

Introduction

Role of the committee

1.1 The Parliamentary Joint Committee on Human Rights assists the Parliament in undertaking its legislative function by examining and reporting on the compatibility of bills, legislative instruments and Acts with Australia's international human rights obligations.

Functions and powers of the committee

1.2 The committee's functions are set out in section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act).¹ The committee's mandate is to:

- examine bills and legislative instruments for compatibility with human rights;
- examine existing Acts for compatibility with human rights; and
- undertake inquiries on any human rights matters referred to it by the Attorney-General.

1.3 The Act attaches no priority to any of the committee's functions. However, the explanatory memorandum to the Human Rights (Parliamentary Scrutiny) Bill 2011 states that the committee's examination of bills and legislative instruments is primarily a traditional scrutiny function and will be the major activity of the committee.²

1.4 As the explanatory memorandum notes, the committee is able to inquire more thoroughly into bills and legislative instruments by calling for submissions, holding public hearings and examining witnesses when it considers this appropriate. The committee is able to determine the manner in which it performs its scrutiny function to ensure that reports on the compatibility of bills and legislative instruments with human rights are provided to Parliament in a timely manner.

1.5 The powers and proceedings of the committee are set out in the committee's resolution of appointment.³

1 A copy of the Act is available at:

<http://www.comlaw.gov.au/Details/C2011A00186>

2 A copy of the explanatory memorandum is available at:

<http://www.comlaw.gov.au/Details/C2010B00216/Explanatory%20Memorandum/Text>.

3 The committee's resolution of appointment is available on its website:

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Role_of_the_Committee

Definition of human rights

1.6 Human rights are defined in section 3 of the Act to mean the rights and freedoms recognised or declared by seven international human rights treaties ratified by Australia. These are the:

- 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 All Forms 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).

Establishment of the committee

1.7 The passage of the Act and the establishment of the committee in March 2012 was part of a concerted effort to enhance the understanding of, and respect for, human rights in Australia. The establishment of the committee was a key element of Australia's Human Rights Framework, which was launched by the government on 21 April 2010. The Framework and the Act clearly intended that the committee would play a key role in enhancing the understanding of, and respect for, human rights in Australia.

Committee membership

1.8 The committee has ten members: five appointed by the Senate and five appointed by the House of Representatives.⁴

1.9 The membership of the committee as at 30 June 2013 was :

- Mr Harry Jenkins MP (Chair)
- Mr Ken Wyatt MP (Deputy Chair)
- Senator the Hon Kim Carr
- Mr Graham Perrett MP
- Senator Anne Ruston

4 See section 5 of the *Human Rights (Parliamentary Scrutiny) Act 2011* and resolution 1(a) of the committee's Resolution of Appointment, which provides that five of the committee's members are to be nominated by the Government, four by the Opposition and one by any minority group or independent Senator.

- Senator Dean Smith
- Senator the Hon Ursula Stephens
- Mr Dan Tehan MP
- Senator Penny Wright
- Mr Tony Zappia MP

1.10 A full list of members since the committee's establishment is provided at Appendix 1.

The committee's mode of operation

1.11 The committee examines all bills and legislative instruments as they come before the Parliament. This includes legislative instruments that are exempt from the disallowance process prescribed by the *Legislative Instruments Act 2003* (LIA).⁵ The committee's aim is to adopt a non-partisan and consensual approach to the consideration of whether a bill or a legislative instrument may raise any human rights concerns.

Work practices

1.12 The committee has established a regular scrutiny and reporting cycle. The committee meets when both the House of Representatives and the Senate are sitting to consider bills and instruments that have come before the Parliament since it last reported. The committee tables a regular scrutiny report each sitting week in the House and the Senate.

1.13 The committee seeks to conclude its examination of legislation while it is still before the Parliament. In the case of bills, the committee undertakes its work around the process for the introduction into, and passage of bills through, the Parliament.

1.14 The committee endeavours to complete its consideration of legislative instruments within the disallowance timeframe. In the event that the committee's concerns cannot be resolved during this timeframe, the committee may give a notice of motion to disallow the instrument as a precautionary measure.⁶

Legal advice

1.15 The committee is assisted by an external legal adviser, who is appointed by the committee with the approval of the Presiding Officers, and a secretariat, which includes two human rights lawyers. The committee's current external legal adviser is Professor Andrew Byrnes. Professor Byrnes is a professor of international law at the University of New South Wales.

Hearings, private briefings and submissions

1.16 While the speed with which the committee must work means that its analysis of legislation is primarily done on the papers, from time to time the committee has found it beneficial to hold public hearings. The committee held three

5 The LIA 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 LIA (section 7) or is otherwise not subject to disallowance (section 42).

6 On 18 June 2013 the committee took this step in relation to the Customs (Drug and Alcohol Testing) Regulation 2013. As the committee had not received a response to its concerns, notice was given in order to give the committee adequate time to consider the compatibility of the instrument, pending the Minister's response. See the committee's *Sixth Report of 2013*, pp 139 – 146; *Seventh Report of 2013*, pp 59 – 62 and *Tenth Report of 2013*, pp 45 – 47.

public hearings during the year: one as part of its examination of the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012 and two as part of its examination of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* and related legislation. In the case of the Social Security Bill, the committee's hearing provided an avenue for it to place evidence regarding the human rights issues raised by the bill on the public record, and therefore available to the Parliament, in the shortest possible timeframe.

1.17 While the committee's preference is to conduct as much of its business as possible in public, the committee has found it helpful to seek private briefings to assist it in developing its understanding of legislation and human rights principles. The committee has held five private briefings during the year and is grateful to all those who made time available to contribute to these. The committee is particularly grateful to representatives from scrutiny committees, organisations and individuals who met privately with the committee during its formative stages. The advice and good will extended to the committee by so many has greatly assisted the committee in formulating its own approach to its task.

