide the information to the PJCHR's satisfaction by pointing to relevant bilateral treaty and Privacy Act provisions.

PJCHR – *Report 1 of 2020* (February 2020)

**Education Legislation Amendment (2020 Measures No. 1) Bill 2020**

*Introduced:* June 2020
*Passed:* June 2020
*Initial PJCHR Report:* July 2020
*Final PJCHR Report:* August 2020
*How it changed the law:* Introduced a mandatory 'Unique Student Identifier' (USI) – a kind of Australia Card for HE and VE students.
*Human rights concerns:* Making student funding contingent on obtaining a USI (with no exemptions available and no clear need for a change), raises privacy issues and may limit some students' right to an education.

PJCHR – *Report 10 of 2020* (August 2020)

**Coronavirus Economic Response Package Omnibus Bill 2020**

*Introduced:* March 2020
*Passed:* March 2020
Initial PJCHR Report: April 2020
Final PJCHR Report: August 2020
*How it changed the law:* Provided for a range of increases to welfare and tax cuts to provide economic relief to citizens at the height of the COVID-19 crisis.
*Human rights concerns:* The law was generally protective of rights, but PJCHR noted that those on pensions seemed to be treated differently from those on other forms of welfare, without adequate justification.

PJCHR – *Report 9 of 2020* (August 2020)

**Category II**

**Case Study – Bill passed before scrutiny could be completed:** The Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020

In October 2020, the Government introduced the Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020. It was passed on 10 December 2020, amending the Social Security (Administration) Act 1999 (Cth) to establish the Cashless Debit Card scheme as a permanent measure in sites where it was being trialled, and extended its reach in the NT and Cape York.

Cashless welfare is a controversial scheme whose stated purpose is to curb the spending of welfare on alcohol, gambling and illegal substances. Delivered through cashless debit cards that quarantine up to 80 percent of an individual's welfare payments, the mechanism has predominantly been applied to Aboriginal and Torres Strait Islander communities, targeting those on income support through compulsory measures regardless of individual circumstances.

Human rights organisations criticised the scheme as being discriminatory and coercive while failing to address the structural realities of economic inequality, for neglecting to incorporate appropriate support services, and for demonising and blaming individuals. The scheme has been further criticised as one that threatens to trap people in poverty and deny Aboriginal and Torres Strait Islander peoples' right to self-determination (concerning the ability of individuals to determine the path of their own lives).

The PJHCR noted that, although such measures may promote the right to an adequate standard of living and/or the rights of the child, they also limit participants' privacy, family and home life and social security. In terms of how the trials to date have been conducted, there are also issues with the right to equality and non-discrimination.[18]

In its report of November 2020,[19] the PJCHR requested a response from the Minister in relation to a number of concerns, including:

- Why the Government did not let the trial conclude/report before making the cashless measures ongoing;
- Evidence of the Cashless Debit Card's effectiveness;
- Evidence of consultation (or an explanation as to why there was none);
- What proportion of people affected by this Bill identify as Aboriginal or Torres Strait Islander;
- Why the onus is on people to demonstrate that they can manage their own finances rather than on the Government to demonstrate that cashless measures are warranted;
- Why the 'serious risk…to wellbeing' threshold for exemption is so high, and
- What other safeguards might be included to assure the PJCHR of the proportionality of these measures.

[18] See PJCHR, *Report 1 of 2021*, 88.
[19] See PJCHR, *Report 14 of 2020*, 38-54.

The Minister responded to the PJCHR on 17 December 2020, **a week after the Bill had already passed**. This Minister stated that there had already been multiple positive evaluations of the Cashless measures, and that community leaders in the affected areas had called for their continuation.[20] The letter did not address all of the questions above, but it did state further that 40% of cashless welfare card holders identified as Aboriginal or Torres Strait Islander, rising to 81% in the NT and Cape York area (in northern Queensland).[21]

In terms of a rational connection to the objective intended to be achieved, the PJCHR acknowledged some evidence of the scheme's effectiveness, including at protecting the rights of children in the relevant areas. However, it noted that publicly-available evaluations are actually equivocal in their findings, and the Minister had not provided any additional evidence of efficacy. This is an ongoing and very concerning theme in PJCHR reports, suggesting that the Government is either not committed to evidence-based decision making, or that it does not feel the need to justify the rights-limiting measures it introduces in human rights terms.

The PJCHR noted further that 40% of participants are still Aboriginal or Torres Strait Islander after the cashless welfare scheme was expanded after initial trials in 2016, which is around 12 times higher than their proportion of the population. There also remain concerns about free, prior and informed consent, as well as mechanisms and the basis for people to opt out of the scheme.

