

Chapter 3

Work of the committee in 2014-15

3.1 This chapter provides information about the work of the committee during 2014-15, 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 assessed. It also shows how many in each category were found to raise no human rights concerns. Where a bill, Act or legislative instrument raised human rights concerns, Table 3.1 shows whether the committee provided an advice-only comment to, or required a response from, the legislation proponent in relation to the human rights issues identified.

Table 3.1: Legislation considered during the 2014-15 financial year

| | Total considered | No human rights concerns | Advice-only comment | Response required |
|-------------------------|------------------|--------------------------|---------------------|-------------------|
| Bills and Acts | 240 | 161 | 26 | 53 |
| Legislative instruments | 1958 | 1927 | 13 | 18 |

3.4 In his tabling statement for a report on 2 December 2014, the committee's Chair Senator Dean Smith outlined that, over the course of that calendar year, the committee considered 250 bills and 1717 legislative instruments.¹ Of those, 213 bills and 1707 instruments were found to be compatible with human rights. This was noted as illustrating that the majority of proposed legislation was compatible or may even promote human rights.

3.5 Of particular note was the committee's consideration of four national security bills, introduced with the aim of ensuring Australia is best placed to combat

1 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 2 December 2014. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements.

terrorism and that law enforcement and intelligence agencies are sufficiently equipped to keep the nation safe. The statement noted that national security legislation necessarily strongly engages human rights and that these bills raised complex issues around balancing the protection of human rights with national security objectives.

Reports tabled during the period

3.6 The committee tabled 16 reports during the reporting period, from the *Ninth Report of the 44th Parliament* to the *Twenty-fourth Report of the 44th Parliament*.²

Commonly engaged rights

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

- right to equality and non-discrimination;³
- right to a fair trial;⁴
- right to social security;⁵
- right to an adequate standard of living;⁶
- right to privacy;⁷
- right to a fair hearing;⁸ and
- right to security of the person and freedom from arbitrary detention.⁹

3.8 During the reporting period, the above seven rights accounted for 58 per cent of rights which the committee reported on substantively within both primary and delegated legislation.¹⁰ This figure does not include rights engaged where the committee initially examined and reported on legislation as not raising

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

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

4 Article 14 of the ICCPR.

5 Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

6 Article 11(1) of the ICESCR.

7 Article 17 of the ICCPR.

8 Article 14 of the ICCPR.

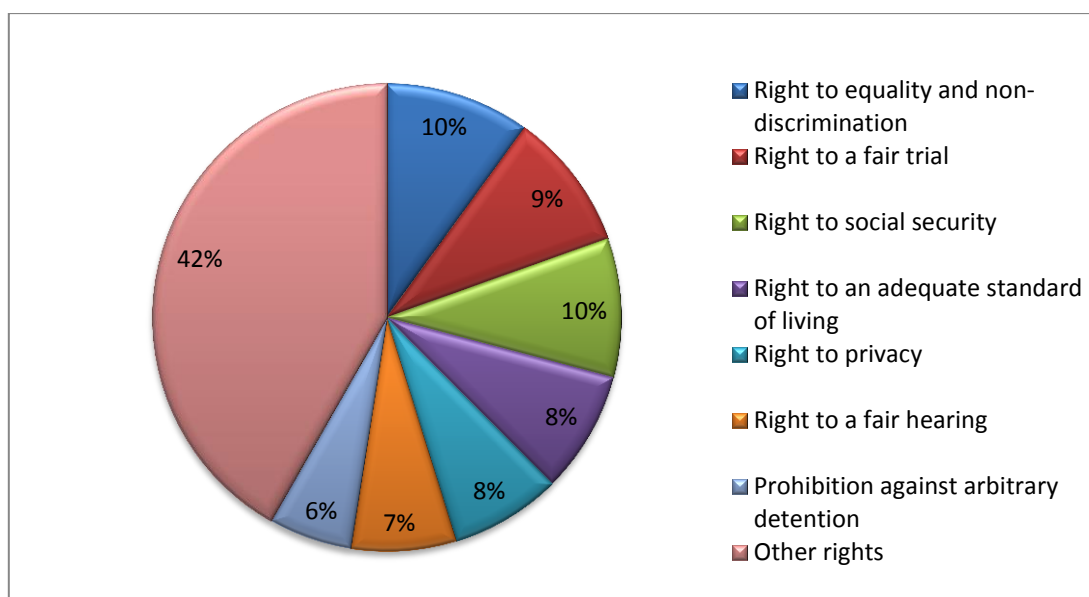
9 Article 9 of the ICCPR.

10 In the previous reporting period of 2013-14, the seven most commonly engaged rights also accounted for 58 per cent of rights engaged within both primary and delegated legislation.

human rights concerns (this may be because the bill or instrument does not engage or promotes human rights, and/or permissibly limits human rights).¹¹

3.9 Figure 3.1 shows the breakdown of human rights engaged by the legislation examined and substantively commented on by the committee during the reporting period. In comparison with previous reporting periods, there were an increased number of civil and political rights which were commonly engaged. These statistics show an increase in the proportion of legislation substantively commented on by the committee which engaged the right to equality and non-discrimination.

