

**PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS**  
**CHAIR'S TABLING STATEMENT**

**Tuesday 28 October 2014**

I rise to speak to the tabling of the Parliamentary Joint Committee on Human Rights' Fourteenth Report of the 44<sup>th</sup> Parliament.

This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* of bills introduced during the period 30 September to 2 October 2014 and legislative instruments received during the period 13 to 19 September 2014. The committee has also considered responses to the committee's comments in previous reports.

Of the 12 bills introduced in the period covered by the report, four are assessed as not raising significant human rights concerns and four raise matters requiring further correspondence with ministers. The committee has deferred its consideration of the remaining four bills.

A number of the bills considered are scheduled for debate during the sitting week commencing 27 October 2014, including:

- the Albury-Wodonga Development Corporation (Abolition) Bill 2014
- the Social Services and Other Legislation Amendment (2014 Budget Measures No. 6) Bill 2014

- the Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014; and
- the Parliamentary Entitlements Legislation Amendment Bill 2014

As always, the report outlines the committee's examination of the compatibility of these bills with our human rights obligations, and I encourage my fellow Senators and others to examine the committee's report to better inform their consideration of proposed legislation.

Importantly for the protection of traditional rights and freedoms – some would prefer the term civil liberties – this report includes our examination of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

As has been widely reported, this legislation proposes a range of very significant changes to national security laws in Australia, and as a consequence the limitation of fundamental rights and freedoms.

As context to my remarks, I remind Senators that the committee's task is to undertake a technical and bipartisan inquiry into the human rights implications of legislation – international human rights obligations as agreed by previous Governments.

Importantly the scrutiny role of the committee requires that it conduct its assessments in absence of partisan politics. Senators will already be familiar with the work of other parliamentary committees – the Scrutiny of Bills Committee and the Parliamentary Joint Committee

on Intelligence and Security – and the similar conclusions drawn by them and us on a variety of proposals.

Overall, I regard the committee's approach to examining the 'Foreign Fighters Bill' as seeking to create a constructive dialogue around the measures contained in the bill, by highlighting particular issues of human rights concern to the parliament.

In this respect, there is scope within the human rights legislative scrutiny framework to ensure that important issues of national security are balanced against the protection of fundamental rights and freedoms.

The report clearly states that the committee 'notes that human rights principles and norms are not to be understood as inherently opposed to national security objectives or outcomes' and that 'international human rights law allows for the balancing of human rights considerations with responses to national security concerns'.

Critically, the committee expects proponents of legislation, who bear the onus of justifying proposed limitations on human rights, to apply this framework in the statement of compatibility required for bills.

More simply put, proposed measures can limit human rights, if they can be shown to be reasonable, necessary and proportionate in pursuit of a legitimate objective.

This analytical framework is capable of ensuring that any intrusions into human rights are finely calibrated, such that our laws only limit rights as much as is necessary to achieve their goal.

On that note, the report observes that, in relation to a number of the proposed measures, the statement of compatibility does not fully explain why the measures are *necessary* in pursuit of a legitimate objective. In particular, it does not explain how and why existing law enforcement and intelligence gathering powers are insufficient to prevent serious threats to Australia's national security interests. In these instances, the committee is seeking further explanation from the Attorney-General.

For example, the bill would extend for 10 years a number of specific powers which are due to expire in 2015 or 2016, such as control orders and preventative detention orders. The committee's report notes that it regards there to be sufficient time before these powers expire to undertake detailed and thorough inquiries as to their efficacy and necessity.

The committee has also taken the approach of recommending amendments and constructive solutions in relation to a number of the

measures in order to strengthen the human rights compatibility of the bill.

For example, the bill currently allows for the exclusion of foreign evidence that is obtained directly as a result of torture. The committee has suggested that foreign evidence obtained directly or indirectly from torture should be excluded in order to align the legislative proposal with Australia's international obligations under the Convention Against Torture.

