

Chapter 3

Work of the committee in 2013-14

3.1 This chapter provides information about the work of the committee during 2013-14, including the major themes and scrutiny issues arising from the legislation examined by the committee.

Legislation considered

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

3.3 Table 3.1 shows the total number of bills, Acts and legislative instruments considered, as well as how many in each category were found to raise no human rights issues, or raised human rights issues in relation to which the committee made advice-only comments to, or required a response from, the legislation proponent.

Table 3.1: Legislation considered during the reporting period

	Total considered	No human rights issues	Advice-only comment	Response required
Bills and Acts	191	110	10	71
Legislative instruments	1954	1887	30	37

Reports tabled during the period

3.4 The committee tabled eight reports during the reporting period, from the *First Report of the 44th Parliament* to *Eighth Report of the 44th Parliament*.¹

Commonly engaged rights

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

- rights to and at work;²

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

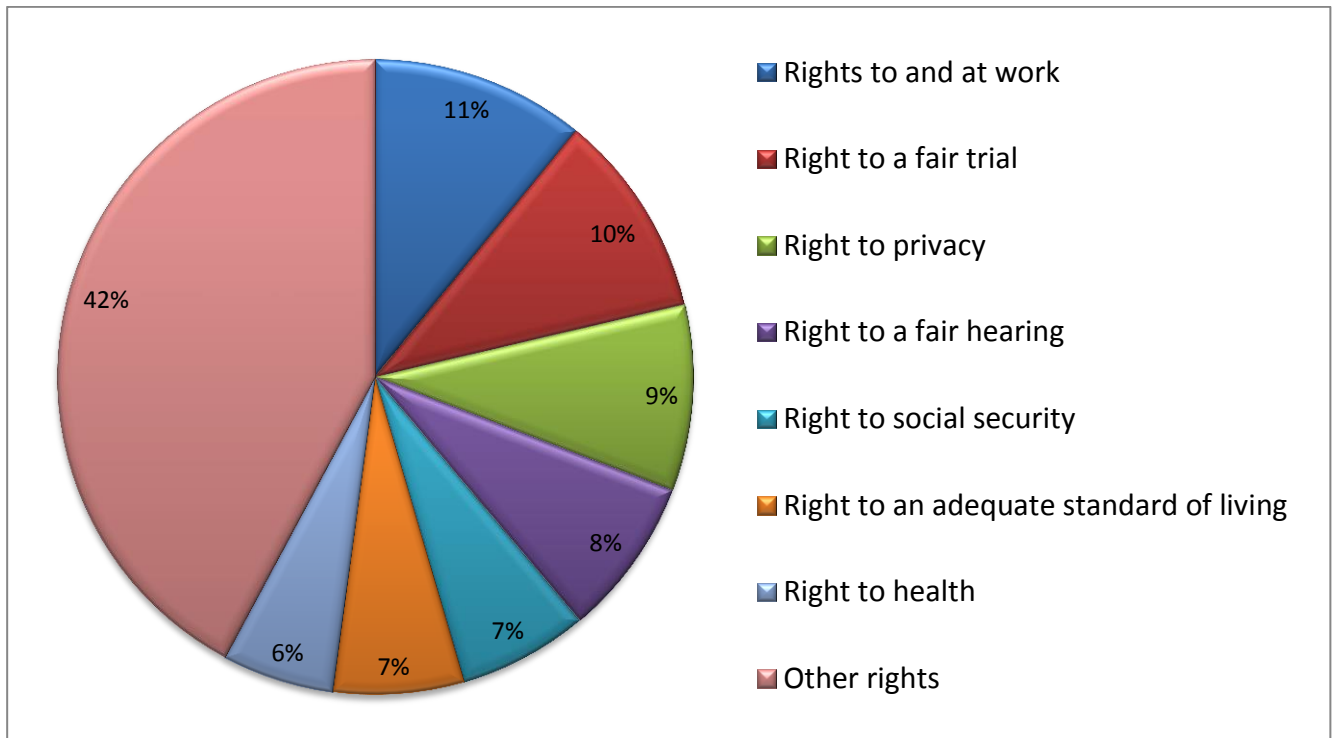
2 Articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

- right to a fair trial;³
- right to privacy;⁴
- right to a fair hearing;⁵
- right to social security;⁶
- right to an adequate standard of living;⁷ and
- right to health.⁸

3.6 During the reporting period, the above seven rights accounted for 58 per cent of rights engaged within both primary and delegated legislation.

