



Parliamentary Joint Committee
on Human Rights

Annual report 2015-16

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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 2015-16

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
Ms Cathy McGowan AO MP (14.05.15-09.05.2016)	Indi, Victoria, IND
Senator Nick McKim (10.9.15-present)	Tasmania, AG
Senator Claire Moore	Queensland, ALP

(01.07.14-present)	
Senator Barry O'Sullivan	Queensland, NAT
(23.02.16-15.03.16)	
Mr Tony Pasin MP	Barker, South Australia, LP
(12.10.15-22.10.15)	
Senator James Paterson	Victoria, LP
(15.03.16-present)	
Mr Michael Sukkar MP	Deakin, Victoria, LP
(22.10.15-09.05.2016)	
Senator Penny Wright	South Australia, AG
(22.03.12-10.09.15)	
Mr Ken Wyatt AM MP	Hasluck, Western Australia, LP
(14.03.12-12.10.15)	

Secretariat 2015-16¹

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Ms Zoe Hutchinson, Principal Research Officer
Mr Matthew Corrigan, Principal Research Officer
Ms Anita Coles, Principal Research Officer
Mr Harry Hobbs, Acting Principal Research Officer
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Ms Alice Petrie, Legislative Research Officer

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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.

Table of Contents

Membership of the committee	iii
Chapter 1—Introduction	1
Establishment of the committee	1
Role of the committee	1
Functions and powers of the committee	1
Definition of human rights and the Act.....	2
Committee membership	2
Acknowledgements	2
Structure of the report	3
Chapter 2—The committee's mode of operation	5
Overview.....	5
The committee's analytical framework.....	5
The scrutiny dialogue model	7
Structure of the committee's reports	7
Legal advice	8
Committee publications and resources	8
Chapter 3—Work of the committee in 2015-16.....	11
Legislation considered	11
Reports tabled during the period	11
Commonly engaged rights.....	12
Major themes	13
Scrutiny issues	20
Additional work of the committee	25
Appendix 1—Outstanding correspondence.....	27
Appendix 2—Guidance Note 1 and Guidance Note 2	29

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 elaborate on 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 other 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 Simon Rice OAM and Dr Aruna Sathanapally.

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 2015 to the dissolution of the 44th Parliament on 9 May 2016 (the reporting period). The Hon Philip Ruddock MP was Chair of the committee throughout this period.

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.

The scrutiny dialogue model

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

2.12 In some cases, ministers may provide an undertaking to address the committee's concerns in the future (for example, by amending legislation or undertaking to conduct a review of the legislation in due course).⁵

2.13 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.

Structure of the committee's reports

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

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

5 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-second report of the 44th Parliament* (1 December 2015), Norfolk Island Legislation Amendment Bill 2015, 87: In response to the committee's request for further information about the compatibility of the bill with the right to equality and non-discrimination and social security, the Assistant Minister for Infrastructure and Regional Development undertook to move amendments to ensure that Australian permanent resident New Zealand citizens living on Norfolk Island will be eligible for social security benefits. On this basis, the committee concluded that the bill was compatible with the right to social security. The amendments were contained in the Passenger Movement Charge Amendment (Norfolk Island) Bill 2016 and the Territories Legislation Amendment Bill 2016. See Parliamentary Joint Committee on Human Rights, *Thirty-fifth report of the 44th Parliament* (25 February 2016) 1-2.

committee's concerns and the information being sought from the legislation proponent.

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

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

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

Legal advice

2.19 The committee is assisted by an external legal adviser, who is appointed by the Presiding Officers of the Parliament. The committee's legal advisers at different times during the reporting period were Professor Simon Rice OAM and Dr Aruna Sathanapally. 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. Dr Sathanapally has researched extensively on the role of representative parliaments in applying and advancing human rights protections and has previously worked with the Australian Government Solicitor providing advice on the interaction of domestic legislation and international obligations. During her time as legal adviser to the committee she continued practising as a barrister in New South Wales.