I would note that the committee has determined that some of the measures outlined in the bill are likely to be incompatible with human rights.

For example, the introduction of the declared area offence provision.

This provision would introduce a new offence of entering or remaining in a declared area unless it was solely for a legitimate purpose. The bill specifies a limited number of legitimate purposes. The offence is punishable by a maximum sentence of 10 years imprisonment.

As noted in the report, the proposed construction of the offence would mean that a person could commit the offence without actually knowing that the area was declared, and without any intention of engaging in or supporting terrorist activity. A person accused of entering or remaining in a declared area would bear an evidential

burden – that is, they would need to provide evidence that they were in a declared area solely for a legitimate purpose.

An offence provision which requires the defendant to carry an evidential burden will engage the right to be presumed innocent because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

The committee has also raised concerns in relation to the right to freedom of movement as the list of defences or excuses to the proposed offence is relatively narrow.

For example, it is not a defence to visit friends, transact business, retrieve personal property, attend to personal or financial affairs or to undertake a religious pilgrimage. While it is a defence to be 'making a news report', this is only the case if the person is 'working in a professional capacity as a journalist'. Accordingly, there appear to be a number of innocent reasons why a person might enter or remain in a declared zone, but that would not bring a person within the scope of the sole legitimate purpose defence.

The report therefore concludes that the declared area offence provision, as currently drafted, is likely to be incompatible with human rights.

The right to freedom of expression, also known as free speech, is a foundational principle of our democracy, and is protected by article 19 of the International Covenant on Civil and Political Rights.

The committee is of the view that a number of measures in the bill engage this fundamental human right or civil liberty:

- the ASIO special powers regime – allows ASIO under a questioning and detention warrant to request the detention of a non-suspect for the purpose of intelligence-gathering. For two years after the expiry of a warrant, it is an offence for an individual to disclose operational information or information which is broadly related to the warrant. This restricts the ability of the media to report on the use of these warrants. The bill would extend the special warrant regime.
- the control order regime – may be applied because of things a person has said rather than things they have done. It also enables a person subject to a control order to be prohibited from talking to particular persons including the media. This bill extends this control order regime.
- the preventative detention order regime – may also be applied because of things a person has said rather than things a person has done. The bill would extend this regime.
- extension of stop, question, search and seizure powers – may be used to disrupt protest activities through the use of 'declared area'

powers which would enable the police to stop, question and search people in the declared area without reasonable suspicion that an individual has committed any offence.

- advocating terrorism – the bill proposes a new offence of advocating terrorism. The offence would be made out where a person (a) advocates the doing of a terrorist act or a terrorism offence; and (b) is reckless as to whether another person will engage in that conduct as a result. The offence would be punishable by a maximum of five years' imprisonment. The report notes the committee's concern that the offence, as drafted, may result in the criminalisation of speech and expression that does not advocate the commission of a terrorist act or terrorism offence. This is because the proposed offence would require only that a person is 'reckless' as to whether their words will cause another person to engage in terrorism (rather than the person 'intends' that this be the case).

It is not the ambition of the committee to be inconvenient to the desire and duty of Government's to protect citizens from the harm of others and the deliberate evils of terrorism.

But the scrutiny role of this committee in this Senate must always be to shine a light on real and possible breaches of those fundamental rights and liberties – the right to freedom from arbitrary detention, the right to freedom of movement, the right to a fair trial and the presumption of innocence, the right to privacy and the rights to freedom of expression and association.

This latest report has as its motivation not a wish to hinder Government but to be a vehicle for more rigorous debate and, as a result, more concise and carefully constructed legislative proposals that simultaneously protect the community and its freedoms so easily taken for granted.

I urge fellow Senators to consult the report for the committee's full examination of this bill, and for the committee's comments on the other legislation and responses considered in the relevant period.

With these comments, I commend the committee's Fourteenth Report of the 44<sup>th</sup> Parliament to the Senate.