



Parliamentary Joint Committee
on Human Rights

Annual report 2013-14

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Mr Laurie Ferguson MP, Deputy Chair	Werriwa, New South Wales, ALP
Senator Carol Brown	Tasmania, ALP
Dr David Gillespie MP	Lyne, New South Wales, NAT
Ms Cathy McGowan AO MP	Indi, Victoria, IND
Senator Nick McKim	Tasmania, AG
Senator Claire Moore	Queensland, ALP
Senator James Paterson	Victoria, LP
Senator Dean Smith	Western Australia, LP
Mr Michael Sukkar MP	Deakin, Victoria, LP

Former members 2013-14

Senator Dean Smith (Chair) (20.08.12-present)	Western Australia, LP
Mr Laurie Ferguson MP (Deputy Chair) (04.12.13-present)	Werriwa, New South Wales, ALP
Senator Sue Boyce (13.11.13-30.06.14)	Queensland, LP
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Table of Contents

Membership of the committee	iii
Chapter 1—Introduction	1
Establishment of the committee	1
Role of the committee	1
Functions and powers of the committee	1
Definition of human rights and the Act.....	2
Committee membership	2
Acknowledgements	2
Structure of the report	3
Chapter 2—The committee's mode of operation	5
Overview.....	5
The committee's analytical framework.....	5
The scrutiny dialogue model	7
Structure of the committee's reports	7
Legal advice	8
Committee publications and resources	8
Chapter 3—Work of the committee in 2013-14.....	11
Legislation considered	11
Reports tabled during the period	11
Commonly engaged rights.....	11
Major themes	13
Scrutiny issues	16
Additional work of the committee	21
Appendix 1—Outstanding correspondence.....	23
Appendix 2—Guidance Note 1 and Guidance Note 2	25

Chapter 1

Introduction

Establishment of the committee

1.1 The committee was established under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act) in March 2012. The establishment of the committee was a key element of Australia's Human Rights Framework, which was launched on 21 April 2010, and which was intended to enhance the understanding of, and respect for, human rights in Australia.¹

Role of the committee

1.2 The establishment of the committee builds on the Parliament's established traditions of legislative scrutiny. Accordingly, the committee undertakes its scrutiny function as a technical inquiry relating to Australia's international human rights obligations. The committee does not consider the broader policy merits of legislation.

1.3 The committee's purpose is to enhance understanding of, and respect for, human rights in Australia; and to ensure appropriate recognition of human rights issues in legislative and policy development.

Functions and powers of the committee

1.4 The committee has the following functions under the Act:

- to examine bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue; and
- to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

1.5 The powers and proceedings of the committee are set out in the committee's resolution of appointment.²

1 See <http://www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliasHumanRightsFramework.pdf>.

2 The committee's resolution of appointment is available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/.

Definition of human rights and the Act

1.6 Human rights are defined in the Act as those contained in the following seven human rights treaties to which Australia is a party:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- Convention on the Elimination of Discrimination against Women (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CRC); and
- Convention on the Rights of Persons with Disabilities (CRPD).

1.7 The committee's analysis of legislation begins with the two main human rights treaties: the ICCPR and the ICESCR. These covenants cover all the key civil and political and economic, social and cultural rights. For the most part, the five other treaties expand or flesh out these rights in a more detailed way. This approach is consistent with the approach the Attorney-General's Department has adopted in providing support to executive departments and agencies.

Committee membership

1.8 The resolution of appointment governing the committee's operation provides that the committee consists of 10 members: three members of the House of Representatives drawn from the government party; two members of the House of Representatives drawn from the opposition or any another non-aligned member; two Senators drawn from the government party; two Senators drawn from the opposition; and one Senator from a minority party or an independent Senator.

1.9 The committee elects as its Chair a government member from either the House of Representatives or the Senate. The Deputy Chair is elected from one of the non-government members of the committee.

Acknowledgements

1.10 The committee wishes to acknowledge the work and assistance of its external legal adviser in the reporting period, Professor Andrew Byrnes.

1.11 The committee also wishes to acknowledge the assistance of ministers and associated departments and agencies during the reporting period. The responsiveness of ministers, departments and agencies to the committee's inquiries is critical to ensuring that the committee can perform its scrutiny function effectively.

Structure of the report

1.12 This report covers the period 1 July 2013 to 30 June 2014 (the reporting period).

1.13 Chapter 2 sets out the committee's mode of operation, its analytical framework and the scrutiny model. Chapter 3 reports on the work of the committee during the reporting period.

Chapter 2

The committee's mode of operation

Overview

2.1 The committee examines and reports on the human rights compatibility of all bills and legislative instruments that come before the Parliament. Since its inception, and in keeping with the longstanding conventions of the Senate scrutiny committees, the committee has sought to adopt a non-partisan, technical approach to its scrutiny of legislation.

2.2 The committee generally meets when both the House of Representatives and the Senate are sitting, and has a regular reporting cycle around these meetings. The committee's reports are tabled after each meeting, and deal with the bills and instruments of delegated legislation introduced or tabled in the preceding period.

