

Parliamentary Joint Committee on Human Rights

Attorney-General's Department

Hearing date: 20 October 2023

Question date: 26 October 2023

Josh Burns asked the following question:

1. Noting the Legislation Handbook states that Departments must undertake their consultation with departments as mentioned in OPC's Drafting Direction No. 4.2, how often do departments consult with AGD before seeking Cabinet approval?
2. At what stage of the drafting process does OPC usually refer matters to AGD? Is it when draft instructions are first received or is it more likely to be once the bill is largely finalised?
3. If AGD considers proposed legislation may risk being incompatible with human rights, and advises the relevant department accordingly, what are the consequences for the department in proceeding without amendment? Is AGD's advice provided to anyone other than the relevant department and OPC?
4. Drafting Direction 4.2 states that drafters are not expected to know about the range of international agreements to which Australia is a party or about the content of any specific agreements. Is training in human rights provided to OPC drafters by AGD? If not, what processes are in place to ensure that potential human rights law issues are correctly identified?
5. Drafting Direction 4.2 advises that legislation should be referred to the Human Rights Unit (HRU) of AGD where legislation might discriminate on the basis of a protected attribute; is specifically directed to people who may be disadvantaged or vulnerable; or might infringe civil, political or other human rights relating to privacy or freedom of speech. It also advises that legislation must be referred to the Office of International Law (OIL) if it involves an international law issue, including a limitation on a right under the core international human rights treaties (e.g. privacy or discrimination). The matters that require referral to the HRU appear to overlap with the matters required to be referred to OIL. Do both the OIL and the HRU give advice in relation to the same provision? How often are such human rights concerns referred to the OIL compared to the HRU?
6. Do all staff working in the Human Rights Unit of AGD have qualifications and expertise in international human rights law? If not, are they required to attend regular training to improve knowledge in the area of international human rights law?
7. The AHRC published a position paper in 2021 on federal discrimination law reform. A number of suggested reforms were implemented as part of the response to the Respect@Work report, but there are others that are yet to be responded to (the AHRC identified this in its supplementary submission). Is AGD implementing these suggested reforms to antidiscrimination law?
8. We understand that AGD is undertaking a review into an appropriate cost model for Commonwealth anti-discrimination laws in response to a recommendation from the Respect@Work report. When will the review be completed? What model did most submissions suggest should be adopted?

Matt O’Sullivan asked the following questions:

9. How would the establishment of a human rights act, as proposed by the AHRC, avoid entrenching a ‘culture of complaint’ in Australia – as the current Attorney-general belatedly recognised in 2013 when he decided not to proceed with the Human Rights and Anti-Discrimination Bill?
10. The rights set out in the AHRC’s proposed Human Rights Act include “freedom of expression” and “freedom of thought, conscience, religion and belief”. It also includes “privacy and reputation” and “freedom from discrimination”. How will you resolve the obvious inconsistencies between these competing rights in a way that doesn’t just lead to litigation?
11. Presumably the rights to be protected through an Act like the Human Rights Act that the AHRC advocates for would need to be supported by Commissioners who have important oversight and education functions. Is that right?

The response to the question is as follows:

1. The Attorney-General’s Department (the Department) is regularly consulted on human rights and other issues at all stages of the policy development process, including through legislative drafting and Cabinet processes.
2. The Office of Parliamentary Counsel (OPC) sends a Bill to the department for review in accordance with Drafting Direction 4.2 once the policy and the draft Bill is sufficiently developed. When a Bill has been provided to the department for review, officers will review the text and, in many cases, contact the drafting instructors within the relevant department to discuss the policy intent and the human rights implications of the proposed drafting. Following this process, comments are returned to the relevant OPC drafters and drafting instructors. In addition to providing specific comments on the drafting, the Human Rights Branch will often suggest the rights that should be considered in the Statement of Compatibility.
3. Comments from the Attorney-General’s Department about a Bill’s potential human rights implications are provided to OPC and the instructing department for consideration and action as necessary. Where the Office of International Law identifies risks that a Bill may be inconsistent with Australia’s international human rights law obligations, the instructing department is advised to seek formal legal advice from (depending on the issue) the Office of International Law, the Australian Government Solicitor or another legal provider. The department may, in appropriate cases, escalate discussions to senior levels in the instructing department and may brief the Attorney-General’s office.
4. The department does not provide human rights law training to OPC.
5. The Human Rights Branch and the Office of International Law have different responsibilities. The Human Rights Branch focuses on domestic human rights issues, including policy interactions with Australia’s anti-discrimination legislation and reviewing Statements of Compatibility. OIL is responsible for advising on Australia’s international obligations, including international human rights law. It is common for bills to be referred to both Human Rights Branch and the Office of International Law.
6. Staff working in the Human Rights Branch have a range of relevant skills and qualifications.

7. Any reforms to anti-discrimination laws are a matter for Government.
8. The review has concluded and advice has been provided to Government which has been informed by the submissions received by the department. The department has been developing draft legislation to support the Government's chosen model.
- 9, 10 and 11. A federal Human Rights Act, including the content and operation of any such Act, is a matter for Government.