1.18 As a general rule, the committee does not invite submissions on the legislation it considers. However, the committee welcomes correspondence and may publish correspondence where this is relevant to a particular matter under consideration. The committee draws on evidence published by other parliamentary committees where relevant to its own work.

Prioritising the committee's work

1.19 The committee categorises bills and instruments into three groups according to the level of human rights scrutiny each bill or instrument would appear to require:

- legislation that does not appear to raise human rights concerns;
- legislation that potentially raises human rights concerns; and
- legislation that raises human rights concerns that the committee considers require closer examination.

Legislation that does not appear to raise human rights concerns

1.20 This category includes legislation that the committee is satisfied does not appear to raise human rights concerns. Such legislation may well engage human rights. However, the committee has been able to satisfy itself, on the face of the legislation and the statement of compatibility, that the legislation is unlikely to give rise to human rights incompatibility.

1.21 In many cases, these bills and instruments are accompanied by a statement of compatibility and other supporting documentation that clearly sets out the objective of the legislation and provides adequate justification for any proposed limitations.

1.22 However, where the committee is satisfied that the legislation does not warrant further scrutiny, but the statement of compatibility does not adequately meet the committee's expectations, the committee will write to the sponsor in an advisory capacity.

Legislation that potentially raises human rights concerns

1.23 This category includes bills and instruments that the committee is unable to form a view on compatibility with human rights without further information. In such cases, the committee writes to the sponsor of the bill or instrument setting out its concerns and requesting the information it requires to complete its examination of the legislation.

1.24 Where the committee considers that such legislation may raise human rights concerns, it will set out its preliminary consideration in its report, identifying those aspects of the legislation that may give rise to human rights concerns and any additional information the committee may require, to assist the sponsor of the legislation to respond to the committee's concerns.

1.25 The committee's practice is to publish the response to such requests in a subsequent report together with its conclusions with regard to human rights compatibility. For the most part responses provide information that is able to allay the committee's concerns.⁷ In many cases, the committee has observed that it would have been helpful if the information provided in the response had been included in the original statement of compatibility.

1.26 On occasion, the response does not fully address the committee's concerns. In this case the committee may seek further clarification from the sponsor, or may determine that it is unable to conclude that the legislation is compatible with human rights.

Legislation that raises human rights concerns that the committee considers require closer examination – thematic inquiries

1.27 Some legislation raises human rights concerns of such significance or complexity that the committee may decide to examine it more closely, either individually or as part of a package of legislation.

1.28 To date, the committee has applied this approach to its examination of one bill and two packages of legislation:

- Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012 [Reports 4/2012 and 5/2013];

7 A list of responses to committee comments which remained outstanding at 30 June 2013 is at Appendix 2. Responses received after 24 June 2013 will be considered by the committee in the 44th Parliament.

- *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* and related legislation [Report 9/2013]; and
- *Stronger Futures in the Northern Territory Act 2012* and related legislation [Report 11/2013].

1.29 While the committee's examination of such legislation may extend beyond its consideration by the Parliament, the committee considers that in some cases there is significant value in exploring human rights principles and their application in an Australian context even after the legislation has been passed. The two principal benefits of this approach are that it enables the committee to:

- assess human rights compatibility on the basis of an understanding of the complete legislative package; and
- contribute to a broader understanding of thematic human rights issues while still maintaining a practical focus.

Working with other parliamentary committees

1.30 The committee recognises that the consideration of the human rights implications of legislation is not solely the responsibility of this committee. The committee appreciates that its work intersects with the work of other parliamentary committees and that it can usefully leverage off this shared responsibility.

1.31 During the review period, the committee focussed on working more effectively with other parliamentary committees, particularly where they have been charged with examining particular bills and instruments. The committee's aim is to complete its work and draw it to the attention of other committees in a timely way. Following the tabling of each of its reports, the committee writes to those committees that may have an interest in legislation considered in the report.

Senate scrutiny committees

1.32 The committee recognises the importance of working effectively alongside the Senate Scrutiny of Bills Committee and the Senate Regulations and Ordinances Committee. While each of the three legislative scrutiny committees has its own distinct focus, there is a high degree of complementarity within their work.

1.33 Soon after the establishment of the committee, the Chair and Deputy Chair met with both Senate scrutiny committees and the three committees agreed to establish a practice of writing to each other to draw attention to comments on particular bills and instruments. On an informal level the three secretariats work closely together within the Senate Legislative Scrutiny Unit.

Other parliamentary committees

1.34 The committee routinely monitors the work of other parliamentary committees. Where possible, the committee endeavours to expedite its own consideration of bills and instruments where this may assist the work of other committees. For example, the committee brought forward its consideration of the

Australian Sports Anti-Doping Authority Amendment Bill 2013 to ensure that the Senate Rural and Regional Affairs and Transport Legislation Committee, to which the bill had been referred for inquiry and report, would have the benefit of the committee's comments early in its own consideration of the bill.⁸ Similarly, the committee resolved to release its comments on the media reform package of bills ahead of the formal tabling of its *Fourth Report of 2013*, to assist the work of the Senate Environment and Communications Legislation Committee and the House of Representatives Infrastructure and Communications Committee. The committee also noted that its report may be of relevance to the Joint Select Committee on Broadcasting Legislation.⁹

1.35 At the same time, the committee closely monitors the work of other committees so that it can draw on this in its own work. For example, in considering the Fair Work Amendment (Small Business-Penalty Rates Exemption) Bill 2012 the committee noted that the bill was being considered by the Senate Education, Employment and Workplace Relations Legislation Committee and decided to defer finalising its views on the bill to take account of that committee's report.¹⁰

1.36 In the case of each of its thematic inquiries, the committee has found the work of other committees valuable in gaining an understanding of the policy and regulatory context of the legislation.