2.3 The committee seeks to conclude and report on its examination of bills while they are still before the Parliament, so that its findings may inform the legislative deliberations of the Parliament. 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. Where a bill is passed before the committee has been able to conclude its examination, the committee nevertheless completes its examination of the legislation and reports its findings to the Parliament.

2.4 The committee examines all legislative instruments tabled in the Parliament, including legislative instruments that are exempt from the disallowance process under the *Legislation Act 2003* (LA).¹ The committee seeks to conclude and report on its examination of legislative instruments within the timeframe for disallowance prescribed by the LA (15 sitting days). In the event that the committee's concerns cannot be resolved before the expiry of this period, the committee may give a 'protective' notice of motion to disallow the instrument to ensure that the ability of the Parliament to disallow the instrument is not lost pending the conclusion of the committee's examination.

The committee's analytical framework

2.5 Australia has voluntarily accepted obligations under the seven core United Nations (UN) human rights treaties. It is a general principle of international human

1 The LA provides that certain instruments are exempt from disallowance by providing either that a type of instrument is not a legislative instrument for the purposes of the LA (section 9) or is otherwise not subject to disallowance (section 42). Prior to March 2016, the LA was called the *Legislative Instruments Act 2003*. References in this report are generally to the current provisions of the LA.

rights law that the rights protected by the human rights treaties are to be interpreted generously and any limitations on human rights are to be interpreted narrowly. Accordingly, the primary focus of the committee's reports is determining whether any identified limitation of a human right is justifiable.

2.6 International human rights law recognises that reasonable limits may be placed on most rights and freedoms—there are few absolute rights (that is, rights which cannot be limited in any circumstances).² All other rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.

2.7 Where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against these limitation criteria.

2.8 As required, the committee takes into account the views of human rights treaty bodies, as well as international and comparative human rights jurisprudence. These sources are relevant to the interpretation of the human rights against which the committee is required to assess legislation.

Statements of compatibility

2.9 The Act requires that each bill and disallowable legislative instrument be accompanied by a statement of compatibility.³ The statement of compatibility serves as the starting point for the application of the committee's analytical framework, and sets out an assessment of the extent to which the legislation engages human rights.

2.10 The committee sets out its expectations in relation to statements of compatibility in its Guidance Note 1.⁴

2 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; 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; and the right to non-refoulement.

3 See Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4 See Guidance Note 1 at Appendix 2. During this reporting period the committee set out its expectations for statements of compatibility in its Practice Note 1. This practice note can be found at Appendix 2 of the committee's reports from its *Sixth Report of the 44th Parliament* onwards. The committee replaced Practice Note 1 with Guidance Note 1 in December 2014.

The scrutiny dialogue model

2.11 The committee's main function of scrutinising legislation is pursued through dialogue with legislation proponents (usually ministers). Accordingly, where legislation raises a human rights concern which has not been adequately justified in the relevant statement of compatibility, the committee's usual approach is to publish an initial report setting out its concerns, and seeking further information from the legislation proponent. Any response from the legislation proponent is subsequently considered and published alongside the committee's concluding report on the matter. As well as making findings on the human rights compatibility of the relevant legislation, the committee may make specific recommendations to ensure the compatibility of the legislation with Australia's human rights obligations.

2.12 In some cases, ministers may provide an undertaking to address the committee's concerns in the future (for example, by amending legislation or undertaking to conduct a review of the legislation in due course).

2.13 The committee does not generally seek public submissions in relation to its assessments of legislation. However, the committee welcomes correspondence and submissions from interested parties in relation to specific items of legislation under consideration, and will take these into account where relevant to the examination of a particular item of legislation.

Structure of the committee's reports

2.14 The structure of the committee's reports reflects the progress of the dialogue model described above, with matters proceeding from an initial report describing the human rights issues and concerns to a concluding report that takes into account any information received by the legislation proponent in response to the committee's initial report.

2.15 Chapter 1 of the committee's reports includes new and continuing matters. This generally includes all bills introduced during the preceding period, with bills not raising human rights concerns being listed as such, and bills raising human rights issues being the subject of substantive report entries setting out the nature of the committee's concerns and the information being sought from the legislation proponent.⁵

5 The structure of the committee's reports has evolved since the reporting period. During the reporting period the committee set out each bill introduced into the Parliament in chapter one, including where it raised no human rights concerns. Between the beginning of the reporting period and the committee's *Fifth Report of the 44th Parliament* the committee structured reports into separate parts for bills and instruments; it then separated the legislation within each part as to its likelihood to engage human rights. The committee's reports also contained an executive summary during the reporting period which set out the statistics and content of legislation considered in each report.

2.16 Chapter 1 also includes the committee's reports on any instruments of delegated legislation tabled in the preceding period that raise human rights concerns. Due to the very high volume of delegated legislation examined by the committee, such instruments are reported on as per an exceptions-based approach.

2.17 Chapter 1 also considers continuing matters, which are matters in relation to which the committee has received a response from the legislation proponent, but requires further information in order to conclude its examination of the matter.