Committee publications and resources

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

Committee guidance notes

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

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

Guidance Note 1—Drafting statements of compatibility

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

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

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

Guide to human rights

2.25 The committee's *Guide to human rights* (the guide) provides an introduction to the key human rights protected by the human rights treaties relevant to the committee's assessments of legislation.⁶

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

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

Index of bills and legislative instruments

2.28 The *Index of bills* and *Index of instruments raising human rights concerns* list all the bills examined by the committee, and those legislative instruments in relation to which the committee has identified human rights concerns (as noted above at paragraph [2.16], the committee takes an exceptions-based approach to reporting on legislative instruments).⁷

2.29 The *Index of bills* contains a shorthand description of any rights engaged by a bill, the action taken by the committee (that is, whether the committee made no comment on the bill, made an advice-only comment or made a comment requiring a

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

7 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*.

response from the legislation proponent), and the relevant reports in which the committee's full comments may be found.⁸

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

Chapter 3

Work of the committee in 2015-16

3.1 This chapter provides information about the work of the committee during 2015-16, including the major themes and scrutiny issues arising from the legislation examined by the committee.

Legislation considered

3.2 During the reporting period, which included an election 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 reporting period

	Total considered	No human rights concerns	Advice-only comment	Response required
Bills and Acts	192	144	17	31
Legislative instruments	1948	1850	21	77

Reports tabled during the period

3.4 The committee tabled 14 scrutiny reports during the reporting period, from the *Twenty-fifth report of the 44th Parliament* to the *Thirty-eighth report of the 44th Parliament*.¹

3.5 The committee also tabled one inquiry report during the reporting period, *2016 Review of Stronger Futures measures*.²

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

Commonly engaged rights

3.6 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 privacy;⁴
- right to an adequate standard of living;⁵
- right to social security;⁶
- right to a fair hearing;⁷
- right to freedom of movement;⁸ and
- non-refoulement obligations.⁹

3.7 During the reporting period, the above seven rights accounted for 65 per cent of rights which the committee commented 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 See Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/strongerfutures2.

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

4 Article 17 of the ICCPR.

5 Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

6 Article 9 of the ICESCR.

7 Article 14 of the ICCPR.

8 Article 12 of the ICCPR.

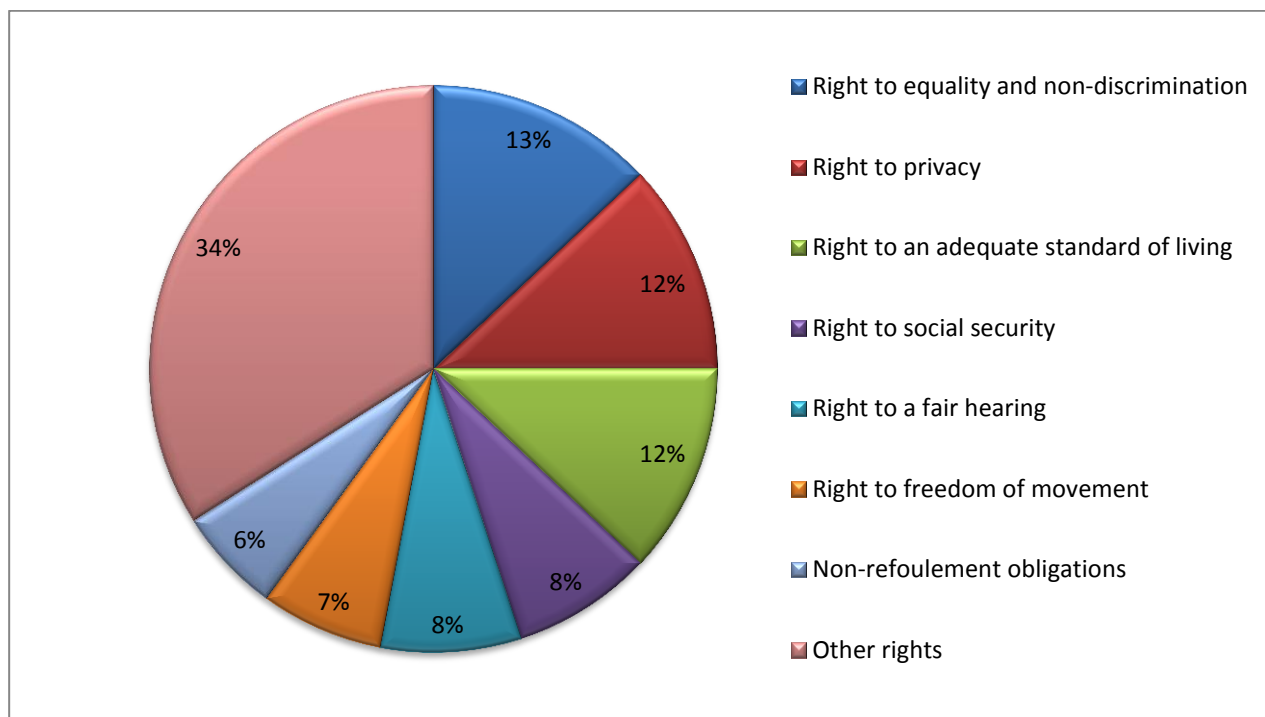
9 Article 33 of the Refugee Convention; article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; articles 6(1) and 7 of the ICCPR; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