3.7 Figure 3.1 shows the breakdown of human rights engaged by the legislation examined by the committee in the reporting period.

Figure 3.1: Human rights engaged by legislation in 2013-14



3 Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

4 Article 17 of the ICCPR.

5 Article 14 of the ICCPR.

6 Article 9 of the ICESCR.

7 Article 11(1) of the ICESCR.

8 Article 12(1) of the ICESCR.

Major themes

3.8 Three significant areas of legislative activity in the reporting period were in the areas of industrial relations, migration, and social security. The committee's examination of legislation relating to these policy areas highlighted a number of significant intersections with Australia's international human rights obligations.

Industrial relations legislation

3.9 The committee examined a series of bills seeking to implement the government's industrial relations policy: the Fair Work (Registered Organisations) Amendment Bill 2013; the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013; and the Fair Work Amendment Bill 2014.⁹

3.10 The measures in these bills included the establishment or re-establishment of bodies with investigative and information-gathering powers to regulate registered organisations (including unions) and persons engaged in the building and construction industry, and measures relating to industrial action and right of entry for unions.

3.11 Human rights commonly engaged by these bills included: the right to work and rights at work; the right to freedom of association (including the right to form and join trade unions); the right to a fair trial (including the right to be presumed innocent); the right to privacy; the right against self-incrimination; the right to freedom of assembly; the right to freedom of expression; the right to equality and non-discrimination; and the right to a fair hearing.

3.12 The committee generally agreed with the statements of compatibility for the bills that the measures being implemented pursued legitimate objectives for the purposes of international human rights law, and were rationally connected to those objectives (that is, the measures appeared likely to achieve their stated objectives).

3.13 However, the committee's assessments raised significant concerns as to the proportionality of the measures, and particularly whether they represented the least rights restrictive way of achieving their stated objectives. In particular, the coercive information-gathering and enforcement powers conferred on industrial oversight bodies gave rise to significant human rights concerns because of their breadth, their application to civil wrongdoing as well as serious criminal offences, the limited procedural safeguards restricting and monitoring their use, the abrogation of the

9 See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014), Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, 1; *Fifth Report of the 44th Parliament* (25 March 2014), Fair Work (Registered Organisations) Amendment Bill 2013, 63; and *Seventh Report of the 44th Parliament* (18 June 2014), Fair Work Amendment Bill 2014, 13.

right of persons not to incriminate themselves, and the significant maximum penalties available for a failure to cooperate.

Migration legislation

3.14 The committee examined a significant number of bills and legislative instruments seeking to implement the government's migration policies, including changes to the handling of applications for protection and humanitarian visas, the mandatory detention regime, and the re-introduction of temporary protection visas.¹⁰

3.15 Human rights engaged by this legislation included the right to humane treatment in detention; the right to equality and non-discrimination; the right not to be arbitrarily detained; the obligation of non-refoulement; the obligation to consider the best interests of the child; the right to protection of the family; the right to freedom of movement; the right to a fair hearing; the right to social security and an adequate standard of living; the right to education; and the right to work.

3.16 While international law does not provide a general right of entry to a country for persons who are non-citizens or permanent residents, Australia has obligations under international human rights law to any person within its jurisdiction, regardless of citizenship. In the migration law context, non-refoulement obligations towards non-citizens are particularly important as they are absolute and may not be subject to any limitations. In numerous instances, the committee emphasised that effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.¹¹

3.17 The committee's assessments of legislation in this area also frequently emphasised that limitations on rights must be prescribed by law and be sufficiently clear to meet the quality of law test. Similarly, safeguards to ensure these limitations

10 See, for example, Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (18 March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 51; Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013, Migration Amendment (Disclosure of Information) Regulation 2013 [F2013L02101], Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 [F2013L02102] and Code of Behaviour for Public Interest Criterion 4022—IMMI 13/155 [F2013L02105], 75; and Migration Amendment (Temporary Protection Visas) Regulation 2013 [F2013L01811], 133.