2.18 Chapter 2 of the committee's reports examines responses received in relation to the committee's requests for information and on the basis of which the committee will conclude or finalise its examination of the legislation in question. As noted above at paragraph [2.11], the committee's concluding remarks on legislation may include findings as to the human rights compatibility of the legislation and/or specific recommendations to address any human rights concerns.

Legal advice

2.19 The committee is assisted by an external legal adviser, who is appointed by the Presiding Officers of the Parliament. The committee's legal adviser during the reporting period was Professor Andrew Byrnes.

Committee publications and resources

2.20 In addition to its regular reports on the human rights compatibility of legislation, the committee has produced a number of publications and resources to assist ministers, departments and interested parties more generally in engaging with the committee and its work.

Committee guidance notes

2.21 The committee has produced the following guidance notes to assist legislation proponents and other interested parties in understanding and engaging with the committee and its work.

2.22 The guidance notes are available on the committee's website and are included in Appendix 2 to this report.⁶

Guidance Note 1—Drafting statements of compatibility

2.23 This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is primarily designed to assist legislation proponents in the preparation of statements of compatibility.

6 During this reporting period the committee set out its expectations for statements of compatibility in its Practice Note 1 and advice on civil penalties in its Practice Note 2 (Interim). These practice notes can be found at Appendix 2 of the committee's reports from its *Sixth Report of the 44th Parliament* onwards. The committee replaced Practice Note 1 and Practice Note 2 (Interim) with Guidance Note 1 and Guidance Note 2 in December 2014.

Guidance Note 2—Offence provisions, civil penalties and human rights

2.24 This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Guide to human rights

2.25 The committee's *Guide to human rights* (the guide) provides an introduction to the key human rights protected by the human rights treaties relevant to the committee's assessments of legislation.

2.26 The guide is intended to provide a brief and accessible overview of Australia's human rights obligations, the key human rights considered by the committee, and the manner in which human rights may be justifiably limited. Case studies are provided to illustrate how human rights may be engaged and limited in practice. The guide also includes a references section for those seeking more comprehensive information about the rights listed in the guide.

2.27 The guide is available on the committee's website.⁷

Index of bills and legislative instruments

2.28 The *Index of bills* and *Index of instruments raising human rights concerns* list all the bills examined by the committee, and those legislative instruments in relation to which the committee has identified human rights concerns (as noted above at paragraph [2.16], the committee takes an exceptions-based approach to reporting on legislative instruments).⁸

2.29 The *Index of bills* contains a shorthand description of any rights engaged by a bill, the action taken by the committee (that is, whether the committee made no comment on the bill, made an advice-only comment or made a comment requiring a response from the legislation proponent), and the relevant reports in which the committee's full comments may be found.⁹

7 The committee's first *Guide to Human Rights* was published in March 2014, during the reporting period. This guide was updated in June 2015.

8 The *Index of instruments raising human rights concerns* was created in January 2016, and was not available during the reporting period. During the reporting period the committee listed the instruments considered as part of each report at Appendix 1 to the relevant report.

9 The Index of bills is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments.

Chapter 3

Work of the committee in 2013-14

3.1 This chapter provides information about the work of the committee during 2013-14, 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 considered, as well as how many in each category were found to raise no human rights issues, or raised human rights issues in relation to which the committee made advice-only comments to, or required a response from, the legislation proponent.

Table 3.1: Legislation considered during the reporting period

	Total considered	No human rights issues	Advice-only comment	Response required
Bills and Acts	191	110	10	71
Legislative instruments	1954	1887	30	37

Reports tabled during the period

3.4 The committee tabled eight reports during the reporting period, from the *First Report of the 44th Parliament* to *Eighth Report of the 44th Parliament*.¹

Commonly engaged rights

3.5 The most commonly engaged human rights identified in legislation during this period were spread across both civil and political rights and economic, social and cultural rights. These were:

