
Chapter 2

The committee's mode of operation

Overview

2.1 The committee examines and reports on the human rights compatibility of all bills and legislative instruments that come before the Parliament. Since its inception, and in keeping with the longstanding conventions of the Senate scrutiny committees, the committee has sought to adopt a non-partisan, technical approach to its scrutiny of legislation.

2.2 The committee generally meets when both the House of Representatives and the Senate are sitting, and has a regular reporting cycle around these meetings. The committee's reports are tabled after each meeting, and deal with the bills and instruments of delegated legislation introduced or tabled in the preceding period.

2.3 The committee seeks to conclude and report on its examination of bills while they are still before the Parliament, so that its findings may inform the legislative deliberations of the Parliament. The committee's ability to do so is, however, dependent on the legislative program of the government of the day and the timeliness of ministers' responses to the committee's inquiries. Where a bill is passed before the committee has been able to conclude its examination, the committee nevertheless completes its examination of the legislation and reports its findings to the Parliament.

2.4 The committee examines all legislative instruments tabled in the Parliament, including legislative instruments that are exempt from the disallowance process under the *Legislation Act 2003* (LA).¹ The committee seeks to conclude and report on its examination of legislative instruments within the timeframe for disallowance prescribed by the LA (15 sitting days). In the event that the committee's concerns cannot be resolved before the expiry of this period, the committee may give a 'protective' notice of motion to disallow the instrument to ensure that the ability of the Parliament to disallow the instrument is not lost pending the conclusion of the committee's examination.

The committee's analytical framework

2.5 Australia has voluntarily accepted obligations under the seven core United Nations (UN) human rights treaties. It is a general principle of international human

1 The LA provides that certain instruments are exempt from disallowance by providing either that a type of instrument is not a legislative instrument for the purposes of the LA (section 9) or is otherwise not subject to disallowance (section 42). Prior to March 2016, the LA was called the *Legislative Instruments Act 2003*. References in this report are generally to the current provisions of the LA.

rights law that the rights protected by the human rights treaties are to be interpreted generously and any limitations on human rights are to be interpreted narrowly. Accordingly, the primary focus of the committee's reports is determining whether any identified limitation of a human right is justifiable.

2.6 International human rights law recognises that reasonable limits may be placed on most rights and freedoms—there are few absolute rights (that is, rights which cannot be limited in any circumstances).² All other rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.

2.7 Where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against these limitation criteria.

2.8 As required, the committee takes into account the views of human rights treaty bodies, as well as international and comparative human rights jurisprudence. These sources are relevant to the interpretation of the human rights against which the committee is required to assess legislation.

Statements of compatibility

2.9 The Act requires that each bill and disallowable legislative instrument be accompanied by a statement of compatibility.³ The statement of compatibility serves as the starting point for the application of the committee's analytical framework, and sets out an assessment of the extent to which the legislation engages human rights.

2.10 The committee sets out its expectations in relation to statements of compatibility in its Guidance Note 1.⁴

2 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law; and the right to non-refoulement.

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

4 See Guidance Note 1 at Appendix 2. During the reporting period the committee initially set out its expectations for statements of compatibility in its Practice Note 1. This practice note can be found at Appendix 2 of the committee's *Sixth Report of the 44th Parliament to the Sixteenth Report of the 44th Parliament*. The committee replaced Practice Note 1 with Guidance Note 1 in December 2014.

2.11 The committee's Chair, Senator Dean Smith, referred to the committee's general expectations for statements of compatibility in his tabling statement on 11 February 2014.⁵ The Chair stated that the committee was particularly concerned to note that some statements of compatibility provided assertions with no supporting evidence. The Chair emphasised that it was not enough for a statement of compatibility to merely claim that a measure would contribute to the achievement of a particular objective or that a measure is 'necessary, reasonable and proportionate'. It was noted that the sponsor of a bill or instrument bears the onus of demonstrating that this is the case and that where the matter is capable of evaluation in light of empirical evidence, the statement of compatibility should set this evidence out in sufficient detail to facilitate the committee's consideration of the compatibility of the measure with human rights.

The scrutiny dialogue model

2.12 The committee's main function of scrutinising legislation is pursued through dialogue with legislation proponents (usually ministers). Accordingly, where legislation raises a human rights concern which has not been adequately justified in the relevant statement of compatibility, the committee's usual approach is to publish an initial report setting out its concerns, and seeking further information from the legislation proponent. Any response from the legislation proponent is subsequently considered and published alongside the committee's concluding report on the matter. As well as making findings on the human rights compatibility of the relevant legislation, the committee may make specific recommendations to ensure the compatibility of the legislation with Australia's human rights obligations.

2.13 In some cases, ministers may provide an undertaking to address the committee's concerns in the future (for example, by amending legislation or undertaking to conduct a review of the legislation in due course).

2.14 The committee does not generally call for public submissions in relation to its assessments of legislation. However, the committee welcomes correspondence and submissions from parliamentarians, interested groups and other stakeholders who wish to bring matters to the committee's attention that are relevant to its functions under the Act. The committee will take these into account where relevant to the examination of a particular item of legislation.