11 See, for example, Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (18 March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 51.

are proportionate should be included in legislation, and not left to administrative or ministerial discretion.¹²

3.18 The committee also examined whether legislative measures in this area disproportionately affected vulnerable groups, such as women, children or refugees. Such impacts may arise in the implementation of migration policy especially where distinct legal arrangements are in place for different categories of persons, such as classes of visa holders. An example of this was the Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 [F2013L02102] and Code of Behaviour for Public Interest Criterion 4022—IMMI 13/155 [F2013L02105], which implemented a code of conduct applying to certain visa holders.¹³

Social security legislation

3.19 The committee examined a significant number of bills seeking to implement the government's social security policies, including: the Social Services and Other Legislation Amendment Bill 2013; Social Security Legislation Amendment (Green Army Programme) Bill 2014; Social Security Legislation Amendment (Increased Employment Participation) Bill 2014; Paid Parental Leave Amendment Bill 2014 and Family Assistance Legislation Amendment (Child Care Measures) Bill 2014.¹⁴

3.20 These bills sought to give effect to a range of measures affecting social security benefits, in many cases introducing targeted measures with the intention of reducing public expenditure on social security payments. Along with the right to social security, this legislation engaged the right to an adequate standard of living, the right to work and to just and favourable conditions of work, and the right to equality and non-discrimination.

3.21 In seeking to reduce levels of social security entitlements and payments—for example, by pausing indexation on certain social security payments—many of the measures in the bills were properly characterised as retrogressive measures for the

12 See, for example, Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (18 March 2014), Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 [F2013L01218], 75.

13 See Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* (18 June 2014), Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 [F2013L02102] and Code of Behaviour for Public Interest Criterion 4022—IMMI 13/155 [F2013L02105], 90.

14 See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014), Social Services and Other Legislation Amendment Bill 2013, 159; *Third Report of the 44th Parliament* (4 March 2014), Social Security Legislation Amendment (Green Army Programme) Bill 2014, 11, and Social Security Legislation Amendment (Increased Employment Participation) Bill 2014, 15; *Eighth Report of the 44th Parliament* (24 June 2014) Family Assistance Legislation Amendment (Child Care Measures) Bill 2014, 16, and Paid Parental Leave Amendment Bill 2014, 54.

purposes of international human rights law.¹⁵ While permissible, retrogressive measures are required by international human rights law to be justified as being in pursuit of a legitimate objective, and being rationally connected and proportionate to, achieving that objective.

3.22 In this respect the committee has consistently recognised that under international human rights law budgetary constraints are capable of providing a legitimate objective for the purpose of justifying reductions in government support that impact on economic, social and cultural rights. However, the committee has routinely requested further information where it is not clear that such measures are proportionate to their stated objective, and particularly where vulnerable groups, such as women, children or indigenous people, would appear to be affected.

3.23 The committee's requests for information from ministers in relation to measures implementing social security policy also routinely seek information as to whether less rights restrictive measures to achieve particular objectives were available and, if so, why they were not adopted.

Scrutiny issues

3.24 During the reporting period, the committee identified a number of issues that posed particular challenges for the committee, as well as for legislation proponents and departments. These included timeliness; the quality of statements of compatibility; human rights scrutiny of appropriation bills; instruments relating to the autonomous sanctions regime; and instruments relating to the Stronger Futures package of legislation.