1.37 In February 2013, the committee resolved to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the exposure draft of the Human Rights and Anti-Discrimination Bill 2012.¹¹ The committee recognised that, while it would have an opportunity to comment on the bill when it was formally introduced into Parliament, it was appropriate and timely for it to make some comments on human rights concerns while amendments to the exposure draft of the bill were under consideration. The committee considers that this may be an approach the committee could consider adopting with regard to future parliamentary inquiries into exposure draft legislation.

8 See the committee's *Second Report of 2013*.

9 See executive summary to the committee's *Fourth Report of 2013*, p x.

10 See the committee's *Second Report of 2012*, p 11; *Seventh Report of 2012*, p 41 and *Sixth Report of 2013*, p 212.

11 The submission is available on the committee's website and on the Senate Legal and Constitutional Affairs Committee's website (submission number 595) at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2010-13/antidiscrimination2012/submissions

Committee publications and resources

Reports

1.38 The committee has tabled 18 legislative scrutiny reports during the period to 30 June 2013. All of these reports have been consensus reports.

1.39 The committee's reports are available on the committee's website.

Tabling statements and speeches

1.40 It has been the Chair's practice to deliver a tabling statement at the tabling of each report. These statements provide a summary of the legislation considered in the report and highlight key issues identified. The Chair's statements are available on the committee's website.

1.41 The Chair and members of the committee have had the opportunity to speak to a variety of audiences at seminars and conferences over the year. The committee has found this a valuable means of raising awareness about the work of the committee and instructive for the variety of feedback and perspectives gathered on each occasion. A list of all conferences and seminars is provided at Appendix 3. All speeches are available on the committee's website.

Practice notes

1.42 The Chair's first statement to the House in June 2012 noted the very comprehensive and useful human rights source material prepared by the Attorney-General's Department and available on the Department's website. The Chair indicated it was the committee's intention to provide guidance material of its own to complement this material. To date the committee has published two practice notes (at Appendix 4):

- Practice Note 1 – Committee's approach to human rights scrutiny and expectations for statements of compatibility; and
- Practice Note 2 (interim) – Civil Penalties

1.43 The committee intends to publish further practice notes in the future.

Impact of committee's work

1.44 The committee considers that its work to date has contributed to the elevation of the consideration of human rights within the Parliament and in the development of policy and legislation.

1.45 Through its regular scrutiny reports and tabling statements, and its cooperation with other parliamentary committees, the committee is helping to ensure that human rights issues are considered in a systematic and consistent way in the consideration of legislation by the Parliament. For example, the committee's

work has been referenced in debates on bills and in parliamentary reports of inquiries on specific bills and instruments.¹²

1.46 There are positive signs that the committee's work is being taken into account in the development and refinement of legislation. Departments and agencies are increasingly aware of the committee's expectations regarding the content of statements of compatibility. More significantly, a number of Ministers have undertaken to review procedures and make amendments to legislation in response to the committee's comments.¹³

1.47 More broadly, the committee notes that public comments by a range of non-government organisations (NGOs) and stakeholders indicate that the committee's work is contributing to debate on human rights issues.

12 See for example the Senate Rural and Regional Affairs and Transport Legislation Committee's report of its inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013 available online at:
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/Completed%20inquiries/2012-13/sportsantidoping/index

13 See for example responses received on the following bills in the committee's *Tenth Report of 2013*: Public Interest Disclosure Bill 2013, pp 159-162; Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, pp 101-107; Australian Public Service Commissioner's Directions 2013, pp 183-184; Fee Rules 2013, pp 198-199; and the Prime Minister's response in relation to the Marine Safety (Domestic Commercial Vessel) National Law Amendment Bill 2013, p 151.

Analysis and interpretation of human rights

1.48 The committee recognises that the nature and scope of the rights and freedoms expressed in the seven human rights treaties requires some interpretation on the committee's part. The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can provide useful sources. Importantly, the committee considers that its interpretation of these rights and freedoms must have relevance within an Australian context.

The committee's analytical framework

1.49 In undertaking its consideration of bills and instruments the committee has been mindful of the importance of establishing a robust analytical framework. The committee devoted some time at the beginning of its work to consider how it would approach its examination of legislation and the use it would make of key sources on the application of the specific human rights and principles engaged by bills and instruments.

Applying the definition of human rights in the Act

1.50 The committee's analysis of legislation begins with the two main human rights treaties: the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). These covenants cover all the key civil and political and economic, social and cultural rights. For the most part, the five other treaties expand or flesh out these rights in a more detailed way.¹⁴ This approach is consistent with the approach the Attorney-General's Department has adopted in providing support to executive departments and agencies.

1.51 Approaching its work in this way, the committee has come to recognise that, while on the face of it, the definition of human rights in the Act appears to set a much greater scrutiny task for this committee than other similar committees in Australia and overseas, in reality the key difference is that this committee's mandate expressly extends to economic, social and cultural rights.

Assessing compatibility with human rights

1.52 Consistent with approaches adopted by human rights committees in other jurisdictions, the committee assesses legislation for its potential to be incompatible with human rights, rather than seeking to determine whether particular legislative provisions could be interpreted as compatible with human rights. Having identified that the legislation engages human rights, the committee's starting point is to consider whether the legislation could be applied in ways which would breach human rights (including whether human rights could be breached as a result of the

14 This approach is summarised in the table at Appendix 5.

exercise of a legislative discretion) and not whether a consistent meaning may be found through the application of statutory interpretation principles. The latter is a task more appropriately left for the courts in the context of enforcing rights.