- rights to and at work;²

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

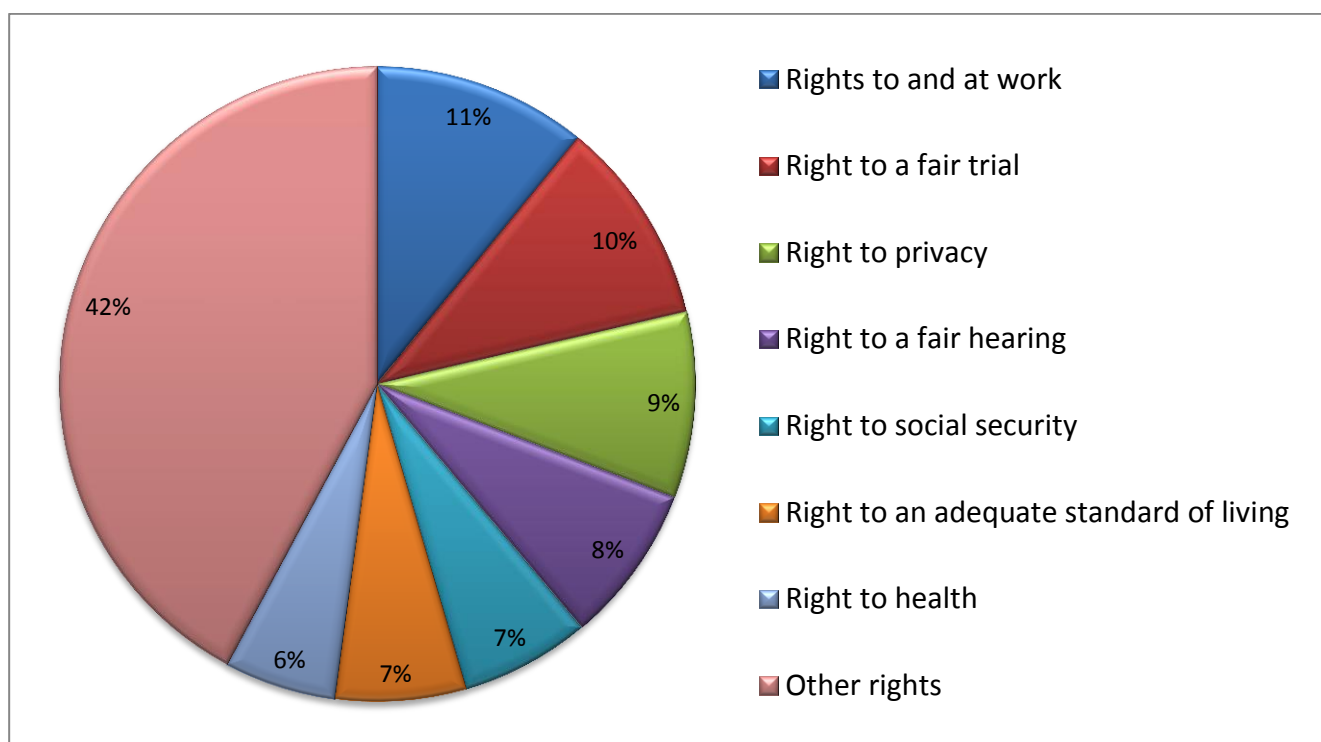
2 Articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

- right to a fair trial;³
- right to privacy;⁴
- right to a fair hearing;⁵
- right to social security;⁶
- right to an adequate standard of living;⁷ and
- right to health.⁸

3.6 During the reporting period, the above seven rights accounted for 58 per cent of rights engaged within both primary and delegated legislation.

3.7 Figure 3.1 shows the breakdown of human rights engaged by the legislation examined by the committee in the reporting period.

Figure 3.1: Human rights engaged by legislation in 2013-14



3 Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

4 Article 17 of the ICCPR.

5 Article 14 of the ICCPR.

6 Article 9 of the ICESCR.

7 Article 11(1) of the ICESCR.

8 Article 12(1) of the ICESCR.

Major themes

3.8 Three significant areas of legislative activity in the reporting period were in the areas of industrial relations, migration, and social security. The committee's examination of legislation relating to these policy areas highlighted a number of significant intersections with Australia's international human rights obligations.

Industrial relations legislation

3.9 The committee examined a series of bills seeking to implement the government's industrial relations policy: the Fair Work (Registered Organisations) Amendment Bill 2013; the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013; and the Fair Work Amendment Bill 2014.⁹

3.10 The measures in these bills included the establishment or re-establishment of bodies with investigative and information-gathering powers to regulate registered organisations (including unions) and persons engaged in the building and construction industry, and measures relating to industrial action and right of entry for unions.

3.11 Human rights commonly engaged by these bills included: the right to work and rights at work; the right to freedom of association (including the right to form and join trade unions); the right to a fair trial (including the right to be presumed innocent); the right to privacy; the right against self-incrimination; the right to freedom of assembly; the right to freedom of expression; the right to equality and non-discrimination; and the right to a fair hearing.

3.12 The committee generally agreed with the statements of compatibility for the bills that the measures being implemented pursued legitimate objectives for the purposes of international human rights law, and were rationally connected to those objectives (that is, the measures appeared likely to achieve their stated objectives).

3.13 However, the committee's assessments raised significant concerns as to the proportionality of the measures, and particularly whether they represented the least rights restrictive way of achieving their stated objectives. In particular, the coercive information-gathering and enforcement powers conferred on industrial oversight bodies gave rise to significant human rights concerns because of their breadth, their application to civil wrongdoing as well as serious criminal offences, the limited procedural safeguards restricting and monitoring their use, the abrogation of the

9 See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014), Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, 1; *Fifth Report of the 44th Parliament* (25 March 2014), Fair Work (Registered Organisations) Amendment Bill 2013, 63; and *Seventh Report of the 44th Parliament* (18 June 2014), Fair Work Amendment Bill 2014, 13.

right of persons not to incriminate themselves, and the significant maximum penalties available for a failure to cooperate.

Migration legislation

3.14 The committee examined a significant number of bills and legislative instruments seeking to implement the government's migration policies, including changes to the handling of applications for protection and humanitarian visas, the mandatory detention regime, and the re-introduction of temporary protection visas.¹⁰

3.15 Human rights engaged by this legislation included the right to humane treatment in detention; the right to equality and non-discrimination; the right not to be arbitrarily detained; the obligation of non-refoulement; the obligation to consider the best interests of the child; the right to protection of the family; the right to freedom of movement; the right to a fair hearing; the right to social security and an adequate standard of living; the right to education; and the right to work.