Timeliness

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

3.26 Accordingly, the responsiveness of legislation proponents to the committee's requests for responses regarding human rights concerns is critical to the effectiveness of the scrutiny process. However, while the committee stipulates a

15 The committee has described deliberate retrogressive measures to mean any measure which implies a backwards step in the level of protection of ICESCR rights as a consequence of an intentional decision by the state and includes any unjustified reduction in public expenditure in the absence of adequate compensatory measures aimed to protect the affected individuals. Deliberate retrogressive measures are not prohibited per se under international human rights law but will require close justification, even during times of severe resource constraints, whether caused by a process of adjustment, economic recession, or by other factors. See Parliamentary Joint Committee on Human Rights, *Fifth Report of 2013: Social Security Legislation Amendment (Fair Incentives to Work) Act 2012* (20 March 2013), 16.

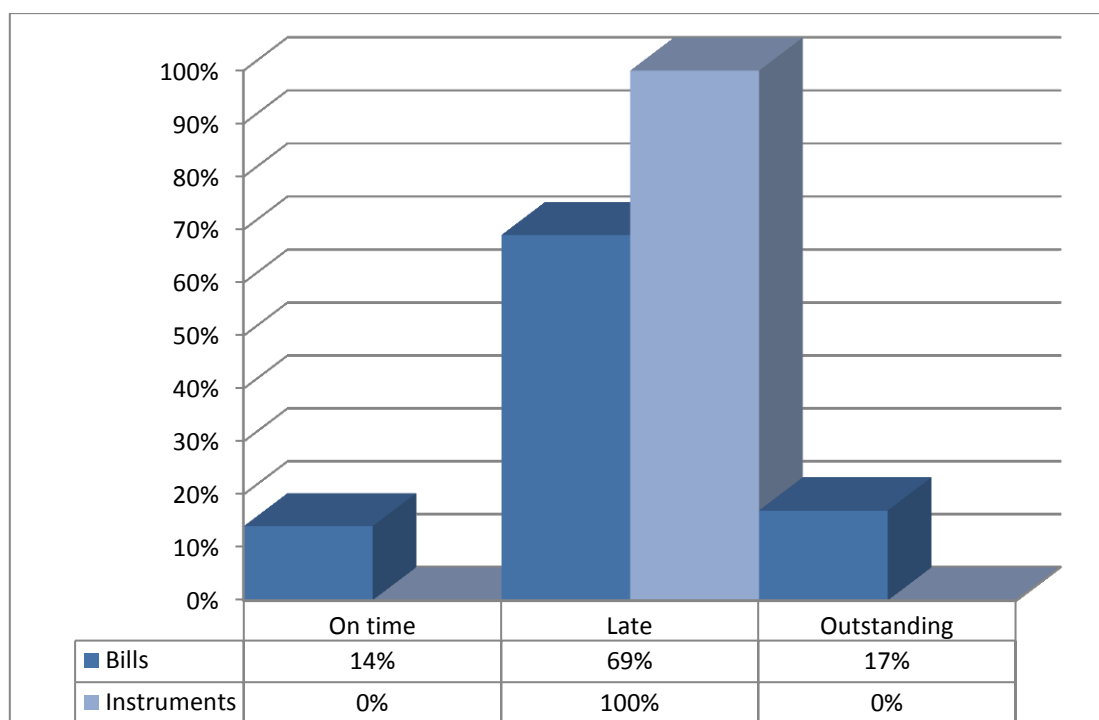
deadline by which it expects a response be provided, there is no legal or procedural requirement to ensure that a legislation proponent provides their response in this time period.

3.27 Timeliness was 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 or timeframe for disallowance had passed.

3.28 Responses were requested in relation to 58 bills in the reporting period (before 30 June 2014). Only eight of these (14%) were provided to the committee by the requested date. Responses in relation to 40 bills (69%) were provided to the committee after the requested date. The remaining 10 bills (17%) still had responses outstanding at 30 June 2014 (see figure 3.2).

3.29 Responses were requested in relation to 44 legislative instruments in the reporting period. No responses relating to these instruments were provided to the committee by the requested date. All responses were provided to the committee after the requested date; there were no responses outstanding at 30 June 2014 (see figure 3.2).