1.53 Where a provision appears to limit rights, the committee considers three key questions:

1. whether the limitation is aimed at achieving a legitimate objective;
2. whether there is a rational connection between the limitation and that objective; and
3. whether the limitation is proportionate to that objective.

1.54 The committee considers that this approach has provided it with a workable and credible strategy for scrutinising compatibility across the seven human rights treaties, something that the committee considered challenging when it was first established.

The role of case law

1.55 The committee considers international and comparative case law in its analysis of human rights principles, where appropriate. The committee does not generally include extensive references to this material in its reports, preferring instead to base its comments on the legal principles derived from human rights jurisprudence.

Statements of compatibility

1.56 Since 4 January 2012, the Act has required that each new bill and disallowable legislative instrument be accompanied by a statement of compatibility.¹⁵ As well as being an obvious starting point for the Parliament's consideration of human rights in the legislative process, the committee considers that statements of compatibility have the potential to significantly increase transparency and accountability in the development of policy and legislation.

1.57 While statements of compatibility provide an important starting point for the committee's work, the committee does not accept statements at face value. It endeavours to look beyond the stated intention of the legislation to consider its likely practical effect and whether decisions to limit rights are evidence based. Where further information is required to determine this, the committee will write to the sponsor of the legislation seeking further information to assist its consideration of the legislation.

The committee's expectations

1.58 From the outset the committee has adopted what it hopes is a constructive approach to statements of compatibility and has set out the following expectations:

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

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- statements should read as succinct self-contained documents capable of informing debate within the Parliament;
 - they should contain an assessment of the extent to which the legislation engages human rights;
 - where limitations on rights are proposed, the committee expects the statement to set out clear and adequate justification for each limitation and demonstrate that there is a rational and proportionate connection between the limitation and a legitimate policy objective.¹⁶

1.59 The committee considers that the preparation of a statement of compatibility should be the culmination of a process that commences early in the development of policy. Statements of compatibility should reflect the assessment of human rights that took place during the development of the policy and the drafting of the legislation. They should not be drafted after the fact and retrofitted to the legislation.

1.60 Best practice suggests that statements of compatibility should accompany all bills and instruments, whether they fall within the requirement in the Act or not. The fact that draft legislation predated the requirement for a statement of compatibility, or is exempt from that requirement, does not prevent the committee from considering its human rights compatibility. In such circumstances the committee will write to the sponsor of the legislation and invite them to provide information regarding the human rights compatibility of the legislation.

1.61 The committee also considers that it will generally be good practice to provide a compatibility statement for government amendments to bills, or to update the original statement, where practicable, and particularly where the amendments could give rise to human rights concerns.

Quality of statements of compatibility

1.62 The requirement to produce a statement of compatibility is having tangible results and the quality of statements of compatibility has improved over the reporting period. The committee notes that some statements of compatibility explicitly refer to the committee's previous comments on similar human rights issues and others appear to be expressed in a manner that is mindful of the committee's expectations.¹⁷

1.63 In tabling its *Seventh Report of 2013*, the Chair noted that the overall quality of statements of compatibility for legislative instruments had improved significantly. In its *Eighth Report of 2013*, the committee highlighted some good examples of

16 See the committee's *Practice Note 1*.

17 See for example the Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012 considered in the committee's *First Report of 2013*, pp 48-56.

statements of compatibility that set out the justification for certain limitations on rights clearly and concisely. For example, the committee noted that the statement provided with the Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013 was exemplary. While the committee raised some questions in relation to certain aspects of the bill, for the most part any limitations to be imposed by the bill were adequately explained in the statement of compatibility.¹⁸

18 Executive Summary to *Eighth Report of 2013* p x, see also the references to the Charities Bill 2013 and Migration Amendment (Offshore Resources Activity) Bill 2013.

Work of the committee in 2012-13

1.64 During the period from 18 June 2012 until 30 June 2013 the committee considered 289 bills (and Acts) and 1,924 legislative instruments. The committee considered that 152 bills (and Acts) and 1,839 instruments did not raise human rights concerns. Of these, the committee wrote to the sponsors of 12 bills and 464 instruments in an advisory capacity. The committee identified 137 bills (and Acts) and 85 legislative instruments for which further information was required to assist the committee with its assessment of human rights compatibility.

Commonly engaged rights

1.65 The human rights issues identified in legislation during this period were spread across both civil and political rights and economic, social and cultural rights. The rights that arose most regularly included:

- right to privacy;¹⁹
- fair trial rights;²⁰
- right to social security;²¹
- right to work and rights in work;²²
- right to freedom of expression;²³
- right to health;²⁴ and
- right to non-discrimination.²⁵

1.66 The following sections consider the legislative and policy context in which each of these rights are commonly engaged and the types of concerns that the committee identified in the reporting period. Relevant examples are provided in each case, however, the examples provided are not exhaustive. Further examples of key human rights considered by the committee are at Appendix 6.

