PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

Remarks to be delivered by Senator the Hon Ursula Stephens, Member of the Parliamentary Joint Committee on Human Rights, to the 2013 Australian Government and Non-Government Organisations Forum on Human Rights, Old Parliament House, Wednesday 19 June 2013.

These remarks provide an overview of the role of the committee in the protection of human rights and its work to date. The intention is to outline the approach the committee has taken to overcoming some of the challenges it faces in enhancing consideration of human rights in the legislative process.

Thank you for this opportunity to speak to you today on behalf of the Parliamentary Joint Committee on Human Rights. I am very pleased to note that a number of you have expressed interest in hearing about the work of the committee over the months since the Chair of the Committee, Mr Harry Jenkins MP, spoke at your Forum in 2012.

I note that some of you are particularly interested in how departments and agencies are adapting to the requirement for Statements of Compatibility and in how you can become more involved in the work of the committee.

I propose to touch on each of these points, but first, for the benefit of those of you who may be less familiar with the work of the committee, I will give you a brief outline of the committee's role in the consideration of human rights in the legislative process, some of the challenges it faces and how it is working to overcome them.

ROLE OF THE COMMITTEE

The committee was established in March 2012 as part of a concerted effort to enhance the understanding of, and respect for, human rights in Australia and to ensure that human rights are explicitly taken into account in the legislative process.

The committee has responsibility for examining and reporting to the Parliament on the compatibility of bills and legislative instruments with Australia's international human rights obligations. It has the ability to examine existing legislation and conduct broad inquiries into matters relating to human rights as referred to it by the Attorney General.

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* to mean the rights and freedoms recognised or declared by the seven key international human rights treaties ratified by Australia.

A key role of this committee is to assist the Parliament and encourage departments and agencies to consider human rights in a more systematic, rigorous and consistent way. From the beginning, we recognised that this would be an evolutionary process as we all came to grips with the meaning and scope of Australia's human rights obligations and how to apply these obligations in our work.

At the same time we came to appreciate that the committee was not intended to be a quasi-judicial body. The committee recognises that if we are to encourage our fellow parliamentarians, and hundreds of public servants, to become engaged in the consideration of human rights, we must try to interpret rights in a way that makes them real and effective.

At the same time, the committee's deliberations must be underpinned by a sound understanding of the human rights principles engaged by legislation and a robust interpretation of Australia's human rights obligations as expressed in the seven human rights treaties.

To this end, the committee has engaged an external legal adviser, Professor Andrew Byrnes from the University of New South Wales who brings significant knowledge and experience to the task. His expertise, together with the human rights expertise available to the committee through its secretariat, provides the committee with a solid foundation upon which to base its work.

However, the committee recognises that questions of human rights compatibility are not answered solely by reference to international law and jurisprudence. At heart they are about the practical impact of legislation and the extent to which a proposed limitation on rights is justifiable. The key questions for us to ask are:

- Does it address some compelling social purpose?
- Is there a rational connection between the proposed limitation and the objective of the legislation? and
- Can we be confident that the proposed limitation will be implemented in a way that is reasonable, necessary and proportionate?

These are judgements that parliamentarians, and public servants, are very well equipped to make. The committee must therefore facilitate these judgements by discussing rights in clear language that is meaningful to both lawyers and non-lawyers alike.

I consider that the committee's reports to date are, for the most part, clearly expressed and reasonably accessible. We appreciate that we do not always hit the mark and some of our reports have been a little unwieldy, which can have an impact on their accessibility. The demands of the legislative program and the volume of legislation conspire to make this an area where we must continue to be vigilant. Recently, we have reappraised how we present our comments on bills and we continue to ensure that our reports are more readily accessible on our website through the provision of *html* and *pdf* versions and the use of hyperlinks in the table of contents.

STATEMENTS OF COMPATIBILITY

Another aspect of the committee's work that calls for vigilance is the consideration of statements of compatibility which the committee considers are central to efforts to elevate the consideration of human rights in the development of policy and legislation.

Since 4 January 2012, each new bill and disallowable legislative instrument must be accompanied by a statement of compatibility. 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.

I said earlier that the committee recognises that this is an evolutionary process. From the outset the committee has adopted what it hopes is a constructive approach to statements of compatibility. The committee has set out the following expectations regarding statements of compatibility:

- 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.