Figure 3.2 Percentage of responses received by due date



Statements of compatibility

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

3.31 In many cases, statements of compatibility provided sufficient information on proposed measures limiting human rights for the committee to conclude its

examination without requesting further information from the legislation proponent. For example, the executive summary to the *First Report of the 44th Parliament* noted that the discussion of civil penalties and criminal process rights in the statement of compatibility accompanying the Clean Energy Legislation (Carbon Tax Repeal) Bill 2013 was particularly useful in assisting the committee with its task.¹⁶

3.32 However, a significant number of bills and legislative instruments during the reporting period failed to provide sufficient information or supporting evidence to justify potential limitations of human rights. In both its *First Report of the 44th Parliament* and *Second Report of the 44th Parliament*, the committee observed that the quality of a number of statements of compatibility fell short of the committee's minimum expectations.¹⁷ In particular, the committee noted that proponents of legislation often claimed that measures engaging human rights were 'reasonable, necessary and proportionate' without providing any supporting analysis or empirical evidence.

3.33 Further, statements of compatibility often stated that measures did not engage human rights where rights were clearly engaged.¹⁸

3.34 In a number of cases, the committee noted that additional information provided by the legislation proponent addressed the committee's concerns, but should have been included in the statement of compatibility for the bill or instrument in the first instance.¹⁹

3.35 Where inadequacies in statements of compatibility were identified, the committee continued its practice of sending advisory letters to legislation proponents to provide guidance on the preparation of, and requirements for, statements of compatibility.

Human rights scrutiny of appropriation bills

3.36 In the 43rd Parliament the committee set out its initial views on the human rights implications of appropriation bills, and recommended that human rights

16 See, for example, Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013), Executive Summary, xv.

17 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014), Executive Summary, x-xi.

18 See, for example, Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014), Australian Citizenship (Intercountry Adoption) Bill 2014, 8-10.

19 See, for example, Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013), Australian Citizenship Amendment (Special Residence Requirements) Bill 2013, 215.

impact assessments be expressly incorporated in portfolio budget statements to ensure that human rights are properly reflected in the budgetary process.²⁰

3.37 The committee's dialogue with the Minister for Finance on appropriation bills continued in the reporting period. In its *Third Report of the 44th Parliament* the committee wrote to the new Minister for Finance on the question of whether the budgetary processes should expressly take account of human rights considerations.²¹

3.38 The minister's response was considered alongside the committee's analysis of new appropriations bills in its *Eighth Report of the 44th Parliament*. The minister considered that requiring human rights impact statements to be included in portfolio budget statements was 'neither practicable nor appropriate',²² but offered the committee a departmental briefing on aspects of appropriation bills and their explanatory memoranda. In its concluding comments in this report, the committee noted that further consultation was required to assess how portfolio budget impact statements and explanatory memoranda could assist the committee in its examination of appropriation bills for compatibility with human rights.

Autonomous sanctions regimes

3.39 In the previous reporting period the committee considered a number of instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*.²³ The committee sought further information from the Minister for Foreign Affairs as to the compatibility of the instruments with multiple human rights.

3.40 More broadly, however, the committee 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. The committee therefore also requested that the minister comprehensively review the autonomous sanctions regimes with respect to Australia's international human rights obligations. The former minister responded stating that he had instructed the Department of Foreign Affairs and Trade to carefully consider this recommendation.

20 Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013), xii and *Seventh Report of 2013* (5 June 2013), xi-xii.

21 See Parliamentary Joint Committee on Human Rights, *Third Report of the 44th Parliament* (4 March 2014), consideration of Appropriation (Parliamentary Departments) Bill (No. 2) 2013-2014, Appropriation Bill (No. 3) 2013-2014, and Appropriation Bill (No. 4) 2013-2014, 3-5.

22 Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014), consideration of Appropriation (Parliamentary Departments) Bill (No. 2) 2013-2014, Appropriation Bill (No. 3) 2013-2014, and Appropriation Bill (No. 4) 2013-2014, 32.

23 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).

3.41 During the reporting period, the committee wrote to the new Minister for Foreign Affairs to draw her attention to the committee's consideration of these matters and to reiterate its request for a review in relation to the sanctions regimes.²⁴ As at the end of the reporting period, the committee had not received a response from the minister.

3.42 Pending the minister's response, the committee continued to defer its consideration of instruments relating to the sanctions regimes.²⁵ These new instruments expanded or applied the operation of the sanctions regimes by designating or declaring that a person or entity is subject to the sanctions regime, or by amending the regime itself. Designating a person or entity has the effect that the assets of the designated person or entity are frozen. Declaring a person has the effect of preventing that person 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.

3.43 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.

Review of Stronger Futures legislation

3.44 During the 43rd Parliament the committee conducted an inquiry into the *Stronger Futures in the Northern Territory Act 2012* and related legislation.²⁶ The Stronger Futures measures apply to the Northern Territory and relate to areas such as tackling alcohol abuse in Aboriginal communities; income management; school attendance; certain land reform measures; food security measures relating to the licensing regimes for food stores in certain areas; and amendments relating to the extent to which customary law may be taken into account in bail and sentencing decisions. The committee received a number of submissions to this inquiry from various groups concerned about the human rights compatibility of the measures.

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

25 These included the Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Iran) Amendment List 2013 (No. 1) [F2013L01312] and Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Amendment Regulation 2013 (No. 1) [F2013L01384] (deferred in the committee's *First Report of the 44th Parliament*); and the Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Democratic People's Republic of Korea) Amendment List 2013 [F2013L02049] (deferred in the committee's *Second Report of the 44th Parliament*).

26 See Parliamentary Joint Committee on Human Rights, *Examination of the Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013).

3.45 The committee determined that a number of rights were engaged by the measures, including the right to self-determination; right to equality and non-discrimination; right to equal protection before the law; right to social security; right to an adequate standard of living; and right to privacy. The committee made a number of findings and recommendations as to the human rights compatibility of the legislation, and determined that it would subsequently review the measures to consider the latest evidence as to the effectiveness and ongoing necessity of the measures.

3.46 The new committee established at the beginning of the 44th Parliament commenced this review in July 2014. Accordingly, during the reporting period, the committee deferred a number of pieces of legislation on the basis that they would be considered as part of the review.²⁷

Additional work of the committee

3.47 During the reporting period the committee endeavoured to broaden public awareness of, and engagement with, the committee, by creating a number of resources to assist members of the public in understanding the committee's work.

3.48 The committee established an *Index of bills*, which lists all bills introduced during the 44th Parliament and the action taken by the committee. It identifies the human rights that have been engaged and the relevant reports where the committee's full analysis may be found. The *Index of bills* is useful for those who are interested in finding the committee's analysis on a particular bill.²⁸

3.49 In March 2014 the committee published a *Guide to human rights*, which provides an introduction to the key human rights considered by the committee. The *Guide to human rights* is discussed in more detail at Chapter 2 of this report, and the latest version is available on the committee's website.²⁹

3.50 The committee also established a mailing list, which notifies subscribers of the committee's work. Subscribers are notified when the committee tables its regular scrutiny reports, as well as other reports, and when the committee publishes new resources (such as the *Guide to human rights* mentioned above).

27 These included the Social Security (Administration) (Recognised State/Territory Authority—NT Alcohol Mandatory Treatment Tribunal) Determination 2013 [F2013L01949] and Stronger Futures in the Northern Territory Regulation 2013 [F2013L01442] (deferred in the committee's *First Report of the 44th Parliament*); and the Social Security (Administration) (Recognised State/Territory Authority—Qld Family Responsibilities Commission Determination 2013 [F2013L02153] (deferred in the committee's *Second Report of the 44th Parliament*).

28 The *Index of bills* is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments. As of January 2016, the committee also publishes an *Index of instruments*, which can also be found at the above address.

29 The *Guide to Human Rights* is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

3.51 Further, the committee began to have its work posted on social media during this period. For example, the official parliamentary Twitter accounts began to announce when the committee's reports had been tabled.

The Hon Philip Ruddock MP

Chair