The PJCHR's conclusion on this Bill was that **'questions remain in relation to rational connection and proportionality', 'it is clear that these measures disproportionately impact on Indigenous Australians,'** and that it is difficult to conclude that participants have a **'reasonable prospect of exiting the program where appropriate.'**[22] However, **'[n]oting that the bill has now passed, the committee makes no further comment….'**

All of these outstanding questions about justification and safeguards should have been addressed properly before Parliament voted on this legislation. The PJCHR's 'no further comment' sounds almost plaintive in the face of legislative machinery which clearly does not sufficiently value its input.

[20] See PJCHR, *Report 1 of 2021*, 91.
[21] See PJCHR, *Report 1 of 2021*, 93.
[22] See PJCHR, *Report 1 of 2021*, 101.

**Other Bills passed after initial scrutiny but before PJCHR could conclude its work:**

**Electoral Legislation Amendment (Modernisation and Other Measures) Bill 2018**

*Introduced:* November 2018
*Passed:* February 2019
*How it changed the law:* Amended the *Electoral Act 1918* (Cth) to require people to complete a mandatory qualification checklist to nominate for federal elections (designed to avoid the trouble many MPs had with s44 of the Constitution in 2017-2018.
*Human rights concerns:* The PJCHR queried whether the requirement to publish candidates' checklists and ID documents on the AEC website was too restrictive of privacy, but did not receive any response from the relevant Minister (Special Minister of State), so made a further request in April 2019. By that time, the Bill had passed.

PJCHR – *Report 2 of 2019* (April 2019)

**Electoral Legislation Amendment (Party Registration Integrity) Bill 2018**

*Introduced:* August 2021
*Passed:* September 2021
*How it changed the law:* Amended the *Electoral Act 1918* (Cth) to require parties to have at least 1,500 members before becoming eligible for federal registration (up from 500).
*Human rights concerns:* The PJCHR found that this change to the law may limit the right to political participation and would limit the right to freedom of association, but was not persuaded that it was justified. The Government, the Committee noted (a month after the Bill passed), had not provided sufficient evidence to establish 'a substantial and pressing concern' so as to justify these civil/political rights restrictions.

PJCHR – *Report 12 of 2021* (October 2021)

**Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021**

*Introduced:* May 2021
*Passed:* June 2021
*How it changed the law:* Amended *Aged Care Act 1997* (Cth) to enshrine further protections against 'restrictive practices' affecting aged care residents' rights (such as confinement and chemical restraint).
*Human rights concerns:* The PJCHR stated 'questions remain as to how some of these restrictions on the use of restraints will operate in practice'. The Committee had conducted an inquiry into restrictive practices in Aged Care (see entry on Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 in the Legislative Instruments Chapter of this report). It asked the Minister whether its previous recommendations had been fully taken into account, but the Bill passed before a response was received.

PJCHR – *Report 7 of 2021* (June 2021)

**Foreign Investment Reform (Protecting Australia's National Security) Bill 2020**

*Introduced:* October 2020
*Passed:* December 2020
*How it changed the law:* This Bill amended the *Foreign Acquisitions and Takeovers Act 1975* (Cth) to enable the Treasurer to do various things to combat foreign investment which might be injurious to Australia's national security.
*Human rights concerns:* The PJCHR noted its concerns in November 2020 that this Bill would allow the Treasurer to share protected personal information with foreign governments, for example to help determine whether a given investor represents a security risk. The PJCHR recommended further safeguards to ensure the sharing of such information did not lead to human rights breaches, such as cruel, inhuman or degrading treatment or imposition of the death penalty. It also noted that increased civil penalties up to $555 were likely to be considered criminal under international human rights law.

PJCHR – *Report 12 of 2021* (February 2021)

**Migration Amendment (Clarifying International Obligations for Removal) Bill 2021**

*Introduced:* March 2021
*Passed:* May 2021
*How it changed the law:* This Bill amended the *Migration Act 1958* (Cth) to bolster Ministerial powers (and discretion) to remove immigration detainees from Australia, even where they face a risk of harm in their home country.
*Human rights concerns:* This Bill was drafted in response to Federal Court decisions holding that such harm ought to be a bar to removal under Migration Act provisions which implement Australia's international non-refoulement obligations. The PJCHR requested further information on safeguards to prevent inappropriate removal and/or indefinite detention (in Report 5 of 2021), but by the time a Ministerial response was received and the PJCHR revisited the Bill in June, it had already passed. The PJCHR stated that it 'considers that the minister's response has not alleviated its serious concerns regarding the compatibility of this measure with the right to liberty, the rights of the child and the prohibition against torture or ill-treatment.' After warning of a 'significant risk' that the law may be contrary to Australia's relevant international human rights obligations, it concluded: 'Noting that this bill passed both Houses of Parliament on 13 May 2021, the committee makes no further comment.'