Figure 3.1: Human rights engaged by legislation in 2014-15



Major themes

3.10 Four significant policy areas that attracted comment from the committee in the reporting period related to migration legislation, national security legislation, indirect discrimination and budgetary measures with retrogressive impacts on economic, social and cultural rights.

11 The committee examines all bills and instruments that come before the parliament for compatibility with human rights. However, it focuses its substantive analysis or comments in reports on measures that raise human rights concerns in such legislation. As such, the rights that are identified as engaged in the above statistics relate to legislation raising human rights concerns. During the 2014-2015 period bills not raising human rights concerns were noted in the committee's reports. For instruments not raising human rights concerns, a cross reference was made in the committee's reports to the list contained in the *Journals of the Senate* or they were identified in an appendix. Instruments raising human rights concerns were identified in the committee's report.

Migration legislation

3.11 The 2014-15 reporting period saw a significant number of bills and legislative instruments relating to migration, asylum seekers and refugees. The committee commented on a number of these bills and legislative instruments, including legislation implementing significant changes to the protection visa framework around decision making and review processes, forms of protection visas and the interpretation and implementation of protection obligations.¹²

3.12 Human rights engaged by this legislation included obligations of non-refoulement; the rights of the child; the right to protection of the family; the right to equality and non-discrimination; the right to a fair trial and fair hearing rights; the right to privacy; the right to health and a healthy environment; the right to security of the person and the right to be free from arbitrary detention; the prohibition on torture, cruel, inhuman and degrading treatment or punishment; the right to freedom of movement; the right to life; the right to humane treatment in detention; the right to freedom of assembly; the right to an effective remedy; the right to work; the right to an adequate standard of living; and the right to equality before the law.

Non-refoulement

3.13 Many of the committee's assessments of legislation in this policy area were focused on non-refoulement obligations, which are absolute and therefore may not be subject to any limitation.

3.14 Non-refoulement obligations require that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; and cruel, inhuman or degrading treatment or punishment.

12 See Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) to *Twenty-fourth report of the 44th Parliament* (23 June 2015); Migration Amendment (Protection and Other Measures) Bill 2014, Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00726]; Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [F2014L00622]; Migration Legislation Amendment Bill (No. 1) 2014 (first reported on in 2013-14 period); Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] (first reported on in 2013-14 period); Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014; Migration Amendment (Partner Visas) Regulation 2014 [F2014L01747]; Migration Amendment (Character and General Visa Cancellation) Bill 2014; Migration Amendment (Complementary Protection) Regulation 2014 [F2014L01617]; Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015; Migration Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01696]; Migration Amendment (Subclass 050 Visas) Regulation 2014 [F2014L01460]; Migration Amendment (Strengthening Biometrics Integrity) Bill 2015; Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461]; Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015 [F2015L00551].

3.15 For example, in its consideration of measures relating to the burden of proof and review of decisions relating to claims for asylum in the Migration Amendment (Protection and Other Measures) Bill 2014 and the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, the committee noted the requirement for 'independent, effective and impartial' review of decisions where non-refoulement obligations may be engaged, due to the serious and irreversible nature of harm that can result from a breach of non-refoulement obligations.¹³ The committee noted that proposed measures to require the Refugee Review Tribunal (RRT) to draw an unfavourable inference in certain cases, and to limit or exclude independent merits review in favour of 'fast track assessments' and internal departmental review, did not satisfy the requirement for 'independent, effective and impartial' review, and were therefore likely to be incompatible with Australia's non-refoulement obligations as a matter of international human rights law.¹⁴

Incorporation and interpretation of protection obligations in Australian domestic law

3.16 The committee also assessed measures in migration legislation that sought to redefine Australia's own interpretation of its international obligations and their incorporation into Australian domestic law, including measures that:

- altered the test for determining protection obligations without direct reference to international law;
- authorised or expanded powers to remove, intercept and detain people at sea regardless of non-refoulement obligations;
- excluded court challenges based on international obligations; and
- created a new statutory framework to declare Australia's protection obligations and removed references to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention).

3.17 The committee noted that, in some cases, these new standards and range of permissible conduct were likely to be incompatible with the required standards under international human rights law.

13 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 88; *Ninth Report of the 44th Parliament* (15 July 2014), Migration Amendment (Protection and Other Measures) Bill 2014, 36, 38.

14 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 88.

3.18 For example, the committee noted that measures permitting Australia to remove an individual from Australia regardless of non-refoulement obligations were incompatible with the obligation of non-refoulement.¹⁵

3.19 The committee also noted that, while Australia has the ability as a sovereign state to change its domestic laws, the severing of the connection between domestic laws and Australia's international obligations engaged and potentially limited a number of human rights protected by international law, such as non-refoulement obligations. This was because the measures denied relevant international human rights norms a role in defining the legal framework and standards within which Australia meets its international human rights obligations.

