

## 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. In keeping with the longstanding conventions of the Senate scrutiny committees,<sup>1</sup> the committee adopts a technical approach to its scrutiny of legislation, and does not consider the policy merits of the legislation.

2.2 During the reporting period, the committee met via a mixture of in-person meetings when both the House of Representatives and the Senate sat, and via tele-conference when Parliament was not sitting. The approach of meeting out of the sitting period initially arose in 2020 in response to the impacts of the COVID-19 pandemic on the parliamentary timetable. The committee continued to adopt this practice in 2021 to improve the timeliness of its reports. As such, five of the committee's reports were adopted outside of the parliamentary sitting calendar, while ten were adopted during the sittings.

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 Parliament's legislative program and the timeliness of 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 also examines all legislative instruments tabled in the Parliament, including legislative instruments that are exempt from the disallowance process.<sup>2</sup> The committee seeks to conclude and report on its examination of

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1 The three scrutiny committees in the Parliament are the Senate Standing Committee for the Scrutiny of Bills; the Senate Standing Committee for the Scrutiny of Delegated Legislation (formerly the Senate Standing Committee on Regulations and Ordinances); and the Parliamentary Joint Committee on Human Rights.

2 Legislative instruments may be exempt from disallowance as a result of exemptions in its enabling legislation, and the *Legislation Act 2003* also provides that certain legislative instruments are exempt from disallowance (see section 44).

legislative instruments within the timeframe for disallowance prescribed by the *Legislation Act 2003* (generally 15 sitting days after tabling).<sup>3</sup>

### **The committee's analytical framework**

2.5 Australia has voluntarily accepted obligations under the seven core United Nations human rights treaties. It is a general principle of international human 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 permissible under international human rights law, and whether legislation could be applied in a way that may risk breaching human rights.

2.6 International human rights law recognises that permissible limits may be placed on most rights and freedoms—there are few absolute rights (that is, rights which cannot be limited in any circumstances).<sup>4</sup> 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 (that is, effective to achieve) its stated objective; and
- be a proportionate way to achieve that objective.

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

2.8 Where relevant, 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.

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3 In the event that the committee's concerns cannot be resolved before the expiry of this period, the committee retains the option to give a 'protective' notice of motion to disallow the instrument, extending the disallowance period by a further 15 sitting days, to ensure that the ability of the Parliament to disallow the instrument is not lost pending the conclusion of the committee's examination.

4 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment (including the prohibition on non-refoulement); 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.

## **Statements of compatibility**

2.9 The *Human Rights (Parliamentary Scrutiny) Act 2011* requires that each bill and disallowable legislative instrument be accompanied by a statement of compatibility.<sup>5</sup> The statement of compatibility serves as the starting point for the application of the committee's analytical framework, and sets out the legislation proponent's assessment of the extent to which the legislation engages human rights.

2.10 The committee sets out its guidance in relation to statements of compatibility in its *Guidance Note 1*.<sup>6</sup>

## **The scrutiny dialogue model**

2.11 The committee's main function of scrutinising legislation is pursued through dialogue with ministers. Accordingly, where legislation raises a human rights concern which has not been adequately explained in the relevant statement of compatibility, the committee's usual approach is to publish an initial report setting out the human rights concerns it has in relation to the legislation and advising that it intends to seek further information from the minister. Any response from the minister is subsequently considered and published alongside the committee's concluding report on the matter. As well as making concluding remarks on the human rights compatibility of the relevant legislation, the committee may make recommendations to strengthen the compatibility of the legislation with Australia's human rights obligations.

2.12 In some cases, ministers may undertake 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) or may advise that amendments have been made to address the committee's earlier concerns when introducing a future iteration of a bill.<sup>7</sup>

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5 See *Human Rights (Parliamentary Scrutiny) Act 2011*, Part 3.

6 See *Guidance Note 1, Expectations for statements of compatibility*, available on the committee's [webpage](#).

7 For example, following consideration of the Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 [F2021L01030] in *Report 10 of 2021* (pp. 51–55) and *Report 12 of 2021* (p.119), the committee suggested a number of amendments be made to the legislative instrument to assist with proportionality, including that the process of making a decision to include an employer on the list be set out in the instrument, including that written reasons be provided to the employer and the employer has a right of reply. On 4 March 2022, the minister registered a new legislative instrument partly in response to the committee's concerns. In particular, the new instrument included an amendment that reflected the committee's suggestion that employers be informed of the decision to list them and be provided with a right of reply. For further details on this case see Chapter 3 of this Annual Report.

## Structure of the committee's scrutiny reports

2.13 The structure of the committee's scrutiny reports reflects the progress of the dialogue model described above, with matters proceeding from an initial report describing the human rights engaged by the bill, to a concluding report that analyses any information received by the legislation proponent in response to the committee's initial report.