PJCHR – *Report 7 of 2021* (June 2021)

**Category III**

**Case Study – Bill passed after scrutiny but with outstanding human rights concerns:** Australian Security Intelligence Organisation Amendment Bill 2020

The Bill for the *Australian Security Intelligence Organisation Amendment Act 2020* (Cth) ('ASIO Bill') contained various amendments to ASIO's compulsory questioning and surveillance powers. By way of background, these powers are among the most extensive of any internal security agency, and their necessity has been called into question not only by human rights advocates, but also by the Government's own Independent National Security Legislation Monitor and the Parliamentary Joint Committee on Intelligence and Security (PJCIS).[23]

The ASIO Bill was introduced into the House of Representatives in May 2020, then referred (as most security-related Bills are) to the PJCIS, as well as the PJCHR. The PJCHR, in its Reports 7 and 9 of 2020, concluded that the Bill posed multiple human rights risks, including in particular to the rights of the child, as it extended ASIO questioning and detention powers to children as young as 14 – all the while restricting access to a lawyer. The Bill also removed the need for external authorisation of questioning and tracking warrants, and removed provisions limiting the relevant powers to the investigation of terrorism offences.

Consistent with past correspondence on such Bills, the Attorney-General explained to the PJCHR that operational flexibility was a priority, and that it was appropriate for a Minister (rather than a judge or other impartial actor) to authorise questioning and detention because there is already enough independent oversight and review from internal mechanisms, and from the Office of the Inspector-General of Intelligence and Security.[24]

The PJCHR considered the Attorney-General's input, and acknowledged that gathering information for national security purposes is a legitimate aim under international human rights law. It also noted with approval that the Bill specified that ASIO must not subject detainees to torture or ill-treatment. However, the PJCHR proposed further safeguards, in particular for persons with cognitive, intellectual or other developmental disabilities, as well as for children. It noted that the Government was only able to point to a single case of child under 16 being involved in terrorist activity, which constituted a thin justification for extending this highly invasive questioning regime to 14 and 15-year-olds. The PJCHR concluded that it was a sufficient justification, but that it required stronger safeguards.[25]

The PJCIS reported on the Bill on 3 December 2020, also recommending stronger safeguards.[26] The Government subsequently made some amendments to the Bill, as well as the SoC, but cited only the PJCIS report as having prompted the changes.[27] This indicates that the PJCHR is highlighting serious concerns with legislation which are shared by other committees, but the

[23] See PJCIS, *Review of ASIO's Questioning and Detention Powers* (2017): https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO/Report.
[24] See PJCHR, *Report 9 of 2020*, 6.
[25] See PJCHR, *Report 9 of 2020*, 69.
[26] PJCIS, *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020*, December 2020, xiii-xiv.
[27] See ASIO Amendment Bill 2020, *Revised Explanatory Memorandum* and *Supplementary Explanatory Memorandum,* both of which mention the PJCIS but not the PJCHR.

Government is not necessarily treating these concerns with the seriousness they deserve if they only appear in PJCHR reports.

**Other Bills passed after final scrutiny but with outstanding concerns:**

**Online Safety Bill 2021**

*Introduced:* February 2021
*Passed:* June 2021
*How it changed the law:* Gave eSafety Commissioner greater powers to target online bullying and other abuse.
*Human rights concerns:* Is generally protective of rights, but PJCHR had outstanding freedom of expression concerns and recommended further amendments.

PJCHR – *Report 5 of 2021* (April 2021)

**Australian Citizenship Amendment (Citizenship Cessation) Bill 2020**

*Introduced:* September 2019
*Passed:* September 2020 (debate delayed by pandemic)
*How it changed the law:* Minister for Home Affairs could cancel a person's citizenship if they act 'inconsistently with their allegiance to Australia' by engaging in terrorism-related offences – expanded existing cancellation power already contained in the *Australian Citizenship Act 2007* (Cth).
*Human rights concerns:* Preliminary advice raised questions about Australia's *non-refoulement* obligations and why dual citizens (subject to this cessation power) could not be dealt with like those who only have Australian citizenship. The PJCHR accepted the Minister's explanations relating to necessity and proportionality, but the narrow availability of judicial review was a concern which should have been better addressed (in this author's view). NB the PJCIS also reviewed this Bill in August 2020, and recommended that its operation be reviewed after three years (in recognition of the extraordinary nature of the citizenship cancellation power).