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.

Finally, 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 legislation predates the requirement for a statement of compatibility, or is exempt from that requirement, does not prevent the committee from considering its human rights compatibility. Where necessary, the committee will write to the proponent of the legislation and invite them to provide information regarding the human rights compatibility of the legislation.

While statements of compatibility provide a starting point for the committee's work, we do not accept statements at face value. We look beyond the stated intention of the legislation and consider the likely practical effect of the legislation and try to understand whether any limitations on rights are evidence based. Where further information is required to determine this, we write to the proponent of the legislation.

The committee considers that the requirement to produce statements of compatibility is having tangible results. It is clear that government agencies and Ministers are gradually getting better at thinking about human rights impacts as part of the legislative process and this is starting to be reflected in the statements that come before the committee. In tabling the committee's Seventh Report of 2013, the Chair noted the committee's observation that the overall quality of statements of compatibility for legislative instruments has improved significantly over recent months.

In its Eighth Report of 2013, which was tabled this morning in the House of Representatives, the committee highlights some good examples of statements of compatibility that set out clearly and concisely the justification for certain limitations on rights.

The committee is aware that it can assist this process of improvement by continuing to provide feedback on its expectations for the discussion of

rights in statements of compatibility. The committee has adopted the practice of highlighting particular issues and concerns in the Executive Summaries to its reports and in the Chair's tabling statements. The committee hopes that this will help with the drafting of future legislation and statements of compatibility.

In September 2012 the committee released its first Practice Note setting out the underlying principles that the committee applies in scrutinising legislation and its expectations with regard to information that should be included in statements of compatibility. Today, the committee released its second Practice Note – an interim note on civil penalty provisions. As the committee refines its thinking on various human rights issues I expect that it will release further practice notes.

THE COMMITTEE'S APPROACH TO THE CONSIDERATION OF LEGISLATION

One of the toughest challenges that the committee faces is undertaking its work and drawing it to the attention of the Parliament in a timely way. From its earliest days, the committee has recognised that the potential volume of bills and legislative instruments, together with the realities of the sitting pattern, could potentially frustrate its efforts to find an effective voice within the Parliament.

While the committee has established a regular scrutiny and reporting cycle based on the sitting pattern for both chambers, we have also sought to exploit opportunities to respond flexibly to the needs of the Parliament.

PRIORITISING THE COMMITTEE'S WORK

The committee has considered 272 bills and 1774 legislative instruments to date and has sought further information in relation to 111 bills and 54 instruments. The committee has sent advisory letters in relation to a further 456 instruments where the statements of compatibility have fallen short of the committee's expectations.

With such a high volume of legislation passing through the Parliament, it is imperative for the committee to prioritise its work. The committee categorises legislation into three groups according to the level of human rights scrutiny it 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.

The first category includes legislation that the committee is satisfied does not appear to raise human rights concerns. Such legislation may well engage human rights: it may have the potential to promote rights or limit

rights. However, the committee has been able to satisfy itself that the implementation of the legislation is unlikely to give rise to human rights concerns.

In many cases, such legislation has been 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. This is not always the case and, while the committee may be satisfied that the legislation does not warrant further scrutiny, it may write to the proponent in an advisory capacity regarding its expectations for statements of compatibility.

The second category includes legislation for which the committee determines that, before it can form a view on the compatibility of the legislation, further clarification is required from the Minister or proponent of the legislation.

The committee sets out its consideration of such legislation in its report and identifies those aspects of the legislation that give rise to human rights concerns together with any additional information the committee may require.

Finally, 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 related legislation.

The committee has applied this approach to its examination of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* and the *Stronger Futures in the Northern Territory Act 2012* and related bills and instruments. The committee tabled its report on the migration legislation this morning and hopes to complete its examination of the Stronger Futures legislation shortly.

While the committee's examination of 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 legislation has been passed.

There are two key benefits to this approach:

Firstly, it enables the committee to assess human rights compatibility on the basis of an understanding of the complete legislative package.

Second, it enables the committee to contribute to a broader understanding of thematic human rights issues while still maintaining a practical focus.