Right to privacy

Relevant to:

- Monitoring, investigation and information-sharing powers.²⁶

19 Article 17 of the ICCPR.

20 Article 14 of the ICCPR.

21 Article 9 of the ICESCR.

22 Articles 6 and 7 of the ICESCR.

23 Article 19 of the ICCPR.

24 Article 12 of the ICESCR.

25 Articles 2 and 26 of the ICCPR, article 2 of the ICESCR.

- Information disclosure schemes (including to third parties, e.g. contractors).²⁷
- Entry, search and seizure powers.²⁸
- Forfeiture and recovery orders.²⁹
- Access to private information through online databases.³⁰
- Publication of personal information.³¹
- Providing for compulsory physical intervention on a person (for instance blood tests, collecting fingerprints, DNA samples or biometric information).³²
- Interferences with personal autonomy and decision-making.³³
- Interception of communications.³⁴

Type of concerns:

- Insufficient justification for why powers that interfere with privacy are reasonable, necessary and proportionate to achieving a legitimate policy objective.³⁵

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- 26 International Tax Agreements Amendment Bill 2012, *First Report of 2013*, pp 36-38.
- 27 National Disability Insurance Scheme Bill 2012, *First Report of 2013*, pp 39-47; see also Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012, *First Report of 2013*, pp 48-56 and Parliamentary Service Amendment (Parliamentary Budget Officer) Bill 2013, *Fourth Report of 2013*, pp 51-52.
- 28 Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012, *First Report of 2013*, pp 4-11, *Third Report of 2013*, pp 97-109 and *Eighth Report of 2013*, pp 23-40.
- 29 Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Bill 2012, *Sixth Report of 2012*, pp 3-11; *Seventh Report of 2012*, p 45 and *First Report of 2013*, pp 126-131.
- 30 Treasury Legislation Amendment (Unclaimed Money and Other Measures) Bill 2012, *Seventh Report of 2012*, pp 30-32 and *Third Report of 2013*, pp 177-179.
- 31 Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures No. 2) Bill 2013, *Sixth Report of 2013*, pp 120-123 and Australian Public Service Commissioner's Directions 2013, *Sixth Report of 2013*, pp 133-134.
- 32 Customs (Drug and Alcohol Testing) Regulation 2013, *Sixth Report of 2013*, pp 139-146, *Seventh Report of 2013*, pp 59-66 and *Tenth Report of 2013*, pp 45-51.
- 33 Social Security Legislation Amendment (Public Housing Tenants' Support) Bill 2013, *Eighth Report of 2013*, pp 12-15 and Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013, *Sixth Report of 2013*, pp 135-137 and *Tenth Report of 2013*, pp 13-19.
- 34 Telecommunications (Interception and Access) Amendment Regulation 2013 (No. 1), *Sixth Report of 2013*, pp 172-173 and *Tenth Report of 2013*, p 179, 210-213.

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- Inadequate explanation of safeguards in place to protect privacy.³⁶
 - Failure to explain limitations on the rights of persons to personal autonomy and the freedom to organise their private and family lives, in particular by making their own decisions about the way in which they use their social security payments.³⁷
 - Focusing on information privacy aspects of measures at the expense of addressing the rights to bodily integrity.³⁸
 - Assertions, without explanation, that the provisions are consistent with the *Privacy Act 1988* and which do not sufficiently demonstrate that the measures are fully consistent with the right to privacy.³⁹
 - Inadequate explanation as to why it is considered that the standard of 'reasonably necessary' is an appropriate threshold for triggering the privacy intrusion. Article 17 of the ICCPR requires interferences with the right to privacy to be 'necessary' for a legitimate objective. The standard of 'reasonably necessary' appears to be lower than the standard of 'necessary' and may not fully reflect the requirement in Article 17.⁴⁰

35 Australian Jobs Bill 2013, *Seventh Report of 2013*, pp 1-5.

36 Corporations and Financial Sector Legislation Amendment Bill 2013, *Sixth Report of 2013*, pp 9-13.

37 *Stronger Futures in the Northern Territory Act 2012* and related legislation, *Eleventh Report of 2013*.

38 Law Enforcement Integrity Legislation Amendment Bill 2012, *Fifth Report of 2012*, pp 12-21, *Sixth Report of 2012*, p 41, *Seventh Report of 2012*, p. 44 and *First Report of 2013*, pp 138-139. See also related secondary legislation: Customs (Drug and Alcohol Testing) Regulation 2013, *Sixth Report of 2013*, pp 139-146, *Seventh Report of 2013*, pp 59-66, *Tenth Report of 2013*, pp 45-51.

39 Student Identifiers Bill 2013, *Sixth Report of 2013*, pp 65-70.

40 Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012, *First Report of 2013*, pp 4-11, *Third Report of 2013*, pp 97-109 and *Eighth Report of 2013*, pp 23-40.

Right to a fair trial and fair hearing

Right to a fair hearing

Relevant to:

- Provisions which affect the disclosure of evidence to the defendant, including secrecy provisions.⁴¹
- Provisions which affect the rights of defendants to examine witnesses against them.⁴²
- Provisions that limit access to courts or tribunals.⁴³
- Provisions that limit access to legal aid or otherwise limit the right to legal representation.⁴⁴

Type of concerns:

- Inadequate justification as to why less restrictive approaches were not adopted when excluding the jurisdiction of Australian courts in relation to the bringing of certain claims.⁴⁵
- Inadequate explanation as to the need for, and proportionality of, removing merits review in particular circumstances.⁴⁶
- Introduction of powers to make certain orders without first giving the affected person a right of representation; and providing for limited rights of review.⁴⁷

41 Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012, *Sixth Report of 2012*, pp 19-21.

42 Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013, *Eighth Report of 2013*, pp 4-6.

43 International Organisations (Privileges and Immunities) Amendment Bill 2013, *Fourth Report of 2013*, pp 42-47.

44 Native Title (Assistance from Attorney-General) Guideline 2012, *Third Report of 2013*, p 90 and Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2013, *First Report of 2013*, pp 27-33 and *Sixth Report of 2013*, pp 189-195.