3.20 The committee further noted that, while the Refugee Convention and its Protocol are not included in the seven core human rights treaties against which the committee is required to assess the human rights compatibility of legislation, there is significant overlap between the obligations under the Refugee Convention and the treaties within the committee's mandate.¹⁶ Consequently, measures in migration legislation that engage Australia's obligations under the Refugee Convention and Protocol will frequently also engage obligations under the treaties within the committee's mandate. Assessments relating to the interpretation of obligations under the treaties within the committee's mandate may therefore be informed by the specialised body of law that has developed from decisions made under, and interpretations of, the Refugee Convention.

Personal information

3.21 Migration legislation assessed in the reporting period included various measures that affected visa applicants' right to privacy. This included measures to allow the disclosure of information concerning a person's change of name and information obtained under warrants, requirements to provide personal information for the purposes of conducting a character test in the context of immigration, and

15 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 78.

16 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 73.

the introduction of a broad discretionary power to collect biometric data at points of entry into Australia.¹⁷

3.22 The committee noted that limitations of human rights must generally be the least rights restrictive means of achieving their objective. Accordingly, where measures of this type appeared overly broad and did not sufficiently define the types of information that may be collected, retained and disclosed, the committee sought further information from the minister as to whether the measures could be regarded as proportionate for the purposes of international human rights law. Measures requiring the inclusion of previous names on the back of citizenship certificates were found likely to be incompatible with the right to privacy as the minister declined to provide information demonstrating that the measures were proportionate.¹⁸ However, advice provided by the minister in relation to the disclosure of information obtained under search warrants enabled the committee to conclude its examination of this measure.¹⁹ During the reporting period, the committee was not able to conclude its comments relating to other measures concerning personal information as responses from the minister had not yet been received.²⁰

Detainees

3.23 The committee also commented on measures which affected the rights of people held in immigration detention centres, most notably amendments to the *Migration Act 1958* to allow the use of force by an authorised officer (generally employees of an Immigration Detention Services Provider (IDSP)).²¹

3.24 The committee noted that the measures engaged various human rights, including the right to life, as the use of force could lead to loss of life; and the prohibition against torture and cruel, inhuman or degrading treatment. Noting that

17 See, Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014), Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014; *Tenth Report of the 44th Parliament* (26 August 2014), Migration Legislation Amendment Bill (No. 1) 2014; *Nineteenth Report of the 44th Parliament* (3 March 2015), Migration Amendment (Character and General Visa Cancellation) Bill 2014; and *Twenty-second Report of the 44th Parliament* (13 May 2015), Migration Amendment (Strengthening Biometrics Integrity) Bill 2015.

18 Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014), Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014, 30.

19 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014), Migration Legislation Amendment Bill (No. 1) 2014, 99.

20 See paragraphs [3.54]-[3.58] of this report for further discussion of the timeliness of responses to the committee's requests for information.

21 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015), Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015.

limitations of human rights are only permissible in pursuit of significant aims, the committee sought information from the minister as to whether the measures pursued a legitimate objective for the purposes of human rights law.

3.25 The committee also noted that the powers authorising the use of force appeared overly broad, and were not subject to sufficient independent monitoring or safeguards, such as those that apply to the use of force by police officers or prison guards. Accordingly, the human rights assessment of the bill raised specific concerns in relation to the compatibility of these measures with the right to life and the prohibition against torture and cruel, inhuman, or degrading treatment.²²

Introduction of multiple forms of temporary protection visas

3.26 In the reporting period the *Migration Act 1958* was also amended to provide for two new forms of visa for people found to engage Australia's protection obligations; Temporary Protection Visas (TPVs) and Safe Haven Enterprise Visas (SHEVs).²³

3.27 The committee noted that TPVs engage and may limit non-refoulement obligations, as they require people to whom Australia owes protection obligations to prove afresh their claims to protection every three years via an assessment and review process with reduced procedural and substantive safeguards. The committee also noted that TPVs engage and may limit the right to health, the obligation to consider the best interests of the child and the right to the protection of the family.

3.28 Safe Haven Enterprise Visas (SHEVs) may be granted to persons who are owed protection obligations and who indicate an intention to work or study in regional areas in Australia. Many of the human rights issues identified in relation to TPVs applied equally to the SHEV regime, particularly in relation to non-refoulement obligations. The committee also sought further information from the minister about the compatibility of a restriction on travel for holders of a SHEV with the right to freedom of movement.²⁴

22 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015), Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, 84-97.

23 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, and *Twenty-fourth Report of the 44th Parliament* (23 June 2015), Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015.

24 Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (23 June 2015), Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015, 23-24.