3.16 While international law does not provide a general right of entry to a country for persons who are non-citizens or permanent residents, Australia has obligations under international human rights law to any person within its jurisdiction, regardless of citizenship. In the migration law context, non-refoulement obligations towards non-citizens are particularly important as they are absolute and may not be subject to any limitations. In numerous instances, the committee emphasised that effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.¹¹

3.17 The committee's assessments of legislation in this area also frequently emphasised that limitations on rights must be prescribed by law and be sufficiently clear to meet the quality of law test. Similarly, safeguards to ensure these limitations

10 See, for example, Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (18 March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 51; Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013, Migration Amendment (Disclosure of Information) Regulation 2013 [F2013L02101], Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 [F2013L02102] and Code of Behaviour for Public Interest Criterion 4022—IMMI 13/155 [F2013L02105], 75; and Migration Amendment (Temporary Protection Visas) Regulation 2013 [F2013L01811], 133.

11 See, for example, Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (18 March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 51.

are proportionate should be included in legislation, and not left to administrative or ministerial discretion.¹²

3.18 The committee also examined whether legislative measures in this area disproportionately affected vulnerable groups, such as women, children or refugees. Such impacts may arise in the implementation of migration policy especially where distinct legal arrangements are in place for different categories of persons, such as classes of visa holders. An example of this was the Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 [F2013L02102] and Code of Behaviour for Public Interest Criterion 4022—IMMI 13/155 [F2013L02105], which implemented a code of conduct applying to certain visa holders.¹³

Social security legislation

3.19 The committee examined a significant number of bills seeking to implement the government's social security policies, including: the Social Services and Other Legislation Amendment Bill 2013; Social Security Legislation Amendment (Green Army Programme) Bill 2014; Social Security Legislation Amendment (Increased Employment Participation) Bill 2014; Paid Parental Leave Amendment Bill 2014 and Family Assistance Legislation Amendment (Child Care Measures) Bill 2014.¹⁴

3.20 These bills sought to give effect to a range of measures affecting social security benefits, in many cases introducing targeted measures with the intention of reducing public expenditure on social security payments. Along with the right to social security, this legislation engaged the right to an adequate standard of living, the right to work and to just and favourable conditions of work, and the right to equality and non-discrimination.

3.21 In seeking to reduce levels of social security entitlements and payments—for example, by pausing indexation on certain social security payments—many of the measures in the bills were properly characterised as retrogressive measures for the

12 See, for example, Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (18 March 2014), Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 [F2013L01218], 75.

13 See Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* (18 June 2014), Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 [F2013L02102] and Code of Behaviour for Public Interest Criterion 4022—IMMI 13/155 [F2013L02105], 90.

14 See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014), Social Services and Other Legislation Amendment Bill 2013, 159; *Third Report of the 44th Parliament* (4 March 2014), Social Security Legislation Amendment (Green Army Programme) Bill 2014, 11, and Social Security Legislation Amendment (Increased Employment Participation) Bill 2014, 15; *Eighth Report of the 44th Parliament* (24 June 2014) Family Assistance Legislation Amendment (Child Care Measures) Bill 2014, 16, and Paid Parental Leave Amendment Bill 2014, 54.

purposes of international human rights law.¹⁵ While permissible, retrogressive measures are required by international human rights law to be justified as being in pursuit of a legitimate objective, and being rationally connected and proportionate to, achieving that objective.

3.22 In this respect the committee has consistently recognised that under international human rights law budgetary constraints are capable of providing a legitimate objective for the purpose of justifying reductions in government support that impact on economic, social and cultural rights. However, the committee has routinely requested further information where it is not clear that such measures are proportionate to their stated objective, and particularly where vulnerable groups, such as women, children or indigenous people, would appear to be affected.

3.23 The committee's requests for information from ministers in relation to measures implementing social security policy also routinely seek information as to whether less rights restrictive measures to achieve particular objectives were available and, if so, why they were not adopted.

Scrutiny issues

3.24 During the reporting period, the committee identified a number of issues that posed particular challenges for the committee, as well as for legislation proponents and departments. These included timeliness; the quality of statements of compatibility; human rights scrutiny of appropriation bills; instruments relating to the autonomous sanctions regime; and instruments relating to the Stronger Futures package of legislation.

Timeliness

3.25 The committee seeks to conclude its consideration of bills while they are still before the Parliament, and its consideration of legislative instruments within the timeframe for disallowance (usually 15 sitting days). In both cases, the committee's approach seeks to ensure that its reports on the human rights compatibility of legislation are available to inform the debates of both Houses of the Parliament.