45 Protection of Cultural Objects on Loan Bill 2012, *First Report of 2013*, pp 62-66, *Third Report of 2013*, pp 159-164 and *Tenth Report of 2013*, pp 94-95.

46 Therapeutic Goods Amendment (2013 Measures No. 1) Bill 2013, *Sixth Report of 2013*, pp 86-89.

47 Court Security Bill 2013, *Sixth Report of 2013*, pp 14-21 and *Tenth Report of 2013*, pp 36-44.

Presumption of innocence

Relevant to:

- Offence provisions which reverse the burden of proof where the defendant carries either an evidential or legal burden of proof with respect to the existence (or non-existence) of some fact.⁴⁸
- No-fault offences, such as strict and absolute liability offences, which allow for the imposition of criminal liability without the need to prove fault.⁴⁹

Type of concerns:

- Insufficient justification for why offences that interfere with the presumption of innocence are reasonable, necessary and proportionate to achieving a legitimate objective.⁵⁰
- Inadequate explanation of provisions that place a legal burden on a defendant as to why an evidential burden would not be a less restrictive alternative to achieve the provision's purpose.⁵¹

Right not to incriminate oneself

Relevant to:

- Provisions which require a person to answer questions or provide information that may tend to incriminate the person.⁵²

Type of concerns:

- Abrogation of the privilege of self-incrimination which are not accompanied by adequate safeguards such as use and/or derivative use immunity.⁵³

48 Australian Charities and Not-for-profits Commission Bill 2012, *Second Report of 2012*, pp 3-7 and Tax Laws Amendment (Special conditions for Not-for-profit Concessions) Bill 2012, *Second Report of 2012* pp 14-18.

49 Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Bill 2013, *Sixth Report of 2013*, pp 25-35.

50 Competition and Consumer Amendment (Australian Food Labelling) Bill 2012, *Fifth Report of 2012*, pp 7-9.

51 Australia Council (Consequential and Transitional Provisions) Bill 2013, *Sixth Report of 2013*, pp 3-5.

52 Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012, *First Report of 2013*, pp 4-11, *Third Report of 2013*, pp 97-109 and *Eighth Report of 2013*, pp 23-40.

Prohibition against double jeopardy

Relevant to:

- Provisions that allow for assistance to be given to investigate, prosecute and punish a person for an offence where the person has already been punished, acquitted or pardoned.⁵⁴
- Provisions that allow a person subject to a civil penalty to later be subject to a criminal offence, where the civil penalty can properly be characterised as 'criminal'.⁵⁵

Type of concerns:

- Failure to explain whether civil penalty regimes that permit criminal proceedings to be brought against a person for substantially the same conduct are compatible with the prohibition against double jeopardy.⁵⁶

Prohibition against retrospective punishment

Relevant to:

- Introduction of criminal offences that are brought into force before the date of the enabling legislation.
- Provisions that make changes to penalty regimes that apply retrospectively (where the penalties may be characterised, under human rights law, as 'criminal' in nature).⁵⁷

53 Small Business Commissioner Bill 2013, *Third Report of 2013*, pp 49-51 and *Sixth Report of 2013*, pp 305-307.

54 Mutual Assistance in Criminal Matters (Cybercrime) Regulation 2013, *Sixth Report of 2013*, pp 167-173 and *Tenth Report of 2013*, pp 56-75.

55 Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012, *First Report of 2013*, pp 4-11, *Third Report of 2013*, pp 97-109 and *Eighth Report of 2013*, pp 23-40; Australian Sports Anti-Doping Authority Amendment Bill 2013, *Second Report of 2013*, pp 3-4, *Third Report of 2013*, pp 113-119, and *Eighth Report of 2013*, pp 41-49; Biosecurity Bill 2012, *First Report of 2013*, pp 25-26, and *Eighth Report of 2013*, pp 50-56; and Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012, *First Report of 2013*, pp 51-56, *Third Report of 2013*, pp 153-158, and *Eighth Report of 2013*, pp 57-67.

56 See examples provided in footnote 52 above.

57 Parliamentary Service Amendment Bill 2012, *First Report of 2013*, pp 57-61, *Sixth Report of 2013*, pp 294-304, *Tenth Report of 2013*, pp 89-93.

Type of concerns:

- Failure to explain whether amendments to penalty regimes expose a person to liability for a penalty for conduct that took place before the legislation was enacted.⁵⁸

Civil penalty provisions

- The committee has considered a number of bills containing civil penalty provisions and has sought clarification as to whether these provisions and the procedures for their enforcement are consistent with guarantees relating to criminal proceedings contained in articles 14 and 15 of the ICCPR.⁵⁹
- As civil penalty provisions raise complex human rights issues and the implications for existing practice are potentially significant, the committee has provided its initial views on these matters in the form of an interim practice note. The practice note is intended to provide guidance to those involved in policy development, drafting and human rights scrutiny of these types of provisions.⁶⁰ It draws attention to the principal criteria employed in assessing whether a civil penalty provision is 'criminal': (a) the classification of the penalty under domestic law; (b) the nature of the penalty provision; and (c) the severity of the penalty.

Right to non-discrimination**Relevant to:**

- Provisions which draw distinctions between people or groups, either directly or indirectly, on prohibited grounds of discrimination.⁶¹
- Provisions which introduce or extend exemptions from prohibited grounds.⁶²

58 Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, *Third Report of 2013*, pp 57-60.

59 See *Eighth Report of 2013*, pp 21-67.

60 See Practice Note 2 (interim) – civil penalties at Appendix 6.

61 Tax Laws Amendment (Clean Building Managed Investment Trust) Bill 2012, *Sixth Report of 2012*, p 32. See also DisabilityCare Australia Fund Bill 2013, *Seventh Report of 2013*, pp 8-16 and National Disability Insurance Scheme Legislation Amendment Bill 2013, *Seventh Report of 2013*, pp 17-20.