10 In the previous reporting period of 2014-15, the seven most commonly engaged rights 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

3.8 Figure 3.1 shows the breakdown of human rights engaged by the legislation examined and substantively commented on by the committee in the reporting period. These statistics show similar trends to the previous reporting period with a balance between civil and political rights and economic social and cultural rights engaged.

Figure 3.1: Human rights engaged by legislation in 2015-16



Major themes

3.9 Three significant policy areas that attracted comment from the committee in the reporting period related to counter-terrorism and national security legislation, legislation made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*, and migration legislation.

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 2015-2016 period, bills not raising human rights concerns were listed in the committee's reports. For legislative 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*. Legislative instruments raising human rights concerns were identified on an exceptions basis in the committee's reports.

Counter-terrorism and national security legislation

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

- the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015;
- the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014;
- the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015; and
- the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014.¹²

3.11 Challenges encountered by the committee in undertaking its human rights assessment of significant changes to national security laws continued to include the expedited passage of measures through the Parliament and measures which sought to expand on existing elements of the national security regime that had not previously been subject to a foundational human rights assessment by the committee (because they pre-dated the establishment of the committee).

3.12 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 the right 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 right 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.

3.13 Legislative responses to issues of national security are generally likely to engage a range of human rights. In its *Thirty-second report of the 44th Parliament* the committee reiterated its previous comments 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

12 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016), Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, 27, and Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, 85; *Thirtieth report of the 44th Parliament* (10 November 2015), Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 82; *Thirtieth report of the 44th Parliament* (10 November 2015), Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, 133. The committee also relevantly examined the National Security Legislation Amendment Bill (No. 1) 2014, its consideration of which fell within the 2014-2015 reporting period, see: *Sixteenth Report of the 44th Parliament* (25 November 2014).

human rights obligations are reasonable, necessary and proportionate to the achievement of a legitimate objective.¹³

3.14 The committee continued to note that providing necessary powers to security and law enforcement authorities to detect and prevent acts of terrorism constitutes a legitimate objective for human rights purposes. Much of the committee's analysis in relation to the bills was targeted at ensuring that those powers were not broader than necessary and were subject to appropriate safeguards. That is, whether limitations on human rights were proportionate. However, the majority of the statements of compatibility for the bills fell short of the committee's expectations, with a number of limitations not being adequately justified for the purposes of international human rights law. The committee accordingly sought further information in relation to each of the bills to fully assess their compatibility with human rights.¹⁴

3.15 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 orders and preventative detention regimes; expansion of search and seizure powers and delayed notification warrants; providing for automatic loss of citizenship; increases to a number of criminal penalties and introduction of new offences (including the declared area offence); the cancellation of passports; and the cancellation of welfare payments for persons whose passports have been cancelled.

3.16 Overall, the timeliness of ministers in responding to committee concerns in this area continued to include significant delays, and some responses took a number of months to be received by the committee. At the end of June 2016, for example, the committee was still awaiting a further response in relation to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, which had been requested by 27 November 2015.¹⁵ 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 deliberations of members of Parliament or the debates of the Parliament more broadly.

13 See Parliamentary Joint Committee on Human Rights, *Thirty-second report of the 44th Parliament* (1 December 2015), Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, 3.

14 See, in particular, Parliamentary Joint Committee on Human Rights, *Thirty-second report of the 44th Parliament* (1 December 2015), Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, 6.