National security legislation

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

- the National Security Legislation Amendment Bill (No. 1) 2014;
- the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014;
- the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014;
- the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014; and
- the Australian Citizenship and Other Legislation Amendment Bill 2014.²⁵

3.30 As a starting point for its examination the committee noted that human rights principles and norms are not to be understood as inherently opposed to national security objectives or outcomes and that international human rights law allows for the balancing of human rights considerations with responses to national security concerns.²⁶

3.31 The human rights assessment of the significant changes to national security laws involved considerable challenges for the committee, particularly where measures were given an expedited passage through the Parliament and/or sought to expand on existing elements of the national security regime which had not previously been subject to a human rights assessment by the committee (because they pre-dated the establishment of the committee).

3.32 In this respect, in relation to proposed national security laws, the committee's Chair, Senator Smith, noted that the committee was particularly disappointed that the Attorney-General's Department did not give sufficient attention to the expectations set out in the Committee's Practice Note 1 (now Guidance Note 1) which stated that 'the committee relies on the statement to provide sufficient information about the purpose and effect of the proposed legislation, the operation of its individual provisions and how these may impact on

25 See Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014), National Security Legislation Amendment Bill (No. 1) 2014, 33; *Nineteenth Report of the 44th Parliament* (3 March 2015), Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 56; *Twentieth Report of the 44th Parliament* (18 March 2015), Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, 39; *Twenty-second Report of the 44th Parliament* (13 May 2015), Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, 129; and *Twenty-fourth Report of the 44th Parliament* (23 June 2015), Australian Citizenship and Other Legislation Amendment Bill 2014, 25.

26 See, Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 28 October 2014. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements

human rights... the committee expects statements to set out the necessary information in a way that allows it to undertake its scrutiny tasks efficiently. Without this information, it is often difficult to identify provisions which raise human rights concerns in the time available'.²⁷ The Chair, Senator Smith, stated that it was important to note that any characterisation of human rights as being in opposition to national security was inaccurate and also unproductive. He further noted that the committee had a critical function in ensuring the right balance was struck between national security and human rights and that Australia's then membership of the UN Security Council required it to exercise important leadership in advancing both international peace and security, and at the same time advancing the protection of national security and human rights on the global stage.²⁸

3.33 The national security and counter-terrorism bills collectively engaged and limited a significant number of human rights, including the right to privacy; the right to freedom of movement; the right to freedom of opinion and expression; the right to equality and non-discrimination; the right to security of the person and to be free from arbitrary detention; the prohibition on torture and cruel, inhuman and degrading treatment or punishment; the obligation to consider the best interests of the child; the rights to a fair trial and fair hearing; the right to an effective remedy; the right to work; the right to social security; and the right to an adequate standard of living.

3.34 Legislative responses to issues of national security are generally likely to engage a range of human rights. The committee noted in its *Nineteenth Report of the 44th Parliament* that, in this regard, international human rights law allows for the balancing of human rights considerations with responses to national security concerns, providing that any limitations on Australia's human rights obligations are reasonable, necessary and proportionate to the achievement of a legitimate objective.²⁹

3.35 The committee consistently noted that the provision of necessary powers to detect and prevent acts of terrorism to security and law enforcement authorities constitutes a legitimate objective for human rights purposes. However, the majority

27 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 1 October 2014. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements

28 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 1 October 2014. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements

29 See Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015), Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 56.

of the statements of compatibility for the bills fell short of the committee's expectations, with a number of limitations not being adequately justified. The committee accordingly sought further information in relation to each of the bills to fully assess their compatibility with human rights.³⁰

3.36 The bills introduced, extended or amended a broad number of measures relating to national security and counter-terrorism. These included the extension and amendment of the control order regime and preventative detention order regime; changes to requirements for gaining Australian citizenship; the increase of a number of criminal penalties; the expansion of information disclosure provisions; the introduction of a mandatory data retention scheme; the expansion of intelligence-collection powers for intelligence agencies; the freezing of assets and cancellation of welfare payments; and a number of broad ministerial discretions not subject to merits review.

3.37 The committee's assessment of these measures was in some cases significantly affected by the expedited passage of the legislation through the Parliament (argued on the basis of urgency). For example, in relation to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, the bills passed both Houses of Parliament in the space of approximately five weeks. As the committee was unable to complete its consideration of the bills before they were enacted, its human rights assessments of the bills were unable to fully inform the deliberations of the Senate and the House of Representatives in passing the legislation. Noting that national security legislation tends to engage and limit a significant number of human rights, and is often lengthy and complex, the committee regards it as imperative that the Parliament is informed of the human rights implications of such legislation at the time it is being debated. Accordingly, the committee considers that the expedited passage of significant legislation argued on the basis of urgency must be weighed appropriately against the need to ensure that the legislative process provides adequate opportunity for consideration of human rights and other significant issues.