3.26 Accordingly, the responsiveness of legislation proponents to the committee's requests for responses regarding human rights concerns is critical to the effectiveness of the scrutiny process. However, while the committee stipulates a

15 The committee has described deliberate retrogressive measures to mean any measure which implies a backwards step in the level of protection of ICESCR rights as a consequence of an intentional decision by the state and includes any unjustified reduction in public expenditure in the absence of adequate compensatory measures aimed to protect the affected individuals. Deliberate retrogressive measures are not prohibited per se under international human rights law but will require close justification, even during times of severe resource constraints, whether caused by a process of adjustment, economic recession, or by other factors. See Parliamentary Joint Committee on Human Rights, *Fifth Report of 2013: Social Security Legislation Amendment (Fair Incentives to Work) Act 2012* (20 March 2013), 16.

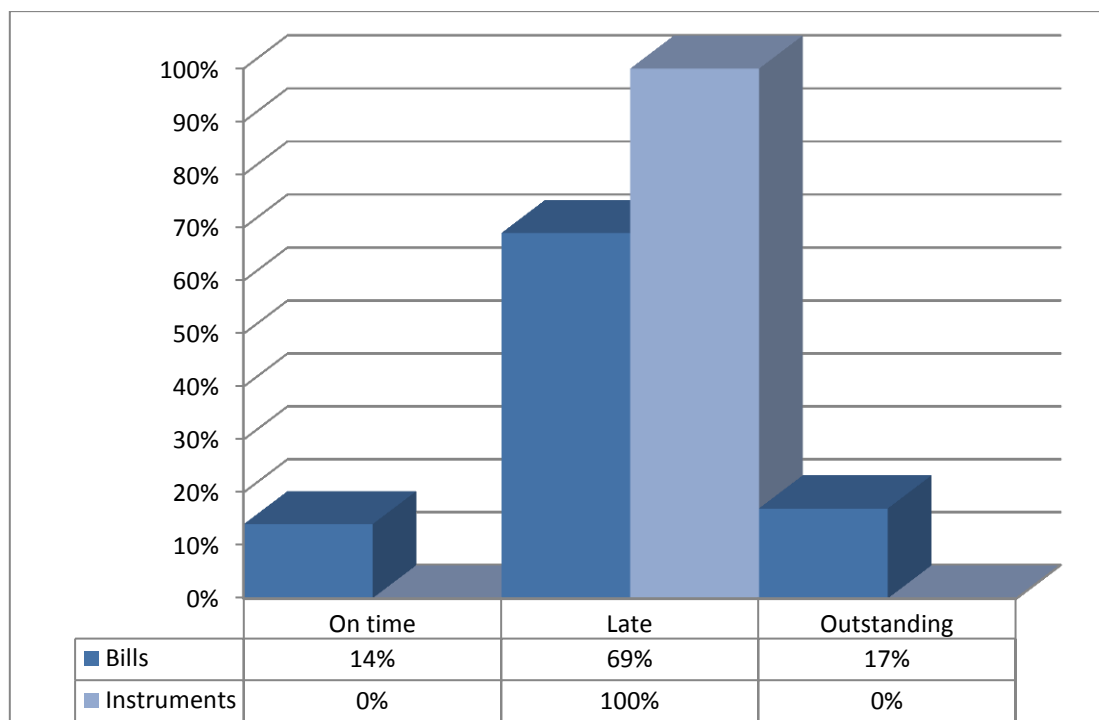
deadline by which it expects a response be provided, there is no legal or procedural requirement to ensure that a legislation proponent provides their response in this time period.

3.27 Timeliness was a significant issue during the reporting period, with responses from legislation proponents often not being received until well after the committee's deadline and, on occasion, not until after the bill or timeframe for disallowance had passed.

3.28 Responses were requested in relation to 58 bills in the reporting period (before 30 June 2014). Only eight of these (14%) were provided to the committee by the requested date. Responses in relation to 40 bills (69%) were provided to the committee after the requested date. The remaining 10 bills (17%) still had responses outstanding at 30 June 2014 (see figure 3.2).

3.29 Responses were requested in relation to 44 legislative instruments in the reporting period. No responses relating to these instruments were provided to the committee by the requested date. All responses were provided to the committee after the requested date; there were no responses outstanding at 30 June 2014 (see figure 3.2).

Figure 3.2 Percentage of responses received by due date



Statements of compatibility

3.30 The quality of statements of compatibility continued to improve over the reporting period.

3.31 In many cases, statements of compatibility provided sufficient information on proposed measures limiting human rights for the committee to conclude its

examination without requesting further information from the legislation proponent. For example, the executive summary to the *First Report of the 44th Parliament* noted that the discussion of civil penalties and criminal process rights in the statement of compatibility accompanying the Clean Energy Legislation (Carbon Tax Repeal) Bill 2013 was particularly useful in assisting the committee with its task.¹⁶

3.32 However, a significant number of bills and legislative instruments during the reporting period failed to provide sufficient information or supporting evidence to justify potential limitations of human rights. In both its *First Report of the 44th Parliament* and *Second Report of the 44th Parliament*, the committee observed that the quality of a number of statements of compatibility fell short of the committee's minimum expectations.¹⁷ In particular, the committee noted that proponents of legislation often claimed that measures engaging human rights were 'reasonable, necessary and proportionate' without providing any supporting analysis or empirical evidence.