15 See Parliamentary Joint Committee on Human Rights, *Thirtieth report of the 44th Parliament* (10 November 2015). The committee had previously requested further information from the Attorney-General in its *Nineteenth Report of the 44th Parliament* (tabled on 3 March 2015). This response had been requested by 27 March 2015 and was not received until 17 September 2015.

Autonomous sanctions regimes

3.17 In previous reporting periods the committee had considered numerous instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*, and sought further information from the Minister for Foreign Affairs as to the compatibility of the instruments with multiple human rights.¹⁶ These instruments expanded or applied the operation of the sanctions regimes by designating, listing or declaring that a person or entity is subject to the sanctions regime, or by amending the regime itself. Designating, declaring or listing a person or entity has the effect that the assets of the designated person or entity are frozen and a person may be prevented from travelling to, entering or remaining in Australia. Additionally, sanctions can restrict or prevent the supply, sale or transfer or procurement of goods or services.

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

3.19 In light of these broad effects the committee also considered that it is necessary to assess whether the sanctions regimes as a whole are compatible with human rights, before it is able to assess the compatibility of individual instruments. In the 2013-14 reporting period, the committee wrote to the then new Minister for Foreign Affairs to draw her attention to the committee's consideration of these matters and to reiterate its earlier request for a review in relation to the sanctions regimes.¹⁷ Pending the minister's response, over this reporting period the committee deferred its consideration of numerous instruments relating to the sanctions regimes.¹⁸

3.20 The minister's response to the committee noted that she saw no need for the Department of Foreign Affairs to review¹⁹ the operation of the regimes.¹⁹ The

16 See Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013); *Seventh Report of 2013* (5 June 2013) and *Tenth Report of 2013* (26 June 2013) and *Annual Report 2013-14* (3 May 2016).

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

18 These included Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Iran) Amendment List 2016 (No. 1) [F2016L00047] (deferred in the committee's *Thirty-fourth report of the 44th Parliament*) and Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Iran) Amendment List 2016 (No. 2) [F2016L00117] (deferred in the committee's *Thirty-sixth report of the 44th Parliament*).

19 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 15.

committee therefore sought the Minister's specific advice in relation to a series of questions relating to the proportionality of the regimes and availability of safeguards to protect human rights.²⁰ The committee received a response to its request for further information on 21 March 2016 which was also the date that the 44th parliament was prorogued. Accordingly, the minister's response was reported on following the commencement of the 45th Parliament.²¹

Migration legislation

3.21 The committee continued to receive a number of bills and legislative instruments relating to migration, asylum seekers and refugees in the reporting period. The committee commented on a number of these bills and legislative instruments, including legislation implementing changes to the complementary protection framework; the protection visa application process; and visa cancellation powers.²²

3.22 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 hearing; the right to privacy; the right to health; 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 an effective remedy; the right to an adequate standard of living; and the right to equality before the law.

20 Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 15 and *Thirty-third Report of the 44th Parliament* (2 February 2016) 38.

21 See, Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (22 November 2016) 41.

22 See Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44th Parliament* (11 August 2015) to *Thirty-eighth report of the 44th Parliament* (3 May 2016) Migration Amendment (Regional Processing Arrangements) Bill 2015; Migration Amendment (Strengthening Biometrics Integrity) Bill 2015; Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461]; Migration Amendment (Complementary Protection and Other Measures) Bill 2015; Migration and Maritime Powers Amendment Bill (No. 1) 2015; Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015 [F2015L01461]; Migration Regulations 1994 - Specification of Required Medical Assessment - IMMI 15/119 [F2015L01747]; Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 [F2015L01961]; Migration Legislation Amendment (2015 Measures No. 4) Regulation 2015 [F2015L01962]; Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015 [F2015L00551]; Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014; Migration Amendment (Character and General Visa Cancellation) Bill 2014; Migration Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01696].

Non-refoulement

3.23 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.

3.24 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.

3.25 In its consideration of measures that engaged Australia's non-refoulement obligations, such as changes to the complementary protection framework with regard to considering the reasonableness of internal relocation, and extending statutory bars on protection visa claims or visa cancellation powers, the committee reiterated its previous statements that where a measure limits a human right, discretionary or administrative safeguards alone are likely to be insufficient for the purpose of a permissible limitation under international human rights law.²³ This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes, and are insufficient in and of themselves to satisfy the standards of 'independent, effective and impartial' review of non-refoulement decisions required to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.²⁴ The committee also noted that review mechanisms are important in guarding against the irreversible harm which may be caused by breaches of Australia's non-refoulement obligations.