Where the committee examines specific legislation in detail, it may hold public hearings and publish its conclusions in a stand-alone report. The committee's examination of the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012, reflected in its Fourth Report of 2012 and Fifth Report of 2013, is an example of this.

INTERACTION WITH OTHER PARLIAMENTARY COMMITTEES

It is important to remember that the consideration of the human rights implications of legislation is not solely the responsibility of this committee. The committee appreciates that our work intersects with the work of other parliamentary committees and that we can usefully leverage off this shared responsibility.

In a statement to the House of Representatives at the end of last year, the Chair said that in 2013 the committee would focus on working more effectively with other parliamentary committees, particularly where they have been charged with examining particular bills and instruments. It is the committee's aim to draw the attention of other committees to our work in a timely way. At the same time, the committee continues to closely monitor the work of other committees so that we can draw on this in our own work.

There are two important reasons for the committee approaching its work in this way:

- First, it makes effective use of resources both within and outside the Parliament; and
- Second, determining the human rights implications of legislation is frequently complex and sometimes contentious. It makes sense to examine legislation from a variety of angles and shed as much light as possible on how the legislation works and how this will interact with Australia's human rights obligations in practical terms.

The committee has taken important steps in this regard since the resumption of the Parliament this year. We have redoubled our efforts to establish clear and regular communication with other parliamentary committees, by stepping up its practice of writing to House and Senate committees drawing attention to its reports.

The committee has continued to follow the work of other committees where this overlaps with its own examination of legislation. This has been particularly helpful in our thematic inquiries. For example, the work of the Senate Education, Employment and Workplace Relations committees was of significant assistance in our examination of the Social Security Legislation Amendment (Fair Incentives to Work) Act 2012, where

Similarly, the our examination of the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation has drawn significantly on evidence and submissions provided to a range of other parliamentary committees.

Finally, earlier this year 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. The committee's intention in providing its initial views on this draft legislation was purely to contribute in a timely way to the debate on these important reforms while amendments to the exposure draft were under consideration.

CONCLUSION

In closing, I would like to turn to your question of how NGOs can be more involved in the work of the committee. First and foremost I encourage you to follow the work of the committee to gain an understanding of the legislation it is considering and the issues of concern to it.

You can do this in a number of ways:

- you can visit our website at www.aph.gov.au/joint_humanrights/, which provides links to all of our reports as well as to each of the

Chair's tabling statements, information about thematic inquiries and background information about the committee.

- you can request a Rich Site Summary (or RSS feed) on the Australian Parliament's website which will give you an alert each time a new report is released; or
- you can follow the House of Representatives and the Senate on Twitter. We ask them both to 'tweet' each time we table a report.

If you have concerns about particular bills or legislative instruments that are being considered by the Parliament you can write to the committee and draw this to our attention. The committee does not call for submissions as a general rule, but we welcome correspondence and will take account of matters raised in correspondence where these are relevant to our work.

However, if a bill or instrument is already the subject of an inquiry by a House or Senate Committee, and you have made a submission to that inquiry, you do not need to make a separate submission to the Human Rights committee. We routinely monitor all parliamentary inquiries into legislation and refer to evidence provided to those inquiries where it is relevant to our consideration of human rights compatibility.

Finally, there may be broader human rights matters that you consider the committee might usefully explore. In this case I would encourage you to

draw these matters to the attention of the Attorney-General, so that he can give consideration to referring them to the committee for inquiry under Section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

In closing I would like to acknowledge the committee's debt to those of you who have already contacted the committee to draw attention to issues and provide constructive advice and encouragement.

The advice and good will extended to the committee by so many has greatly assisted us in our work to date and has helped us to begin to formulate our own, distinctly Australian, approach to our task, particularly in the area of economic, social and cultural rights where we are breaking new ground.

In closing I would like to acknowledge my colleagues on the committee, particularly the Chair, Mr Harry Jenkins. They have brought significant commitment and energy to our work and I am proud of our preparedness to try and act as parliamentarians rather than politicians in our consideration of human rights principles. This has allowed us to adopt a collegiate and objective approach to our work and has allowed us to make, what I hope you consider to be, a useful contribution to the wider understanding of human rights principles. Thank you for your attention today. I would be very happy to take your questions.