Type of concerns:

- Inadequate justification for the differential treatment.⁶³
- Assertions that measures are 'special measures'.⁶⁴

Freedom of expression

Relevant to:

- Regulation of the media.⁶⁵
- Provisions which restrict access to information, including freedom of information.⁶⁶

Type of concerns:

- Inadequate justification for limitations on the ability of persons to broadcast or publish material and the right of persons to receive such information.⁶⁷
- Insufficient detail of standards to be applied in regulating the media.⁶⁸
- Inadequate reasons as to why limitations on freedom of expression may be necessary and whether other less restrictive options were considered.⁶⁹

62 Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, *Sixth Report of 2013*, pp 58-64.

63 Tax and Superannuation Laws Amendment (2013 Measures No.2) Bill 2013, *Sixth Report of 2013*, pp 71-81; and *Tenth Report of 2013*, pp 108-113.

64 *Stronger Futures in the Northern Territory Act 2012* and related legislation, *Eleventh Report of 2013*, pp 21-31.

65 See media reform package, *Fourth Report of 2013*, pp 1-26.

66 Parliamentary Service Amendment (Freedom of Information) Bill 2013, *Eighth Report of 2013*, pp 9-11.

67 Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013, *Fourth Report of 2013*, pp 1-7.

68 Broadcasting Legislation Amendment (News Media Diversity) Bill 2013, *Fourth Report of 2013*, pp 8-14.

69 News Media (Self-Regulation) Bill 2013, *Fourth Report of 2013*, pp 15-23.

Right to social security

Relevant to:

- Provisions that enable the recovery of social security benefits.⁷⁰
- Provisions that revise the methodology for payment of social security benefits that might lead to a reduction in payment.⁷¹
- Provisions which remove existing entitlements.⁷²

Type of concerns:

- Inadequate explanation of the potential impact of changes to social security measures.⁷³
- Inadequate justification for reductions in social security or superannuation benefits.⁷⁴
- Retrogressive measures.⁷⁵
- Exclusion of right of review.⁷⁶

Right to work and rights in work

Relevant to:

- Provisions which change superannuation entitlements or the tax treatment of superannuation savings.⁷⁷

70 Financial Framework Legislation Amendment Bill (No.2) 2013, *Fourth Report of 2013*, pp 36-38.

71 Veterans' Affairs Legislation Amendment (Military Compensation Review and Other Measures) Bill 2013, *Sixth Report of 2013*, pp 90-94.

72 Health Insurance (Dental Services) Amendment Determination 2012 (No. 1), *Seventh Report of 2012*, pp 51-55 and *Third Report of 2013*, pp 133-137.

73 Family Assistance and Other Legislation Amendment Bill 2013, *Third Report of 2013*, pp 18-20 and *Sixth Report of 2013*, pp 218-220.

74 Superannuation Laws Amendment (MySuper Capital Gains Tax Relief and Other Measures) Bill 2013, *Eighth Report of 2013*, p 16. See also Health Insurance (Dental Services) Amendment Determination 2012 (No. 1), *Seventh Report of 2012*, pp 51-55 and *Third Report of 2013*, pp 133-137.

75 Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012, *Fourth Report of 2012* (Interim Report) and *Fifth Report of 2013* (Final Report).

76 Financial Framework Legislation Amendment Bill (No.2) 2013, *Fourth Report of 2013*, pp 36-38.

- Safe and healthy working conditions.⁷⁸
- Provisions with the potential to generate or limit employment.⁷⁹
- Provisions that reduce the applicable time limits for lodging claims relating to unfair dismissal and adverse employment action.⁸⁰

Type of concerns:

- Inadequate justification for substantial increases in fees for trade certificates.⁸¹
- Provisions that may lead to job losses in certain regions.⁸²
- Lack of clarity regarding criteria for determining that the access of certain persons to secure work areas (of airports and seaports) should be suspended.⁸³
- Lack of adequate procedural safeguards and the availability of review.⁸⁴
- Expansive powers to exempt persons in particular occupations from workplace health and safety laws.⁸⁵

77 Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Bill 2013, *Seventh Report of 2013*, pp 39-42.

78 Asbestos Safety and Eradication Agency Bill 2013, *Sixth Report of 2013*, pp 1-2 and *Work Health and Safety Act 2011* (Application to Defence activities and Defence members) Declaration 2012, *Fourth Report of 2013*, pp 74-75.

79 Australian Jobs Bill 2013, *Seventh Report of 2013* pp 1-5 and Customs Amendment (Prohibition of Certain Coal Exports) Bill 2013, *Sixth Report of 2013*, pp 22-24.

80 Fair Work Amendment Bill 2012, *Seventh Report of 2012*, pp 16-19.

81 Tradepersons' Rights (Cost Recovery) Amendment Regulation 2013 (No. 1) *Seventh Report of 2013*, pp 54-55.

82 Customs Amendment (Prohibition of Certain Coal Exports) Bill 2013, *Sixth Report of 2013*, pp 22-24.

83 Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Bill 2013, *Sixth Report of 2013*, pp 25-35.

84 Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Bill 2013, *Sixth Report of 2013*, pp 25-35.