3.38 The timeliness of ministers in responding to committee concerns in this area remained poor, and responses often took a number of months to be received by the committee. At the end of the reporting period, for example, the committee was still

30 See, in particular, Parliamentary Joint Committee on Human Rights, *Thirteenth Report of the 44th Parliament* (1 October 2014), National Security Legislation Amendment Bill (No. 1) 2014, 8: *Inadequate statement of compatibility*; and *Fourteenth Report of the 44th Parliament* (28 October 2014), Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 9: *Inadequate statement of compatibility – legitimate objective*. The exception was in relation to the statement of compatibility for the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, to which the committee commended the Attorney-General's Department for having provided 'a very informative and detailed statement of compatibility'. See *Fifteenth Report of the 44th Parliament* (14 November 2014), 11.

awaiting a response in relation to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, which had been requested by 3 March 2015. This served to limit the impact of the committee's final assessment of the legislation. If legislation proponents do not respond before the legislation is finally passed by both Houses, these responses are unable to inform the committee's deliberations or the debates of the Parliament more broadly.

Right to equality and non-discrimination (indirect discrimination)

3.39 During the reporting period the committee assessed a number of bills and legislative instruments which engaged and limited the right to equality and non-discrimination (which includes both direct and indirect discrimination).

3.40 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),³¹ which has either the purpose (called 'direct' discrimination) or the effect (called 'indirect' discrimination) of adversely affecting human rights.³² The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.³³

3.41 During the reporting period, the committee substantively reported on 14 pieces of legislation which engaged the right to be free from indirect discrimination. Of this legislation seven bills and legislative instruments were found to be compatible with this right, and another seven contained measures which were found to be incompatible.³⁴ Legislation which was found to be compatible with this right generally assessed limitations in accordance with the committee's analytical

31 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

32 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989).

33 *Althammer v Austria* HRC 998/01, [10.2].

34 The Social Security (Administration) (Declared income management areas—Ceduna and Surrounding Region) Determination 2014 [F2014L00777] was deferred for consideration in conjunction with the committee's Stronger Futures inquiry after its initial comments. See Parliamentary Joint Committee on Human Rights, *Thirteenth Report of the 44th Parliament* (1 October 2014) 17. At the end of the reporting period, the committee had also not yet finalised its consideration of a number of measures in relation to the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015 and Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014. Further, the incompatibility finding in relation to the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 was also the subject of a dissenting report from two committee members. See Parliamentary Joint Committee on Human Rights, *Seventeenth Report of the 44th Parliament* (2 December 2014), Dissenting Report, 15-16.

framework and expectations regarding the content of statements of compatibility, including the need to provide relevant empirical data and analysis, and information regarding any safeguards in place to ensure the measures were proportionate to their stated objective.³⁵

3.42 However, the committee notes that, while statements of compatibility generally identify and assess measures that engage and limit direct discrimination, there appears to be less understanding and therefore acknowledgement of the occurrence and effects of indirect discrimination. This lack of understanding is reflected by the fact that, of the thirteen bills and three legislative instruments assessed in the reporting period that engaged and limited the right not to be indirectly discriminated against, only one of the statements of compatibility acknowledged the engagement of the right.³⁶ Further, in response to the committee's requests for further information in relation to the question of indirect discrimination, a number of ministerial responses addressed the question of direct rather than indirect discrimination, again suggesting a general misunderstanding of the nature of the right.³⁷ This indicates that there may be scope for further education on these issues within government departments and agencies.

The importance of assessing legislation for potential indirect discrimination is underscored by the fact that the measures engaging indirect discrimination were contained in legislation across a range of portfolios, including Social Services; Immigration and Border Protection; Employment; Industry; Education; and Attorney-General's. The disproportionate effect of these measures fell most commonly on the basis of gender (namely women), but also on the basis of race and ethnicity, and disability. This indicates that indirect discrimination can occur due to legislation operating across a variety of portfolio areas, and is able to affect broad sections of Australian society.

Budgetary measures with retrogressive impacts on economic, social and cultural rights

3.43 The committee assessed a number of bills seeking to implement measures introduced in the 2014-15 Budget, which, in aiming to reduce levels of certain entitlements or payments—for example, by pausing indexation on a number of social

35 See, for example, Parliamentary Joint Committee on Human Rights, *Eleventh Report of the 44th Parliament* (2 September 2014), Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014, 9-10; and *Twentieth Report of the 44th Parliament* (18 March 2015), Migration Amendment (Protection and Other Measures) Bill 2014, 81-87.

36 See the statement of compatibility for the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014, 8-10.

37 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), Migration Legislation Amendment Bill (No. 1) 2014, 115-116; and *Seventeenth Report of the 44th Parliament* (2 December 2014), Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014, 12-13.

security payments—were properly characterised as retrogressive measures for the purposes of international human rights law.³⁸

3.44 Retrogressive measures are understood as backward steps in the attainment of economic, social and cultural rights. 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.