3.33 Further, statements of compatibility often stated that measures did not engage human rights where rights were clearly engaged.¹⁸

3.34 In a number of cases, the committee noted that additional information provided by the legislation proponent addressed the committee's concerns, but should have been included in the statement of compatibility for the bill or instrument in the first instance.¹⁹

3.35 Where inadequacies in statements of compatibility were identified, the committee continued its practice of sending advisory letters to legislation proponents to provide guidance on the preparation of, and requirements for, statements of compatibility.

Human rights scrutiny of appropriation bills

3.36 In the 43rd Parliament the committee set out its initial views on the human rights implications of appropriation bills, and recommended that human rights

16 See, for example, Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013), Executive Summary, xv.

17 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014), Executive Summary, x-xi.

18 See, for example, Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014), Australian Citizenship (Intercountry Adoption) Bill 2014, 8-10.

19 See, for example, Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013), Australian Citizenship Amendment (Special Residence Requirements) Bill 2013, 215.

impact assessments be expressly incorporated in portfolio budget statements to ensure that human rights are properly reflected in the budgetary process.²⁰

3.37 The committee's dialogue with the Minister for Finance on appropriation bills continued in the reporting period. In its *Third Report of the 44th Parliament* the committee wrote to the new Minister for Finance on the question of whether the budgetary processes should expressly take account of human rights considerations.²¹

3.38 The minister's response was considered alongside the committee's analysis of new appropriations bills in its *Eighth Report of the 44th Parliament*. The minister considered that requiring human rights impact statements to be included in portfolio budget statements was 'neither practicable nor appropriate',²² but offered the committee a departmental briefing on aspects of appropriation bills and their explanatory memoranda. In its concluding comments in this report, the committee noted that further consultation was required to assess how portfolio budget impact statements and explanatory memoranda could assist the committee in its examination of appropriation bills for compatibility with human rights.

Autonomous sanctions regimes

3.39 In the previous reporting period the committee considered a number of instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*.²³ The committee sought further information from the Minister for Foreign Affairs as to the compatibility of the instruments with multiple human rights.

3.40 More broadly, however, the committee considered that it is necessary to assess whether the sanctions regimes as a whole are compatible with human rights, before it is able to assess the compatibility of individual instruments. The committee therefore also requested that the minister comprehensively review the autonomous sanctions regimes with respect to Australia's international human rights obligations. The former minister responded stating that he had instructed the Department of Foreign Affairs and Trade to carefully consider this recommendation.

20 Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013), xii and *Seventh Report of 2013* (5 June 2013), xi-xii.

21 See Parliamentary Joint Committee on Human Rights, *Third Report of the 44th Parliament* (4 March 2014), consideration of Appropriation (Parliamentary Departments) Bill (No. 2) 2013-2014, Appropriation Bill (No. 3) 2013-2014, and Appropriation Bill (No. 4) 2013-2014, 3-5.

22 Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014), consideration of Appropriation (Parliamentary Departments) Bill (No. 2) 2013-2014, Appropriation Bill (No. 3) 2013-2014, and Appropriation Bill (No. 4) 2013-2014, 32.

23 See Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013); *Seventh Report of 2013* (5 June 2013) and *Tenth Report of 2013* (26 June 2013).

3.41 During the reporting period, the committee wrote to the new Minister for Foreign Affairs to draw her attention to the committee's consideration of these matters and to reiterate its request for a review in relation to the sanctions regimes.²⁴ As at the end of the reporting period, the committee had not received a response from the minister.

3.42 Pending the minister's response, the committee continued to defer its consideration of instruments relating to the sanctions regimes.²⁵ These new instruments expanded or applied the operation of the sanctions regimes by designating or declaring that a person or entity is subject to the sanctions regime, or by amending the regime itself. Designating a person or entity has the effect that the assets of the designated person or entity are frozen. Declaring a person has the effect of preventing that person from travelling to, entering or remaining in Australia. Additionally, sanctions can restrict or prevent the supply, sale or transfer or procurement of goods or services.

3.43 The broad effects of the sanctions regimes as implemented in both primary and delegated legislation therefore engage and limit multiple human rights. These include the right to privacy; right to a fair hearing; right to protection of the family; right to equality and non-discrimination; right to an adequate standard of living; right to freedom of movement; and the prohibition against non-refoulement.

Review of Stronger Futures legislation

3.44 During the 43rd Parliament the committee conducted an inquiry into the *Stronger Futures in the Northern Territory Act 2012* and related legislation.²⁶ The Stronger Futures measures apply to the Northern Territory and relate to areas such as tackling alcohol abuse in Aboriginal communities; income management; school attendance; certain land reform measures; food security measures relating to the licensing regimes for food stores in certain areas; and amendments relating to the extent to which customary law may be taken into account in bail and sentencing decisions. The committee received a number of submissions to this inquiry from various groups concerned about the human rights compatibility of the measures.