85 Foreign Affairs Portfolio Miscellaneous Measures Bill 2013, *Fourth Report of 2013*, pp 39-41.

Right to health

Relevant to:

- Measures that relate to the national healthcare system,⁸⁶ including Medicare⁸⁷ and other medical benefits payments.⁸⁸
- Provisions that may impact on access to private health insurance.⁸⁹
- Public health measures.⁹⁰
- Treatment of asylum seekers, including detention conditions.⁹¹
- Environmental protection measures.⁹²

Type of concerns:

- Inadequate justification for limitations.⁹³
- Retrogressive measures.⁹⁴

86 National Health Reform Amendment (Definitions) Bill 2013, *Seventh Report of 2013*, p 33.

87 Tax Laws Amendment (Medicare Levy) Bill 2013, *Seventh Report 2013*, p 45.

88 Tax and Superannuation Laws Amendment (2013 Measures No.2) Bill 2013, *Sixth Report of 2013*, pp 71-81.

89 Private Health Insurance Legislation Amendment (Base Premium) Bill 2013, *Seventh Report of 2013*, pp 34-35.

90 Biosecurity Bill 2012, *First Report of 2013*, pp 16-26; Asbestos Safety and Eradication Agency Bill 2013, *Sixth Report of 2013*, p 2.

91 *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* and related legislation, *Ninth Report of 2013*.

92 Environment Protection and Biodiversity Conservation Amendment Bill 2013, *Fourth Report of 2013*, pp 32-35.

93 Health Insurance Amendment (Medicare Funding for Certain Types of Abortion) Bill 2013, *Sixth Report of 2013*, pp 36-39, and *Tenth Report of 2013*, pp 76-81; *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* and related legislation, *Ninth Report of 2013*.

94 Health Insurance (Dental Services) Amendment Determination 2012 (No. 1), *Seventh Report of 2012*, pp 51-55, and *Third Report of 2013*, pp 133-134.

Other human rights scrutiny issues

1.67 During the reporting period, the committee identified a number of issues that pose particular challenges for the committee, as well as for ministers and departments. These include the extent to which principal Acts should be included in the analysis of the human rights implications of bills and legislative instruments and the consideration of human rights in the development of legislation that is the product of complex whole of government processes or intergovernmental agreement.

Scrutiny of principal Acts

1.68 Throughout the year, the committee noted a tendency for sponsors of legislation to suggest that, where an amending bill incorporates by reference the provisions of an existing Act, such amendments do not raise any human rights concerns by virtue of this reference to existing legislation.⁹⁵

1.69 In its *Third Report of 2013*, the committee set out its expectation that, to the extent that the parent Act is relevant to the operation of the amending provision, the statement of compatibility should include an analysis of the human rights implications and compatibility of the provisions of the existing or parent Act, as they are applied or extended by the amendment.

1.70 This approach is consistent with the committee's functions under the Act in two respects. First, the operation of amendments have to be analysed in terms of their legal effect and practical impact, which can only be done by reviewing their operation in the statutory framework of which they form part. Second, such a review contributes to the committee's performance of its mandate 'to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue'.

Human rights scrutiny of national cooperative schemes of legislation

1.71 In its consideration of the Marine Safety (Domestic Commercial Vessel) National Law Amendment Bill 2013. The committee set out its concerns regarding areas of activity regulated under national schemes of legislation resulting from intergovernmental agreements. While the minor amendments proposed by this bill did not give rise to any human rights concerns, the committee noted its concern that the parent Act, the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*, may give rise to human rights concerns.

1.72 The committee observed that an increasing number of areas of activity are regulated under national schemes resulting from intergovernmental agreements, and the committee noted that the legislative form of such schemes varies. In some

95 Customs Amendment (Anti-Dumping Commission) Bill 2012, *Third Report of 2013*, pp 8-11; Water Efficiency Labelling Standards (Registration Fees) Bill 2013, *Fourth Report of 2013*, p 67.

cases the legislation of one jurisdiction is adopted by the legislatures of other jurisdictions; in others, each jurisdiction commits itself to enacting a uniform law in terms agreed at the intergovernmental level. Sometimes these arrangements involve the agreement of the parties that changes to the template law will be automatically adopted in the various jurisdictions.

1.73 The committee notes that these types of arrangements give rise to legislative scrutiny concerns, as there may be no formal agreement or procedure in place to ensure that cooperative national schemes and implementing legislation are scrutinised for human rights compatibility during their development and before they are finalised at an intergovernmental level. Following the conclusion of an intergovernmental agreement, there may be only a limited opportunity for legislative scrutiny at a time when such consideration may influence the final content of the legislation.

1.74 As with any legislation, the committee considers that the issue of compatibility with human rights should be an integral part of the development of any national scheme.

1.75 In response to the committee's views, the former Prime Minister, Ms Julia Gillard, advised that the First Parliamentary Counsel will seek the views of the states and territories on amending the Protocol on Drafting National Uniform Legislation to refer to the Commonwealth's requirements for assessing human rights compatibility.⁹⁶

Human rights scrutiny of appropriation bills

1.76 In its *Third Report of 2013* the committee set out its initial views on the human rights implications of appropriation bills. The committee noted that it does not anticipate it will generally be necessary for it to make substantive comments on such bills. Nonetheless, the committee's expectation is that the incorporation of human rights considerations in the underlying budgetary processes would, where appropriate, provide the most practical approach to ensuring that human rights are taken into account in the development of policy and legislation.

1.77 In its consideration of appropriation bills in its *Seventh Report of 2013*, the committee noted the difficulties of providing comprehensive statements of compatibility for appropriation bills. The committee recognised that the detail relating to specific government expenditure is primarily contained in the relevant portfolio budget statements instead of the bill itself.

96 See the former Prime Minister's response in relation to the Marine Safety (Domestic Commercial Vessel) National Law Amendment Bill 2013, *Tenth Report of 2013*, p 151.

