



Guidance note 1

Expectations for statements of compatibility

Introduction

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* all bills and disallowable legislative instruments must be accompanied by a statement assessing their compatibility with human rights.¹ Human rights are defined as the rights and freedoms contained in seven core human rights treaties to which Australia is a party, encompassing both civil and political rights, and economic, social and cultural rights.²

The Parliamentary Joint Committee on Human Rights' mandate is to examine all existing and proposed Commonwealth legislation for compatibility with human rights. The committee views statements of compatibility as essential to the consideration of human rights in the legislative process, and considers they are an important starting point for the committee's assessment of legislation. Where the committee's analysis suggests that legislation may limit a right and the statement of compatibility does not include sufficient information, the committee may seek further information from the relevant minister.

Further information as to the key rights protected by the seven human rights treaties, and how the rights may be applied, can be found in the committee's [Guide to Human Rights](#).

The committee's approach to human rights scrutiny

The committee views its human rights scrutiny as essential in informing Parliament, and the broader community, as to the potential for new legislation to limit human rights. The committee also considers it has a broader educative role, which includes raising awareness of when legislation may limit or promote human rights.

The starting point for the committee is whether the legislation engages rights (that is, if it potentially affects or involves rights), and if so, whether the legislation could be applied in ways which limit human rights. The committee will consider whether there is a risk that any limitations on rights would be impermissible under international human rights law. Most rights can be limited as long as it can be demonstrated that the limitations are reasonable, necessary, and proportionate. In this regard, the

1 See *Human Rights (Parliamentary Scrutiny) Act 2011*, sections 8-9. While legislative instruments exempt from disallowance are not required to be accompanied by a statement of compatibility (see section 9), the committee's role is to examine *all* legislative instruments for compatibility with human rights (see section 7). As such, it is good practice for the explanatory statement for an exempt legislative instrument to contain an assessment of human rights compatibility.

2 International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities. See *Human Rights (Parliamentary Scrutiny) Act 2011*, section 3.

committee considers that the inclusion of adequate human rights safeguards in legislation is often essential to ensure human rights are protected in practice.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of human rights.³ Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*, may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee also refers to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights that fall within its mandate.

The committee's expectations for statements of compatibility

While there is no prescribed form for statements, the committee considers the [templates](#) provided by the Attorney-General's Department to be useful models to follow. The committee expects statements to be able to be read as stand-alone documents, that is, for the reader to understand the overall measures in the legislation without needing to refer to other parts of the explanatory materials.

The statement of compatibility should identify whether any human rights are engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those rights that are directly engaged. Whether a right is directly engaged by a measure should be based on an assessment of degree and impact on a case-by-case basis. The [resources](#) provided by the Attorney General's Department may be helpful in this regard.

Where legislation has multiple schedules or parts that deal with different matters, the committee considers it is useful if the statement identifies the objective of each of the different measures and provides an assessment of whether rights are engaged by these measures (not simply a summary of the bill's objectives as a whole). Where the statement identifies that rights are engaged, the committee expects it will identify the relevant sections, clauses or items of the legislation referred to.

Where legislation does not engage rights, or promotes rights

If legislation does not engage human rights, the committee expects information to be given to support that conclusion, unless this is self-evident from the description of the overall objective of the legislation.

Where a measure promotes rights, the statement should set out the objective of the relevant measure and how the measure promotes rights.

Where legislation engages an absolute right

There are very few human rights obligations that are absolute under international law: that is, they can never be lawfully limited under any circumstances.⁴ If such rights are engaged by a measure in legislation, the statement of compatibility should, if relevant, explain why the relevant measure will not give rise to conduct that will breach an absolute right, including explaining whether there are adequate and effective safeguards in place to ensure such rights are not limited.

³ These may include, for example, jurisprudence of the United Nations (UN) [Human Rights Committee and other treaty bodies](#), [European Court of Human Rights](#), and General Comments of [UN Treaty Bodies](#).

⁴ Absolute rights include the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment (including the obligation of *non-refoulement*); the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

Where legislation limits rights

Where legislation limits human rights the committee expects that the statement of compatibility provide a detailed, reasoned and evidence-based assessment of each measure that limits rights, and include information as to:

- what is the objective of the specific measure that limits rights (this will not necessarily be the objective of the legislation as a whole).⁵ This should include how it addresses a pressing or substantial concern (and not simply seeks an outcome regarded as desirable or convenient). This may include, for example, information as to why current laws are insufficient and evidence as to the gap that the proposed measure seeks to fill;
- how the specific measure will be effective to achieve the stated objective. It is not enough to put forward a legitimate objective if, in fact, the measure limiting the right would not make a real difference to achieving that objective; and
- how the limitation is proportionate to that objective (that is, how the restriction on rights is balanced against the interests sought to be achieved). This may include setting out:
 - whether there are effective safeguards or controls over the measure (noting that administrative or discretionary safeguards may not be sufficient);
 - whether the measure is sufficiently circumscribed (e.g. that it does not create a broad unfettered discretion, but contains sufficient legislative criteria to guide any decision making);
 - whether there is any oversight of the measure and access to merits and judicial review;
 - whether consideration has been given to any less rights restrictive alternatives that could achieve the stated objective;
 - whether the measure provides sufficient flexibility to treat different cases differently, or whether it imposes a blanket policy without regard to the merits of an individual case;
 - what the extent of any interference with human rights is – the greater the interference the less likely it is to be considered proportionate; and
 - whether any affected groups are particularly vulnerable.

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⁵ Note that some rights may only be limited on specific grounds (for example, to protect national security, public safety, health or order or the rights and freedoms of others). See the [Guide to Human Rights](#) for further information.