3.45 Many of the committee's comments concerned changes to social security programs, such as those contained in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 and the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014, which sought to give effect to a wide range of measures with the intention of reducing expenditure on social security payments.³⁹

3.46 The Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 sought to amend various Acts relating to social security, family assistance, veterans' entitlements and farm household support to make a number of changes to certain Australian Government payments. These included measures to:

- Pause indexation for three years of the income free areas and assets value limits for student payments;

38 In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. A retrogressive measure is a measure which reduces or represents a backward step in the level of attainment of economic, social and cultural rights. The obligation means that the state cannot unjustifiably take a deliberate backward step which negatively affects the enjoyment of these rights. In assessing whether a retrogressive measure is justified, the limitation criteria contained in the committee's analytical framework are a useful starting point: See *Guidance Note 1*.

39 Other bills considered in this portfolio included: Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014; Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014; Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014; Family Assistance Legislation Amendment (Child Care Measures) Bill 2014; Family Assistance Legislation Amendment (Child Care Measures) Bill No. 2 2014; Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014; Social Services and Other Legislation Amendment (2014 Budget Measures No. 5) Bill 2014; Social Services and Other Legislation Amendment (2014 Budget Measures No. 6) Bill 2014; Social Services and Other Legislation Amendment (Seniors Supplement Cessation) Bill 2014; Dental Benefits Rules 2014 [F2014L01748]; Social Services Legislation Amendment Bill 2015; and Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015.

- Pause indexation for three years of the income and assets test free areas for all pensioners (other than parenting payment single recipients) and the deeming thresholds for all income support payments;
- Provide that all pensions are indexed to the Consumer Price Index only by removing both benchmarking to Male Total Average Weekly Earnings and indexation to the Pensioner and Beneficiary Living Cost Index.

3.47 The committee sought the advice of the minister as to whether the measures were compatible with these rights, noting that the statement of compatibility did not adequately identify and assess how potential limitations on the right to social security, the right to an adequate standard of living and the rights to quality and non-discrimination would be reasonable, necessary and proportionate in each case.

3.48 The further information provided by the Minister in this case was an excellent model for the kind of detailed information and analysis required to assist the committee in its assessment of the human rights compatibility of legislation.⁴⁰ This further information allowed the committee to conclude that the measures were largely compatible with the right to social security and the right to an adequate standard of living, with identified limitations of rights being generally assessed as reasonable, necessary and proportionate in pursuit of a legitimate objective. Significantly, out of the twelve matters raised by the committee in relation to measures in the bill, the committee concluded that ten of those were compatible with human rights.

3.49 Other committee comments related to changes to the Higher Education Loan Program contained in the Higher Education and Research Reform Amendment Bill 2014 and the Higher Education and Research Reform Bill 2014.⁴¹

3.50 Along with the right to social security, this legislation engaged the right to an adequate standard of living, the right to equality and non-discrimination, the right to work and the right to education.

3.51 With regard to retrogressive measures, the committee has consistently noted 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 continued to request further information where it was not clear that

40 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 24 September 2014. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements

41 See also Minerals Resource Rent Tax Repeal and Other Measures Bill 2014.

such measures were proportionate to their stated objective.⁴² The committee's requests for information from ministers in relation to retrogressive measures also routinely sought information as to whether less rights restrictive measures to achieve particular objectives were available and, if so, why they were not adopted.

3.52 In relation to the majority of measures affecting social security entitlements, the committee was able to accept evidenced arguments that the measures were proportionate to the objective of ensuring the sustainability of the wider social security system. However, in relation to measures introducing or increasing income support waiting periods or age requirements, and certain measures reducing higher education support for students, evidence was not provided to demonstrate the proportionality of these changes, and the committee was therefore unable to find the measures to be compatible with human rights on the basis of the information provided.

Scrutiny issues

3.53 During the reporting period, a number of issues posed particular challenges for the committee as well as for legislation proponents and departments in the context of the scrutiny process. These included timeliness; the content and scope of omnibus bills introduced by the government; and the quality of statements of compatibility.

Timeliness

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

3.55 Accordingly, the responsiveness of legislation proponents to the committee's requests for information regarding human rights concerns is critical to the effectiveness of the scrutiny process. While the committee stipulates a deadline by which it expects a response be provided, there is no legal or procedural requirement to ensure that a legislation proponent provides the response in this time period.