PJCHR – *Report 1 of 2020* (February 2021)

**Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2021**

*Introduced:* September 2020
*Passed:* November 2021
*How it changed the law:* Established extended 'supervision order' scheme for high risk offenders (replacing prior control order scheme). People considered to pose an 'unacceptable risk' to the community may be detained for up to 3 years (with possibility of extension) by court order.
*Human rights concerns:* May involve double jeopardy, undue restrictions on privacy and liberty, as well as freedom of movement and association, and possibly also rights to work, to educate oneself, to practise one's religion or to care for one's family (depending on the conditions attached to the supervision order). The PJCHR, after considering advice from the Attorney-General about eg how a person's risk factors would be assessed, concluded that the Bill 'inverts the basic assumptions of the criminal justice system', and that the Government simply claiming such a measure is not a 'penalty' does not make it so. It recommended that supervision orders be issued on the basis of a higher standard of proof than the balance of probabilities, which is the standard in civil matters. The PJCHR also had concerns about fair hearings, but concluded that the 'special advocate' regime set up for offences involving national security information was acceptable.

PJCHR – *Report 13 of 2020* (November 2020)

**Crimes Legislation Amendment (Economic Disruption) Bill 2020**

*Introduced:* September 2020
*Passed:* February 2021
*How it changed the law:* Bolstered law enforcement powers to combat money laundering.
*Human rights concerns:* This Bill limits several rights, particularly in the name of expanding the scope of proceeds of crime seizures and money laundering offences. However, the PJCHR's main outstanding concern was that it authorises undercover law enforcement officials to interrogate under-18s without adequate safeguards.

PJCHR – *Report 13 of 2020* (November 2020)

**Native Title Legislation Amendment Bill 2020**

*Introduced:* October 2019
*Passed:* February 2021
*How it changed the law:* Altered the *Native Title Act 1993* (Cth) to modify various aspects of Native Title claim and dispute resolution processes, prioritising majority claims over individual or minority objections.
*Human rights concerns:* The PJCHR noted the Attorney-General's comments that consultation with affected Indigenous groups and individuals would be ongoing with respect to these changes, and that they potentially promote (majority) group rights to culture and self-determination, even if they limit individual rights to the same. The conclusion in the Committee's report was that 'ultimately much will depend on how the proposed amendments and safeguards operate in practice.'

PJCHR – *Report 4 of 2020* (April 2020)

**National Radioactive Waste Management Amendment (Site Selection, Community Fund and Other Measures) Bill 2020**

*Introduced:* February 2020
*Passed:* June 2021
*How it changed the law:* Established the National Radioactive Waste Management Facility and enabled acquisition of land in South Australia for disposing of nuclear waste.
*Human rights concerns:* The PJCHR queried whether free, prior and informed consent was given by the Indigenous communities affected by this decision to establish a nuclear waste dump in SA's Kimba district. Having considered the Minister's response about private polling and heritage assessments, the PJCHR concluded that significant opposition remained and compulsory acquisition of the land could impact on rights to culture and self-determination.

PJCHR – *Report 4 of 2020* (April 2020)

**Biosecurity Amendment (Strengthening Penalties) Bill 2021**

*Introduced:* February 2021
*Passed:* June 2021
*How it changed the law:* Increased certain penalties under the *Biosecurity Act 2015* (Cth), including for the general public travelling to Australia.
*Human rights concerns:* The PJCHR was concerned that very harsh civil penalties (fines in the hundreds of thousands of dollars) may effectively amount to criminal penalties under human rights law, regardless of their categorisation under Australian law. However, they are not accompanied by criminal due process guarantees (such as the presumption of innocence or a need for proof beyond reasonable doubt).

PJCHR – *Report 4 of 2021* (March 2021)

## Chapter 3 – Legislative Instruments of Concern

The term 'legislative instrument' denotes a law of the Commonwealth other than a 'primary law' – otherwise known as an Act of Parliament. The primary law authorises the making of rules to implement it by the Executive Government. This effectively delegates Parliament's law-making power, leading to such instruments being described as 'delegated legislation'. The idea is that Parliament cannot possibly prescribe every detail of the implementation of its far-reaching laws, and that Government has the expertise to do so. It also allows for a much quicker and more flexible way to make changes to the law, because delegated legislation takes effect immediately on registration (an obvious risk if it contains measures which limit human rights).

Several types of instruments fall into this category, including:

- Regulations
- Ministerial Determinations
- Rules
- Ordinances
- Orders or Proclamations of the Governor-General
- Ministerial Codes of Practice

However, there are other, similar instruments which may be technically administrative rather than legislative, for example orders of Ministers or senior public officials applying to specific individuals. These orders are not scrutinised by Parliament.

It is important to note that legislative instruments outnumber Bills by an order of magnitude, and make up around half the volume of Commonwealth (federal) law.[28] They often contain significant and binding rights-limiting measures. For example, they can impose tough visa conditions, prescribe who is eligible for welfare payments, or even impose a curfew on an entire city.[29] Some governmental uses of delegated legislative power in Australia in recent years have been described as 'egregious examples of abuse of delegated authority.'[30]

As noted in Chapter 1, parliamentary committees cannot amend or reject legislation. However, their members can and do sometimes 'move to disallow' a legislative instrument. For example, PJCHR Member Ursula Stephens moved in the Senate to disallow the Customs (Drug and Alcohol Testing) Regulations 2013 in June 2013.[31] This led to the instrument's reintroduction in 2014 with amendments to make it more rights-compatible. Having said that, the practice happens so rarely as to be negligible in terms of improving the rights compliance of the statute book as a whole.

[28] Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation (Report),* June 2019, 6.
[29] Migration Regulations 1994; Social Security Regulation 2012 or Stay at Home Directions (Restricted Areas) (No 8) (2020) (Vic).
[30] Appleby, above n 3, 283.
[31] See Parliament of Australia, *Disallowance Alert 2013:* https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Disallowance_alert/alert2013.

## Non-disallowable Instruments

To add to the confusing array of types of legislative instruments, there is also the question of whether they are 'disallowable'. Most legislative instruments are, which means they can be vetoed by either House of Parliament but in reality only the Senate due to the Government having a majority in the House of Representatives. However, they have effect and can be acted on by officials until the Senate votes on the relevant motion.

However, some legislative instruments – including the Determination in the case study below – are 'non-disallowable'.[32] The PJCHR, under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), may scrutinise any legislative instrument, but those which are not disallowable do not have to have a Statement of Compatibility with Human Rights attached.[33] This effectively means that officials are not compelled to consider the human rights implications of the instrument in the drafting process, and the PJCHR can only infer from the text of the instrument itself what the Government's position might be in terms of rights compatibility.

Until recently, the PJCHR was the only committee of the Australian Parliament scrutinising non-disallowable legislative instruments, which have been estimated to make up as much as 20% of all delegated legislation.[34] When you consider that the PJCHR has scrutinised a total of more than 10,000 legislative instruments from 2012-2019, that is a very significant number.[35] In 2019, the Senate Standing Committee on Regulations and Ordinances published a report on scrutiny of delegated legislation, concluding that this was an unsatisfactory state of affairs from an accountability perspective. The Senate Committee (now renamed the Standing Committee for the Scrutiny of Delegated Legislation) has since commenced to scrutinise non-disallowable instruments as well as disallowable ones.

If an instrument is non-disallowable, there is little Parliament can do if it is dissatisfied with the way the Executive has drafted it. Committees such as the PJCHR and Senate Standing Committee on the Scrutiny of Delegated Legislation may draw attention to such instruments, but they cannot compel the Government to make changes.[36]

> **Case Study:** The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 (Cth)
>
> This Determination by the Minister for Health, made on 30 April 2021, prohibited travellers from entering Australia if they had come from (or recently been in) India. It was made in response to a spike in cases in that country, which overwhelmed its public health system, and – according to the Government's advice – threatened to put undue pressure on Australia's public health system as well. The Determination became known

[32] See further Janina Boughey, 'Executive power in emergencies: Where is the accountability?' (2020) 45(3) *Alternative Law Journal* 168.
[33] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 7 & 9.
[34] From discussions with parliamentary staffers familiar with the figures (NB an exact figure is hard to come by, because non-disallowable instruments are not well studied).
[35] Reynolds, Hall and Williams, above n 3, 263.
[36] See further eg Tim Wright, 'Delegated Legislation and Emergency Rule-making in Australia' (2021) 28 *Australian Journal of Administrative Law* 44.

as the 'India travel ban' and notoriously prevented even Australian citizens from re-entering their own country – a potential breach of the International Covenant on Civil and Political Rights.[37]

This Biosecurity Determination was made under s 477 of the *Biosecurity Act 2015* (Cth), which allows the Minister for Health to 'determine any requirement that he or she is satisfied is necessary…to prevent or control' the spread of infectious disease. Not only was the Minister able to exercise this exceedingly broad discretion, but it also entailed the imposition of a fine of up to 300 penalty units ($66,000) and/or 5 years imprisonment for breach of the Direction.[38]

Such an Executive order imposes extraordinary restrictions on travellers' human rights, and as such should be subject to the highest level of human rights scrutiny. However, the *Human Rights (Parliamentary Scrutiny) Act 2011* does not require the Government to attach a Statement of Compatibility with Human Rights to such a Determination because it is not in the 'disallowable' category.

Nevertheless, the PJCHR examined the Determination in its *Report 6 of 2021* and found that, although it protected the rights to life and health, it would have a disproportionate impact on Indian-Australians. The Committee lamented that the Government was not required to consider human rights since it did not have to prepare a Statement of Compatibility for this instrument, and asked the Minister several questions about proportionality and safeguards.[39]

The Minister's response as set out in the PJCHR's Report 8 of 2021 was so cursory that the Committee concluded that it was not possible to evaluate the proportionality of the Determination properly based on the information available to it. The Committee acknowledged that extraordinary rights-limiting measures may be necessary during a pandemic, but called for such instruments to be accompanied by a Statement of Compatibility to prompt the Government to consider the rights impacts involved.[40]

A case brought against the Determination in May 2021 in the Federal Court was dismissed, in part because the human right to enter one's own country could not even be raised, given the lack of any such guarantee in Commonwealth law. The Biosecurity Act powers were also said to completely override any relevant Common Law right of Australian citizens.[41]

In the end, neither the Minister nor the Federal Court had to consider the travel ban from a human rights perspective. Only the Chief Medical Officer, in his health advice to the Minister, mentioned that exclusion of citizens from their own country was a momentous and unprecedented step before the step was actually taken. Under s 477(4) of the Biosecurity Act, some proportionality reasoning (ie consideration of the likely effectiveness of the Direction, and whether less intrusive measures were available) had to be applied by the Minister. However, the Federal Court under Australian

[37] For further details and legal analysis, see Bruce Chen, 'The COVID-19 border closure to India: Would an Australian Human Rights Act have made a difference?' (2021) 46(4) *Alternative Law Journal* 320.
[38] *Biosecurity Act 2015* (Cth), s 479
[39] PJCHR, *Report 6 of 2021*, 6-7.
[40] PJCHR, *Report 8 of 2021*, 45-47.
[41] See further Chen, above n 37, 321-322.

administrative law only required that the Minister show he was following relevant health advice,[42] and the parliamentary scrutiny process likewise could only accept the Minister's assurance.

**Other (disallowable) legislative instruments of concern:**

**Social Security (Parenting payment participation requirements–class of persons) Instrument 2021**

*Registered:* January 2021
*Came into Force:* July 2021
*How it changed the law:* Made participation in the controversial 'ParentsNext' welfare program compulsory for some.
*Human rights concerns:* The PJCHR had serious concerns about compelling certain parents to take part in the ParentsNext scheme, which involved mandatory playgroups, health appointments or further education.
Recognising that it would not have enough time to examine the instrument before it came into force, Senator Dodson (on behalf of the PJCHR) moved to extend the disallowance period on 11 May 2021. The motion failed, and the instrument came into force before the inquiry could be completed.
The PJCHR eventually found that the instrument could be turned from a vehicle for limiting participants' rights to one for promoting them, simply by making the scheme voluntary.

PJCHR – *ParentsNext Inquiry Report* (August 2021)

**Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019**

*Registered and Came into Force:* July 2019
*How it changed the law:* Sought to regulate the use of physical and chemical restraints in aged care and like settings.
*Human rights concerns:* The instrument was generally positive from a human rights point of view, as it had been drafted to respond to some of the unacceptable aged care practices revealed by the Royal Commission established in 2018. However, interaction with State/Territory laws and other Commonwealth laws was unclear, and the PJCHR also wanted mandatory reporting for compliance.
Senator McKim, on behalf of the PJCHR, tabled a motion to extend the disallowance period by 15 sitting days to give more time for the inquiry. In response the Government amended the Principles with immediate effect to address PJCHR concerns instead, and also committed to a review of the Principles in 12 months (eventually resulting in the Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021) – a rare victory for human rights scrutiny.

PJCHR – *Quality of Care Inquiry Report* (November 2019)

[42] *Newman v Minister for Health and Aged Care* [2021] FCA 517, [38-68].

**Why is it so important for these instruments to be subject to scrutiny?**

Instruments made by members of the Executive Government may be made on an urgent basis, without the time for consultation or reflection built into regular legislative processes. Under Australian administrative law, the courts are limited to asking 'was the instrument validly made'? The courts can examine whether a Minister, for example, had the power to make a certain kind of Determination under the relevant Act of Parliament, but they cannot ask whether the Determination is proportionate or the best way to achieve the Government's aims. Occasionally, as with the Biosecurity Act (see Case Study above), the relevant Act requires the Minister to be satisfied that the delegated legislation made under it is appropriate, proportionate and not overly restrictive of people's rights. However, even where such a requirement exists, the courts cannot question the Minister's reasoning, as long as the Minister has turned their mind to the requirements.

Instruments of an administrative nature may be reviewable to determine whether the official in question took the 'correct or preferable' approach in tribunals such as the Administrative Appeals Tribunal or a state equivalent, but (a) this rarely occurs and (b) these tribunals, like the courts, are unlikely to question Ministers' reasoning – particularly when it comes to restricting people's rights in times of emergency.[43] For example, the Victorian Civil and Administrative Tribunal is expressly bound to follow the policy of the government of the day.[44]

To determine whether the instrument in question was the best and/or most appropriate way of achieving the Government's aim (and whether the aim itself was a legitimate one), parliamentary scrutiny is crucial. However, leading public law scholar Professor Gabrielle Appleby has observed that parliamentary scrutiny of delegated legislation in Australia is no longer effective, due to a range of factors including:

- Overly wide delegations;
- Abuse of disallowance procedures and parliamentary recesses to avoid scrutiny;
- Uncritical bi-partisan support' of the major parties for rights-limiting legislation, and
- Interest-group capture within government.[45]

Appleby argues that the courts therefore have a 'proper and necessary role in prodding parliamentary oversight of executive power' when it comes to these delegated instruments.

As with scrutiny of Bills, parliamentary oversight alone has little chance of reigning in the increasing excesses of Executive power enabled by delegated legislation.

[43] See Boughey, above n 32, 171.
[44] See *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 57.
[45] Appleby, above n 3, 269.

## Chapter 4 – Positive Developments Relating to the Scrutiny Regime

### *Update to Guidance for Public Servants*

One important development since our earlier research into the scrutiny process (2012-2016) is the updating of the leading guide for the APS on legislation – the Department of Prime Minister and Cabinet's Legislation Handbook – in 2017. The latest version of the Handbook advises public servants working on legislation that they should be aware of issues such as retrospectivity (where a new law applies to things which have already happened; retrospective criminalisation being the example of most concern from a human rights perspective) or reversals of the burden of proof in criminal laws.[46] Further, the Handbook advises that AGD can provide advice on what should be in an SoC (albeit on a billable basis – an oddity of Commonwealth Government accounting practice),[47] and passes on some guidance as to the content of an SoC from the PJCHR.[48]

This update reflects concrete acknowledgment of the work of the PJCHR, and should increase the visibility of the scrutiny regime during the drafting process.

### *PJHCR and Public Submissions*

Between 2012 and 2017, the PJCHR did not accept many public submissions to inform its work. Such submissions were mainly confined to a handful of inquiries – for example the widely-publicised inquiry into freedom of speech in Australia, and the Stronger Futures (NT Intervention) legislation.[49]

In its fast-paced weekly scrutiny work, there was usually not time to accept and process public submissions (consistent with the practice of the older parliamentary scrutiny committees).[50] However, in 2020-21, the PJCHR invited public submissions on emergency health laws introduced to combat COVID-19 pandemic. It later published some of these, including submissions from Amnesty International, refugee and disability rights groups, generalist human rights advocates and Electronic Frontiers Australia.[51]

In the context of a flurry of emergency law-making, particularly in the form of delegated legislation, this (along with the work of other parliamentary committees[52]) provided one of the few much-needed avenues of input to formal review available in 2020-21. NGOs and research centres regularly contribute to inquiries by non-scrutiny parliamentary committees, providing a valuable source of additional research and perspective.

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[46] See PM&C, *Legislation Handbook 2017*, pp 27 & 31.
[47] See PM&C, *Legislation Handbook 2017*, p 42.
[48] See PM&C, *Legislation Handbook 2017*, pp 45-46.
[49] See PJCHR, *Completed Inquiries*: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_Inquiries; also Fletcher, *Australia's Human Rights Scrutiny Regime,* pp187-188.
[50] See Fletcher, *Australia's Human Rights Scrutiny Regime,* pp177-178. Although it does not generally accept public submissions, the Senate Standing Committee for the Scrutiny of Bills does sometimes take private briefings from senior public servants – see: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Private_briefings.
[51] See PJCHR, *COVID-19 Legislative Scrutiny*: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/COVID19_Legislative_Scrutiny.
[52] See Moulds, *Scrutinising COVID-19 Laws,* p 183.

### *Ministerial Responses to PJCHR Queries*

In earlier studies, there was a trend towards late Ministerial responses, sometimes (as in some of the examples in Chapter 3) after the legislation in question had already passed. These tardy responses meant that the PJCHR could not reach a conclusion or make final recommendations with respect to the legislation in question. In some cases, the relevant interim report was sufficient to inform those curious about a piece of legislation's human rights compatibility. However, in many cases, the PJCHR required further information than that which was provided in the SoC, and had to await the Ministerial response before assessing the legislation properly.