2.15 In his tabling statement on 25 November 2014, the committee's Chair noted that the role of scrutiny committee members is to ensure that scrutiny committee reports are legally and technically credible, as well as consistent with past practice, and that this is naturally done at meetings through the testing and questioning of the

5 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 11 February 2014. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements

issues and analysis provided in the committee's reports.⁶ It was noted that committee members also contribute to directing the tone and nature of the committees' dialogue with ministers, and to shaping the committees' actions in cases where legislation may offend a relevant scrutiny principle. The Chair's statement emphasised that over the course of time, a great many parliamentarians have served on the Parliament's scrutiny committees, and in that service have worked within the constraints of the scrutiny approach to serve the Parliament and its ethos of informed inquiry.

Structure of the committee's reports

2.16 The structure of the committee's reports reflects the progress of the dialogue model described above, with matters proceeding from an initial report describing the human rights issues and concerns to a concluding report that takes into account any information received by the legislation proponent in response to the committee's initial report.

2.17 Chapter 1 of the committee's reports includes new and continuing matters. This generally includes all bills introduced during the preceding period, with bills not raising human rights concerns being listed as such, and bills raising human rights issues being the subject of substantive report entries setting out the nature of the committee's concerns and the information being sought from the legislation proponent.⁷

2.18 Chapter 1 also includes the committee's reports on any instruments of delegated legislation tabled in the preceding period that raise human rights concerns. Due to the very high volume of delegated legislation examined by the committee, such instruments are reported on as per an exceptions-based approach.

2.19 Chapter 1 also considers continuing matters, which are matters in relation to which the committee has received a response from the legislation proponent, but requires further information in order to conclude its examination of the matter.

2.20 Chapter 2 of the committee's reports examines responses received in relation to the committee's requests for information and on the basis of which the

6 Parliamentary Joint Committee on Human Rights, Chair's tabling statement, Tuesday 25 November 2014. See:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements

7 The structure of the committee's reports evolved during the reporting period; initially Chapter 1 discussed each bill introduced into the Parliament in detail, including bills that raised no human rights concerns. The committee's reports also contained an executive summary. From the *Eighteenth Report of the 44th Parliament* onwards Chapter 1 simply listed bills not engaging human rights or containing marginal or justifiable limitations at the beginning of the chapter, along with any deferred legislation, and the executive summary was removed.

committee will conclude or finalise its examination of the legislation in question. As noted above at paragraph [2.12], the committee's concluding remarks on legislation may include findings as to the human rights compatibility of the legislation and/or specific recommendations to address any human rights concerns.

Legal advice

2.21 The committee is assisted by an external legal adviser, who is appointed by the Presiding Officers of the Parliament. The committee's legal advisers during the reporting period were Professor Andrew Byrnes and Professor Simon Rice. Professor Byrnes possesses extensive experience and an established reputation in international human rights law and during his time as legal adviser to the committee was also Chair of the Australian Human Rights Centre at the University of New South Wales. Professor Rice had worked and researched extensively in anti-discrimination, human rights and access to justice issues and while serving as the committee's legal adviser was also Director of Law Reform and Social Justice at the Australian National University College of Law and Chair of the Australian Capital Territory Law Reform Advisory Council.

Committee publications and resources

2.22 In addition to its regular reports on the human rights compatibility of legislation, the committee has produced a number of publications and resources to assist ministers, departments and interested parties more generally in engaging with the committee and its work.

Committee guidance notes

2.23 The committee has produced the following guidance notes to assist legislation proponents and other interested parties in understanding and engaging with the committee and its work.

2.24 The guidance notes are available on the committee's website and are included in Appendix 2 to this report.⁸

Guidance Note 1—Drafting statements of compatibility

2.25 This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is primarily designed to assist legislation proponents in the preparation of statements of compatibility.

8 During the reporting period the committee initially set out its expectations for statements of compatibility in its Practice Note 1 and advice on civil penalties in its Practice Note 2 (Interim). These practice notes can be found at Appendix 2 of the committee's *Sixth Report of the 44th Parliament* to the *Sixteenth Report of the 44th Parliament*. The committee replaced Practice Note 1 and Practice Note 2 (Interim) with Guidance Note 1 and Guidance Note 2 in December 2014.

Guidance Note 2—Offence provisions, civil penalties and human rights

2.26 This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Guide to human rights

2.27 The committee's *Guide to human rights* (the guide) provides an introduction to the key human rights protected by the human rights treaties relevant to the committee's assessments of legislation.⁹

2.28 The guide is intended to provide a brief and accessible overview of Australia's human rights obligations, the key human rights considered by the committee, and the manner in which human rights may be justifiably limited. Case studies are provided to illustrate how human rights may be engaged and limited in practice. The guide also includes a references section for those seeking more comprehensive information about the rights listed in the guide.

2.29 The guide is available on the committee's website.

Index of bills and legislative instruments

2.30 The *Index of bills* and *Index of instruments raising human rights concerns* list all the bills examined by the committee, and those legislative instruments in relation to which the committee has identified human rights concerns (as noted above at paragraph [2.18], the committee takes an exceptions-based approach to reporting on legislative instruments).¹⁰

2.31 The *Index of bills* contains a shorthand description of any rights engaged by a bill, the action taken by the committee (that is, whether the committee made no comment on the bill, made an advice-only comment or made a comment requiring a response from the legislation proponent), and the relevant reports in which the committee's full comments may be found.¹¹

9 The committee's first *Guide to Human Rights* was published in March 2014. This guide was updated in June 2015.

10 The *Index of instruments raising human rights concerns* was created in January 2016, and was not available during the reporting period. The instruments received and considered by the committee in the reporting period (all legislative instruments tabled in the parliament) were listed in the relevant *Journals of the Senate*.

11 The Index of bills is available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments.