



Parliamentary Joint Committee
on Human Rights

Annual report 2014-15

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Committee information

Current members (December 2017)

Mr Ian Goodenough MP, Chair (14.09.16-present, Chair from 14.09.16-present)	Moore, Western Australia, LP
Mr Graham Perrett MP, Deputy Chair (06.02.13-05.08.13 and 15.09.16-present)	Moreton, Queensland, ALP
Mr Russell Broadbent MP (14.09.16-present)	McMillan, Victoria, LP
Senator Carol Brown (01.07.14-present)	Tasmania, ALP
Ms Madeleine King MP (15.09.16-present)	Brand, Western Australia, ALP
Mr Julian Leeser MP (14.09.16-present)	Berowra, New South Wales, LP
Senator Nick McKim (12.09.16-present)	Tasmania, AG
Senator Claire Moore (01.07.14 to 09.05.16 and from 15.09.16-present)	Queensland, ALP
Senator James Paterson (12.09.16-present)	Victoria, LP
Senator Linda Reynolds CSC (12.09.16-present)	Western Australia, LP

Former members 2014-15

Senator Dean Smith (Chair) (20.08.12-09.05.2016, Chair from 05.12.13-04.03.15)	Western Australia, LP
The Hon Philip Ruddock MP (Chair) (03.03.15-09.05.2016, Chair 04.03.15-09.05.2016)	Berowra, New South Wales, LP
Mr Laurie Ferguson MP (Deputy Chair) (04.12.13-09.05.2016)	Werriwa, New South Wales, ALP
Senator Carol Brown (01.07.14-present)	Tasmania, ALP
Senator Matthew Canavan (01.07.14-09.05.2016)	Queensland, NAT
Dr David Gillespie MP (04.12.13-09.05.2016)	Lyne, New South Wales, NAT
Mr Andrew Laming MP (04.12.13-25.09.14)	Bowman, Queensland, LP
Ms Cathy McGowan AO MP (14.05.15-09.05.2016)	Indi, Victoria, IND

Senator Claire Moore (01.07.14-present)	Queensland, ALP
Ms Michelle Rowland MP (04.12.13-14.05.15)	Greenway, New South Wales, ALP
Ms Fiona Scott MP (25.09.14-03.03.15)	Lindsay, New South Wales, LP
Senator Penny Wright (22.03.12-10.09.15)	South Australia, AG
Mr Ken Wyatt AM MP (14.03.12-12.10.15)	Hasluck, Western Australia, LP

Secretariat 2014-15¹

Mr Ivan Powell, Committee Secretary
Ms Zoe Hutchinson, Principal Research Officer
Mr Matthew Corrigan, Principal Research Officer
Ms Anita Coles, Principal Research Officer
Dr Patrick Hodder, Senior Research Officer
Ms Jessica Strout, Senior Research Officer
Ms Hannah Dibley, Legislative Research Officer
Ms Alice Petrie, Legislative Research Officer

Secretariat for the preparation of the annual report

Ms Toni Dawes, Committee Secretary
Ms Zoe Hutchinson, Principal Research Officer
Ms Eloise Menzies, Senior Research Officer
Ms Alice Petrie, Legislative Research Officer
Mr David Hopkins, Legislative Research Officer

1 The human rights committee secretariat is staffed by parliamentary officers drawn from the Department of the Senate Legislative Scrutiny Unit (LSU), which usually includes two Principal Research Officers with specialised expertise in international human rights law. LSU officers, including the Committee Secretary, regularly work across multiple scrutiny committee secretariats.

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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 advisers in the reporting period, Professor Andrew Byrnes and Professor Simon Rice, as well as the Committee Secretary and members of the secretariat.

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 2014 to 30 June 2015 (the reporting period). Senator Dean Smith was Chair of the committee from February 2014 to March 2015 and The Hon Philip Ruddock MP was Chair from March 2015 to May 2016.

1.13 Chapter 2 sets out the committee's mode of operation, its analytical framework and the scrutiny dialogue 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 the reporting period the committee initially 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 *Sixth Report of the 44th Parliament to the Sixteenth Report of the 44th Parliament*. The committee replaced Practice Note 1 with Guidance Note 1 in December 2014.

2.11 The committee's Chair, Senator Dean Smith, referred to the committee's general expectations for statements of compatibility in his tabling statement on 11 February 2014.⁵ The Chair stated that the committee was particularly concerned to note that some statements of compatibility provided assertions with no supporting evidence. The Chair emphasised that it was not enough for a statement of compatibility to merely claim that a measure would contribute to the achievement of a particular objective or that a measure is 'necessary, reasonable and proportionate'. It was noted that the sponsor of a bill or instrument bears the onus of demonstrating that this is the case and that where the matter is capable of evaluation in light of empirical evidence, the statement of compatibility should set this evidence out in sufficient detail to facilitate the committee's consideration of the compatibility of the measure with human rights.

The scrutiny dialogue model

2.12 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.

2.13 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).

2.14 The committee does not generally call for public submissions in relation to its assessments of legislation. However, the committee welcomes correspondence and submissions from parliamentarians, interested groups and other stakeholders who wish to bring matters to the committee's attention that are relevant to its functions under the Act. The committee will take these into account where relevant to the examination of a particular item of legislation.

2.15 In his tabling statement on 25 November 2014, the committee's Chair noted that the role of scrutiny committee members is to ensure that scrutiny committee reports are legally and technically credible, as well as consistent with past practice, and that this is naturally done at meetings through the testing and questioning of the

5 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 11 February 2014. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements

issues and analysis provided in the committee's reports.⁶ It was noted that committee members also contribute to directing the tone and nature of the committees' dialogue with ministers, and to shaping the committees' actions in cases where legislation may offend a relevant scrutiny principle. The Chair's statement emphasised that over the course of time, a great many parliamentarians have served on the Parliament's scrutiny committees, and in that service have worked within the constraints of the scrutiny approach to serve the Parliament and its ethos of informed inquiry.

Structure of the committee's reports

2.16 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.

2.17 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.⁷

2.18 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.

2.19 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.

2.20 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

6 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 25 November 2014. See:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements

7 The structure of the committee's reports evolved during the reporting period; initially Chapter 1 discussed each bill introduced into the Parliament in detail, including bills that raised no human rights concerns. The committee's reports also contained an executive summary. From the *Eighteenth Report of the 44th Parliament* onwards Chapter 1 simply listed bills not engaging human rights or containing marginal or justifiable limitations at the beginning of the chapter, along with any deferred legislation, and the executive summary was removed.

committee will conclude or finalise its examination of the legislation in question. As noted above at paragraph [2.12], 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

2.21 The committee is assisted by an external legal adviser, who is appointed by the Presiding Officers of the Parliament. The committee's legal advisers during the reporting period were Professor Andrew Byrnes and Professor Simon Rice. Professor Byrnes possesses extensive experience and an established reputation in international human rights law and during his time as legal adviser to the committee was also Chair of the Australian Human Rights Centre at the University of New South Wales. Professor Rice had worked and researched extensively in anti-discrimination, human rights and access to justice issues and while serving as the committee's legal adviser was also Director of Law Reform and Social Justice at the Australian National University College of Law and Chair of the Australian Capital Territory Law Reform Advisory Council.

Committee publications and resources

2.22 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

2.23 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.

2.24 The guidance notes are available on the committee's website and are included in Appendix 2 to this report.⁸

Guidance Note 1—Drafting statements of compatibility

2.25 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.

8 During the reporting period the committee initially 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 *Sixth Report of the 44th Parliament* to the *Sixteenth Report of the 44th Parliament*. 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

2.26 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

2.27 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.⁹

2.28 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.

2.29 The guide is available on the committee's website.

Index of bills and legislative instruments

2.30 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 [2.18], the committee takes an exceptions-based approach to reporting on legislative instruments).¹⁰

2.31 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.¹¹

9 The committee's first *Guide to Human Rights* was published in March 2014. This guide was updated in June 2015.

10 The *Index of instruments raising human rights concerns* was created in January 2016, and was not available during the reporting period. The instruments received and considered by the committee in the reporting period (all legislative instruments tabled in the parliament) were listed in the relevant *Journals of the Senate*.

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

Chapter 3

Work of the committee in 2014-15

3.1 This chapter provides information about the work of the committee during 2014-15, including the major themes and scrutiny issues arising from the legislation examined by the committee.

Legislation considered

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

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

Table 3.1: Legislation considered during the 2014-15 financial year

	Total considered	No human rights concerns	Advice-only comment	Response required
Bills and Acts	240	161	26	53
Legislative instruments	1958	1927	13	18

3.4 In his tabling statement for a report on 2 December 2014, the committee's Chair Senator Dean Smith outlined that, over the course of that calendar year, the committee considered 250 bills and 1717 legislative instruments.¹ Of those, 213 bills and 1707 instruments were found to be compatible with human rights. This was noted as illustrating that the majority of proposed legislation was compatible or may even promote human rights.

3.5 Of particular note was the committee's consideration of four national security bills, introduced with the aim of ensuring Australia is best placed to combat

1 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 2 December 2014. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements.

terrorism and that law enforcement and intelligence agencies are sufficiently equipped to keep the nation safe. The statement noted that national security legislation necessarily strongly engages human rights and that these bills raised complex issues around balancing the protection of human rights with national security objectives.

Reports tabled during the period

3.6 The committee tabled 16 reports during the reporting period, from the *Ninth Report of the 44th Parliament* to the *Twenty-fourth Report of the 44th Parliament*.²

Commonly engaged rights

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

- right to equality and non-discrimination;³
- right to a fair trial;⁴
- right to social security;⁵
- right to an adequate standard of living;⁶
- right to privacy;⁷
- right to a fair hearing;⁸ and
- right to security of the person and freedom from arbitrary detention.⁹

3.8 During the reporting period, the above seven rights accounted for 58 per cent of rights which the committee reported on substantively within both primary and delegated legislation.¹⁰ This figure does not include rights engaged where the committee initially examined and reported on legislation as not raising

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

3 Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

4 Article 14 of the ICCPR.

5 Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

6 Article 11(1) of the ICESCR.

7 Article 17 of the ICCPR.

8 Article 14 of the ICCPR.

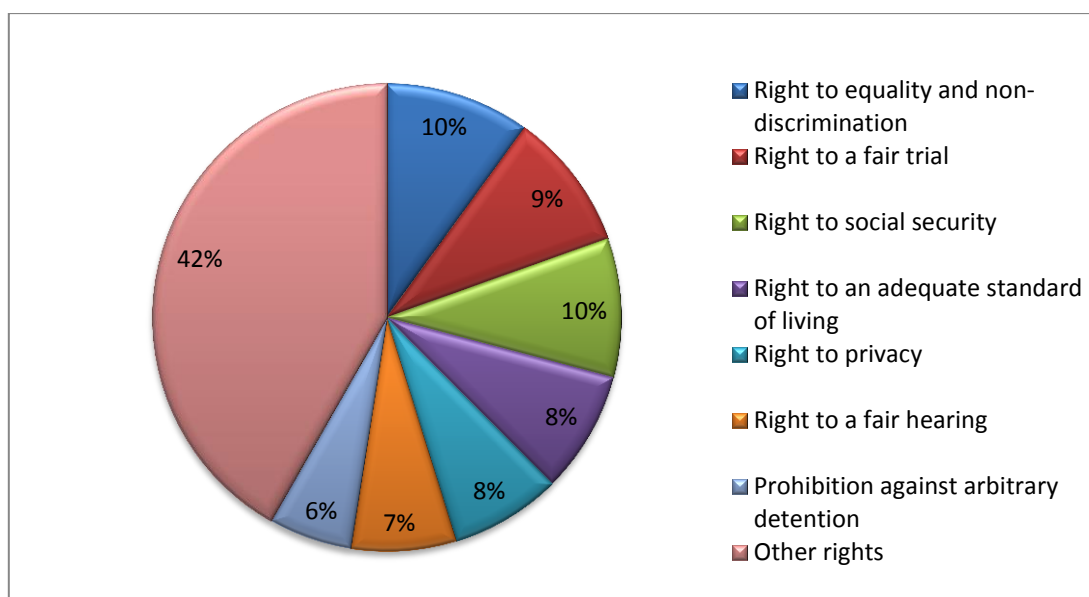
9 Article 9 of the ICCPR.

10 In the previous reporting period of 2013-14, the seven most commonly engaged rights also accounted for 58 per cent of rights engaged within both primary and delegated legislation.

human rights concerns (this may be because the bill or instrument does not engage or promotes human rights, and/or permissibly limits human rights).¹¹

3.9 Figure 3.1 shows the breakdown of human rights engaged by the legislation examined and substantively commented on by the committee during the reporting period. In comparison with previous reporting periods, there were an increased number of civil and political rights which were commonly engaged. These statistics show an increase in the proportion of legislation substantively commented on by the committee which engaged the right to equality and non-discrimination.

Figure 3.1: Human rights engaged by legislation in 2014-15



Major themes

3.10 Four significant policy areas that attracted comment from the committee in the reporting period related to migration legislation, national security legislation, indirect discrimination and budgetary measures with retrogressive impacts on economic, social and cultural rights.

11 The committee examines all bills and instruments that come before the parliament for compatibility with human rights. However, it focuses its substantive analysis or comments in reports on measures that raise human rights concerns in such legislation. As such, the rights that are identified as engaged in the above statistics relate to legislation raising human rights concerns. During the 2014-2015 period bills not raising human rights concerns were noted in the committee's reports. For instruments not raising human rights concerns, a cross reference was made in the committee's reports to the list contained in the *Journals of the Senate* or they were identified in an appendix. Instruments raising human rights concerns were identified in the committee's report.

Migration legislation

3.11 The 2014-15 reporting period saw a significant number of bills and legislative instruments relating to migration, asylum seekers and refugees. The committee commented on a number of these bills and legislative instruments, including legislation implementing significant changes to the protection visa framework around decision making and review processes, forms of protection visas and the interpretation and implementation of protection obligations.¹²

3.12 Human rights engaged by this legislation included obligations of non-refoulement; the rights of the child; the right to protection of the family; the right to equality and non-discrimination; the right to a fair trial and fair hearing rights; the right to privacy; the right to health and a healthy environment; the right to security of the person and the right to be free from arbitrary detention; the prohibition on torture, cruel, inhuman and degrading treatment or punishment; the right to freedom of movement; the right to life; the right to humane treatment in detention; the right to freedom of assembly; the right to an effective remedy; the right to work; the right to an adequate standard of living; and the right to equality before the law.

Non-refoulement

3.13 Many of the committee's assessments of legislation in this policy area were focused on non-refoulement obligations, which are absolute and therefore may not be subject to any limitation.

3.14 Non-refoulement obligations require that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; and cruel, inhuman or degrading treatment or punishment.

12 See Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) to *Twenty-fourth report of the 44th Parliament* (23 June 2015); Migration Amendment (Protection and Other Measures) Bill 2014, Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00726]; Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [F2014L00622]; Migration Legislation Amendment Bill (No. 1) 2014 (first reported on in 2013-14 period); Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] (first reported on in 2013-14 period); Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014; Migration Amendment (Partner Visas) Regulation 2014 [F2014L01747]; Migration Amendment (Character and General Visa Cancellation) Bill 2014; Migration Amendment (Complementary Protection) Regulation 2014 [F2014L01617]; Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015; Migration Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01696]; Migration Amendment (Subclass 050 Visas) Regulation 2014 [F2014L01460]; Migration Amendment (Strengthening Biometrics Integrity) Bill 2015; Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461]; Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015 [F2015L00551].

3.15 For example, in its consideration of measures relating to the burden of proof and review of decisions relating to claims for asylum in the Migration Amendment (Protection and Other Measures) Bill 2014 and the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, the committee noted the requirement for 'independent, effective and impartial' review of decisions where non-refoulement obligations may be engaged, due to the serious and irreversible nature of harm that can result from a breach of non-refoulement obligations.¹³ The committee noted that proposed measures to require the Refugee Review Tribunal (RRT) to draw an unfavourable inference in certain cases, and to limit or exclude independent merits review in favour of 'fast track assessments' and internal departmental review, did not satisfy the requirement for 'independent, effective and impartial' review, and were therefore likely to be incompatible with Australia's non-refoulement obligations as a matter of international human rights law.¹⁴

Incorporation and interpretation of protection obligations in Australian domestic law

3.16 The committee also assessed measures in migration legislation that sought to redefine Australia's own interpretation of its international obligations and their incorporation into Australian domestic law, including measures that:

- altered the test for determining protection obligations without direct reference to international law;
- authorised or expanded powers to remove, intercept and detain people at sea regardless of non-refoulement obligations;
- excluded court challenges based on international obligations; and
- created a new statutory framework to declare Australia's protection obligations and removed references to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention).

3.17 The committee noted that, in some cases, these new standards and range of permissible conduct were likely to be incompatible with the required standards under international human rights law.

13 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 88; *Ninth Report of the 44th Parliament* (15 July 2014), Migration Amendment (Protection and Other Measures) Bill 2014, 36, 38.

14 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 88.

3.18 For example, the committee noted that measures permitting Australia to remove an individual from Australia regardless of non-refoulement obligations were incompatible with the obligation of non-refoulement.¹⁵

3.19 The committee also noted that, while Australia has the ability as a sovereign state to change its domestic laws, the severing of the connection between domestic laws and Australia's international obligations engaged and potentially limited a number of human rights protected by international law, such as non-refoulement obligations. This was because the measures denied relevant international human rights norms a role in defining the legal framework and standards within which Australia meets its international human rights obligations.

3.20 The committee further noted that, while the Refugee Convention and its Protocol are not included in the seven core human rights treaties against which the committee is required to assess the human rights compatibility of legislation, there is significant overlap between the obligations under the Refugee Convention and the treaties within the committee's mandate.¹⁶ Consequently, measures in migration legislation that engage Australia's obligations under the Refugee Convention and Protocol will frequently also engage obligations under the treaties within the committee's mandate. Assessments relating to the interpretation of obligations under the treaties within the committee's mandate may therefore be informed by the specialised body of law that has developed from decisions made under, and interpretations of, the Refugee Convention.

Personal information

3.21 Migration legislation assessed in the reporting period included various measures that affected visa applicants' right to privacy. This included measures to allow the disclosure of information concerning a person's change of name and information obtained under warrants, requirements to provide personal information for the purposes of conducting a character test in the context of immigration, and

15 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 78.

16 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 73.

the introduction of a broad discretionary power to collect biometric data at points of entry into Australia.¹⁷

3.22 The committee noted that limitations of human rights must generally be the least rights restrictive means of achieving their objective. Accordingly, where measures of this type appeared overly broad and did not sufficiently define the types of information that may be collected, retained and disclosed, the committee sought further information from the minister as to whether the measures could be regarded as proportionate for the purposes of international human rights law. Measures requiring the inclusion of previous names on the back of citizenship certificates were found likely to be incompatible with the right to privacy as the minister declined to provide information demonstrating that the measures were proportionate.¹⁸ However, advice provided by the minister in relation to the disclosure of information obtained under search warrants enabled the committee to conclude its examination of this measure.¹⁹ During the reporting period, the committee was not able to conclude its comments relating to other measures concerning personal information as responses from the minister had not yet been received.²⁰

Detainees

3.23 The committee also commented on measures which affected the rights of people held in immigration detention centres, most notably amendments to the *Migration Act 1958* to allow the use of force by an authorised officer (generally employees of an Immigration Detention Services Provider (IDSP)).²¹

3.24 The committee noted that the measures engaged various human rights, including the right to life, as the use of force could lead to loss of life; and the prohibition against torture and cruel, inhuman or degrading treatment. Noting that

17 See, Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014), Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014; *Tenth Report of the 44th Parliament* (26 August 2014), Migration Legislation Amendment Bill (No. 1) 2014; *Nineteenth Report of the 44th Parliament* (3 March 2015), Migration Amendment (Character and General Visa Cancellation) Bill 2014; and *Twenty-second Report of the 44th Parliament* (13 May 2015), Migration Amendment (Strengthening Biometrics Integrity) Bill 2015.

18 Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014), Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014, 30.

19 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014), Migration Legislation Amendment Bill (No. 1) 2014, 99.

20 See paragraphs [3.54]-[3.58] of this report for further discussion of the timeliness of responses to the committee's requests for information.

21 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015), Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015.

limitations of human rights are only permissible in pursuit of significant aims, the committee sought information from the minister as to whether the measures pursued a legitimate objective for the purposes of human rights law.

3.25 The committee also noted that the powers authorising the use of force appeared overly broad, and were not subject to sufficient independent monitoring or safeguards, such as those that apply to the use of force by police officers or prison guards. Accordingly, the human rights assessment of the bill raised specific concerns in relation to the compatibility of these measures with the right to life and the prohibition against torture and cruel, inhuman, or degrading treatment.²²

Introduction of multiple forms of temporary protection visas

3.26 In the reporting period the *Migration Act 1958* was also amended to provide for two new forms of visa for people found to engage Australia's protection obligations; Temporary Protection Visas (TPVs) and Safe Haven Enterprise Visas (SHEVs).²³

3.27 The committee noted that TPVs engage and may limit non-refoulement obligations, as they require people to whom Australia owes protection obligations to prove afresh their claims to protection every three years via an assessment and review process with reduced procedural and substantive safeguards. The committee also noted that TPVs engage and may limit the right to health, the obligation to consider the best interests of the child and the right to the protection of the family.

3.28 Safe Haven Enterprise Visas (SHEVs) may be granted to persons who are owed protection obligations and who indicate an intention to work or study in regional areas in Australia. Many of the human rights issues identified in relation to TPVs applied equally to the SHEV regime, particularly in relation to non-refoulement obligations. The committee also sought further information from the minister about the compatibility of a restriction on travel for holders of a SHEV with the right to freedom of movement.²⁴

22 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015), Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, 84-97.

23 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, and *Twenty-fourth Report of the 44th Parliament* (23 June 2015), Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015.

24 Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (23 June 2015), Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015, 23-24.

National security legislation

3.29 The committee examined a number of bills seeking to implement the government's national security and counter-terrorism policies, including:

- the National Security Legislation Amendment Bill (No. 1) 2014;
- the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014;
- the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014;
- the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014; and
- the Australian Citizenship and Other Legislation Amendment Bill 2014.²⁵

3.30 As a starting point for its examination the committee noted 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.²⁶

3.31 The human rights assessment of the significant changes to national security laws involved considerable challenges for the committee, particularly where measures were given an expedited passage through the Parliament and/or sought to expand on existing elements of the national security regime which had not previously been subject to a human rights assessment by the committee (because they pre-dated the establishment of the committee).

3.32 In this respect, in relation to proposed national security laws, the committee's Chair, Senator Smith, noted that the committee was particularly disappointed that the Attorney-General's Department did not give sufficient attention to the expectations set out in the Committee's Practice Note 1 (now Guidance Note 1) which stated that 'the committee relies on the statement to provide sufficient information about the purpose and effect of the proposed legislation, the operation of its individual provisions and how these may impact on

25 See Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014), National Security Legislation Amendment Bill (No. 1) 2014, 33; *Nineteenth Report of the 44th Parliament* (3 March 2015), Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 56; *Twentieth Report of the 44th Parliament* (18 March 2015), Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, 39; *Twenty-second Report of the 44th Parliament* (13 May 2015), Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, 129; and *Twenty-fourth Report of the 44th Parliament* (23 June 2015), Australian Citizenship and Other Legislation Amendment Bill 2014, 25.

26 See, Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 28 October 2014. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements

human rights... the committee expects statements to set out the necessary information in a way that allows it to undertake its scrutiny tasks efficiently. Without this information, it is often difficult to identify provisions which raise human rights concerns in the time available'.²⁷ The Chair, Senator Smith, stated that it was important to note that any characterisation of human rights as being in opposition to national security was inaccurate and also unproductive. He further noted that the committee had a critical function in ensuring the right balance was struck between national security and human rights and that Australia's then membership of the UN Security Council required it to exercise important leadership in advancing both international peace and security, and at the same time advancing the protection of national security and human rights on the global stage.²⁸

3.33 The national security and counter-terrorism bills collectively engaged and limited a significant number of human rights, including the right to privacy; the right to freedom of movement; the right to freedom of opinion and expression; the right to equality and non-discrimination; the right to security of the person and to be free from arbitrary detention; the prohibition on torture and cruel, inhuman and degrading treatment or punishment; the obligation to consider the best interests of the child; the rights to a fair trial and fair hearing; the right to an effective remedy; the right to work; the right to social security; and the right to an adequate standard of living.

3.34 Legislative responses to issues of national security are generally likely to engage a range of human rights. The committee noted in its *Nineteenth Report of the 44th Parliament* that, in this regard, international human rights law allows for the balancing of human rights considerations with responses to national security concerns, providing that any limitations on Australia's human rights obligations are reasonable, necessary and proportionate to the achievement of a legitimate objective.²⁹

3.35 The committee consistently noted that the provision of necessary powers to detect and prevent acts of terrorism to security and law enforcement authorities constitutes a legitimate objective for human rights purposes. However, the majority

27 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 1 October 2014. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements

28 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 1 October 2014. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements

29 See Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015), Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 56.

of the statements of compatibility for the bills fell short of the committee's expectations, with a number of limitations not being adequately justified. The committee accordingly sought further information in relation to each of the bills to fully assess their compatibility with human rights.³⁰

3.36 The bills introduced, extended or amended a broad number of measures relating to national security and counter-terrorism. These included the extension and amendment of the control order regime and preventative detention order regime; changes to requirements for gaining Australian citizenship; the increase of a number of criminal penalties; the expansion of information disclosure provisions; the introduction of a mandatory data retention scheme; the expansion of intelligence-collection powers for intelligence agencies; the freezing of assets and cancellation of welfare payments; and a number of broad ministerial discretions not subject to merits review.

3.37 The committee's assessment of these measures was in some cases significantly affected by the expedited passage of the legislation through the Parliament (argued on the basis of urgency). For example, in relation to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, the bills passed both Houses of Parliament in the space of approximately five weeks. As the committee was unable to complete its consideration of the bills before they were enacted, its human rights assessments of the bills were unable to fully inform the deliberations of the Senate and the House of Representatives in passing the legislation. Noting that national security legislation tends to engage and limit a significant number of human rights, and is often lengthy and complex, the committee regards it as imperative that the Parliament is informed of the human rights implications of such legislation at the time it is being debated. Accordingly, the committee considers that the expedited passage of significant legislation argued on the basis of urgency must be weighed appropriately against the need to ensure that the legislative process provides adequate opportunity for consideration of human rights and other significant issues.

3.38 The timeliness of ministers in responding to committee concerns in this area remained poor, and responses often took a number of months to be received by the committee. At the end of the reporting period, for example, the committee was still

30 See, in particular, Parliamentary Joint Committee on Human Rights, *Thirteenth Report of the 44th Parliament* (1 October 2014), National Security Legislation Amendment Bill (No. 1) 2014, 8: *Inadequate statement of compatibility*; and *Fourteenth Report of the 44th Parliament* (28 October 2014), Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 9: *Inadequate statement of compatibility – legitimate objective*. The exception was in relation to the statement of compatibility for the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, to which the committee commended the Attorney-General's Department for having provided 'a very informative and detailed statement of compatibility'. See *Fifteenth Report of the 44th Parliament* (14 November 2014), 11.

awaiting a response in relation to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, which had been requested by 3 March 2015. This served to limit the impact of the committee's final assessment of the legislation. If legislation proponents do not respond before the legislation is finally passed by both Houses, these responses are unable to inform the committee's deliberations or the debates of the Parliament more broadly.

Right to equality and non-discrimination (indirect discrimination)

3.39 During the reporting period the committee assessed a number of bills and legislative instruments which engaged and limited the right to equality and non-discrimination (which includes both direct and indirect discrimination).

3.40 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),³¹ which has either the purpose (called 'direct' discrimination) or the effect (called 'indirect' discrimination) of adversely affecting human rights.³² The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.³³

3.41 During the reporting period, the committee substantively reported on 14 pieces of legislation which engaged the right to be free from indirect discrimination. Of this legislation seven bills and legislative instruments were found to be compatible with this right, and another seven contained measures which were found to be incompatible.³⁴ Legislation which was found to be compatible with this right generally assessed limitations in accordance with the committee's analytical

31 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

32 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989).

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

34 The Social Security (Administration) (Declared income management areas—Ceduna and Surrounding Region) Determination 2014 [F2014L00777] was deferred for consideration in conjunction with the committee's Stronger Futures inquiry after its initial comments. See Parliamentary Joint Committee on Human Rights, *Thirteenth Report of the 44th Parliament* (1 October 2014) 17. At the end of the reporting period, the committee had also not yet finalised its consideration of a number of measures in relation to the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015 and Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014. Further, the incompatibility finding in relation to the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 was also the subject of a dissenting report from two committee members. See Parliamentary Joint Committee on Human Rights, *Seventeenth Report of the 44th Parliament* (2 December 2014), Dissenting Report, 15-16.

framework and expectations regarding the content of statements of compatibility, including the need to provide relevant empirical data and analysis, and information regarding any safeguards in place to ensure the measures were proportionate to their stated objective.³⁵

3.42 However, the committee notes that, while statements of compatibility generally identify and assess measures that engage and limit direct discrimination, there appears to be less understanding and therefore acknowledgement of the occurrence and effects of indirect discrimination. This lack of understanding is reflected by the fact that, of the thirteen bills and three legislative instruments assessed in the reporting period that engaged and limited the right not to be indirectly discriminated against, only one of the statements of compatibility acknowledged the engagement of the right.³⁶ Further, in response to the committee's requests for further information in relation to the question of indirect discrimination, a number of ministerial responses addressed the question of direct rather than indirect discrimination, again suggesting a general misunderstanding of the nature of the right.³⁷ This indicates that there may be scope for further education on these issues within government departments and agencies.

The importance of assessing legislation for potential indirect discrimination is underscored by the fact that the measures engaging indirect discrimination were contained in legislation across a range of portfolios, including Social Services; Immigration and Border Protection; Employment; Industry; Education; and Attorney-General's. The disproportionate effect of these measures fell most commonly on the basis of gender (namely women), but also on the basis of race and ethnicity, and disability. This indicates that indirect discrimination can occur due to legislation operating across a variety of portfolio areas, and is able to affect broad sections of Australian society.

Budgetary measures with retrogressive impacts on economic, social and cultural rights

3.43 The committee assessed a number of bills seeking to implement measures introduced in the 2014-15 Budget, which, in aiming to reduce levels of certain entitlements or payments—for example, by pausing indexation on a number of social

35 See, for example, Parliamentary Joint Committee on Human Rights, *Eleventh Report of the 44th Parliament* (2 September 2014), Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014, 9-10; and *Twentieth Report of the 44th Parliament* (18 March 2015), Migration Amendment (Protection and Other Measures) Bill 2014, 81-87.

36 See the statement of compatibility for the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014, 8-10.

37 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), Migration Legislation Amendment Bill (No. 1) 2014, 115-116; and *Seventeenth Report of the 44th Parliament* (2 December 2014), Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014, 12-13.

security payments—were properly characterised as retrogressive measures for the purposes of international human rights law.³⁸

3.44 Retrogressive measures are understood as backward steps in the attainment of economic, social and cultural rights. 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.

3.45 Many of the committee's comments concerned changes to social security programs, such as those contained in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 and the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014, which sought to give effect to a wide range of measures with the intention of reducing expenditure on social security payments.³⁹

3.46 The Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 sought to amend various Acts relating to social security, family assistance, veterans' entitlements and farm household support to make a number of changes to certain Australian Government payments. These included measures to:

- Pause indexation for three years of the income free areas and assets value limits for student payments;

38 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. A retrogressive measure is a measure which reduces or represents a backward step in the level of attainment of economic, social and cultural rights. The obligation means that the state cannot unjustifiably take a deliberate backward step which negatively affects the enjoyment of these rights. In assessing whether a retrogressive measure is justified, the limitation criteria contained in the committee's analytical framework are a useful starting point: See *Guidance Note 1*.

39 Other bills considered in this portfolio included: Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014; Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014; Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014; Family Assistance Legislation Amendment (Child Care Measures) Bill 2014; Family Assistance Legislation Amendment (Child Care Measures) Bill No. 2 2014; Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014; Social Services and Other Legislation Amendment (2014 Budget Measures No. 5) Bill 2014; Social Services and Other Legislation Amendment (2014 Budget Measures No. 6) Bill 2014; Social Services and Other Legislation Amendment (Seniors Supplement Cessation) Bill 2014; Dental Benefits Rules 2014 [F2014L01748]; Social Services Legislation Amendment Bill 2015; and Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015.

- Pause indexation for three years of the income and assets test free areas for all pensioners (other than parenting payment single recipients) and the deeming thresholds for all income support payments;
- Provide that all pensions are indexed to the Consumer Price Index only by removing both benchmarking to Male Total Average Weekly Earnings and indexation to the Pensioner and Beneficiary Living Cost Index.

3.47 The committee sought the advice of the minister as to whether the measures were compatible with these rights, noting that the statement of compatibility did not adequately identify and assess how potential limitations on the right to social security, the right to an adequate standard of living and the rights to quality and non-discrimination would be reasonable, necessary and proportionate in each case.

3.48 The further information provided by the Minister in this case was an excellent model for the kind of detailed information and analysis required to assist the committee in its assessment of the human rights compatibility of legislation.⁴⁰ This further information allowed the committee to conclude that the measures were largely compatible with the right to social security and the right to an adequate standard of living, with identified limitations of rights being generally assessed as reasonable, necessary and proportionate in pursuit of a legitimate objective. Significantly, out of the twelve matters raised by the committee in relation to measures in the bill, the committee concluded that ten of those were compatible with human rights.

3.49 Other committee comments related to changes to the Higher Education Loan Program contained in the Higher Education and Research Reform Amendment Bill 2014 and the Higher Education and Research Reform Bill 2014.⁴¹

3.50 Along with the right to social security, this legislation engaged the right to an adequate standard of living, the right to equality and non-discrimination, the right to work and the right to education.

3.51 With regard to retrogressive measures, the committee has consistently noted 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 continued to request further information where it was not clear that

40 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 24 September 2014. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements

41 See also Minerals Resource Rent Tax Repeal and Other Measures Bill 2014.

such measures were proportionate to their stated objective.⁴² The committee's requests for information from ministers in relation to retrogressive measures also routinely sought information as to whether less rights restrictive measures to achieve particular objectives were available and, if so, why they were not adopted.

3.52 In relation to the majority of measures affecting social security entitlements, the committee was able to accept evidenced arguments that the measures were proportionate to the objective of ensuring the sustainability of the wider social security system. However, in relation to measures introducing or increasing income support waiting periods or age requirements, and certain measures reducing higher education support for students, evidence was not provided to demonstrate the proportionality of these changes, and the committee was therefore unable to find the measures to be compatible with human rights on the basis of the information provided.

Scrutiny issues

3.53 During the reporting period, a number of issues posed particular challenges for the committee as well as for legislation proponents and departments in the context of the scrutiny process. These included timeliness; the content and scope of omnibus bills introduced by the government; and the quality of statements of compatibility.

Timeliness

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

3.55 Accordingly, the responsiveness of legislation proponents to the committee's requests for information regarding human rights concerns is critical to the effectiveness of the scrutiny process. While the committee stipulates a deadline by which it expects a response be provided, there is no legal or procedural requirement to ensure that a legislation proponent provides the response in this time period.

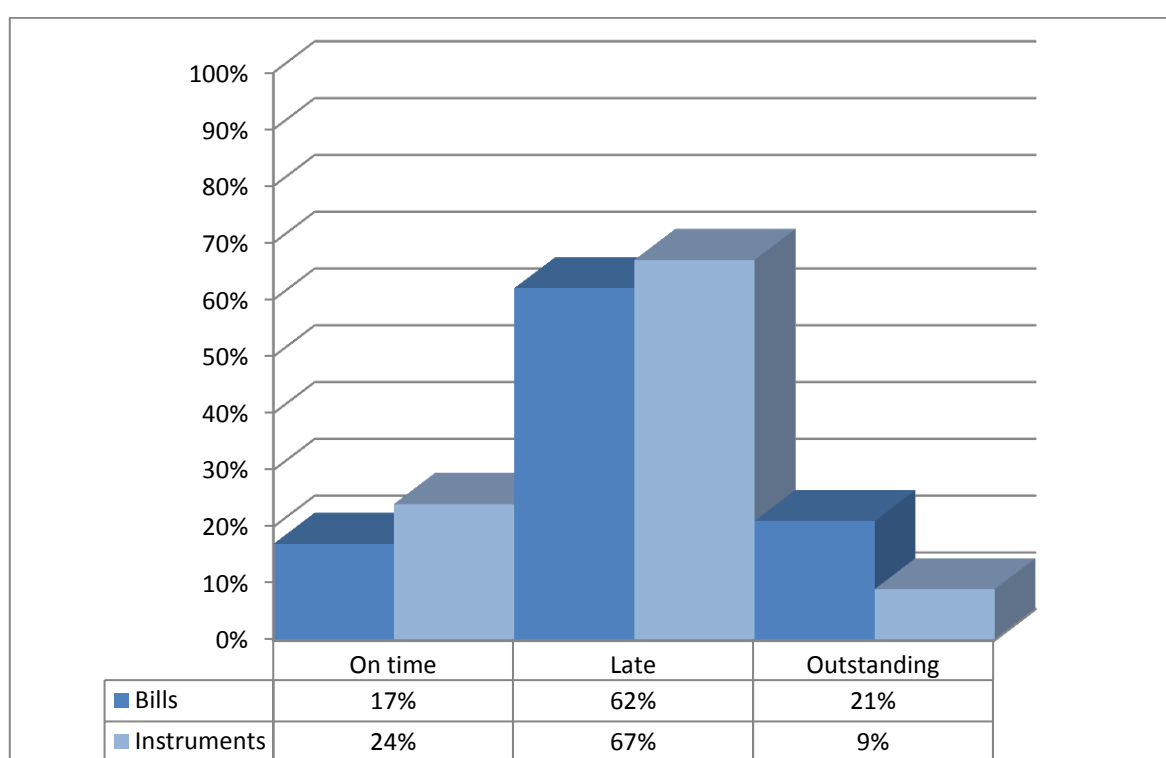
3.56 Timeliness continued to be a significant issue during the reporting period, with responses from legislation proponents often not being received until well after the committee's deadline and, on occasion, not until after the bill had passed or the timeframe for disallowance had expired.

42 See for example Parliamentary Joint Committee on Human Rights *Eighteenth Report of the 44th Parliament* (10 February 2015), 49; *Nineteenth Report of the 44th Parliament* (3 March 2015), 112; *Twenty-second Report of the 44th Parliament* (13 May 2015), 168-173 and 196-198.

3.57 Responses were requested in relation to 58 bills in the reporting period. Only 10 of these (17%) were provided to the committee by the requested date. Responses in relation to 36 bills (62%) were provided to the committee after the requested date. The remaining 12 bills (21%) still had responses outstanding at 30 June 2015 (see figure 3.2).

3.58 Responses were requested in relation to 21 legislative instruments in the reporting period. Only five of these (24%) were provided to the committee by the requested date. Responses in relation to 14 legislative instruments (67%) were provided to the committee after the requested date. The remaining two legislative instruments (9%) still had responses outstanding at 30 June 2015 (see figure 3.2).

Figure 3.2: Percentage of responses received by due date



Omnibus bills

3.59 The committee assessed two 'Omnibus Repeal Day' bills that were introduced during the reporting period.⁴³ These bills, along with 'Statute Law Revision' bills, sought to reduce regulatory burden by amending or repealing legislation across various portfolios and consolidating 'non-controversial' measures in a single bill.

43 See Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015), Omnibus Repeal Day (Spring 2014) Bill 2014, 174; and *Twenty-third Report of the 44th Parliament* (18 June 2015), Omnibus Repeal Day (Autumn 2015) Bill 2015, 40.

3.60 The nature of these bills, which compile various disconnected measures into a single bill, generally resulted in the statements of compatibility providing only very brief assessments of the human rights compatibility of measures contained in the legislation. While the majority of measures included in the omnibus bills clearly did not engage human rights, the committee sought further information about three measures: the removal of a requirement for consultation when amending disability standards; the removal of a requirement for independent reviews of Stronger Futures measures; and the repeal of the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975*. The committee received a satisfactory response in relation to the third measure, but was unable to conclude that the first two measures were compatible with human rights.⁴⁴ This demonstrates the important role of the committee in ensuring that omnibus and similar bills are subjected to the same level of scrutiny that standalone bills receive to ensure that ministers are aware of the wider impacts of ostensibly 'non-controversial' measures.

Statements of compatibility

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

3.62 Many statements of compatibility provided sufficient assessments of limitations of human rights for the committee to conclude its examination of the legislation without having to request further information from the legislation proponent.⁴⁵ For example, in his tabling statement to the *Tenth Report of the 44th Parliament*, the committee Chair noted that the statement of compatibility for the International Tax Agreements Amendment Bill 2014 'demonstrates that departments continue to develop the knowledge and expertise to formulate human rights assessments that are consistent with the committee's human rights analytical framework'.⁴⁶

3.63 However, while statements of compatibility are increasingly acknowledging where rights are engaged by specific measures, there remains considerable room for improvement in providing adequate justifications for limitations of rights in

44 See Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015), Omnibus Repeal Day (Spring 2014) Bill 2014, 174.

45 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014), International Tax Agreements Amendment Bill 2014, 35; and *Eighteenth Report of the 44th Parliament* (10 February 2015), Biosecurity Bill 2014, Biosecurity (Consequential Amendments and Transitional Provisions) Bill 2014, Quarantine Charges (Imposition—General) Amendment Bill 2014, Quarantine Charges (Imposition—Customs) Amendment Bill 2014, and Quarantine Charges (Imposition—Excise) Amendment Bill 2014, 31-33.

46 Tabling statement to the *Tenth Report of the 44th Parliament* (26 August 2014) 3, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements.

accordance with the committee's analytical framework. For example, generic statements asserting that limitations are 'reasonable, necessary and proportionate' continue to be frequently made without providing any supporting analysis or empirical evidence.⁴⁷

3.64 Further, statements of compatibility continue to state that measures do not engage human rights where rights are clearly engaged, and thus fail to provide an assessment in accordance with the committee's analytical framework.⁴⁸ For example, as noted above, a number of statements of compatibility failed to acknowledge measures that engaged the right to equality and non-discrimination (indirect discrimination).⁴⁹

3.65 During the reporting period a number of bills reintroduced measures which had previously been examined and commented on by the committee. In many of these instances, the statements of compatibility were very similar, and often identical, to that which had been provided in the first instance. In its *Ninth Report of the 44th Parliament*, the committee noted its expectation that, where concerns have been raised in relation to a measure, any subsequent re-introduction of the measure will be accompanied by a statement of compatibility addressing the committee's previously identified concerns.⁵⁰ The committee continued to draw its expectations to the attention of ministers throughout the reporting period, particularly where the

47 See, for example, Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014), Higher Education and Research Reform Amendment Bill 2014, 9-10; *Eighteenth Report of the 44th Parliament* (10 February 2015), Family Tax Benefit (Tighter Income Test) Bill 2014, 34-36; and *Nineteenth Report of the 44th Parliament* (3 March 2015), Omnibus Repeal Day (Spring 2014) Bill 2014, 29-32.

48 See, for example, Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014), Telecommunications Legislation Amendment (Deregulation) Bill 2014, 23-24; *Twenty-first Report of the 44th Parliament* (24 March 2015), Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2015—Mosul District, Ninewa Province, Iraq [F2015L00245], 8-11; and *Twenty-fourth Report of the 44th Parliament* (23 June 2015), Criminal Code Amendment (Animal Protection) Bill 2015, 3-6.

49 See, for example, Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014), Business Services Wage Assessment Tool Payment Scheme Bill 2014 and Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014, 11-12, and Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014, 72; and *Twelfth Report of the 44th Parliament* (24 September 2014), Higher Education and Research Reform Amendment Bill 2014, 11-13.

50 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014), Fair Work (Registered Organisations) Amendment Bill 2014, 22.

information previously provided to the committee had enabled it to conclude its consideration of the relevant measure.⁵¹

3.66 The committee also noted its expectation that, where a minister has agreed to amend a bill in response to the committee's comments, the re-introduced bill include those amendments.⁵²

Additional work of the committee

Stronger Futures inquiry

3.67 The committee determined in July 2014 to undertake a 12-month review of its previous inquiry, which examined the *Stronger Futures in the Northern Territory Act 2012* and related legislation, in order to consider the latest evidence and test the continuing necessity for the Stronger Futures measures.

Committee's guidance material

3.68 In December 2014 the committee replaced its *Practice Note 1* and *Practice Note 2* with *Guidance Note 1: Drafting statements of compatibility* and *Guidance Note 2: Offence provisions, civil penalties and human rights*.

3.69 *Guidance Note 1* sets out the committee's expectations for statements of compatibility, and provides guidance on the committee's analytical framework and approach to assessing legislation for compatibility with human rights.

3.70 *Guidance Note 2* provides guidance on the committee's expectations and approach in relation to assessing provisions that create offences and civil penalties.

3.71 The committee also updated its *Guide to Human Rights* in June 2015.

Mr Ian Goodenough MP

Chair

51 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), Social Services and Other Legislation Amendment (2014 Budget Measures No. 5) Bill 2014, 96, and Social Services and Other Legislation Amendment (Seniors Supplement Cessation) Bill 2014, 100; and *Twenty-second Report of the 44th Parliament* (13 May 2015), Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461], 116-120 (in regards to the regulation implementing measures previously commented on in a related bill).

52 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014), Fair Work (Registered Organisations) Amendment Bill 2014, 22.

Appendix 1

Outstanding correspondence

As at 30 June 2015, the following responses to committee comments in its regular reports in the 44th Parliament remained outstanding.

Outstanding correspondence

Government bills and legislative instruments

Bill name	Portfolio	Report Number	Response due date
Omnibus Repeal Day (Autumn 2014) Bill 2014	Prime Minister	5/44	11/04/2014
Clean Energy (Income Tax Rates and Other Amendments) Bill 2013 [No. 2]	Treasury	9/44	08/08/2014
Minerals Resource Rent Tax Repeal and Other Measures Bill 2013 [No. 2]	Treasury	9/44	08/08/2014
Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014	Employment	11/44	26/09/2014
Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014	Attorney-General	19/44	27/03/2015
Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014	Attorney-General	20/44	10/04/2015
Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015	Employment	20/44	10/04/2015
Australian Border Force Bill 2015	Immigration and Border Protection	22/44	05/06/2015
Copyright Amendment (Online Infringement) Bill 2015	Attorney-General	22/44	05/06/2015
Defence Legislation (Enhancement of Military Justice) Bill 2015	Defence	22/44	05/06/2015
Migration Amendment (Strengthening Biometrics Integrity) Bill 2015	Immigration and Border Protection	22/44	05/06/2015

Norfolk Island Legislation Amendment Bill 2015	Infrastructure	22/44	05/06/2015
Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015	Employment	22/44	05/06/2015
Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461]	Immigration and Border Protection	22/44	05/06/2015
Seafarers Rehabilitation and Compensation (Prescribed Ship—Intra-State Trade) Declaration 2015 [F2015L00336]	Employment	22/44	05/06/2015

Private Members and Senators bills

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

Committee inquiries

As at 30 June 2015, the committee was still awaiting responses to its inquiries into the following legislation:

Legislation	Portfolio	Report Number
<i>Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012</i> and related legislation	Immigration and Citizenship	9/2013
<i>Stronger Futures in the Northern Territory Act 2012</i> and related legislation	Prime Minister and Cabinet	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.aprh.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 <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx>.

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 a 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 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 edition, 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* (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [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 civil penalty provision 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 2/3 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 at pages 3-4 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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