Continuing and mandatory immigration detention

3.26 Certain measures considered by the committee over the reporting period engaged and limited the right to liberty and the prohibition against arbitrary detention by providing for continuing and mandatory immigration detention of certain individuals. These included amendments made by the Migration and Maritime Powers Amendment Bill (No. 1) 2015 to extend the statutory bar on

23 See Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) Migration Amendment (Complementary Protection and Other Measures) Bill 2015, 66; and Migration and Maritime Powers Amendment Bill (No. 1) 2015, 29.

24 For further detail relating to the requirements for the effective discharge of Australia's non-refoulement obligations see Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (2 February 2015), pp 49-51 and *Fourth Report of the 44th Parliament* (18 March 2014) pp 59-62 (both relating to the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013).

protection visa claims in the event of an unsuccessful removal from Australia and the expansion of visa cancellation powers.²⁵

3.27 The right to liberty applies to all forms of deprivations of liberty, including immigration detention. The committee noted that Australia's obligations with respect to the right to liberty require that any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require the detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary.

3.28 With respect to the above measures, in order to address the human rights compatibility issues raised, the committee recommended that the *Migration Act 1958* be amended to:

- provide an individual assessment of the necessity of detention in each individual case;
- provide each individual subject to immigration detention a statutory right of review of the necessity of that detention; and
- in the case of individuals detained for a lengthy period of time, provide a periodic statutory right of review of the necessity of continued detention.

Children

3.29 During the reporting period the committee considered numerous migration measures affecting the rights of children, including measures which limited the obligation to consider the best interests of the child and the rights of children to be heard in judicial and administrative proceedings.²⁶

3.30 Examples of these measures included: the removal of restrictions on the collection of personal identifiers from minors; registration of children adopted from countries that are not party to the Hague Convention as Australian citizens; bars on

25 See Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 29. See also Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) Migration Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01696], 218; and Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 149.

26 See Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44th Parliament* (11 August 2015) to *Thirty-sixth report of the 44th Parliament* (16 March 2016) Migration Amendment (Regional Processing Arrangements) Bill 2015; Migration Amendment (Strengthening Biometrics Integrity) Bill 2015; Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461]; Migration and Maritime Powers Amendment Bill (No. 1) 2015; Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015 [F2015L01461] and Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.

further protection visa applications; and the conversion of applications for permanent protection visas to applications for temporary protection visas.

3.31 Noting that, under the Convention on the Rights of the Child (CRC) nation state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration,²⁷ the committee sought information from the minister as to whether the measures were proportionate to their stated objectives, including whether there were sufficient safeguards in place to ensure that the best interests of the child would be taken into account by decision makers implementing the measures.

Scrutiny issues

3.32 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 the timeliness of legislation proponents in responding to the committee's requests for further information; re-introduced measures and statements of compatibility; and appropriations bills and federal financial relations determinations.

Timeliness

3.33 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 parliamentary deliberations.

3.34 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 within this time period. There is also no procedural requirement for the committee to have finally reported on a particular bill prior to its passage by the Parliament, even where this is due to the failure of a minister to respond to the committee's requests for information.