2.14 Chapter 1 of the committee's reports include new and continuing matters. This generally includes all bills introduced during the preceding sitting week and legislative instruments tabled in the preceding period. Where the committee considers that a bill or instrument engages human rights and further information is required in order for the committee to complete its examination, these bills and instruments are the subject of substantive report entries describing the relevant measures, the human rights that appear to be engaged and limited by the measure, and the information that is required in order for the committee to complete its assessment. Where the committee considers that legislation does not engage, or only marginally engages, human rights; promotes human rights; and/or permissibly limits human rights, it lists these bills in a 'no comment' section of the report, or in relation to instruments, states it has no comment in relation to the remaining instruments registered in the relevant period.<sup>8</sup> Chapter 1 also considers continuing matters (or further response required matters), where the committee has received a response from the legislation proponent, but requires further information in order to conclude its examination of the matter.

2.15 Where bills introduced by private members and senators appear to engage and potentially limit human rights and this has not been adequately explained in the statement of compatibility, these bills are listed in Chapter 1 without being analysed in detail, with a note that should they proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill. This assists in enabling the committee to manage its high workload and prioritise those bills which are more likely to move to further stages of debate.

2.16 Chapter 2 of the committee's reports examine responses received in relation to the committee's requests for information, on the basis of which the committee has concluded its examination of the legislation in question. Ministerial responses are published in full alongside the report on the committee's website.<sup>9</sup> These

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8 Each report states that the committee examines the legislative instruments registered on the Federal Register of Legislation during a specified period. Due to the very high volume of legislative instruments examined by the committee, instruments on which no substantive comment is made are not listed in the report itself. All legislative instruments scrutinised by the committee during the stated period can be viewed on the Federal Register of Legislation using its [advanced search function](#).

9 Ministerial responses are available on the committee's [webpage](#).

responses are also extracted and analysed in Chapter 2 of the report. As noted above at paragraph [2.11], the committee's concluding remarks on legislation may include findings as to the human rights compatibility of the legislation, and recommendations to address any human rights concerns.

### **Legal advice**

2.17 The committee is assisted by an external legal adviser on a part-time basis, who is appointed by the Presiding Officers of the Parliament. The committee's legal adviser during the reporting period was Associate Professor Jacqueline Mowbray. Associate Professor Mowbray has extensive research and teaching experience in international law and human rights. Associate Professor Mowbray has also published widely on related matters, including, as co-author, a leading work on the International Covenant on Economic, Social and Cultural Rights. Associate Professor Mowbray previously served as co-director of the Sydney Centre for International Law and as editor of the *Australian International Law Journal*. During her time as legal adviser to the committee she remained employed by the University of Sydney.

2.18 In addition to the external legal adviser, the human rights committee secretariat also includes staff with expertise in international human rights law.

### **Committee publications and resources**

2.19 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***

2.20 The committee has produced two guidance notes, which are available on the committee's [webpage](#).

#### ***[Guidance Note 1](#)—Expectations for statements of compatibility***

2.21 This note sets out the committee's approach to human rights assessments and provides guidance as to statements of compatibility. It is primarily designed to assist in the preparation of statements of compatibility.

2.22 This note was updated in November 2021 to provide more specific and accessible guidance as to the committee's approach to human rights assessment of legislation and its expectations regarding the information to be included in statements of compatibility.

#### ***[Guidance Note 2](#)—Offence provisions, civil penalties and human rights***

2.23 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 approach in relation to assessing the human rights compatibility of such provisions.

### **Guide to human rights**

2.24 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.

2.25 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 permissibly 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. The guide is available on the committee's [website](#).

### **Scrutiny Update**

2.26 Following the tabling of a scrutiny report, the committee secretariat sends a *Scrutiny Update* publication to all parliamentarians and their staff, Senate committee office staff and individuals and organisations that have subscribed to receive the publication. The *Scrutiny Update* provides a summary of the legislation commented on by the committee as set out in full in its scrutiny report. It includes information that may be useful to Parliamentarians when debating legislation and also serves to raise awareness about the role and functions of the committee.

### **Index of bills and legislative instruments**

2.27 The [Index of bills and legislative instruments](#) lists all the bills examined by the committee, and those legislative instruments in relation to which the committee has substantively commented on. The index contains a shorthand description of any rights engaged by the legislation and the action taken by the committee (that is, whether the committee made no comment, an advice-only comment, or a comment requiring a response from the legislation proponent); and the relevant report(s) in which the committee's full comments may be found.

### **Scrutiny reports and databases**

2.28 The committee's scrutiny reports themselves are also a key resource. These are available on the committee's [webpage](#). They can be downloaded as single PDF documents or separate chapters. The scrutiny reports are also available on the Australasian Legal Information Institute (AustLII) [website](#) where each report entry for legislation is available separately and is individually searchable.

### **Lists of COVID-19 legislation**

2.29 In relation to the scrutiny of federal COVID-19 related legislation the committee continued to publish during 2021 lists of legislation introduced or registered on its [webpage](#). These lists include all bills and legislative instruments made in response (or partly in response) to the COVID-19 pandemic, also including all COVID-19 related legislation, regardless of whether it engages human rights.

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***Interaction with other committees***

2.30 The committee also assists the work of the Senate's eight legislative standing committees or relevant joint committees,<sup>10</sup> by drawing attention to comments it has made in its scrutiny reports to the relevant committee secretariat about a bill in which the other committee is currently conducting an inquiry into.

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10 Such as the Parliamentary Joint Committee on Intelligence and Security.