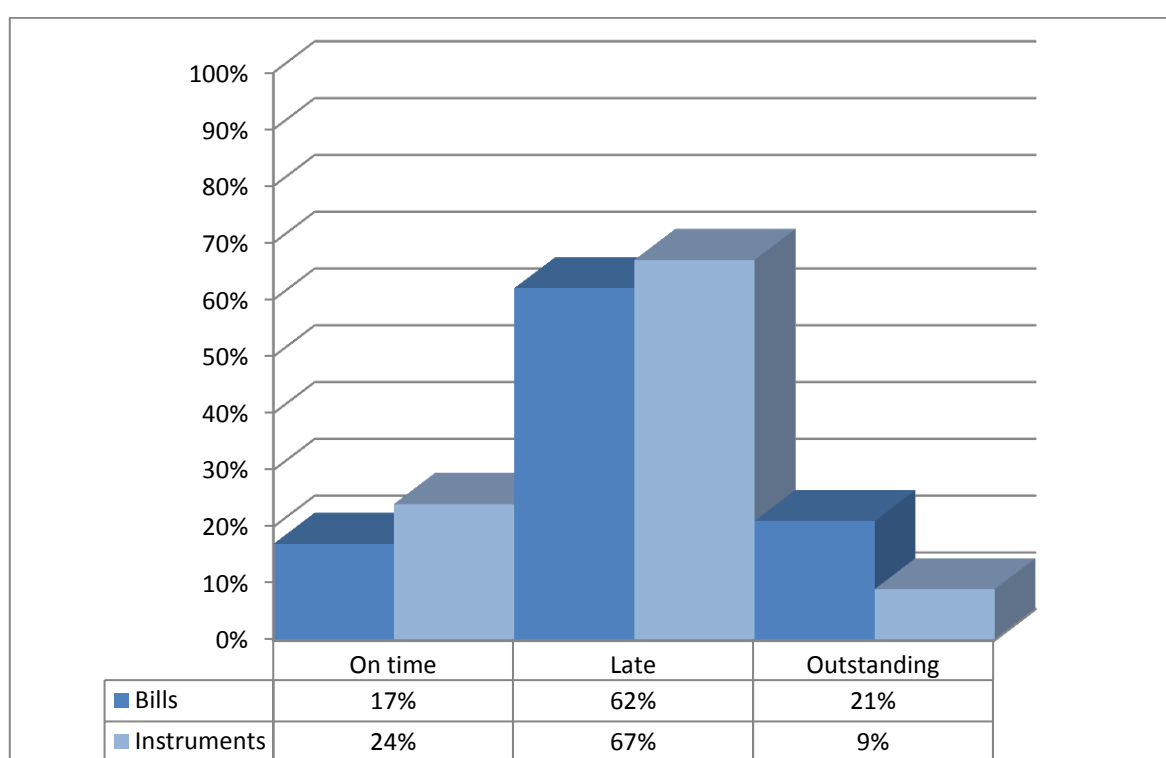
3.56 Timeliness continued to be a significant issue during the reporting period, with responses from legislation proponents often not being received until well after the committee's deadline and, on occasion, not until after the bill had passed or the timeframe for disallowance had expired.

42 See for example Parliamentary Joint Committee on Human Rights *Eighteenth Report of the 44th Parliament* (10 February 2015), 49; *Nineteenth Report of the 44th Parliament* (3 March 2015), 112; *Twenty-second Report of the 44th Parliament* (13 May 2015), 168-173 and 196-198.

3.57 Responses were requested in relation to 58 bills in the reporting period. Only 10 of these (17%) were provided to the committee by the requested date. Responses in relation to 36 bills (62%) were provided to the committee after the requested date. The remaining 12 bills (21%) still had responses outstanding at 30 June 2015 (see figure 3.2).

3.58 Responses were requested in relation to 21 legislative instruments in the reporting period. Only five of these (24%) were provided to the committee by the requested date. Responses in relation to 14 legislative instruments (67%) were provided to the committee after the requested date. The remaining two legislative instruments (9%) still had responses outstanding at 30 June 2015 (see figure 3.2).

Figure 3.2: Percentage of responses received by due date



Omnibus bills

3.59 The committee assessed two 'Omnibus Repeal Day' bills that were introduced during the reporting period.⁴³ These bills, along with 'Statute Law Revision' bills, sought to reduce regulatory burden by amending or repealing legislation across various portfolios and consolidating 'non-controversial' measures in a single bill.

43 See Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015), Omnibus Repeal Day (Spring 2014) Bill 2014, 174; and *Twenty-third Report of the 44th Parliament* (18 June 2015), Omnibus Repeal Day (Autumn 2015) Bill 2015, 40.

3.60 The nature of these bills, which compile various disconnected measures into a single bill, generally resulted in the statements of compatibility providing only very brief assessments of the human rights compatibility of measures contained in the legislation. While the majority of measures included in the omnibus bills clearly did not engage human rights, the committee sought further information about three measures: the removal of a requirement for consultation when amending disability standards; the removal of a requirement for independent reviews of Stronger Futures measures; and the repeal of the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975*. The committee received a satisfactory response in relation to the third measure, but was unable to conclude that the first two measures were compatible with human rights.⁴⁴ This demonstrates the important role of the committee in ensuring that omnibus and similar bills are subjected to the same level of scrutiny that standalone bills receive to ensure that ministers are aware of the wider impacts of ostensibly 'non-controversial' measures.