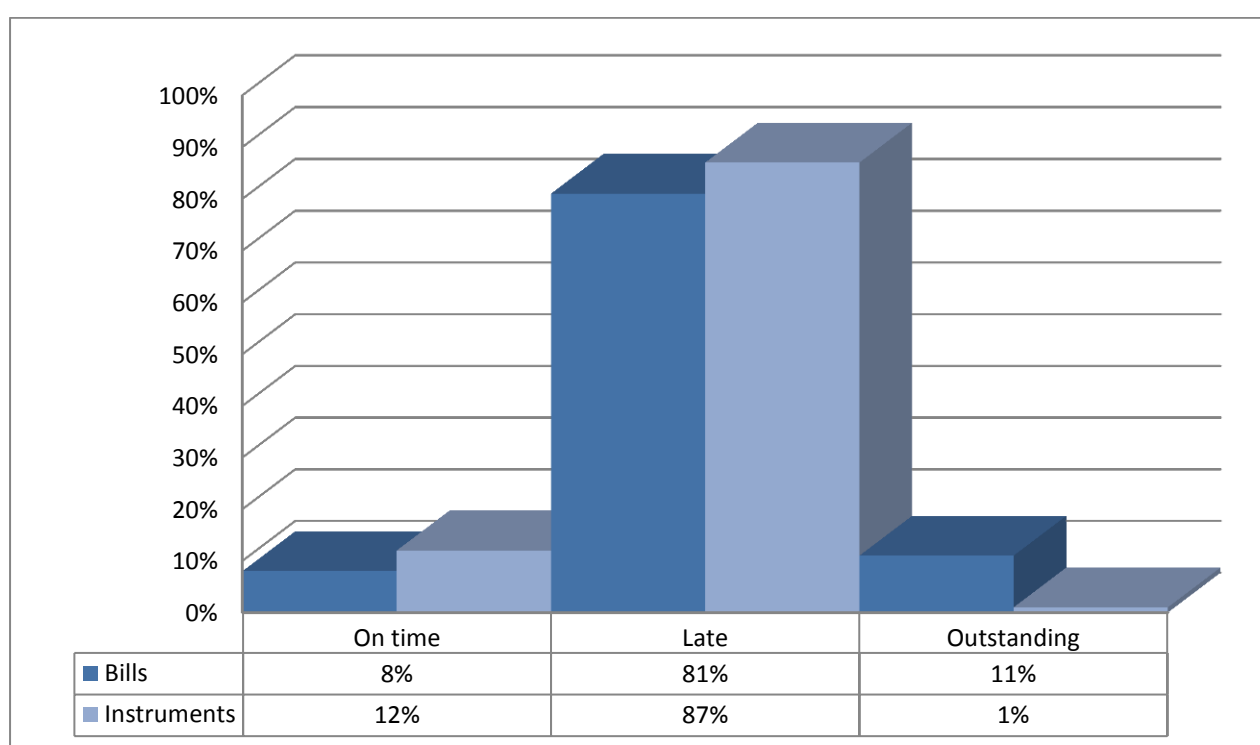
3.35 Timeliness continued to be a significant issue during the reporting period, with responses from legislation proponents often not being received until well after the committee's deadline and, on occasion, not until after the bill had passed (even when passage of the bill was not expedited) or the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

27 Article 3(1).

3.36 Responses were requested in relation to 26 bills in the reporting period.²⁸ Only two of these (8%) were provided to the committee by the requested date. Responses in relation to 21 bills (81%) were provided to the committee after the requested date. The remaining three bills (11%) still had responses outstanding at 9 May 2016 (see figure 3.2).

3.37 Responses were requested in relation to 68 legislative instruments in the reporting period.²⁹ Only 8 of these (12%) were provided to the committee by the requested date. Responses in relation to 59 legislative instruments (87%) were provided to the committee after the requested date. The remaining one legislative instrument (1%) still had a response outstanding at 9 May 2016 (see figure 3.2).

Figure 3.2: Percentage of responses received by due date



28 A response was also requested in relation to five Acts considered as part of the committee's inquiry report, *2016 Review of Stronger Futures measures* (16 March 2016). A government response to this inquiry report has not yet been received.

29 A response was also requested in relation to nine legislative instruments considered as part of the committee's inquiry report, *2016 Review of Stronger Futures measures* (16 March 2016). A government response to this inquiry report has not yet been received.

Previously introduced measures

3.38 During the reporting period numerous bills reintroduced measures which had previously been examined and commented on by the committee.³⁰ 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. During the previous reporting period, 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.³¹

3.39 The committee continued to draw its expectations to the attention of ministers throughout the reporting period, particularly where the information previously provided to the committee had enabled it to conclude its consideration of the relevant measure.³² The committee also noted that where a statement of compatibility in relation to a previously introduced measure does not identify the measure as engaging and/or limiting rights previously identified by the committee, despite the minister's previous dialogue with the committee on these measures, the scrutiny dialogue between the committee and proponents of legislation is less effective.³³

30 See Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44th Parliament* (11 August 2015) to *Thirty-eighth report of the 44th Parliament* (3 May 2016) Fairer Paid Parental Leave Bill 2015; Migration Amendment (Regional Processing Arrangements) Bill 2015; Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015; Social Services Legislation Amendment (Youth Employment) Bill 2015; Crimes Legislation Amendment (Harming Australians) Bill 2015; Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2015; Omnibus Repeal Day (Spring 2015) Bill 2015; and Counter-Terrorism Legislation Amendment Bill (No. 1) 2015.