Since late 2016, the PJCHR has been attempting to address this issue by setting deadlines for Ministers to respond, warning that the Committee might make conclusions in the absence of responses if these deadlines are not met, and keeping a register of responses and their timeliness.[53] It has been reported that these measures resulted in an increase from just 8% of responses arriving on time to approximately 30%.[54] Clearly there is still work to be done in this area.

[53] See Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72, 92.
[54] See Hutchinson, above n 53, 92-93.

## Conclusion – The Difference a Charter of Human Rights Could Make

The recommendations of the National Human Rights Consultation Committee in 2009 were carefully designed to be complementary. A Human Rights Act was not among the Committee's first recommendations – those had to do with human rights education, which is indeed crucial in developing a human rights culture. However, it was recommended as part of a comprehensive national reform proposal, the substance of which has since been adopted (after appropriate local consultations) in the ACT, Victoria and Queensland. Although they differ in detail, all of those jurisdictions now have:

- Rights-based scrutiny in their legislatures
- Human rights education programs for public officials
- A Charter or Human Rights Act that:
    - obliges public officials to respect citizens' rights, and consider them when making decisions, and
    - prescribes a role for the courts in reviewing official actions and decisions when they are alleged to have fallen short of the minimum standards set by the law

Research has shown that these Charters, even in Queensland, where one has only been in force for a short time, have reinforced parliamentary scrutiny as an oversight mechanism.[55] In the Commonwealth jurisdiction, the PJCHR-led scrutiny regime operates alone, meaning the rights protection system is like a tripod missing two legs.

Dr Sarah Moulds, an expert in parliamentary scrutiny of legislation, wrote in 2020 about how scrutiny processes (including human rights scrutiny processes) responded to the challenge of the unprecedented powers exercised by the Government at the height of the COVID-19 crisis. Moulds noted that committees like the PJCHR were sometimes the only forum for questions about the necessity and proportionality of extreme measures such as travel bans, because the wider Parliament showed little interest in taking the time to debate such things.[56] Moulds observed that:

> Consideration of the roles of these committees in scrutinising Australia's counter-terrorism laws, for example, shows that publicly documenting the rights-abrogating features of proposed laws can have a rights *enhancing* impact on future iterations of these laws, even if this comes too late for immediate amendments to be made and even when the impact is far from completely remedial from a rights perspective.[57]

All of those involved in the Commonwealth human rights scrutiny regime, and the PJCHR in particular, are working hard to ensure that human rights are visible in the legislative development process. It is vitally important work for marginalised Australians and others subject to Australian jurisdiction (such as people seeking asylum) that human rights analyses of new legislation be performed, so that when (if) attitudes shift, a future Government knows which laws need to change.

However, the task of building a culture of real respect for human rights in Canberra is a daunting one, and we need a stronger and broader human rights protection regime to achieve it. The following are our recommendations to achieve these outcomes:

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[55] See Moulds, *Scrutinising COVID-19 Laws,* p 182.
[56] Moulds, above n 3, 181.
[57] Moulds, above n 3, 186.

1. A Federal **Charter of Human Rights,** which includes embedding human rights in the decisions and services of government and provides the right of people to take action when their rights have been violated
2. Guaranteed **time for the PJCHR to complete** its scrutiny before Parliament votes on new laws affecting human rights, for example via the mechanism in Senate Standing Order 115.
3. More time and resources for the PJCHR to **inquire into systemic and/or urgent national human rights issues**, along with a mandate to do so without a reference from the Government
4. Prescription in law that **legislative instruments (delegated, executive-made legislation) be disallowable by default** if they engage Australia's international human rights obligations, so that the scrutiny process can effectively suspend such laws if necessary, and
5. Internal Government **advice, including consultation processes for proposed new laws**, to take into account Australia's international human rights obligations routinely and at an early stage, and for Ministers to consider this advice seriously in the legislative development process.

Proper consideration of human rights in government deliberations and decisions leads to better laws, and stronger scrutiny by Parliament of those decisions improves them still further. The best work from a culture of human rights accountability never sees the light of day, because it helps prevent bad decisions from being made in the first place, or marginalised people being forgotten in the policy development process. However, when there are proposed Bills or delegated legislation that have negative impacts on the human rights of people in the Australian community, there should be proper scrutiny of them before they are enacted.

Human rights should be at the heart of all Australian laws, policies and public services. The sooner this report's recommendations are implemented, the better.