Statements of compatibility

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

3.62 Many statements of compatibility provided sufficient assessments of limitations of human rights for the committee to conclude its examination of the legislation without having to request further information from the legislation proponent.⁴⁵ For example, in his tabling statement to the *Tenth Report of the 44th Parliament*, the committee Chair noted that the statement of compatibility for the International Tax Agreements Amendment Bill 2014 'demonstrates that departments continue to develop the knowledge and expertise to formulate human rights assessments that are consistent with the committee's human rights analytical framework'.⁴⁶

3.63 However, while statements of compatibility are increasingly acknowledging where rights are engaged by specific measures, there remains considerable room for improvement in providing adequate justifications for limitations of rights in

44 See Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015), Omnibus Repeal Day (Spring 2014) Bill 2014, 174.

45 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014), International Tax Agreements Amendment Bill 2014, 35; and *Eighteenth Report of the 44th Parliament* (10 February 2015), Biosecurity Bill 2014, Biosecurity (Consequential Amendments and Transitional Provisions) Bill 2014, Quarantine Charges (Imposition—General) Amendment Bill 2014, Quarantine Charges (Imposition—Customs) Amendment Bill 2014, and Quarantine Charges (Imposition—Excise) Amendment Bill 2014, 31-33.

46 Tabling statement to the *Tenth Report of the 44th Parliament* (26 August 2014) 3, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements.

accordance with the committee's analytical framework. For example, generic statements asserting that limitations are 'reasonable, necessary and proportionate' continue to be frequently made without providing any supporting analysis or empirical evidence.⁴⁷

3.64 Further, statements of compatibility continue to state that measures do not engage human rights where rights are clearly engaged, and thus fail to provide an assessment in accordance with the committee's analytical framework.⁴⁸ For example, as noted above, a number of statements of compatibility failed to acknowledge measures that engaged the right to equality and non-discrimination (indirect discrimination).⁴⁹

3.65 During the reporting period a number of bills reintroduced measures which had previously been examined and commented on by the committee. In many of these instances, the statements of compatibility were very similar, and often identical, to that which had been provided in the first instance. In its *Ninth Report of the 44th Parliament*, the committee noted its expectation that, where concerns have been raised in relation to a measure, any subsequent re-introduction of the measure will be accompanied by a statement of compatibility addressing the committee's previously identified concerns.⁵⁰ The committee continued to draw its expectations to the attention of ministers throughout the reporting period, particularly where the

47 See, for example, Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014), Higher Education and Research Reform Amendment Bill 2014, 9-10; *Eighteenth Report of the 44th Parliament* (10 February 2015), Family Tax Benefit (Tighter Income Test) Bill 2014, 34-36; and *Nineteenth Report of the 44th Parliament* (3 March 2015), Omnibus Repeal Day (Spring 2014) Bill 2014, 29-32.

48 See, for example, Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014), Telecommunications Legislation Amendment (Deregulation) Bill 2014, 23-24; *Twenty-first Report of the 44th Parliament* (24 March 2015), Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2015—Mosul District, Ninewa Province, Iraq [F2015L00245], 8-11; and *Twenty-fourth Report of the 44th Parliament* (23 June 2015), Criminal Code Amendment (Animal Protection) Bill 2015, 3-6.

49 See, for example, Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014), Business Services Wage Assessment Tool Payment Scheme Bill 2014 and Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014, 11-12, and Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014, 72; and *Twelfth Report of the 44th Parliament* (24 September 2014), Higher Education and Research Reform Amendment Bill 2014, 11-13.

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

information previously provided to the committee had enabled it to conclude its consideration of the relevant measure.⁵¹

3.66 The committee also noted its expectation that, where a minister has agreed to amend a bill in response to the committee's comments, the re-introduced bill include those amendments.⁵²

Additional work of the committee

Stronger Futures inquiry

3.67 The committee determined in July 2014 to undertake a 12-month review of its previous inquiry, which examined the *Stronger Futures in the Northern Territory Act 2012* and related legislation, in order to consider the latest evidence and test the continuing necessity for the Stronger Futures measures.

Committee's guidance material

3.68 In December 2014 the committee replaced its *Practice Note 1* and *Practice Note 2* with *Guidance Note 1: Drafting statements of compatibility* and *Guidance Note 2: Offence provisions, civil penalties and human rights*.

3.69 *Guidance Note 1* sets out the committee's expectations for statements of compatibility, and provides guidance on the committee's analytical framework and approach to assessing legislation for compatibility with human rights.

3.70 *Guidance Note 2* provides guidance on the committee's expectations and approach in relation to assessing provisions that create offences and civil penalties.

3.71 The committee also updated its *Guide to Human Rights* in June 2015.

Mr Ian Goodenough MP

Chair

51 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), Social Services and Other Legislation Amendment (2014 Budget Measures No. 5) Bill 2014, 96, and Social Services and Other Legislation Amendment (Seniors Supplement Cessation) Bill 2014, 100; and *Twenty-second Report of the 44th Parliament* (13 May 2015), Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461], 116-120 (in regards to the regulation implementing measures previously commented on in a related bill).

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