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

32 See, for example, Parliamentary Joint Committee on Human Rights, *Twenty-fifth report of the 44th Parliament* (11 August 2015) Fairer Paid Parental Leave Bill 2015, 55; and *Twenty-eighth report of the 44th Parliament* (17 September 2015) Social Services Legislation Amendment (Youth Employment) Bill 2015, 36-37.

33 Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) Social Services Legislation Amendment (Youth Employment) Bill 2015, 36-37.

Appropriations bills and federal financial relations determinations

3.40 In previous reporting periods the committee set out its initial views on the human rights implications of appropriation bills.³⁴ The committee previously explained that compliance with Australia's obligations to progressively realise economic, social and cultural rights using the maximum of resources available is reliant on government allocation of budget expenditure. Further, specific appropriations may involve reductions in expenditure which amount to retrogressive measures or limitations on economic, social and cultural rights which need to be justified for the purposes of international human rights law. The appropriation of funds thus facilitates the taking of actions which both effect the progressive realisation of, and the failure to fulfil, Australia's obligations under the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

3.41 In this early analysis the committee recommended that human rights impact assessments be expressly incorporated in portfolio budget statements to ensure that human rights are properly reflected in the budgetary process. The Minister for Finance set out in dialogue with the committee that he considered requiring human rights impact statements to be included in portfolio budget statements to be 'neither practicable nor appropriate'.³⁵ In later analysis, where the committee reiterated this recommendation and the Minister for Finance in response again considered that changes to existing processes were not required, the committee concluded its analysis for future re-examination.³⁶

3.42 In its *Twenty-eighth report of the 44th Parliament* the committee examined a number of Federal Financial Relations Determinations which specify the amounts to be paid to the states and territories to support a number of outcomes and projects or rewards for nationally significant reforms.³⁷ In its assessment of these determinations the committee referred to its previous analysis of appropriations bills and set out again how proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights.

3.43 In dialogue with the committee in relation to these determinations, the Treasurer provided additional information which allowed the committee to conclude

34 See Parliamentary Joint Committee on Human Rights, *Third report of 2013* (13 March 2013); *Seventh report of 2013* (5 June 2013) xi; *Third report of the 44th Parliament* (4 March 2014); *Eighth report of the 44th Parliament* (24 June 2014) 32; *Twentieth report of the 44th Parliament* (18 March 2015) 5-9; and *Twenty-third report of the 44th Parliament* (18 June 2015) 13-17.

35 Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014) 32.

36 Parliamentary Joint Committee on Human Rights, *Twenty-third report of the 44th Parliament* (18 June 2015) 13-17.

37 Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 10-14.

that the determinations would not constitute a retrogressive measure for the purposes of international human rights law and were therefore compatible with Australia's international human rights obligations.³⁸ While the nature of federal financial relations determinations may allow for a more straightforward assessment of the interaction of such legislation with human rights than it may for appropriations bills, the willingness of legislation proponents to engage with the committee and its mandate can result in effective outcomes and the committee will continue to engage with the Minister for Finance in its consideration of appropriations bills in the future.

Statements of compatibility

3.44 During the reporting period, many statements of compatibility provided sufficient assessments of limitations on human rights, which enabled the committee to conclude its scrutiny of specific legislation without having to request further information from the legislation proponent.

3.45 For example, in his tabling statement in the House of Representatives on 23 February 2016, the committee's then Chair Mr Philip Ruddock MP drew members' attention to a legislative instrument made by the Minister for Employment, Senator Cash, titled Social Security (parenting payment participation requirements – classes of persons) Specification 2016 (No. 1). The instrument limited certain parenting payments to particular classes of persons, with the objective of encouraging them to progress towards and achieve beneficial education and employment outcomes. The statement of compatibility for the instrument identified the limits this placed on the right to social security and other rights, and provided an informative and evidence-based analysis that clearly addressed each element of the committee's analytical framework. The Chair noted that a statement of this quality allowed the committee to accept the conclusion that the instrument was compatible with human rights without the need to write to the minister seeking further information.