24 See Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 165-167.

25 These included the Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Iran) Amendment List 2013 (No. 1) [F2013L01312] and Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Amendment Regulation 2013 (No. 1) [F2013L01384] (deferred in the committee's *First Report of the 44th Parliament*); and the Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Democratic People's Republic of Korea) Amendment List 2013 [F2013L02049] (deferred in the committee's *Second Report of the 44th Parliament*).

26 See Parliamentary Joint Committee on Human Rights, *Examination of the Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013).

3.45 The committee determined that a number of rights were engaged by the measures, including the right to self-determination; right to equality and non-discrimination; right to equal protection before the law; right to social security; right to an adequate standard of living; and right to privacy. The committee made a number of findings and recommendations as to the human rights compatibility of the legislation, and determined that it would subsequently review the measures to consider the latest evidence as to the effectiveness and ongoing necessity of the measures.

3.46 The new committee established at the beginning of the 44th Parliament commenced this review in July 2014. Accordingly, during the reporting period, the committee deferred a number of pieces of legislation on the basis that they would be considered as part of the review.²⁷

Additional work of the committee

3.47 During the reporting period the committee endeavoured to broaden public awareness of, and engagement with, the committee, by creating a number of resources to assist members of the public in understanding the committee's work.

3.48 The committee established an *Index of bills*, which lists all bills introduced during the 44th Parliament and the action taken by the committee. It identifies the human rights that have been engaged and the relevant reports where the committee's full analysis may be found. The *Index of bills* is useful for those who are interested in finding the committee's analysis on a particular bill.²⁸

3.49 In March 2014 the committee published a *Guide to human rights*, which provides an introduction to the key human rights considered by the committee. The *Guide to human rights* is discussed in more detail at Chapter 2 of this report, and the latest version is available on the committee's website.²⁹

3.50 The committee also established a mailing list, which notifies subscribers of the committee's work. Subscribers are notified when the committee tables its regular scrutiny reports, as well as other reports, and when the committee publishes new resources (such as the *Guide to human rights* mentioned above).

27 These included the Social Security (Administration) (Recognised State/Territory Authority—NT Alcohol Mandatory Treatment Tribunal) Determination 2013 [F2013L01949] and Stronger Futures in the Northern Territory Regulation 2013 [F2013L01442] (deferred in the committee's *First Report of the 44th Parliament*); and the Social Security (Administration) (Recognised State/Territory Authority—Qld Family Responsibilities Commission Determination 2013 [F2013L02153] (deferred in the committee's *Second Report of the 44th Parliament*).

28 The *Index of bills* is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments. As of January 2016, the committee also publishes an *Index of instruments*, which can also be found at the above address.

29 The *Guide to Human Rights* is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

3.51 Further, the committee began to have its work posted on social media during this period. For example, the official parliamentary Twitter accounts began to announce when the committee's reports had been tabled.

The Hon Philip Ruddock MP

Chair

Appendix 1

Outstanding correspondence

As at 30 June 2014, the following responses to committee comments in its regular reports in the 44th Parliament remained outstanding.

Outstanding correspondence

Government bills

Bill name	Report Number	Response due date
Social Security Legislation Amendment (Increased Employment Participation) Bill 2014	3/44	14/03/2014
Omnibus Repeal Day (Autumn 2014) Bill 2014	5/44	11/04/2014

Private Members and Senators bills

Bill name	Report Number	Response due date
National Integrity Commission Bill 2013	1/44	06/01/2014
Reserve Bank Amendment (Australian Reconstruction and Development Board) Bill 2013	1/44	06/01/2014
Criminal Code Amendment (Harming Australians) Bill 2013	2/44	21/02/2014
Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013	2/44	21/02/2014
Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013	2/44	21/02/2014
Great Barrier Reef Legislation Amendment Bill 2014	3/44	14/03/2014
Native Title Amendment (Reform) Bill 2014	4/44	11/04/2014
Live Animal Export (Slaughter) Prohibition Bill 2014	6/44	06/06/2014

Committee inquiries

As at 30 June 2014, the committee was still awaiting responses to its inquiries into the following legislation:

Legislation	Report Number
<i>Social Security Legislation Amendment (Fair Incentives to Work) Act 2012</i>	4/2012 and 5/2013
<i>Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012</i> and related legislation	9/2013
<i>Stronger Futures in the Northern Territory Act 2012</i> and related legislation	11/2013

Appendix 2

Guidance Note 1 and Guidance Note 2

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in *the Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- 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
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.¹ For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.²

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

¹ Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; 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.

² For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- 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.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

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 the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. 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 has also referred 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 in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department.³

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

³ The Attorney-General's Department guidance may be found at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Parliamentaryscrutiny.aspx#role>

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance to on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).¹

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.²

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.³ However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

¹ For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>.

² The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

³ See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), available at <http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).⁴ Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

⁴ See, for example, *A v Australia* (2000) UN doc A/55/40, [522]; *Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, [522]* (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.⁵

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.⁶ This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if:

- a) the purpose of the penalty is to punish or deter; **and**
- b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

⁵ This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately two-thirds of the head sentence).

⁶ The UN Human Rights Committee, while not providing further guidance, has determined that civil penalties may be 'criminal' for the purpose of human rights law. See, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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