3.46 However, there remained considerable room for improvement in terms of the quality of statements of compatibility in general. In his tabling statement on 8 September 2015, the committee's Chair emphasised the importance of ensuring that statements of compatibility for bills and instruments provide considered and evidence-based assessments of how any potential limitations of human rights are justified. In this respect, the Chair noted that the statements of compatibility for some of the bills considered, for example, in the committee's *Twenty-Seventh Report of the 44th Parliament* fell short of the committee's expectations. For example, the Chair noted the statement of compatibility for the Social Security Legislation Amendment (Debit Card Trial) Bill 2015, which provided no empirical evidence of how the proposed measures were likely to be effective in achieving their objective.

38 Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th Parliament* (23 February 2016) 115-119.

The provision of this information was necessary because income management schemes, while having a legitimate objective for the purpose of international human rights law, necessarily involve limitations on a number of human rights, such as the right to a private life and the right to equality and non-discrimination. The committee's mandate therefore requires analysis of evidence indicating whether the limitations will be effective to achieve, and proportionate to, the stated objective.

Additional work of the committee

Stronger Futures inquiry

3.47 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. This inquiry process was conducted during the reporting period.

3.48 The committee wrote to a number of individuals and organisations inviting submissions to the inquiry by 10 October 2014. Further details regarding the inquiry and its background were also made available on the committee's website. Twenty-three submissions were subsequently accepted, published, and considered in conjunction with the final report.

3.49 The committee also corresponded with the Minister for Indigenous Affairs a number of times throughout the inquiry process, and requested specific information to allow it to further analyse the ongoing compatibility of the measures.³⁹

3.50 In its inquiry report the committee examined a number of matters, including some not dealt with in its previous consideration of the measures, such as customary law in bail and sentencing decisions, food security, and land reform measures. The majority of the recommendations, however, related to the measures to address alcohol abuse, the income management scheme, and the School Enrolment and Attendance through Welfare Reform Measure.

3.51 The committee tabled its final inquiry report on 16 March 2016.⁴⁰ This final report contained seven recommendations aimed at improving the human rights compatibility of the legislation.⁴¹ The committee is yet to receive a formal government response to this report.

39 The minister's responses to the committee are contained at appendix 3 of the final inquiry report. See Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) Appendix 3.

40 See Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/strongerfutures2/Final_report.

41 The legislation considered in the final inquiry report includes five Acts and nine legislative instruments, and is listed at Appendix 1 of that report.

Mr Ian Goodenough MP

Chair

Appendix 1

Outstanding correspondence

As at 9 May 2016, 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
Road Safety Remuneration Repeal Bill 2016	Employment	38/44	3/05/2016

Private 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
Foreign Death Penalty Offences (Preventing Information Disclosure) Bill 2015	Mr Palmer MP	24/44	17/07/2015
Privacy Amendment (Protecting Children from Paparazzi) Bill 2015	Mr Katter MP	32/44	18/12/2015
Flags Amendment (Protecting Australian Flags) Bill 2016	Mr Christensen MP	36/44	1/04/2016

Committee inquiries

As at 9 May 2016, the committee was still awaiting responses to its inquiries into the following legislation:

Inquiry	Portfolio	Report tabled
Examination of the <i>Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012</i> and related legislation	Immigration and Citizenship	19 June 2013
Review of <i>Stronger Futures in the Northern Territory Act 2012</i> and related legislation	Indigenous Affairs	16 March 2016

Appendix 2

Guidance Note 1 and Guidance Note 2

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

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

Background

Australia's human rights obligations

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

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

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

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

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

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

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

Civil and political rights

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

Economic, social and cultural rights

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

Limiting a human right

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

Prescribed by law

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

Legitimate objective

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

Rational connection

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

Proportionality

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

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

¹ Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

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

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

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

The committee's approach to human rights scrutiny

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

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

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

The committee's expectations for statements of compatibility

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

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

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

³ The Attorney-General's Department guidance may be found at <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/Join/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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